

SMYTH *v.*  
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SMYTH (Surveyor of Taxes) *v.* STRETTON.<sup>(1)</sup>

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*Income Tax, Schedule E.—5 and 6 Vict., cap. 35, Sec. 146, rule 1.—A sum of £35 was placed to the credit of the respondent by the Governors of Dulwich College under the Provident Scheme for the Assistant Masters of the College. Of this sum no part is payable until the respondent leaves the College or until his decease; he cannot raise money on it; and as regards one moiety payment is contingent on a certain length of service and on good conduct.*

*Held, that the whole sum is a taxable addition to the respondent's salary.*

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At a Meeting of the Commissioners of Taxes for the Division of First East Brixton in the County of Surrey, holden at 151, Bermondsey Street, London, S.E., on the 5th day of December, 1901. Mr. Gilbert B. Stretton, one of the Assistant Masters of

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(1) Reported 20 T.L.R. 443.

Dulwich College, appealed against an assessment made upon him under Schedule "E" of the Income Tax Acts in the sum of £385 in respect of his emoluments as Assistant Master received from the Governors of Dulwich College for the year ended the 5th day of April, 1901, on the ground that the said assessment included £35 not liable to taxation, being the amount placed to his credit by the Governors under the Provident Fund Scheme for the year 1900, a copy of which is sent herewith.

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The Appellant contended:—

1. That he had no actual enjoyment of the said sum of £35 it being in the nature of a bonus at the end of his career as a Master at the College and that he could not raise any money on the sum.

2. That with respect to a moiety thereof it was uncertain whether it would ever be received, as under Section "C" of the said Scheme power is reserved by the Governors to refuse such part of the grant: in other words this moiety is contingent, not vested in character and therefore cannot be described as income in any way.

3. That the sums credited under the Scheme did not form the subject of agreement when the Appellant entered the employ of the Governors or of any subsequent agreement and that it was open to question whether they were legally recoverable.

In support of the Assessment the Crown Surveyor quoted the charging words under Schedule "E" of the Income Tax Act, 1842, Section 146, whereby all emoluments "accruing by reason of such offices" are made liable to assessment and contended that the whole amount credited was practically an addition to the annual income performing the function of a payment to a superannuation fund and thus relieving the Appellant from the necessity of making similar provision out of the salary actually paid to him during the year in question, that the possibility of forfeiture was too remote to affect the question and that the scheme did not comply with the conditions laid down for deduction in the way of Life Insurance premiums by Section 54 of 16 and 17 Vict. cap. 34, as amended.

Now, we the undersigned Commissioners present having heard the parties and considered the nature of the said Provident Fund Scheme were unanimously of opinion that the said sum of £35 was not liable to taxation and reduced the assessment accordingly from £385 to £350.

Whereupon the Crown Surveyor expressed his dissatisfaction with our decision as being erroneous in point of law and requested us under Section 49 of the Taxes Management Act,

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1880, to state a Case for the opinion of the High Court of Justice which we have now done and do sign accordingly.

Given under our hands at 151, Bermondsey Street aforesaid this eleventh day of March, 1902.

THOS. W. ELLSTON, RICHARD FAWSETT, J. WELCH, BUXTON MORRISH,	}	Commissioners.
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SCHEME FOR THE ESTABLISHMENT OF A PROVIDENT FUND  
FOR THE BENEFIT OF THE ASSISTANT MASTERS ON THE  
PERMANENT STAFF OF THE DULWICH COLLEGE PURSUANT  
TO THE RESOLUTION OF THE BOARD OF 25TH APRIL,  
1899.

