[HIGH COURT OF AUSTRALIA.]

COOPER . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

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PERTH, *Sept.* 17;

SYDNEY, *Nov.* 5.

KITTO J.

Income Tax (Cth.)—Allowable deductions—Annuities paid to acquire interests in lease of land—Whether outgoing incurred in gaining assessable income or of capital nature—Premium paid for lease of undivided share in land—Whether deductible—Income Tax and Social Services Contribution Assessment Act 1936-1956 (*No.* 27 *of* 1936—*No.* 25 *of* 1956), *ss.* 51 (1)*, 88 (1) (5)*.

C., the owner of certain property upon which an hotel business was conducted, leased it to six lessees until the death of the survivor of such lessees or for a term of thirty-five years commencing on 6th September 1936 whichever should be the longer period. The rent payable under the lease included a sum equal to one-half the net profits made by the lessees in carrying on the hotel business and the lease declared that the furniture plant stock in trade tenant's fixtures and fittings belonged to the lessor and lessees in equal undivided shares as tenants in common. C. subsequently purchased the interest in the lease and business of one of the lessees. Some time later, in

* Sections 51 (1) and 88 (1) and (5) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 are, so far as relevant, as follows:—

Section 51—(1) All . . . outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income.

* Section 88—(1) Where a taxpayer has paid any premium in respect of land, premises or machinery used for the purpose of producing assessable income, and in the year of income—(*a*) he is the lessee of the land, premises or machinery . . . a proportionate part of the amount of that premium, arrived at by distributing that amount proportionately over the period of the lease unexpired at the date when the premium was paid; shall be an allowable deduction . . . (5) For the purposes of the application of this section in relation to—(*a*) a premium paid in respect of land . . . which is . . . 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 this section shall be applied accordingly.

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settlement of litigation taken by C. against the others for breach of covenant, deeds were executed by which C. covenanted to pay an annuity to each of these lessees as consideration for the assignment to C. of their interests in the lease and a lump sum as consideration for the assignment of their interests in the business. C. thereafter conducted the business in partnership with his wife, the partnership agreement providing that C. should be indemnified from the partnership funds in respect of (*inter alia*) the payment of the annuities. During one year of income C. paid £3,825 in respect of such annuities and claimed to deduct that sum from his income under s. 51 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 or alternatively, a deduction of £1,913 (being half that sum) under s. 88 (1) of the Act. The Commissioner of Taxation disallowed the deductions. On appeal,

Held: (1) that the annual payments which C. had bound himself to make were the price of a capital asset, and were, therefore, of a capital nature. Thus the sum of £3,825 was not allowable as a deduction under s. 51 (1).

Egerton-Warburton v. *Deputy Federal Commissioner of Taxation* (1934) 51 C.L.R. 568, distinguished.

(2) that s. 88 (1) enables a tax-payer to claim a deduction for a payment made by way of premium only where he is the lessee of the entirety of the land in respect of which the payment is made and not where he is the lessee of an undivided share in such land. Accordingly C. was not entitled to deduct the said sum of £1,913.

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

The relevant facts appear fully in the judgment hereunder.

H. V. Reilly, for the appellant.

T. S. Louch Q.C. and *A. L. Gleedman*, for the respondent.

Cur. adv. vult.

NOV. 5. KITTO J. delivered the following written judgment:—

This is an appeal by Reginald Frederick Cooper under ss. 187 and 197 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 against an assessment of the tax payable by him in respect of income derived during the year ended 30th June 1956.

Throughout that year the appellant was in partnership with his wife in a business of hotel proprietors. They conducted the Hotel

