Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Shenton v. *Smith, from the Supreme Court of Western Australia; delivered 2nd February* 1895.

Present:

The LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.

[*Delivered by Lord Hobhouse.*]

The substantial question in this appeal is the question on what terms was the Respondent Dr. Smith engaged in the service of the Government of Western Australia. He claims damages on the ground that he was wrongfully dismissed contrary to the rules and regulations of Her Majesty's service and to the terms of his employment therein. The Appellant who represents the Government contends that the Respondent's employment was only temporary and during the pleasure of the Government; and that though in point of fact he was dismissed after hearing and for good cause, the right of the Government was to dismiss him at will.

It appears that in the month of April 1887 Dr. Rogers, who was medical officer at Albany, obtained leave of absence, and the Respondent was desirous of acting in his place. He was accepted, and in the Government Gazette of the 8th June 1887 it was notified that His Excellency

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the Governor had been pleased to approve of the "following temporary appointment, viz.: Henry "Lionel Smith Esqre. to act as medical officer "at Albany during the temporary absence of "Cecil Rogers Esqre. granted leave of "absence."

About eight months afterwards the Respondent asked to have his appointment made permanent, but was informed that the Government had decided not to interfere with the existing arrangement. So matters went on until the following July, when events happened at the Albany Hospital which resulted in the death of a boy, and for which blame was attached to the Respondent at the Coroner's inquest.

On the 9th July 1888 an order was passed by the Governor directing that the Respondent should be informed that his tenure of office would cease at the close of the year, and the Respondent was informed accordingly. He sent to the Governor a statement of his case, and a request that the order should be re-considered. His request was not granted, but the term of his acting appointment was extended to allow time for appeal to the Secretary of State.

All the papers, including the correspondence and the proceedings at the inquest on the boy, with a further argument on the part of the Respondent, were transmitted to the Secretary of State, who replied that he saw no reason to interfere with the Governor's decision. This result was at once communicated to the Respondent, in a letter dated the 8th March 1889, in which he was informed that his tenure of the acting appointment would cease on the 15th of that month.

In October 1889 Dr. Smith presented a petition of right, making the Colonial Secretary Defendant, and after the usual formalities, the petition was permitted to proceed. No questions

of procedure arose upon it other than such as are common to an ordinary plaintiff and defendant. The trial of the cause took place before Mr. Justice Stone, when that learned Judge expressed an opinion that the Plaintiff ought to be non-suited, but on the Plaintiff objecting, he did not make an order of non-suit. So the trial proceeded, but it became abortive because the jury could not agree.

A new trial then took place before C. J. Onslow, who put several specific questions to the Jury. The first was whether the Plaintiff was led to believe that he would hold the office during good behaviour so long as the office existed, to which the jury answered, yes. They then went on to find that the Government had not given reasonable notice to the Plaintiff, and had no reasonable cause to dismiss him, and they assessed his damages at 200*l*.

The Defendant moved for a new trial or to have judgment entered up in his favour. That motion was refused, subject to the reservation of a question for the Full Court, which the Chief Justice states thus :—Whether the Plaintiff, though appointed temporarily, was still entitled to be treated in accordance with the procedure laid down in the Colonial Office Regulations with regard to the dismissal of public servants. It is agreed that the procedure in question was not followed.

On the argument of this question before the Full Court the Chief Justice took a view adverse to the Defendant. Mr. Justice Stone, who was the other Judge, took the opposite view. The necessary result was that the verdict which the Plaintiff had got remained undisturbed. Hence the present appeal.

The reasoning of the learned Chief Justice is not quite easy to follow. He says that the jury found as a fact that the Plaintiff was led to

believe that he would hold the office during good behaviour as long as the office existed. But it does not appear what weight he attached to that finding, because he allows that it was not strictly supported by the evidence, and his own finding is only that the Plaintiff was to act during the absence of Dr. Rogers, a compact which he thinks was broken by the Government in dismissing him. There is not indeed a tittle of evidence to support the finding of the jury; and their Lordships agree with the Defendant's contention that the question ought not to have been put, or if put should have been answered in the negative. The only evidence on the point is that of the Plaintiff, who merely says that he got the Gazette notice; that Mr. Loftie, the Government Resident at Albany, gave him a Colonial Office List which contains a copy of the Regulations; and that he considered that he held his office subject to his good behaviour. He does not even state, to say nothing of proving, that any one led him to believe that he was to hold during good behaviour, or that the Regulations would form part of his contract with the Government. There is therefore no special contract in the case. The contention on this point must be that in every case a Government servant, to whom the Regulations are communicated, is entitled to keep his office until suspended or dismissed according to the procedure thereby prescribed to the Government. That is a legal inference depending on the nature of the Regulations, and not for the jury to decide.

