[HIGH COURT OF AUSTRALIA.]

COOPER . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1958.

MELBOURNE, *May* 19, 20; *Oct.* 23.

Dixon C.J., Fullagar and Taylor JJ.

Income Tax (Cth.)—Assessable income—Allowable deduction—Premium—Paid in respect of land etc. used for the purpose of producing assessable income—Where in year of income taxpayer is lessee of the land etc. or in the case of a premium paid for the surrender of the lease he would have been lessee had the lease been transferred to him and he had not been entitled to the reversion—Right of taxpayer paying premium to elect that period of lease unexpired at date of payment of premium be deemed to be two years where lease of "indefinite duration"—Lease granted in 1936 *by taxpayer to six persons until death of survivor of such persons or for thirty-five years whichever longer—Whether persons took as joint tenants or in common—Whether estate granted one of freehold or leasehold—Whether lease of "indefinite duration"—Death of one of six persons in* 1938*—Transfer to taxpayer by registered transfer of his interest by his administrator in* 1951*—Whether merger in taxpayer's estate in fee simple—Transfers by other five persons each of his interest to taxpayer in* 1952 *in consideration of an annuity to each for twelve years—Whether annuity payments in year of income an allowable deduction—Scope of statutory provisions—Income Tax and Social Services Contribution Assessment Act* 1936-1956 (*No.* 27 *of* 1936—*No.* 25 *of* 1956), *ss.* 83 (1), 88 (1) (5)*—Transfer of Land Act* 1893-1950 (*W.A.*), *s.* 82.

As of 5th September 1936 a taxpayer who was the owner in fee simple of land on which stood an hotel made an indenture with six members of a family named Guilfoyle. The indenture provided that the taxpayer as lessor demised and leased to the Guilfoyles as lessees the said land "to hold to the lessees until the death of the survivor of" them "or for the term of thirty-five years commencing on 6th September 1936 whichever term be the longer period of time". There were no words of severance in the indenture or any express provision clearly indicating that the estate or interest was taken by the lessees other than jointly. Disputes which had arisen between the five surviving Guilfoyles and the taxpayer were settled in 1952 and in accordance with the terms of settlement each transferred his share or interest expressed to be a one-sixth undivided share to the taxpayer in consideration, *inter alia*, of an annuity of £780 to be paid to each of the five by the taxpayer for twelve

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years. Each transfer was registered under the *Transfer of Land Act* 1893-1950 (W.A.) and contained a provision against merger. One of the Guilfoyles, Denis, died in 1938 and by a separate transaction in 1951, on the basis that the Guilfoyles were tenants in common, his share was transferred by his administrator to the taxpayer. The transfer contained no provision against merger but it was registered under the *Transfer of Land Act* 1893-1950 (W.A.). The taxpayer purported to elect under s. 88 (5) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 that the period of the lease unexpired at the date when the premium was paid should be deemed to be two years. In the year ended 30th June 1956 the taxpayer paid by way of annuity to the five Guilfoyles the sum of £3,825, and he claimed to deduct from his assessable income pursuant to s. 88 (1) of such Act one half of that sum.

Held, (1) that s. 88 (1) applies only to a lease of land premises or machinery considered as an entirety or to a consideration payable in connexion therewith;

(2) that s. 88 (1) (*a*) does not include the case of an owner in fee simple who has got in a lease which he has preserved from merger and s. 88 (1) (*b*) applies only to the case of a surrender;

(3) that the effect of s. 82 of the *Transfer of Land Act* 1893-1950 (W.A.) was to prevent a merger of the lease when the owner in fee simple took a duly registered transfer;

(4) that accordingly C., as the holder of undivided shares in the lease, was not entitled to deduct under the section a proportion of the payments made by him in respect of those undivided shares.

English Scottish & Australian Bank Ltd. v. *Phillips* (1937) 57 C.L.R. 302, at pp. 320-325, referred to.

Quaere whether, since the primary estate created by the indenture in 1936 was an estate for life, the estate created fell within the provisions of ss. 83 et seq. of the *Income Tax and Social Services Contribution Assessment Act.*

Parker v. *Gravenor* (1556) 2 Dy. 150a [73 E.R. 326]; (1556) 1 And. 19 [123 E.R. 331] and *Cadee and Oliver's Case* (1588) 3 Leo. 153, at p. 154 [74 E.R. 601] referred to.