Australia in Perth. The appellant himself held the freehold of the hotel, being the registered proprietor thereof under the *Transfer of Land Act* 1893-1950 (W.A.); but the partnership agreement provided that he should make the premises available for partnership purposes on terms that from partnership funds he should be indemnified against certain liabilities which he had assumed and against all rates and taxes payable by him on the premises. What the liabilities were which are there referred to it will be necessary to consider later. Suffice it for the moment to say that in the year ended 30th June 1956 the partnership's obligation to indemnify the appellant against those liabilities involved it in an expenditure of £3,825. That sum was treated in the partnership's profit and loss account for the year as " rent ", together with another sum of £5,200 as to which there is no dispute in this case. The appellant's share of the partnership net profit for the year, arrived at after allowing for these two items of rent as deductions against gross profit, was included in the appellant's return as part of his assessable income; but the £3,825 which the partnership paid by way of indemnification to the appellant was not included as part of his assessable income. A sum of £1,913, however, was treated in the return as an allowable deduction against property income, the explanation being given by means of a letter to the commissioner that the appellant considered that one-half of the £3,825 which had gone to satisfy the liabilities above referred to was an allowable deduction by virtue of sub-s. (1) of s. 88, as extended by sub-s. (5) of that section. The commissioner, however, assessed the appellant to tax on the footing that the taxable income shown in the return should be increased, not only (as admittedly it should be) by adding thereto the £3,825 which had been paid by the partnership to the appellant or on his behalf—described in an alteration sheet as additional rent—but also by adding back the £1,913 which had been treated as a deduction.

The appellant lodged an objection to the assessment as having allowed insufficient deductions from assessable income. He relied on alternative grounds. In the first place he went beyond the position taken up in his return, contending that the whole amount of the £3,825 which he had become liable to pay in the relevant year was an allowable deduction because the items of which it was composed " constituted outgoings incurred in gaining the assessable income or in carrying on business for that purpose and were not outgoings of capital or of a capital private or domestic nature or incurred in relation to the gaining or production of exempt income ". This was a claim based upon s. 51 (1) of the Act. Alternatively the

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appellant contended that the outgoings which made up the £3,825 " constituted premiums paid by the appellant in respect of premises the subject of a lease of indefinite duration, used for the purpose of producing the assessable income, and of which the appellant was the lessee in the year of income, and, the taxpayer having elected that the period of the lease unexpired at the date when the said premiums were paid should be deemed to be two years, one half of the said amounts should have been allowed as a deduction ". This was a reiteration of the claim that s. 88 (1) and (5) applied to the case so as to justify the deduction of the £1,913.

The alternative contentions thus advanced have been pursued on this appeal. In order to consider them it is necessary to see how the appellant became liable to pay the £3,825 in the relevant year.

The history of the matter goes back to 1936. In that year, the appellant, being then, as he is now, the freeholder of the hotel property, leased it to six brothers named Guilfoyle until the death of the survivor of the lessees or for a term of thirty-five years commencing on 6th September 1936 whichever should be the longer period. The rent reserved fell into five parts : a fixed weekly rent of £95, three yearly rents related to future expenditure by the appellant, and what was described as " a further or additional clear yearly rental of a sum equal to one half of the net profits made by the lessees from the carrying on of the business of an hotelkeeper in the said hotel to be ascertained and to be payable as hereinafter provided ". The lease contained extensive provisions " for the purpose of ascertaining and securing to the lessor one-half of the net profits of the said hotel ". It also contained a covenant by the appellant to purchase the furniture plant stock-in-trade tenant's fixtures and fittings then in the hotel, to pay for those assets, and to pay all other incidental expenses in connexion with the taking over on 6th September 1936 of the business of the hotel. It went on to provide that half the amount of all moneys so expended by the appellant should be repaid to him by the lessees over a period of five years with interest ; and then followed a declaration that the furniture plant stock-in-trade tenant's fixtures and fittings should " belong to the lessor and the lessees in equal shares, that is to say the lessor one undivided half thereof and the lessees one undivided half thereof as tenants in common ".

Between 1936 and 1951 certain changes took place in the ownership of several of the one-sixth shares in the lease and of the one-twelfth interests of the Guilfoyles in the business, but they need not be noticed here. The lessees commenced on the agreed date

to carry on the business, and one of the Guilfoyles, Dr. Francis Guilfoyle, became the resident manager of the business. By July 1950 the appellant had become dissatisfied with the conduct of the business and he commenced legal proceedings against the Guilfoyles (as I shall call the owners for the time being of the interests which originally belonged to the six brothers), claiming damages for breach of covenant. The proceedings were settled on terms which in the main were concerned with the future carrying on of the business. Further disagreements arose, however, and in September 1951 the appellant served on the Guilfoyles a notice which has been described in argument as " a preliminary to a claim for possession of the hotel, to terminate the lease ". The interest of one of the original Guilfoyles, Denis Paul Guilfoyle, who had died, was then vested in one Haynes as personal representative. Haynes at once interviewed the appellant. In giving evidence, the appellant described what took place : " The attitude was he (Haynes) was highly dissatisfied with the whole situation and conduct of the hotel and wanted to get out of it, and sought an offer from me for the purchase of his one-sixth share in the lease and the business. I settled with him and paid him £4,500 ". A transfer to the appellant of the interest of Denis Paul Guilfoyle in the lease was then executed by Haynes, and it was registered under the *Transfer of Land Act* on 10th October 1951.