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*As to the present Assistant Masters.*

1. That the following increase of Salaries shall be granted from the date on which the Scheme comes into operation, subject to the conditions hereinafter mentioned :—

- (a) Assistant Masters having not less than five years, but less than fifteen years' service, an increase of 5 per cent.
- (b) Assistant Masters having not less than fifteen years' service and over, an increase of  $7\frac{1}{2}$  per cent.
- (c) A further addition, equal in amount to the above sums, shall be granted from the same date to the Assistant Masters alluded to in (a) and (b), such addition being, however, subject to the conditions provided by Paragraph 5.
- (d) Assistant Masters not having fifteen years' service shall, on reaching that period, be eligible for the increase sanctioned by (b) and (c).
- (e) In the case of the few present Assistant Masters of advanced age, it shall be open to the Governors to grant the maximum increase alluded to in (b) and (c).

*As to future Assistant Masters.*

2. That future Assistant Masters shall in like manner, on attaining five years' service from the date of their appointment, be entitled to the increase of 5 per cent, as in Clause I. (a), and to the additional increase of 5 per cent. as in Clause I. (c), but shall not be entitled to any further increase.

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3. That all Assistant Masters shall be required to become members of the Fund at the expiration of five years from the date of their respective appointments.

4. That the whole of the above increases of salary shall not be paid to the Masters, but shall be retained by the Governors and accumulated at compound interest for the purpose of forming the said Provident Fund, but subject to the Provisions hereinafter contained.

5. That Assistant Masters having less than ten years' service who may resign their appointments, or from any other cause than ill-health cease to belong to the College, shall be entitled to receive the total increase sanctioned by (a) and the accumulations thereof, but shall not receive the additional increase sanctioned by (c), or the accumulations thereof. In the event of any such Assistant Master retiring from ill-health the Governors, in addition to the increase sanctioned by (a), may grant him the further 5 per cent. sanctioned by (c), and the accumulations thereof. In the event of death of any such Assistant Master whilst in the service of the College, the 5 per cent. due by (c) as well as under (a), with the accumulations thereof, shall be paid to his legal representative.

6. That Assistant Masters who shall have served ten years or upwards, and who may retire before the age of sixty from any other cause than misconduct shall receive the total sum due to them respectively under (a) or (b) and (c), and the accumulations thereof. In the event of death before the age of sixty whilst in the service of the College, the full amount credited the Assistant Master in the Fund Books shall be paid to his legal representative.

7. That Assistant Masters who shall at any time be removed for misconduct, or having been guilty of misconduct, may be allowed to resign—such misconduct being certified to by the Master of the College—shall not receive the additional increase sanctioned by (c), or the accumulations thereof.

*Generally.*

8. That every Assistant Master be required to retire on reaching the age of sixty years, unless retained by the Master under exceptional circumstances.

9. That Assistant Masters having less than five years' service may be allowed to contribute to the Fund out of their salaries not exceeding 10 per cent. of their salaries and not less than 5 per cent.

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10. That the additional increase of salary prescribed by (c) remaining unissued under the circumstances provided by Paragraphs 5 and 7, shall remain as a credit to the Fund for the purpose of enabling the Governors to deal with any exceptionally special cases requiring and deserving assistance.

11. That the Chaplain be offered the option of joining the Fund. (The Governors are of opinion that they have no power to grant any increase to the salary prescribed by (d) of Section 57 of the Scheme, dated 18th August, 1882.)

12. That it is not intended to bring the Clerk to the Governors under the Scheme now proposed, as by the terms of the letter of the Charity Commissioners of the 1st March, 1890, the Governors have the power, subject to the consent of such Commissioners, to grant pensions to their employes.

13. That it shall be permissible for the Governors to contract with an Insurance Office or other suitable financial Institution for the carrying out of the Scheme.

14. The amounts arising from the Fund shall be paid over to the Insurance office or other Institution selected from time to time, as may be determined upon, arrangements being made for the return to the Governors of the sums set free under Paragraphs 5 and 7.

The Scheme to come into operation from the 1st of January, 1900.

