

*Appeal dismissed. Respondent to pay to appellant the extra costs occasioned by the hearing of the appeal in Sydney.*

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v.  
COLONIAL  
SUGAR  
REFINING  
CO. LTD.

Solicitor for the appellant, *W. F. Webb*, Crown Solicitor for Queensland.  
Solicitors for the respondent, *Minter, Simpson & Co.*

B. L.

[HIGH COURT OF AUSTRALIA.]

ROFE AND ANOTHER . . . . . APPELLANTS;

AND

THE DEPUTY FEDERAL COMMISSIONER  
OF LAND TAX FOR NEW SOUTH  
WALES . . . . . } RESPONDENT.

*Land Tax—Assessment—Owner—Joint owner—Deduction of £5,000—Trustees—Beneficiaries entitled to income from land—Will of testator who died before 1st July 1910—Land Tax Assessment Act 1910-1916 (No. 22 of 1910—No. 33 of 1916), secs. 3, 10, 11, 12, 33, 38 (7).*

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SYDNEY,  
Nov. 9, 10,  
11.  
Knox C.J.,  
Isaacs and  
Rich JJ.

A testator who died before 1st July 1910 by his will devised certain land to trustees upon trust for such of the children of one of his sons living at the testator's death or born thereafter as should attain the age of twenty-one years, and, if more than one, as tenants in common. He directed that his trustees should accumulate the net rents and profits of the land until one of such children should first attain the age of twenty-one years, and should thereafter, on 1st January of each year, divide the net rents and profits into as many equal shares as there were children living on that day or who had died before that day having attained the age of twenty-one years, and should pay one of such shares to each of such children, or to the parent or guardian of such of them as were under the age of twenty-one years, or to the representatives of such of them as had died after attaining that age. There were four children of such son of the testator, and the eldest of them attained the age of

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twenty-one years on 9th October 1915. The trustees were assessed for land tax for the year 1916-1917, and were allowed only one deduction of £5,000.

*Held*, that on 30th June 1916 the three children who had not attained the age of twenty-one years were not "owners," and therefore that the four of them were not "joint owners," within the definitions of those terms in sec. 3 of the *Land Tax Assessment Act* 1910-1916, and therefore that the trustees were not entitled to more than one deduction either under sec. 38 (7) or on the ground that the trustees were entitled to as many deductions of £5,000 as the beneficiaries would have been entitled to claim had they been separately assessed.

CASE STATED.

On the hearing of an appeal to the High Court by John Fulton Rofe and Thomas Ernest Rofe from an assessment of them as trustees of the estate of Alfred Rofe deceased, for Federal land tax for the year ended 30th June 1917, *Gavan Duffy J.* stated a case, which was substantially as follows, for the determination of the Full Court :—

1. Alfred Rofe, formerly of Petersham, near Sydney, in the State of New South Wales, now deceased, was, at the date of his death hereinafter mentioned, the owner of land and personalty situated in the said State.

2. The said Alfred Rofe duly made his last will and testament on 3rd June 1902.

3. The said Alfred Rofe died on 9th July 1902 without having altered his said will.

4. Probate of the said will was, on 29th August 1902, duly granted by the Supreme Court of New South Wales in its probate jurisdiction to John Fulton Rofe, Arthur Camden Rofe and Thomas Ernest Rofe, the executors and trustees therein named. By a decree of the Supreme Court of New South Wales in its equity jurisdiction the said Arthur Camden Rofe was, on 13th June 1904, discharged from the trusts of the said will so far as they relate to the lands with which this appeal is concerned, and the legal estate in the said lands is now vested in the said two executors and trustees, John Fulton Rofe and Thomas Ernest Rofe, who are the above-named appellants.

5. The provisions of the said will material to this appeal are as follows :—The testator gave and devised the said lands being all that parcel of land having about sixty-three feet frontage to Elizabeth Street extending through to Castlereagh Street and having a