On 31st October 1951 the appellant commenced an action against the rest of the Guilfoyles claiming damages for breaches of covenant and for possession of the premises. He commenced further actions at later dates. Before the actions came to trial, however, the appellant's solicitors opened negotiations for a settlement, and in correspondence agreement was reached between the appellant and each of the defendants for the acquisition by the former of the respective interests of the latter in both the lease and the business. The agreements were implemented, with some variations, by instruments executed at various dates in 1952 and 1953. In respect of each of the Guilfoyles there were three instruments. First, there was a deed containing, so far as presently material, (1) a recital that in settlement of the actions and otherwise for the considerations thereinafter appearing the assignor had agreed to sell to the assignee his one-sixth share and interest in the unexpired portion of the lease from 1st October 1952 ; (2) an assignment to the appellant of a one-sixth interest in the lease and a share in the business and the assets thereof ; (3) a covenant by the appellant (a) as consideration for the assignment of the interest in the lease to pay the assignor for twelve years from 1st October 1952 an annuity of £780 to be

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charged on that interest in the lease, and (b) as consideration for the assignment of the share in the business and assets to pay the assignor the sum of £1,000; (4) a declaration that the unexpired term of the lease should not merge in the freehold but should continue to subsist as part of the personal estate of the appellant; and (5) a release and discharge by the appellant of all claims and demands the subject of the actions or arising in respect of the lease. In the case of Dr. Francis Guilfoyle, the deed contained additional provisions, including provisions for the retirement of the assignor from the management of the business and the payment of a retiring allowance to him by the appellant. In some cases the deed also contained provisions for the appellant's taking over the control of the business, together with the plant furniture stock-in-trade chattels and other assets of the business as they stood at midnight on 30th September 1952, on a walk-in walk-out basis. Secondly, there was a transfer to the appellant, which was in due course registered under the *Transfer of Land Act*, of the relevant one-sixth interest in the lease. Thirdly, there was a deed whereby the appellant charged the transferred interest in the lease with the annuity payable as above-mentioned.

The appellant took possession of the premises and the business assets on the agreed date, 1st October 1952, and he and his wife conducted the hotel thenceforth in partnership. On 29th June 1953 they executed a deed of partnership, dating the partnership back to 1st October 1952. It contained a clause (cl. 5) in these terms: "As from and inclusive of the first day of October One thousand nine hundred and fifty two the said Reginald Frederick Cooper acquired all the respective shares and interests of the lessees in a lease of the aforesaid hotel premises and as consideration therefor covenanted to pay various annuities to the lessees and to perform and comply with all the obligations of the lessees under the aforesaid lease and the various shares and interests in the said lease so acquired were duly charged in favour of the lessees by the said Reginald Frederick Cooper as security for his obligations as aforesaid. During the term of the partnership the said Reginald Frederick Cooper will make the said premises available for partnership purposes on terms that from partnership funds he shall be indemnified against all liabilities assumed by him to the lessees as aforesaid and also against all rates and taxes of whatsoever kind imposed on the said premises and by the said Reginald Frederick Cooper payable in whatsoever capacity." It was under this provision that the charges for "rent" were made in the partnership profit and loss account for the year ended 30th June 1956. The

annuities which the appellant had covenanted to pay to the assignors of the five-sixths of the lease and the five-twelfths of the business which had remained outstanding after his purchase from Haynes in October 1951 totalled £3,900, but in the relevant year it appears that only £3,825 was paid to the annuitants. It is upon the payment of this amount that the appellant relies in his claim for an allowable deduction.