The learned Chief Justice indeed goes on to say that it is not necessary to decide whether the procedure of the Regulations should have been followed, because the jury have found that there was no good cause of dismissal. But that finding is irrelevant unless the Government was

bound to show good cause of dismissal; and that question must, except on one supposition, depend upon the former question which the Chief Justice declines to decide.

The supposition in question is that the Government had entered into an absolute unconditional engagement with the Plaintiff to employ him during the absence of Dr. Rogers; and it may be that such was the view of the learned Chief Justice. But there is nothing in the case to support such a view. The Plaintiff applied for the post, was gazetted as to a temporary acting appointment, applied to be appointed permanently, and was refused. That is positively all. How is it possible on that to contend that he has a firmer hold on his acting appointment than Dr. Rogers had on his permanent appointment? The Defendant contends that the Plaintiff had not so firm a hold; but that, even if it were decided that an official in the position of Dr. Rogers is entitled to hold during good behaviour, such a right would not extend to one who is appointed for a mere temporary purpose. That view appears to their Lordships to be quite sound; but they do not further dwell upon it, because they prefer to rest their judgment on a broader ground.

It has been argued at the bar that a Colonial Government stands on a different footing from the Crown in England, with respect to obligations towards persons with whom it has dealings. Their Lordships do not go into the cases cited for proof of that proposition, for they are quite different from this case, and neither principle nor authority has been adduced to show that in the employment and dismissal of public servants a Colonial Government stands on any different footing from the Home Government.

It appears to their Lordships that the proper grounds of decision in this case have been

expressed by Mr. Justice Stone in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind. Dr. Smith did in fact make such an official appeal to the Secretary of State, and the Colonial Government recognized his right to do so, and prolonged his tenure so as to allow time for the decision of that appeal, and to save him from injury if it should go in his favour. Where there is representative Government, the other estates may, if they think fit, make themselves the mouth-piece of that sort of grievance against the Crown, as of any other. In a Crown Colony, as Western Australia then was, this appeal to the Secretary of State exhausted the Plaintiff's remedies within the Colony.

As for the Regulations, their Lordships again agree with Mr. Justice Stone that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants. In the heading they are stated to be "printed for "the information and guidance of the Governors "of Her Majesty's Colonies, and of all Her "Majesty's officers subordinate to them." They are alterable from time to time without any assent on the part of Government servants, which could not be done if they were part of a contract with those servants. On the face of them it is pointed out (see Regulation 64) to be the general rule in Crown Colonies that offices are

holden during Her Majesty's pleasure. The difficulty of dismissing servants whose continuance in office is detrimental to the State, would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service. No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a Colonial Government to whom the Regulations have been addressed, can insist upon holding office till removed according to the process thereby laid down. Any Government which departs from the Regulations is amenable, not to the servant dismissed, but to its own official superiors, to whom it may be able to justify its action in any particular case.

The result is that in their Lordships' judgment the Court below should have ordered judgment to be entered for the Defendant. As regards the costs of the litigation below, the Appellant's Counsel has not pressed for them, but has preferred to leave the matter to this Board. The Respondent has made a wrongful claim, and has not acquiesced in the simplest method of bringing his claim to a test by means of a non-suit. On the other hand the Appellant has raised defences which have been decided against him. Under all the circumstances of the case, their Lordships think that justice will be done by entering the judgment for the Defendant without costs. They will humbly advise Her Majesty accordingly.

The costs of this appeal stand in a different position. The verdict was for 200*l.* which is under the amount for which an appeal lies in strict course of law. Special leave to appeal was granted because of the general nature of the question; but this Board thought that it would be hard for the individual suitor to bear the costs

of an appeal admitted on such a ground, and they therefore put the Appellant under the obligation to pay costs in any event. The order will be according to that condition.