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*Sir Edward Carson, S.G. (Rowlatt with him), for the Surveyor.*—The Provident Scheme merely provides a particular way of investing a portion of the salaries of the Assistant Masters. Payment of one moiety of the sum is contingent on certain circumstances, but this contingent moiety is an annual payment out of the respondent's salary to give him certain benefits if certain events occur, and constitutes a portion of the emoluments of his office. The contingency on which the payment is dependent makes no difference in point of law because the Respondent must be presumed to have assented to the arrangements provided by the Scheme, inasmuch as he continues his position at the College, and to have accepted the Scheme as a way of regulating the salary he gets from year to year. The principle of the case is already decided by *Hudson v. Gribble*.<sup>(1)</sup> The increase is credited by virtue of the Respondent's Office, and is calculated for his services during the year as an addition to his salary, and by reference to the salary.

*Danckwerts, K.C. (Ellis Griffith with him), for the Respondent.*—This Case is not governed by the decision in *Hudson v.*

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(1) 1V. T.C. p. 522.

*Gribble*, for in that case the amounts deducted by the Corporation of Manchester for the Thrift Fund formed part of their employees' salaries, while the Corporation was indebted to the employees in respect of those amounts, and could only justify the deductions on the ground that they were made by virtue of a contract with the employees, whereas in the present case the substance of the transaction is that the Governors of Dulwich College for a fund out of their own money, and that they could not be sued for the amounts contributed to the fund. The fund is not a part of the income of the Masters, as it would be if it were formed of contributions by them. The words "increase of salary" are used in the Scheme to denote the contingent moiety as well as the other moiety, and we can, therefore, use the contingent moiety as a means of ascertaining what is meant by the whole Scheme. The amount payable by the Governors under the Scheme is exactly on the same footing as the amount payable by the Corporation to the Thrift Fund in *Hudson v. Gribble*, an amount which nobody contended was taxable.

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*The Solicitor-General, in reply.*—When the sum becomes due as a portion of the salary, the Governors become trustees of it to invest it and make accumulations in accordance with their undertaking. The additional salary relieves the Assistant Masters of the necessity of providing other sums which prudent men might have to take out of the salaries paid to them in order to make some provision for themselves or their families. The increase accrues yearly by virtue of the Respondent's Office, and so comes within the Income Tax Acts.

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JUDGMENT.

*Channell, J.*—This Case was argued before me yesterday, and I think it is better for me to give judgment in it whilst the matter is fresh in my mind. I cannot say that I am altogether satisfied with the decision I am about to come to in this Case, I think it is arguable. It seems to me to depend upon this. Here is a Scheme established by the Governors of Dulwich College, and the question is whether the true effect of that Scheme is to increase the salaries of the Assistant Masters, imposing at the same time an obligation upon them to deal with a portion of the increased salaries in a certain way—whether that is the true effect of the Scheme or whether the true effect of the Scheme, when you look at the substance of it, is not really to increase the salaries but to give to the Masters upon their ceasing to hold the position of Assistant Masters, gratuities or allowances. I do not use the word "gratuities" in the sense that there is no consideration for it, because the services of the Masters during the time that they serve, after the arrangement is made, are no doubt consideration for it,

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but retiring bonuses or something of that kind when they cease. If that is the true effect of the Scheme, then I do not think it becomes a salary for the purposes of taxation, and on the whole, I agree with what Mr. Danckwerts says, you must look at the substance of it and not the words; but at the same time, I do not say that you must disregard the words, because if the fact is as I think it is in this Case, that the objects of the Scheme could have been carried out in two different ways, or two ways differently, for the purpose of taxation, either by increasing the salaries, and saying "If we increase your salaries you must devote a certain portion of them to certain purposes"—if the Scheme could have been carried out either in that way or by giving them retiring bonuses, then if you are left in doubt as to which of those two ways the governing body have in fact carried out, I do not think that you can do otherwise than look at the words they use, to see if they really understood the words that they were using.