frontage of forty-five feet to Castlereagh Street being the land purchased by him from the Perpetual Trustee Co. of New South Wales Ltd. and also all that parcel of land adjoining the Elizabeth Street side of the lastly described premises having fifty-one feet frontage to Elizabeth Street by a depth of about seventy feet being the land purchased by him from Messieurs Lipman and Webb (such two properties being hereinafter called his "D" properties) together with the appurtenances thereunto belonging unto and to the use of his trustees upon trust for such of the children of his son Thomas Ernest Rofe living at the testator's death or born afterwards as should attain the age of twenty-one years and if more than one as tenants in common in equal shares but if all of the issue of his said son Thomas Ernest Rofe should die under the age of twenty-one years then upon trust for the next-of-kin of his said son Thomas Ernest Rofe in equal shares. The testator directed that his said trustees should (until the shares of the children or next-of-kin of his said son Thomas Ernest Rofe in his said "D" properties should be conveyed to them) receive the rents and profits of and manage his said "D" properties and every part thereof as they might think proper with power to demise or let the same or any part or parts thereof either from year to year or for any term or number of years (not exceeding ten) either upon repairing or building leases and generally upon such terms as his said trustees should think proper and with power to accept surrenders and make allowances to and arrangements with tenants and others and with all other powers expedient or desirable for the due management of the same, and should accumulate the net rents and profits of the same until one of the children of his said son Thomas Ernest Rofe should first attain the age of twenty-one years or until twenty-one years after his (the testator's) death whichever period should first happen (such period being hereinafter called the "income distribution period for Tom's children"), provided nevertheless that his said trustees might in their discretion pay such net rents and profits or any part or parts thereof for or towards the maintenance education or advancement in life of any one or more of the children of his said son Thomas Ernest Rofe. And he directed that, when and so soon as the income distribution period for Tom's children should arrive, his said trustees

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ROFE many equal parts or shares as there were children of his said son  
v. Thomas Ernest Rofo living at the date of such income distribution  
DEPUTY period for Tom's children, and should pay one of such equal parts or  
FEDERAL shares to each of such children or, if under the age of twenty-one  
COMMISS- years, to his or her parent or guardian for and on behalf of such child.  
SIONER OF The testator further directed that from and after the income dis-  
LAND TAX tribution period for Tom's children his said trustees should there-  
(N.S.W.). after on the first day of January in each year divide the net rents  
— and profits of his said "D" properties into as many equal parts or  
shares as there were children of his said son Thomas Ernest Rofo  
who were living on such day or who had died before such day over  
the age of twenty-one years, and should pay one of such equal parts  
or shares to each of such children or, if such child were under the  
age of twenty-one years, to the parent or guardian of such child or,  
if such child should have died after reaching the age of twenty-one  
years, to the representative of such deceased child, for and on  
behalf of such child under the age of twenty-one years or deceased  
child respectively. He next directed that, if it should happen at  
any time that there were no children of his said son Thomas Ernest  
Rofo or representatives of such children who were entitled under  
the foregoing provisions to take the rents and profits as above  
mentioned, his said trustees should for and during such period or  
failure of children or representatives thereof as aforesaid pay the  
net rents and profits to his said son Thomas Ernest Rofo absolutely.  
The testator declared that the payment by his trustees of any share  
of the rents and profits to the parent or guardian of any child who  
might be under the age of twenty-one years should exonerate his  
said trustees from all liability with respect to such share of the rents  
and profits or accumulations. And he authorized and empowered  
his said trustees at any time or times or from time to time during  
the period in which they were entitled to manage his said "D"  
properties under the foregoing provisions to raise any sum they might  
deem necessary by way of mortgage and to join in any transfer of  
any mortgage or other charge or encumbrance upon all or any part of  
his said "D" properties, or to pay off all or any part of the money  
secured by any such mortgage charge or encumbrance, and for that



purpose to adjust and settle any accounts with any mortgagee or encumbrancer. The testator also declared that whenever the term "net rents and profits" was used in his will, the same should be taken to mean the rents and profits received from the particular property or properties referred to after payment thereout of all rates, taxes, land tax, repairs, premiums for insurance against loss by fire or accidents, commissions and all other lawful charges payable in respect to such particular property or properties.

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6. The said Thomas Ernest Rofe still survives and has had four children and no more, of whom three are still alive and the eldest of whom, namely, Minnie Edith Fulton Nance Rofe, attained the age of twenty-one years on 8th October 1915. The other three children of the said Thomas Ernest Rofe, namely, Dulcie Victoria Eleanor Fulton Rofe, Ernest Fulton Gladstone Rofe and Jessie Margaret Fulton Rofe, were born respectively on 2nd April 1897, 19th January 1899 and 8th November 1906, and the said Ernest Fulton Gladstone Rofe died on 15th May 1920.