Quaere whether the lessees under the indenture in 1936 took the estate or interest created as joint tenants or tenants in common.

Quaere whether the lease was one of indefinite duration within the meaning of s. 88 (5) of the *Income Tax and Social Services Contribution Assessment Act.*

Decision of *Kitto* J.: *Cooper* v. *Federal Commissioner of Taxation* (1957) 97 C.L.R. 397, affirmed.

APPEAL under the *Income Tax and Social Services Contribution Assessment Act* 1936-1956.

Reginald Frederick Cooper appealed pursuant to ss. 187 and 197 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 to the High Court of Australia against an assessment of

income tax payable by him in respect of income derived during the year ended 30th June 1956.

The appeal was heard by *Kitto* J., who on 5th November 1957 dismissed the same with costs: *Cooper* v. *Federal Commissioner of Taxation* (1).

From this decision Cooper appealed to the Full Court.

Dr. E. G. Coppel Q.C. (with him *N. O'Bryan*), for the appellant. The only question for decision on this appeal is whether the appellant is entitled to deduct £1,913 under s. 88 (1) of the *Income Tax and Social Services Contribution Assessment Act*. [He referred to the definition of "premium" in s. 83]. Here the money paid by the appellant was in the nature of a premium for or in connexion with the assignment by the Guilfoyles of their leasehold interest. Primarily it is put that there was one transaction with the five Guilfoyles. Alternatively there were five transactions each requiring the appellant to pay a premium in respect of a leasehold interest. A lease registered under the *Transfer of Land Act* 1893-1950 (W.A.) does not merge upon the lessee becoming the registered proprietor of the freehold. [He referred to *Bevan* v. *Dobson* (2); *Lewis* v. *Keene* (3); *English Scottish & Australian Bank Ltd.* v. *Phillips* (4).] Whether or not the interest of Denis Paul Guilfoyle deceased, merged is not material here because by his notice of objection the appellant did not claim a deduction in respect of anything paid to his estate. The result of the transaction with the five Guilfoyles was that there was an assignment, although contained in a series of documents, of the whole leasehold interest outstanding in them to the appellant, the consideration being the payment of an annual sum for twelve years to each assignor. It follows that the total of the annuities is a premium payable in more than one amount for the assignment of a lease. When the opening words of s. 88 (1) are read with the definition of "premium" the words "in respect of" in s. 88 (1) are seen to refer to the subject matter of the lease and not to the consideration for which the premium is paid. The purpose of the reference to "land, premises or machinery" is to limit the deduction to cases where what has been obtained is something used for the purpose of earning assessable income. Prima facie "land" as used in s. 88 includes an interest in land: see s. 22 of the *Acts Interpretation Act* 1901-1957. There is no contrary intention appearing in s. 88 (1). Wherever the word "lease" is found

(1) (1957) 97 C.L.R. 397.
(2) (1906) 26 N.Z.L.R. 69.
(3) (1936) 36 S.R. (N.S.W.) 493; 53 W.N. 177.
(4) (1937) 57 C.L.R. 302, at pp. 321, 323, 324.

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in Div. 4 it is apt to include the case where there is more than one lessor or lessee. Looking at s. 84, if five out of six tenants in common granted a lease of their interest in the freehold and received a premium the amount received by each would be part of his assessable income under that section. When s. 85 speaks of an amount paid to acquire the lease the words are apt to include a leasehold of any interest. Section 88 (1) is the counterpart of ss. 84 and 85 and one would expect the deduction to be co-extensive with the liability to pay tax. There is nothing in s. 88 (1) (*b*) to suggest that the premium must be paid for the physical thing " land ". The sub-section supports the view that the deduction could be claimed notwithstanding that what was surrendered was the five-sixth remaining of the freehold interest and not the entirety. If that is correct as regards the surrender it tends against the notion which found favour with the learned judge below that there is a contrary intention to be found in the section. Section 88 (4) is neither in favour of nor against the argument of the appellant.