Now, in this Case, the Scheme deals with two different percentages of 5 per cent. each; there is another of  $7\frac{1}{2}$  per cent. which does not apply to this particular Master, but stands on precisely the same footing as the first 5 per cent. that we have to deal with, and we may leave that out; there are two percentages of 5 per cent. under Clause A. and Clause C. in the first section of the Scheme. They are substantially different in my opinion. They both come under the same words as to increase of salary, and each party is entitled to draw an argument, and each party has drawn an argument from the fact that they are lumped together; the Solicitor-General and Mr. Rowlatt say sum A. is quite clearly in their favour, and therefore that I must come to the conclusion that the entirety is an increase of salary: on the other hand, Mr. Danckwerts says that C. is quite clearly in his favour, and it is not a sum which the Assistant Masters ever get at all except as a matter of discretion and bounty, and that therefore I must take it, as that is lumped together with A., that neither A. nor C. are increases of salary. That prevents one from getting much benefit from either argument; they must be set off against one another, and one has to look at what the real substance of the thing is.

Now, in this Case I have to deal with a decision which certainly is very much in point, and that is the decision in this Case of *Bell v. Gribble* and *Hudson v. Gribble*. That establishes, if authority were wanted (I think for the main proposition authority clearly existed before), that a sum receivable by way of salary or wages is not the less salary or wages taxable because for some reason or another the person who receives it has not got the full right to apply it just as he likes. The fact that income which is income, but which has even by operation of some statute to be devoted compulsorily to some purpose or another, does not prevent it being income. That is decided of course by one of the various Mersey Dock Cases.



which have (many of them) decided important points of law. But this case of *Bell v. Gribble* goes a little further. There is the case dealt with by Lord Justice Mathew: "Suppose in the case of a marriage settlement a man agrees to set apart out of his salary at his office so much every year by way of investment. According to Mr. Asquith's argument that would not be income; but really it is clear in each of the cases I have mentioned the payment is purely voluntary, and is of the same character as a payment made by a thrifty man who out of his salary reserves so much every year for old age or for contingencies." Now, that case is quite clear, a case where a man has a salary from his office, which is what the Lord Justice puts, and by agreement with somebody else, I presume his father-in-law, has bound himself to set apart a certain portion of that salary year by year and save it and invest it for the benefit of his wife and children, that case is quite clear; it still is income, and he has contracted with somebody else to apply it in a particular way, and to save it; but the decision in *Bell v. Gribble* and *Hudson v. Gribble* goes beyond that, because it applies the same rule to a case where the money comes from the person with whom the contract is made to apply it in a particular way. In *Bell v. Gribble* it was a case of a local Act of Parliament of the City of Manchester enabling them to establish this Provident Fund for their servants, but it was dealt with as a case of contract and was a case of contract of course; the statute was merely the authority of the Corporation to contract, and the servants who became servants and who need not have become servants, were dealt with as contracting with the Corporation upon those terms. It is an extension of the illustration Lord Justice Mathew was giving, because there is a substantial difference between a sum being placed out of the disposal of the person who is being dealt with as having got the enjoyment of it, if it is placed out of his disposal by a contract with the person from whom he gets it—there is a distinction between that and his getting it from one source and contracting with another person to deal with it in a certain manner; I think it is a substantial difference. I may illustrate it by what I think is a pretty well-known illustration relating to a technical subject, and not of use beyond an illustration, and that is the law in reference to bills of sale. If a borrower is getting from a lender an advance on a bill of sale, it is legitimate to treat the entire sum purporting to be advanced, as now advanced, notwithstanding there are some deductions made from that sum for the purpose of paying sums which the borrower is by some other existing independent obligation liable to pay, such as to deduct sums payable for rent and so on; those may be properly treated, as I understand the law, as part of the advance, and the advance may be stated as an advance of the entire sum, notwithstanding a portion of it is detained by the lender for the purpose of paying the sum due by the existing obligation of the borrower for his rent or