To support the argument that the whole of the £3,825 is deductible, the appellant rests his case upon the decision of this Court in *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (1). In that case certain taxpayers acquired a farming property for a consideration consisting in part of a promise to pay the transferor an annuity secured by a charge over the property. By the part of the decision which is relied upon, the Court held that payments of the annuity were allowable deductions in the assessments of the transferees. This conclusion, however, was reached only because of a peculiar set of circumstances which gave the character of income charges to outgoings which in most cases would have been of a capital nature. This was explained in *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (2), and the appellant does not dispute it. But he says that there is a comparable set of circumstances here. It is therefore desirable to see what the peculiar circumstances were in the *Egerton-Warburton Case* (1), and why they had the effect which the Court ascribed to them. The transferor was a father, and the transferees were his sons. The property was the family farming property. The agreement for the transfer had features which removed it from the category of sales and gave it " all the marks of a family settlement " (3). The sons were to take over the family property as a going concern—in effect, they were to earn the family income. During the father's life they were to pay him an annuity and let him occupy a dwelling-house on the property. After his death they were to pay the mother an annuity. After the death of both the father and the mother, they were to pay a lump sum to other members of the family as the father might appoint. The payment of the father's annuity was secured by a registered charge over the property. That fact by itself could have no significance for income tax purposes ; but it fell into place as part of the whole plan, which was to let the sons have the property and run it without having to wait for their father's death, conditionally upon their paying him an income while he lived and making, on his death, payments which could fairly be

(1) (1934) 51 C.L.R. 568.
(2) (1953) 89 C.L.R. 428.
(3) (1934) 51 C.L.R., at p. 574.

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described as taking the place of the testamentary dispositions he might have made if he had kept the property instead of letting them have it. The result was to bring about what amounted, in practical effect, as *Fullagar* J. has said: "to a post mortem distribution to children as beneficiaries of the father's property" (1) coupled with "a gift of the land to the sons charged during the father's lifetime with an outgoing analogous to interest on a mortgage and charged with a capital sum payable at the father's death" (1). *Williams* A.C.J. has described the annuity payments as "in the nature of rents which the sons had to pay during this period in order to occupy the land and carry on their business" (2). They were not strictly rent, of course, nor were they strictly interest on a mortgage. But taking a practical view of the manner in which the family, as a family, was re-organising its affairs, the Court considered that the annuity payments were as surely chargeable against the income of the sons as rent or interest would have been. They were in substance the running payments which had been agreed upon for the immediate possession which it was the purpose of the arrangement to give the sons. So considered, they were far removed in character from instalments of a price; and therefore the reason did not exist which in ordinary cases of the purchase of a capital asset requires the conclusion that the consideration paid, whether in one sum or in several and whether at one time or over a period, is an outgoing of a capital nature.

The appellant attributes a similar complexion to the facts of the present case. He contends that the true view of the annual amounts which the appellant bound himself to pay to the Guilfoyles is that they, like the annuity in the *Egerton-Warburton Case* (3) are not really a price. Just as the transaction in that case was in the nature of a family settlement rather than a sale, so, the appellant contends, each transaction by which he acquired one of the outstanding five-sixths of the lease in 1952-1953 should be considered, not as a transaction of sale and purchase, but as a settlement of litigation between persons who, if they were not in law partners, at least were together interested in the business and its profits. It should be recognised, he says, that the combined effect of these five transactions was to give him the immediate control of the business and the immediate possession of the land, and to give the five Guilfoyles for the future an income in the form of an annuity in place of a share of the profits. In other words, the annual payments should be regarded, from the appellant's point of view, as

(1) (1953) 89 C.L.R., at p. 459.
(2) (1953) 89 C.L.R., at p. 447.
(3) (1934) 51 C.L.R. 568.

being in substance current outgoings, comparable with rent, in respect of the possession of property used for the production of assessable income.

It is proper, no doubt, to regard the entire situation that was being dealt with by the transactions in which the appellant bound himself to pay the amounts in question, and to recognise that those transactions, considered together, possessed, if not the character of, at least a close resemblance to, a dissolution of a partnership effected by one partner buying out the interests of the others, including buying out the share of each of the others in the principal asset for the price of £9,360 payable in twelve annual amounts. But the fact that the asset was a leasehold interest upon which the purchaser held the reversion, so that the purchase accelerated the possession to which otherwise the appellant would not have become entitled until possibly twenty years later, provides the only feature of the case which may plausibly be said to suggest an analogy with the *Egerton-Warburton Case* (1). There is really no analogy, however. To say that the transaction in the present case was entered into by way of settling pending litigation, and as a method of dissolving a partnership or a relationship resembling a partnership, is only to describe the motivating circumstances. It leaves the transaction a purchase and nothing else. And the annual payments are in truth only instalments: they do not take the place of the profit the transferors might have made from their leasehold interests, for, apart from anything else, they are payable over a period of only twelve years, whereas the lease might have lasted for much longer. The appellant is really not in any different position from any reversioner who has bought an outstanding leasehold interest and agreed to pay a fixed price by instalments. He purchased property with a view to retaining it and putting it to a capital purpose. In my opinion the annual payments which he bound himself to make are simply the price of a capital asset, and are therefore of a capital nature and not allowable as deductions under s. 51.