L. Voumard Q.C. (with him *H. R. Newton*), for the respondent. In s. 88 (1) the word " land " is used to denote a physical entity and not to mean an undivided interest in land. Thus s. 88 (2) refers to " making improvements on that land ", s. 88 (5) (*b*) to " making improvements upon land ". The appellant was not a " lessee " within meaning of s. 88 (1) (*a*) because there could be no tenure and no person against whom to enforce covenants except himself. Thus s. 88 (1) (*b*) lays down that in order to have a taxpayer regarded as a lessee it must be assumed that the lease had been transferred to him and that he was not entitled to the reversion. Section 88 (1) (*a*) and (*b*) do not cover the whole ground because they omit the case of a man who is in a position to take a surrender but does not do so and acquires the term and keeps it alive by providing against a merger. In Div. 4 premium means a payment for the assignment of the entirety of a lease and not of an undivided share in a lease. Thus in s. 83 the fact that the word " assignment " is found in connexion with " grant " suggests that the word " lease " cannot mean an undivided share in a lease because it is not possible to make a grant of an undivided share of a lease. In s. 85 (1) (*b*) the words " improvements upon land which is the subject of the lease " suggest that " lease " must mean the entirety and in s. 85 (2) the words " business carried on upon land a lease of which is granted" suggest the same. See also ss. 88 (1) (*b*), 83A (1) (*a*) (*b*), 85A, 87.

Dr. E. G. Coppel Q.C., in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment :—

This appeal concerns a claim to a deduction from assessable income under s. 88 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956. That provision entitles a taxpayer who has paid a premium in respect of land, premises or machinery used for the purpose of producing assessable income, if he be a lessee or if he be a reversioner who has paid the premium to obtain a surrender of a lease, to deduct, when certain conditions are fulfilled, a proportion of the premium. The facts of the case require a closer examination but it will make it easier to see what is material in the legislative provision if the foundation in fact of the present taxpayer's claim to a deduction is described briefly at once.

In partnership with his wife the taxpayer conducts the business of an hotelkeeper at the Australia Hotel, which stands on a parcel of land in Murray Street, Perth, and is owned by the taxpayer. He is in fact the registered proprietor of an estate in fee simple. But up to the beginning of 1952 he was not entitled to the land in possession. For in 1936 he had granted an estate or interest in possession to certain persons named Guilfoyle and they conducted the hotel business. The term of their interest was until the death of the survivor of them (an event that has not yet occurred) or for thirty-five years from 6th September 1936, whichever should be the longer period. This term was granted by a registered instrument. The taxpayer claims that he got in the interests of the Guilfoyles for considerations which or some of which fall within s. 88 and that consequently he is entitled to a deduction under that provision. His primary case is not that he obtained a surrender of the Guilfoyles interest. The reason why it is not is because in the case of the greater number of the Guilfoyles he took a transfer of undivided shares in the lease containing a provision against merger. He maintains that in respect of those undivided shares, if not of all the shares, his title in possession is to be referred to the lease and not to his fee simple. He says therefore that when he pays the consideration he pays a premium as lessee of the land which is used to produce the assessable income derived by him from or by means of the partnership between himself and his wife as hotelkeepers. *Kitto* J., by whom the taxpayer's appeal from his assessment was heard, took the view that the first assignment the taxpayer had taken of an undivided interest did merge, there being no provision against merger in the assurance of the interest to the taxpayer (1). Indeed so much was not denied. But this fact formed, in the opinion of that learned judge, a fatal objection to the taxpayer's claim ;

(1) (1957) 97 C.L.R., at p. 407.

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for s. 88 relates only to a premium paid not for an undivided share in land but for or in connexion with the lease of an entirety (1). The taxpayer stood as a person entitled to the land in possession in fee simple in respect of one undivided share, and as to the other undivided shares in virtue of a term to that extent preserved from merger. That, his Honour considered, was not within s. 88.

One curious and perhaps complicating factor is that for the transfer of the undivided shares preserved from merger the consideration which the taxpayer agreed to pay included in each case an annuity for twelve years. The deduction claimed is in respect of annuity payments made during the year of income. A lump sum payment was made in respect of the interest that was held to merge, but there was no claim to deduct a proportion of that payment as a premium or part of a premium.