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for other matters. But if a sum is detained by the lender from the borrower for some agreed bonus or for something that there is no obligation of the borrower to pay other than the obligation created by the contract that is being made between the parties at the time, then you may not state the entire amount to be an advance made at the time; you state the amount of money which the man lends, and in consideration of that amount of money and a sum which he has agreed to pay to the borrower for some consideration, whatever it happens to be. That illustrates what I am meaning, that there is a substantial difference between a sum being detained by the person who would otherwise pay it, by reason of a right to detain it that is created as part of the same contract which he is carrying out, and to that extent therefore it seems to me that the decision in *Bell v. Gribble* or *Hudson v. Gribble*—both names are at the top, and I do not know which is the case—the decision in those Cases goes beyond what the previous Cases and the illustration of Lord Justice Mathew had established. But it is binding, and it seems to me that it creates a difficulty in my saying that the Governing Body here did not mean as to both of these sums really to increase the salary, and to increase the salary with a view of enabling the Assistant Masters without losing money to take part in this Provident Fund, and not only enabling them to do it, but binding them to do it, because in *Bell v. Gribble* the servants were bound to make those payments or to allow those deductions, as part of the terms of their service, just as here, this becomes part of the engagement of these Assistant Masters from the time that it came into operation—whether they are previous Masters or newly appointed Masters really makes no difference for the purpose. I think, under the circumstances that I am bound to hold that this Scheme really meant what it said; that it did mean to increase the salaries, and to provide that as to one portion of the increase the Assistant Masters should have it in any event; all the clauses shew that as to the first 5 per cent. the Masters were to have it, or their representatives were to have it if they died, and they were even to have it if they left by reason of some misconduct, and they were to have it not year by year, but when they left, and with compound interest. The Scheme has been criticised by somebody in reference to the grammar of Section 4, and, I think, criticised with some grounds; it may also be criticised on the ground that it does not state at what rate of interest this compound interest was to be, nor does it state for anybody who had to assess the compound interest, what he would want to know, what was done as to rests, whether it was to be annual, or half-yearly, or how the compound interest was to be calculated; it is not absolutely complete if it is to be criticised, but that does not make any difference for the purpose that I have to consider. In reference to the first 5 per cent. it seems to me it must have been meant to be that which it is said to be, viz., an increase of salary

payable at a future date, and when payable, payable with compound interest, and, therefore, I do not think the Case would have been arguable if that provision stood alone. It does not stand alone. The next one, if it stood alone, would be certainly very arguable; I am not quite clear about it now, but it seems to me that being put as it is with the other sum which is clearly salary, and being in express and clear words used not by ignorant people—notwithstanding what I have said as to their grammar, and other things—but by people, namely, the Governors and Masters of this College, who must be considered to understand quite well what they say, it has been stated distinctly to be salary, and it seems to me not by any means necessary to prevent it being salary, because there is a binding obligation. As to this sum C. that it shall be left in the hands of the Governors of the College upon certain specified terms, which are as to C. not that they are to have it in every possible event, they are not to have it if they do not serve for 10 years, unless their non-service for as much as 10 years depends on the case of ill-health; and then in the case of ill-health it is discretionary with the Governors to give it. So in that case, if they have served for less than 10 years, they do not get this sum C. as of right, and also if they are removed for misconduct or have resigned to avoid being removed for misconduct they do not receive that sum, but that sum in those cases, if it is not given to them, goes into a general fund, which the Governors are to distribute to exceptional and special cases requiring and deserving assistance. Therefore, each man when he pays down, if you may call it paying down, when he has deducted from what otherwise would be his salary the sum C., when he is paying over or submitting to the deduction of that sum, is paying it in the nature of a premium, in respect of advantages which he is probably to get, advantages secured to him for certain in certain events, which he may not get in certain other events, but also he is purchasing the right to have or to ask for and possibly to get, if he happens to be specially unfortunate, and therefore, in that sense, the sense of this fund, “specially deserving”; he has a possibility of getting an additional allowance out of the sums which other gentlemen have contributed. Gentlemen who have served for five years, and, therefore, come into this charge, but not served for 10, and have gone out perhaps to some better appointment elsewhere, will have paid certain sums which they will not get back, and those go to increase the fund, and each person who subscribes to the fund has a chance of getting a portion of those funds. The result is, it is like a premium paid down for an insurance in certain events, a sum paid for advantages which you may or may not get, or get to a greater or lesser extent. It is exactly like the case of a person being obliged to insure his life, that would not prevent the sum being salary. In one sense it is a hard case on these Assistant Masters. It is a ground of complaint