The appellant relies mainly, however, on sub-ss. (1) and (5) of s. 88. Sub-section (1), so far as material, provides: "Where a taxpayer has paid any premium in respect of land, premises or machinery used for the purpose of producing assessable income, and in the year of income—(*a*) he is the lessee of the land, premises or machinery . . . a proportionate part of the amount of that premium, arrived at by distributing that amount proportionately over the period of the lease unexpired at the date when the premium was paid, shall be an allowable deduction". To this, sub-s. (5)

(1) (1934) 51 C.L.R. 568.

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adds: "For the purposes of the application of this section in relation to—(*a*) a premium paid in respect of land . . . which is . . . 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 this section shall be applied accordingly". Section 88 appears in Div. 4 of Pt. III of the Act, and by s. 83 the word "premium" is given an exclusive definition for the purposes of Div. 4. It means a consideration payable in one amount, or each amount of a consideration payable in more than one amount, where the consideration is within any of the descriptions set out in three lettered paragraphs. The description relied upon in this case is provided by the words in par. (*a*): "in the nature of a premium, fine or foregift payable to a person for or in connexion with the . . . assignment by him of a lease".

The appellant made an election under s. 88 (5), and I assume, as counsel for the commissioner has invited me to do, that the lease to the Guilfoyles was a lease "of indefinite duration" within the meaning of that sub-section. But it will be seen that in order to uphold the appellant's contention based on s. 88, it would be necessary to hold, *inter alia*, that each of the annual amounts payable in the relevant year was (i) an amount of a consideration payable in more than one amount, (ii) payable for or in connexion with the assignment of a lease and (iii) paid in respect of land which was, or premises which were, used for the purpose of producing assessable income, and of which the appellant was the lessee in the year of income.

The commissioner denies that any one of these three descriptions is satisfied. To bring the amounts within the first two, the appellant puts an argument which offers a choice of three views. The first is that his six purchases of the interest of the Guilfoyles amounted in substance to one purchase, and that the six transfers to him should therefore be regarded as having effected the assignment of "a lease". On this footing he says that the total of the lump sum paid for the first purchase and the agreed annual payments in respect of the last five purchases formed a consideration for such an assignment "payable in more than one amount", and none the less so because separate amounts were payable to the several assignors. I am unable to accept this argument, because in actual fact the purchase of Denis Paul Guilfoyle's interest was clearly a transaction by itself, entirely unconnected with the transactions concerning the other five interests. Not only were they separated

from it by a substantial interval of time, but they resulted from a different course of negotiation. The purchase of Denis Paul Guilfoyle's interest was completed before any negotiations with respect to the other five interests had commenced, and without any express or implied condition concerning those interests.

Then the appellant contends that the matter should be considered either on the footing that the last five transfers, considered as linked together, assigned to the appellant the whole lease as it then existed, or on the footing that each of the last five transfers, considered separately, assigned to the appellant an undivided share of that lease. Even if the latter view is to be preferred, it is said that there was an assignment of a lease within the meaning of s. 83 because " lease " includes a share in a lease, and that the appellant was the lessee within the meaning of s. 88 (1) because " lessee " includes the holder of a share in a lease.