Before *Kitto* J. the claim to deduct the annuity payments from the assessable income was put on a further ground, namely that they were proper outgoings in gaining the assessable income. This ground his Honour rejected (2) and on appeal before us the taxpayer did not persist in it.

With this explanation of the case it is possible now to return to s. 88. The purpose of this section is to enable a taxpayer using land premises or machinery for the purpose of producing assessable income to deduct a due proportion of a premium, if he paid one to acquire possession of the land either as lessee or as a reversioner getting in an outstanding lease. What is a premium is defined in s. 83. The premium when ascertained is to be proportioned over the term of the lease, an expression also defined in s. 83. In the words of s. 88 (1) "a proportionate part of the amount of that premium, arrived at by distributing that amount proportionately over the period of the lease unexpired when the premium was paid shall be an allowable deduction". Sub-section (5) contains a qualification which makes it possible, so the taxpayer claims, to work s. 88 (1) when the premium takes the form of payment of an annuity. The relevant part of sub-s. (5) provides that for the purpose of the application of s. 88 in relation "(*a*) . . . to a premium paid in respect of land . . . which is, or premises which are, the subject of a lease of indefinite duration . . . the taxpayer who paid the premium . . . may elect that the period of the lease unexpired at the date when the premium was paid . . . shall be deemed to be two years and where such an election has been made the provisions of the section shall be applied accordingly." Sub-section (6) then provides in effect that the election shall be in writing

(1) (1957) 97 C.L.R., at pp. 408, 409. (2) (1957) 97 C.L.R., at p. 405.

and lodged with the commissioner either before or at the time of making the return of income of the year in which the premium is paid or within such further time as the commissioner allows. If the premium were regarded as one sum of money the provisions of sub-ss. (5) and (6) could hardly apply to the annuity payments. But the definition of " premium " in s. 83 (1) of the *Assessment Act* 1936-1956 says that it means a consideration payable in one amount, or each amount of a consideration payable in more than one amount, where etc. These are the words of the definition adopted by Act No. 90 of 1952, s. 15, in place of prior definitions of the words " lease " and " premiums ". But it was enacted that the old definitions should apply in relation to a consideration received or paid under an agreement made not later than 31st December 1952 for the grant assignment or surrender of a lease of land. Apparently the instruments embodying all the transactions on which the case turns, save one, were executed before that date. Fortunately, however, in the old definition there is no great difference in the words relating to a consideration payable in more than one amount. The old words run " and where any of the foregoing considerations is payable in more than one amount each such amount shall be deemed to be a premium ".

In holding that the annual payments on account of the annuities for twelve years could not be deducted as business expenses or outgoings, *Kitto* J. proceeded on the basis that they formed expenditure not of a revenue nature but on account of capital. If, therefore, these payments could otherwise qualify to come within the definition there might be not much wrong in deeming each of them to be a premium in pursuance of the words last quoted from the definition. On that footing the taxpayer elected under sub-s. (5) that the period of the lease unexpired at the date when the premium was paid should be deemed to be two years. That would result in the payment for the given year of the annuity being split for the purpose of the deduction into two equal parts and that would happen again in the next year, for with respect to it a like election would be made. So in every year after the first until the last year of the annuity there would be two apportioned parts of the annual amount payable, together equivalent to the whole amount. Such is the theory on which the taxpayer's case is based.

We are concerned here with payments made in the year ending 30th June 1956, and sub-s. (5), though adopted by Act No. 28 of 1952, s. 10, would apply to them notwithstanding that they arose under documents most of which were executed before 31st December 1952. Act No. 90 (not No. 28) of 1952 s. 15, removed from s. 83

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a definition of " lease " as well as replacing the definition of " premium " ; but s. 15 (2) contains the reservation already mentioned by which the old definitions continue to apply to a consideration received or paid under an agreement made not later than 31st December 1952. The material part of the definition of " lease " says that when used in relation to a premium the word means the lease granted assigned or surrendered. The commissioner contends that this cannot apply when the assignment or surrender is of an undivided share nor to a case where for several considerations several undivided shares are granted or assigned notwithstanding that in all they make up the entirety. The material part of the definition of " premium " says that the word means " any consideration in the nature of a premium fine or foregift payable to any person for or in connexion with the grant or assignment by him of a lease, or any consideration for or in connexion with the surrender of a lease . . . and where any of the foregoing considerations is payable in more than one amount each such amount shall be deemed to be a premium ".