7. The above-mentioned appellants, as trustees of the said will, from time to time have granted leases of the above-mentioned "D" properties, and have accumulated, divided or distributed the net rents and profits derived therefrom according to the directions of the said will.

8. For the land tax year 1915-1916 the Deputy Commissioner issued an assessment dated 3rd November 1916, claiming land tax for the year upon the full unimproved value of the said "D" properties less the sum of £5,000 under sec. 11 of the *Land Tax Assessment Act* 1910-1916. The amount of tax claimed was £114 13s. 1d., which has been paid by the trustees.

9. For the land tax year 1916-1917 the Deputy Commissioner issued an assessment dated 19th November 1917, claiming land tax for the year upon the full unimproved value of the said "D" properties less the sum of £20,000, being £5,000 in respect of the share of each of the said children of the said Thomas Ernest Rofe. The amount of tax claimed by the said Deputy Commissioner was 16s. 8d., and was paid by the said trustees.

10. On 11th July 1918 the Deputy Commissioner issued an amended assessment claiming additional land tax in respect of



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the land tax year 1916-1917, such amended assessment being based on the full unimproved value of the said "D" properties less (instead of the sum of £20,000 previously allowed) only the exemption under sec. 11 of the *Land Tax Assessment Act* 1910-1916 of £5,000. The additional amount of land tax thus claimed was £113 16s. 5d., making a total tax claimed in respect of the year £114 13s. 1d. This amount has been duly paid.

11. For the land tax years 1915-1916 and 1916-1917, the net rents and profits derived from the said "D" properties amounted to £381 10s. 1d. and £465 6s. 2d. respectively, and the unimproved value of the said "D" properties was £20,198.

12. The appellants have delivered a notice of objection in accordance with the *Land Tax Assessment Act* 1910-1916 in respect of the said assessment for the land tax year 1915-1916 claiming (1) that the principle of the assessment is wrong; (2) that the four beneficiaries are entitled to a deduction of £5,000 each; (3) that the assessment is excessive.

13. The appellants have delivered a notice of objection in accordance with the *Land Tax Assessment Act* 1910-1916 in respect of the said amended assessment for the land tax year 1916-1917 claiming (1) that the assessment was excessive; (2) that "the deduction of £5,000 for each of the four children of Thomas Ernest Rofe (in all £20,000) as provided for in sec. 38 and the amendment thereof of the Commonwealth *Land Tax Act* 1910-1914 should be allowed, they being the persons entitled to the beneficial interests in the said lands under the will of Alfred Rofe who died on the 9th day of July 1902; (3) that the period of distribution arrived on the 8th day of October 1915, the date the eldest daughter of Thomas Ernest Rofe attained the age of twenty-one years."

14. The objections specified in the said notices were disallowed by the Deputy Commissioner and the appellants duly asked that the respective notices of objection should be treated as notices of appeal. The Deputy Commissioner duly transmitted the said objections to the High Court for determination as a formal appeal.

15. The appeal came on for hearing before this Court on 4th August and the Court thought fit to state this case in writing for the opinion of the High Court in Full Court upon the following



questions arising in the appeal, which in the opinion of this Court are questions of law :—

- (1) Whether the appellants should be assessed on the basis mentioned in par. 10 hereof for the year 1916-1917.
- (2) Whether the appellants should be assessed on the basis mentioned in par. 9 hereof for the year 1916-1917.
- (3) In the event of questions 1 and 2 being answered in the negative, on what basis should the appellants be assessed for the year 1916-1917 ?

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*Leverrier* K.C. (with him *J. A. Browne*), for the appellants. The appellants are entitled to four deductions of £5,000 each, either under sec. 38 (7) of the *Land Tax Assessment Act* 1910-1916, because the four grandchildren of the testator are joint owners, or under secs. 33 and 35, because a trustee is not liable to more tax than that to which his beneficiaries would have been liable if they had been assessed (*Sendall v. Federal Commissioner of Land Tax* (1)). The object of sec. 38 (7) is to confer a benefit upon persons within a certain degree of relationship to the testator and who were taxable as joint owners, and it ensures them getting the same benefits as cestuis que trustent who were not joint owners already had. Under the will in the present case the class of children entitled to share in the corpus and the income was ascertained on the death of Thomas Ernest Rofe. As to corpus each child until he attained the age of twenty-one years had a contingent interest, the contingency depending on his attaining the age of twenty-one years and the amount of his share depending on the number of children who attained that age. As regards the income on and after 8th October 1915, when the eldest attained the age of twenty-one years, all the children had an interest in it, and no living child would at any time be without a share of the income. That being so, the children fall within the provisions of sec. 38 (7). They also fall within sec. 35, for from the inception of the trust each of them held an equitable interest in the land, and was liable to be assessed as if he was the legal owner, and each was therefore entitled to a deduction of £5,000. The children fall within the definitions of "owner" and "joint owner."