I think it is true that the transfer by Haynes to the appellant of Denis Paul Guilfoyle's one-sixth of the lease had the effect of destroying that one-sixth by merger, and that, as a result, when the appellant came to deal with the persons interested in the remaining five-sixths there was subsisting a leasehold interest in five-sixths only of the property. The terms of Haynes' transfer have not been proved before me, but there is nothing to suggest that it contained any indication of an intention inconsistent with merger, and all the proved facts are against the existence of any such intention. The transaction was nothing but a simple purchase by a reversioner of an interest in an outstanding term, with nothing upon which equity could seize as a reason for refusing to recognise the merger which in such circumstances would result at common law. The one-sixth interest, therefore, was " annihilated ", " sunk or drowned ", as *Blackstone* would say, in the appellant's estate in fee simple : 2 *Bla. Comm.*, 17th ed. (1830), p. 177, and thenceforth the only subsisting lease was of five undivided sixths of the formerly demised premises : cf. *Badeley* v. *Vigurs* (1) ; *Preston* on *Conveyancing*, 3rd ed. (1821), vol. iii, p. 89.

By contrast, the other five transfers clearly did not result in any merger. Not only did they state explicitly that no merger should take place, but the provision in them that the shares in the lease which they transferred should be charged with the annual payments showed plainly that those shares were intended not to be swallowed in the reversion so long, at least, as the charge remained. So clear a demonstration of intention could not but prevent a merger from being recognised in equity during the subsistence of the charges ;

(1) (1854) 4 E. & B. 71 [119 E.R. 28].

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and by virtue of s. 25 (4) of the *Supreme Court Act* 1935-1954 (W.A.), which followed s. 25 (4) of the *Judicature Act* 1873 (Imp.) (36 & 37 Vict. c. 66), it must likewise be regarded as having prevented a merger from taking effect at law: *Capital and Counties Bank Ltd.* v. *Rhodes* (1); *Lewis* v. *Keene* (2).

But even assuming that the five subsequent transfers are to be regarded as having together vested in the appellant the whole of the then subsisting leasehold interest (or, equally, even assuming that they are to be regarded as having vested in him five separate one-fifths of that leasehold interest and that an interest in a lease is itself to be considered as a lease in applying s. 88), the question remains: does s. 88 (1) apply where a consideration is paid in respect not of land or premises in a physical sense but of an undivided share of land or premises? No doubt a person who occupies the dual position of a lessee as to an undivided share of land and a tenant in fee simple in possession as to the rest of the land, and who uses the land as a whole for the purpose of producing assessable income, may be said, in one sense, to be using each undivided share for that purpose. I have come to the conclusion, however, that that is not the sense in which s. 88 (1) speaks of using land for that purpose. It is clear that the words "premises" and "machinery" refer to physical objects, and in this context "land" cannot have the extended meaning which, by virtue of s. 22 (*c*) of the *Acts Interpretation Act* 1901-1950 (Cth.) it *prima facie* bears. The three substantives seem to me to refer, not to legal or beneficial interests, nor to undivided shares, but to concrete things. I am therefore of opinion that the section cannot apply to a payment, premium though it be, unless it was a payment in respect of a parcel of land, or a building, or a piece of machinery, or more than one of such things, of which the taxpayer was the lessee.

Clearly the appellant was not in the relevant year the lessee of the land and premises constituting the Hotel Australia, and the payments now in question were not made in respect of the entirety thereof. As to one undivided sixth part, he was a tenant in fee simple in possession. Only of the other five-sixths was he the lessee, and only in respect of that proportion of the property did he make the payments. Accordingly in my opinion he is not entitled to the benefit of s. 88 (1). Views may differ in regard to a legislative policy which makes the right to a deduction in respect of a premium depend upon the distinction between a lease of the whole of land used for the production of assessable income and a lease of

(1) (1903) 1 Ch. 631.

(2) (1936) 36 S.R. (N.S.W.) 493; 53 W.N. 177.

an undivided part of land so used ; but s. 88 seems to me clearly to have been framed without reference to the case of a lease of an undivided interest. Sub-section (4) of s. 88 was referred to by counsel for the appellant as tending against this view. It makes provision for the case where a taxpayer succeeds to any lease " or share therein " upon the death of a person who had paid a premium, and it entitles such a taxpayer to the same deduction, " or part thereof proportionate to his share in the lease ", as the deceased person would have been entitled to had he lived. The provision, as I read it, does not refer to a case where a deceased person himself had only a share in a lease, but applies only to a case where the deceased person had a lease to which several persons have together succeeded on his death. Its tendency is, I think, to support the view I have taken by the very contrast which it provides with the rest of the section.

For the reasons I have stated I dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Dwyer & Thomas.*

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

R. A. H.