The same contention is advanced for the commissioner upon this definition, namely that it is speaking of one consideration, even though payable in divers instalments, given for a lease in or as an entirety. Moreover, so it is said, where there are separate contracts with owners of undivided shares for separate considerations you cannot add up the considerations or the transactions and say that they amount to a consideration payable to any person in connexion with an assignment of a lease or for that matter for the surrender of a lease.

It is now desirable to turn to a somewhat closer examination of the material instruments and of such facts as might be considered to affect the operation upon them of s. 88. As of 5th September 1936 the taxpayer made an indenture as the party of the one part with six members of a family named Guilfoyle, men, as parties of the other part. They were called the " lessees " and he " the lessor ". It is a long document containing many convenants characteristic of the lease of an hotel. Notwithstanding its form as an indenture it was registered under the *Transfer of Land Act* 1893-1950 (W.A.) The first clause is headed " Demise " and proceeds to provide that the lessor (that is the taxpayer) in consideration of the rents and convenants thereinafter contained or therein implied thereby demised and leased to the lessees (that is the six Guilfoyles) the parcel of land being portion etc. and being the land comprised in the specified certificate of title, (that is the certificate in virtue of which the taxpayer is the registered proprietor in fee simple).

The parcels go on to include expressly the Australia Hotel, as a building erected on the land. The second clause is headed "Term and Rentals". It opens as follows: "To hold to the lessees until the death of the survivor of", naming the six Guilfoyles, "or for the term of thirty-five years commencing on 6th September 1936 whichever term be the longer period of time (terminable however as hereinafter provided) at the following rents". Then follows a statement of the rents. They comprised five different forms of annual payment, the fifth of which consisted of half the net profits of the lessees in carrying on the hotel.

It has been assumed that the foregoing constituted a "lease" within the meaning of ss. 83 and 88 and that assumption appears to be based on the further asssumption that the instrument granted a term of years and nothing but a term of years. The assumptions, however, seem to be very doubtful indeed. The first portion of the *tenendum* expresses the grant of an interest for the lives of six persons. That, unless its effect is controlled by context, must amount to a grant of an estate of freehold for life. Then follows what is expressed as an alternative grant of a term of years if that be the longer period of time. In *Parker* v. *Gravenor* (1) there was a lease made by indenture for the life of the lessee with a proviso that if he should die within the term of sixty years then his executors and assigns should enjoy the land as in the title of the lessee for the term of so many years remaining as would amount to sixty in all. This was held a life estate and the lessee was held to have no interest in a term after his lease for life but only a covenant. Probably the view that would have been taken at a later time would be that there was a term or *interesse termini* to take effect at the end of the life estate. In *Cadee and Oliver's Case* (2) there is this passage: "A lease is made to one for life; and if he dieth within twenty years, that his executors and assigns shall hold the land until the expiration of the twenty years, the said interest may be granted. Which *Wray* Chief Justice denyed (3)." *Wray* C.J. referred to *Gravenor's Case* (1) and apparently pronounced the interest for twenty years to be void. But the point for present purposes is not whether a term arose on the determination of the life estate but that the interest granted in the first instance is an estate for life, an estate of freehold. What context is there to control this grant? It would seem that the primary estate created by the instrument now under consideration was an estate for the lives of them all and if a term of years was

(1) (1556) 2 Dy. 150a [73 E.R. 326]; (1556) 1 And. 19 [123 E.R. 331].
(2) (1588) 3 Leo. 153 [74 E.R. 601].
(3) (1588) 3 Leo. at p. 154 [74 E.R., at p. 601].

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created it was expectant upon the determination of the life estate, a future contingent interest.

Doubtless the description " lease " is capable of applying to a grant of an estate for life, but it would be a natural construction of ss. 83 and 88 to confine them to the more ordinary conception of a lease, namely a demise for a term of years or a periodical tenancy and any statutory description of lease which is of indefinite duration.

Although no one made the point there cannot but be much doubt whether the estate or interest created by the indenture is within the provisions beginning with s. 83.