(1) 12 C.L.R., 653.



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*Flannery* K.C. (with him *Corringham*), for the respondent. On 30th June 1916 it could not be predicated of any one of the three children of Thomas Ernest Rofe who had not attained the age of twenty-one years that he was in receipt of or was entitled to receive the income for the year ending 31st December 1916, for if he died before 1st January 1917 he would receive none of that income. Therefore, none of those three children was on 30th June 1916 an "owner" nor were there any persons who could come within the definition of "joint owners." Apart from the trustees, the only person who fell within the definition of an "owner" is the eldest child who had attained the age of twenty-one years. None of the children had a "life or greater interest" in the income, for, though their interests terminated with their lives, those interests were not commensurate with their lives, because each of them might live until 29th December in a particular year and yet not be entitled to any of the income of the year ending 31st December. For this reason also, the children were not "joint owners," and so could not come within sec. 38 (7). The interests are the same as in *Hoysted v. Federal Commissioner of Taxation* (1). (See also *Terry v. Federal Commissioner of Taxation* (2).) As to the point that the liability of the trustees is limited to the liability of the beneficiaries, the definition of "owner" includes trustees, so that the trustees are liable under secs. 10 and 11 for the full tax in respect of the whole land with one deduction. There is nothing in the Act to exempt the trustees from that liability.

[ISAACS J. referred to *Liverpool and London and Globe Insurance Co. v. Bennett* (3).]

*Leverrier* K.C., in reply.

*Cur. adv. vult.*

Nov. 11.

KNOX C.J. The special case having been amended is now limited to the assessment for land tax for the financial year 1916-1917. The appellants challenge the assessment on the ground that they

(1) 27 C.L.R., 400.

(2) 27 C.L.R., 429.

(3) (1913) A.C., 610, at p. 616.



should have been allowed four deductions of £5,000 each instead of one deduction of £5,000. The appellants are the trustees of the will of Alfred Rofe, and they hold certain property for the benefit of the grandchildren of the testator. The trusts as set out in the will are for such of the children of his son Thomas Ernest Rofe living at the date of the testator's death or born afterwards as should attain the age of twenty-one years and if more than one as tenants in common in equal shares, but if all of the issue of such son should die under the age of twenty-one years then upon trust for the next-of-kin of such son in equal shares. Then there is a direction that until the shares of the children or next-of-kin of Thomas Ernest Rofe should be conveyed to them the trustees should receive the rents and profits of the property, over which they were given certain powers of management, and should accumulate the net rents and profits of the same until one of the children of Thomas Ernest Rofe should first attain the age of twenty-one years or until twenty-one years after the testator's death whichever period should first happen (such period being called "the income distribution period for Tom's children"), with a provision for maintenance, education and advancement of such children. Then follows the provision which is directly relevant to the question raised in the present case. It is stated in the special case as follows: "The testator further directed that from and after the income distribution period for Tom's children his trustees should thereafter on the first day of January in each year divide the net rents and profits" of the property "into as many equal parts or shares as there were children of his said son Thomas Ernest Rofe who were living on such day or who had died before such day over the age of twenty-one years, and should pay one of such equal parts or shares to each of such children or, if such child were under the age of twenty-one years, to the parent or guardian of such child or, if such child should have died after reaching the age of twenty-one years, to the representative of such deceased child, for and on behalf of such child under the age of twenty-one years or deceased child respectively."