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(it is not for me to say if it is legitimate or not), against the Income Tax, that it charges in the same way income arising from a man's own work and exertions, out of which there is a moral obligation at any rate to put something by for his family and those dependent on him, and for his own old age and chance of illness—it treats that for the purpose of taxation on exactly the same footing as income arising from capital, which capital remains intact, and is there for the man in his old age, or his children. It is an objection to be made to the tax, but there is the tax; it exists, and considerations of that sort it seems to me cannot be taken into account in considering whether a particular case comes within the principles of the taxation. Of course, the Legislature has done something for persons in that position—it is very little, but something in the way of the provision that exists as to deducting the premiums on life assurances. That is done to meet the grievance. This Case, though it may possibly come within the mischief which that particular provision is meant to meet, does not come as it seems to me within any of the statutory relief that has been given. Of course, it is not a life assurance within the meaning of that, nor can it possibly be said, and it is not argued by Mr. Danckwerts in an argument, which has assisted me very much, that it comes within the express words set out in this case about certain deductions allowed by Act of Parliament, which was one of the things considered in *Bell v. Gribble*, but this Case could not be said to come within that, and does not.

The result seems to me to be that I must take that sum as a sum which really has been added to the salary and is taxable, and it is not the less added to the salary because there has been a binding obligation created between the Assistant Masters and Governors of the Schools that they should apply it in a particular way.

*Rowlatt.*—The appeal will be allowed with costs, my Lord?

*Danckwerts.*—Well, really, my Lord, with regard to this application, I should ask your Lordship to say no costs here.

*Channell, J.*—In many cases you settle that; if you do not settle it, they follow the event, I suppose.

*Danckwerts.*—I should submit to your Lordship's discretion that this is not a case in which costs should be given. It is a very small amount, and we are Respondents, it is £1 15s.

*Channell, J.*—I do not know, I am sure. There has never been applied to tax cases the question that you have not recovered enough. There is no County Court where you can recover small amounts.

*Danckwerts.*—There is really no great principle involved, and your Lordship will see the whole thing can be undone tomorrow and done in a totally different way.

*Channell, J.*—Yes, I think it could myself.

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*Danckwerts.*—There is a similar Case where there was a Bursar at Oxford who was supporting a decision of the Court below against which the Crown appealed, and the Court in that case certainly said that they would not give costs.

*Channell, J.*—I personally have a very strong feeling that costs ought always to follow the event, unless you can make out some very clear reason to the contrary; it causes more dissatisfaction in the end. I think that this is a case in which the Crown might very well say they do not ask for costs; if they do not, I see no reason why they should not follow the event. I do not know how many of these Masters there are, but I am sorry that I cannot relieve them from this small payment, and I think that the costs ought to follow the event in almost *all* cases. I simply say, if costs are asked for—let them take a little time to consider if they are or not, there may be questions behind for aught I know—they ought to have them, but I think it is a case in which the Crown might well forego the costs; it is a small amount. I do not ask you to answer now.

*Rowlatt.*—At present I must ask for costs, my Lord.

*Channell, J.*—Then I think the Order must be drawn up with costs.

*Danckwerts.*—I think my learned friend ought to take instructions before making that application.

*Rowlatt.*—I understand that your Lordship gives me the Order now?

*Channell, J.*—Yes, I think you must have the Order.

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