In the next place it was assumed that the lessees, the six Guilfoyles took the estate or interest created by the indenture as tenants in common so that upon the death of any one of them his undivided share devolved upon his legal personal representative. But there are no words of severance. It is a long document but a perusal of its contents has failed to disclose any express provision clearly indicating that the estate or interest was taken by the lessees otherwise than jointly. There is of course the subject matter, an hotel, and the usual indications that the business of hotelkeeping was to be carried on by the lessees. Would that suffice at law, as distinguished from equity, to imply that words otherwise insufficient to sever the interest into a tenancy in common nevertheless created not a joint tenancy but a tenancy in common ?

This question, however, was passed by and it was assumed in favour of the taxpayer that the six Guilfoyles took as tenants in common. On that assumption the interest, for example, of Denis Paul Guilfoyle who died on 10th June 1938 was treated as passing to his administrator. On an application made in 1951 to the Registrar of Titles a memorandum notifying the death and appointment of the administrator was endorsed, apparently under s. 187 of the *Transfer of Land Act*, upon the indenture. There was also endorsed a memorandum notifying a transfer of the interest by the administrator to the taxpayer. There is certainly not a little to be said for the view that this interest and the interests of two other members of the family, both of whom died in 1942, had passed to the remaining three lessees by survivorship, at all events in point of legal estate. But that perhaps must be subject to the effect of s. 187 of the *Transfer of Land Act*. The possible importance of this will be seen when the instruments come to be considered by which the taxpayer sought to get in all interests. For in every case the assurance is expressed in terms of a one-sixth share or interest.

It is necessary to mention still another assumption that was made. The taxpayer could not, as he has purported to do, elect under

sub-s. (5) (*a*) of s. 88 that the period of the lease should for the apportionment of the supposed premium consisting of an annuity payment, be deemed to be two years unless it appeared (and this has been pointed out already in this judgment) that the lease is one of indefinite duration. *Kitto* J. in his judgment said with reference to this condition : " I assume, as counsel for the commissioner has invited me to do, that the lease to the Guilfoyles was ' of indefinite duration ' within the meaning of the sub-section " (1). On any view of the lease it seems a very doubtful assumption. At best the duration of the lease was limited by the lapse of a fixed period of time or the later occurrence of an event certain to occur although at an uncertain time. But obviously in so far as the lease is a term of years it is not of indefinite duration. What is uncertain, if the doubtful hypothesis be adopted that " indefinite " is used as meaning " uncertain ", is the life interest and, for the reasons given already, that may be outside the provisions altogether.

The foregoing are difficulties which appear to stand in the way of the success of the taxpayer. But, since on independent grounds his case does not appear to fall within the provisions contained in ss. 83 and 88, it is not necessary to consider them further.

Upon this appeal his case is that within the year of income, *scil.* that ended 30th June 1956, he paid an amount of £3,825 as part of the consideration in the nature of a premium to persons in connexion with the assignment by them of a lease. This sum formed part of a total of £3,900 payable during that year to five persons representing the Guilfoyle interest in annuities of £780 each. In the years in question, for some reason, £75 remained unpaid and the payments made amounted to £3,825. The taxpayer treated the total of the annuities for twelve years as the consideration for the assignment to him of the lease and then applied so much of the definition of " premium " in the *Assessment Acts* as brought within that expression each amount payable where such a consideration was payable in more than one amount. Then having thus fixed upon the amount of £3,825 the character of " a premium " he applied to it the provision of sub-s. (5) of s. 88 and apportioned the sum over two years, the year of income and the next year, claiming in respect of the year of income, with which our decision of this appeal must alone be concerned, half the amount, viz. £1,913.

The transactions on which the claim depends begin with a transfer by the administrator of Denis Paul Guilfoyle, that one of the six lessees who had died in 1938. It was not put in evidence but the registration of the transfer is endorsed on the indenture granting the

(1) (1957) 97 C.L.R., at p. 406.

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estate or interest to the six Guilfoyles until the death of the last survivor of them or for thirty-five years, whichever should be the longer period.