The assessment appealed against being for the financial year 1916-1917, the relevant date at which to consider the ownership of the property is 30th June 1916. On that date the eldest child

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1920. twenty-one years and there were then living three other children all  
under the age of twenty-one years. The income distribution period  
referred to in the will had arrived on 9th October 1915, the date on  
which the eldest child attained the age of twenty-one years. The  
question then is whether, under the gift in the will which I have  
read and under the circumstances which I have stated, the appellants  
are entitled to one or more than one deduction of £5,000 in their  
assessment for land tax. Sec. 10 of the *Land Tax Assessment Act*  
provides that "land tax shall be levied and paid upon the unim-  
proved value of all lands within the Commonwealth which are  
owned by taxpayers, and which are not exempt from taxation under  
this Act." Sec. 11 provides that "(1) Land tax shall be payable  
by the owner of land upon the taxable value of all land owned by  
him, and not exempt from taxation under this Act." Sec. 12 provides  
that "Land tax shall be charged on land as owned at noon on the  
thirtieth day of June immediately preceding the financial year in and  
for which the tax is levied." It is apparent from those sections that  
the person who is liable to pay land tax is the owner, or some person  
who by virtue of the Act is deemed to be the owner, on 30th June  
immediately preceding the year of assessment. "Owner" is defined  
in sec. 3 as including "every person who jointly or severally, whether  
at law or in equity, (a) is entitled to the land for any estate of free-  
hold in possession; or (b) is entitled to receive, or in receipt of, or  
if the land were let to a tenant would be entitled to receive, the rents  
and profits thereof, whether as beneficial owner, trustee, mortgagee  
in possession, or otherwise." Now, the position of these bene-  
ficiaries on 30th June 1916 was that the eldest daughter, who had  
attained the age of twenty-one years, had a vested right to an  
aliquot share of the income of the property, the amount of that  
share being determined by the aggregate number of the beneficiaries  
who were in existence on 1st January in each year and of the  
beneficiaries who had died after attaining the age of twenty-one  
years. But under no circumstances could she, or her estate in the  
event of her death, be deprived of that share of the income. She  
had an absolutely vested interest in the share, the amount of which  
was to be determined by the state of facts existing on 1st January



in each year. As to the other children, all of whom were under the age of twenty-one years on 30th June 1916, none of them had any right or title to any of the income which had accrued up to that date from 1st January 1916 unless he or she survived until 1st January 1917. It was not a case of the income being apportioned in the case of a child dying during the year, but the right to a share of the income depended on the child surviving until 1st January 1917. It is clear, therefore, as to the three children under the age of twenty-one years, first, that none of them was on 30th June 1916 entitled to the land for any estate of freehold in possession, and, secondly, that none of them was on that day entitled to receive or in receipt of the rents and profits either as beneficial owner or otherwise. That being so, none of those three children was an "owner" within the meaning of the Act, and therefore none of them was taxable under the Act, it not being suggested that their case comes under any provision of the Act under which they would be deemed to be owners.

Mr. *Leverrier* put his case on two grounds, to which the circumstances of the case afford a complete answer. The first ground rests on sec. 38 (7), which provides that where under the will of a testator who died before 1st July 1910 the beneficial interest in any land or in the income thereof is for the time being shared among a number of persons, standing in a certain relationship to the testator, in such a way that they are taxable as joint owners, then they shall be entitled, subject to certain qualifications, to more than one deduction of £5,000. That case depends on the beneficiaries being taxable as joint owners, and it is obvious that they cannot be "joint owners" unless they are "owners," and, as there is only one beneficiary who was an owner at the material time, it is quite clear that sec. 38 (7) cannot apply. Mr. *Leverrier* also put his case on the ground that the appellants, being assessed as trustees, could not be assessed for more tax than the aggregate of the amounts for which their cestuis que trustent would have been assessable, and that, as each of the cestuis que trustent would have been entitled to one deduction of £5,000, the trustees must be allowed four deductions of £5,000 each. But the same answer meets that argument. The fact is that none of the three younger children was assessable at all,

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1920. the Act. The trustees were owners, for they are declared to be so  
ROFE by sec. 33, and the eldest daughter was also an owner within the  
v. definition of that word. It is quite clear that she was the only  
DEPUTY owner, apart from the trustees, at the relevant date. That being so,  
FEDERAL it follows that even if effect were to be given to the second contention  
COMMISS- of Mr. *Leverrier* as to the extent of the liability of a trustee, as to  
SIONER OF which we need express no opinion, there could only be one deduction  
LAND TAX of £5,000.  
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For these reasons I am of opinion that the questions should be answered as follows : question 1, Yes ; question 2, No. Question 3 need not be answered.

ISAACS J. I agree.

RICH J. I agree.

*Questions answered accordingly.*

Solicitors for the appellants, *Alfred Rofe & Sons*.

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

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