The transfer was based upon the disputable assumption that the estate or interest was held by the six Guilfoyles as tenants in common so that the share of the deceased passed to his administrator. We know that the transfer was made as part of the settlement of claims made by the taxpayer and in consideration of a payment of £4,500. Let it be assumed that Denis Paul's one-sixth share had not devolved by survivorship upon the other five lessees; even so, the view accepted before *Kitto* J. that the effect of the transfer of the undivided share to the registered proprietor in fee simple was to merge it in his estate cannot be accepted unquestioned. We are dealing with a transfer of an interest under a Torrens registration system and there was due registration of the transfer. The entry endorsed upon the indenture runs " as to the interest of Denis Paul Guilfoyle only. Transfer " (giving the number) " to " (the taxpayer) " Registered 10th October 1951 " specifying the time. It is authenticated by the Assistant Registrar of Titles. Section 82 of the *Transfer of Land Act* 1893-1950 (W.A.) provides: " The proprietor of land or of a lease . . . or of any estate right or interest therein respectively may transfer the same by a transfer in one of the forms in the . . . Schedule hereto . . . Upon the registration of the transfer the estate and interest of the proprietor as set forth in such instrument or which he shall be entitled or able to transfer or dispose of under any power with all rights powers and privileges thereto belonging or appertaining shall pass to the transferee and such transferee shall thereupon become the proprietor thereof . . . ." In *English Scottish & Australian Bank Ltd.* v. *Phillips* (1) the question of the effect of a mortgagor (a registered proprietor in fee simple) taking a transfer of the mortgage was considered (2) and it was decided (*Dixon, Evatt and McTiernan* JJ.) (3) that there was no merger, the transfer, of course, being registered. The question whether, when a registered proprietor of an estate in fee simple holding in reversion upon a lease for a term of years takes a duly registered transfer of the lease, a merger of the lease ensues was discussed to some extent but left undecided. The passages, there cited, in *Kerr's Australian Lands Titles (Torrens) System*, (1927) viz. at pp. 29 and 251 support the view that such a registered leasehold interest does not merge at law so long as it remains registered as a separate estate or interest and that appears to conform better with the Torrens system.

(1) (1937) 57 C.L.R. 302.
(2) (1937) 57 C.L.R., at pp. 320-325.
(3) (1937) 57 C.L.R., at p. 325.

In favour of the taxpayer it seems proper to assume the correctness of this view of the matter. It is an assumption in the taxpayer's favour because it removes the foundation for the view that as to a one-sixth share or interest the taxpayer could hold only in virtue of his estate in fee simple. Assuming that he got in the other undivided shares in the lease they would with the shares of Denis Paul Guilfoyle add up to the entirety of the lease. It would not follow that he would be the registered proprietor of the entirety of the lease but he would at least be registered proprietor of all six undivided shares in the lease.

The next of the transactions upon which the taxpayer's claim rests arose from a settlement of certain complaints and claims that he made with respect to the conduct by the Guilfoyles of the hotel business, in the net profits of which, it will be remembered, he took a half share as part of the rent. The persons who would be entitled to the remaining five undivided shares on the assumption that a tenancy in common existed agreed upon a compromise by which the taxpayer took transfers of those interests. His claims were to be discharged and he was to pay to each of them by way of consideration a sum in cash and an annuity of £780 for twelve years.

But of the five co-owners in question two died before they or any other of the five had transferred their shares in the estate or interest created by the indenture between the taxpayer as lessor and the six Guilfoyles as lessees. If it was not a tenancy in common but a joint tenancy the result, so far as the legal estate was concerned, would be that the joint tenancy became one in three (equal) undivided shares. Again that must be subject to the operation of s. 187 of the *Transfer Of Land Act* when the transmissions were endorsed on the registered indenture. The arrangement for the compromise or settlement of 1952 was carried out by five sets of instruments. Each set consisted of three instruments viz.: (i) An indenture between the person in whom the interest of the original Guilfoyle was supposed to have vested of the one part and the taxpayer of the other part. This gave formal expression to the terms of settlement. (ii) A transfer of the share or interest, which was duly registered. (iii) A charge, duly registered, of the undivided share the subject of the transfer.

Now all five sets of documents were expressly limited respectively to the one-sixth undivided share with which that set dealt. Accordingly each transfer was incapable of transferring more than one-sixth interest which is specified; that is to say it could not convey the whole estate or interest which would be vested in the transferor if a joint tenancy and not a tenancy in common were originally created by the indenture of 17th September 1936.

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But let it be assumed that by means of the foregoing assurances it had come about before the beginning of the year of income 1955-1956 that all six undivided shares were vested in the taxpayer. (It has already been remarked that in one case the matter is governed by the amended definitions in s. 83, but that may be ignored.) The result is that you have five several sums paid in that year of income, each totalling about £780. In point of fact each of these sums is payable at the rate of £15 per week. Doubtless it makes no arithmetical difference whether you treat the notional " premium " which under the definition the taxpayer claims to have paid as in every case £15 and say that there were five of them every week and then apportion each of them under sub-s. (5) of s. 88 or, on the other hand, you reach the sum of £1,913 in the manner hitherto adopted. But it must strike one that the taxpayer's claim gives a very unreal operation to ss. 83 and 88 when it is seen what it involves if it is literally applied. For if it is literally applied, it means an apportionment under sub-s. (5) of every £15 and the treatment of that weekly sum as a " premium " because it is part of a " consideration payable in more than one amount " and must accordingly be treated under the definition as a premium, the total consideration for the assignment being an annuity at the rate of £780 payable for twelve years.

This, however, does no more than emphasise the curious consequences of the manner in which the taxpayer seeks to apply ss. 83 and 88. There are in fact two basal misconceptions in the use to which he seeks to put those provisions. Let it be supposed that all else necessary to his case may be supplied notwithstanding what has already been said, yet the facts of his case cannot bring him within s. 88 (1) as affected by the definitions in s. 83.

For the taxpayer is wrong in supposing that the provisions relate to anything but a lease of land premises or machinery considered as an entirety or to a consideration payable in connexion with anything else. He is wrong too in supposing that par. (*a*) of s. 88 (1) relates to anything but the case of a lessee holding under a lessor ; that is to say, in supposing that it could include an owner in fee simple who has got in a lease which he has preserved from merger. Section 88 (1) (*a*) enables a tenant to apportion a premium because it is a lump sum payment equivalent to rent. It no more contemplates the owner in fee simple claiming in respect of the price of an outstanding interest although a term of years than it contemplates his claiming in respect of the price of the fee simple.

The first of these two objections to the use to which the taxpayer seeks to put these provisions is supported by the very terms of the

provisions. A reading of the definitions of " lease ", " premium " and " term of the lease " in s. 83 of the *Assessment Act* 1936-1951 will show the difficulty of any other interpretation. To take the last of these expressions, the residual length of the term is to be reckoned from the date when the premium is received. If you have a lease held in undivided shares which are acquired by the lessor at different dates, paying the purchase money for the assignment of one at one date, of a second at another and of a third at still another and so on, how can the definition be applied ? The relevant part of the definition of premium makes it mean a consideration in connexion with a grant or assignment of a lease : it must be in the nature of a premium fine or foregift payable to a person and the " foregoing consideration " that may be payable in more than one amount, not separate considerations for undivided parts of the lease. When one turns to s. 88 (1) (*a*) it is plain that the provision is directed to the " use " of " land " by a lessee of the land. It is plain that the premium is to be proportioned over the period of the lease unexpired when the premium was *paid*. All this looks to a single transaction in acquiring an entirety in a lease giving a right to enjoyment of the land. Sub-section (5) can hardly be supposed not only to authorise the adoption of different periods of two years for successive payments on account of one consideration but to allow different periods of two years for payments on account of different considerations for undivided shares, even though making up the entirety of the lease.

As to the second of the two grounds which are fatal to the taxpayer's case, it is enough to say that par. (*b*) of s. 88 (1) provides for the case of a surrender to the reversioner of a lease. Here there is no surrender. The undivided shares still subsist. It may be urged that the policy behind par. (*b*) is not carried into full effect unless some provision covers the case of a transfer of a term to the reversioner if the term is kept alive and preserved from merger. To this it would be enough to say that we are not concerned with the logical scope of a supposed policy, but with the ambit of an express provision. But it is by no means clear that so wide a policy was accepted by the legislature.

For all the foregoing reasons the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Dwyer & Thomas*, Perth, by *Ronald Stewart & McIntosh.*

Solicitor for the respondent *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.