[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION APPELLANT;

AND

WESTGARTH AND ANOTHER . . . RESPONDENTS.

H. C. OF A. 1949.

SYDNEY, *Dec.* 8, 23.

McTiernan J.

1950.

SYDNEY, *May* 3.

MELBOURNE, *June* 8.

Latham C.J., Williams, Webb and Fullagar JJ.

Estate Duty (Cth.)—Assessment—Dutiable estate—House—Value at date of death of owner—Bona-fide opinion of administrators of deceased's estate based on Valuer-General's certificate—Nine months later house sold at increased price—Assessment amended—"Full and true disclosure of all the material facts"—Non-disclosure—Mistake of fact or law—Correction—Statement of fact—Statement of opinion—Distinction—Estate Duty Assessment Act 1914-1942 (*No.* 22 *of* 1914—*No.* 18 *of* 1942), *s.* 10 (2), 20 (2), (3), (4).*

In a return made under the *Estate Duty Assessment Act* 1914-1942, the administrators of an estate set forth as required by s. 10 (2) the description and values of the items comprising the estate and including a house belonging to the deceased at a value of £2,750 as at date of death as shown in an attached certificate by the Valuer-General of New South Wales. About nine months after that date the house was sold for £3,200, the delegate of the Treasurer having consented thereto under the *National Security* (*Economic Organization*) *Regulations*. The commissioner then amended the assessment showing the value of the house as £3,200, thereby increasing the liability of the estate to duty. Just prior to the issue of the amended assessment two valuers agreed that the value of the house at date of death was £3,200.

Held, that as the administrators had placed a value on the property which they honestly believed to be true, there had been a full disclosure of all the material facts necessary for the making of the assessment and (*Fullagar* J. dissenting) its amendment by the commissioner was not a correction of a mistake of fact within the meaning of s. 20 (3) of the *Estate Duty Assessment Act* 1914-1942.

Decision of *McTiernan* J., affirmed.

* Section 20 (2) (3) are set out in the judgment of *Latham* C.J. at p. 404 hereunder.

APPEAL from *McTiernan* J.

An objection was lodged by Dudley Westgarth and John Dudley Westgarth, administrators of the estate of Ina Mary Campbell, deceased, against an amended assessment of estate duty, notice of which was issued on 30th September 1946.

The objection was disallowed by the Commissioner of Taxation, but on an appeal to it the Board of Review upheld the administrator's claim. The commissioner appealed to the High Court.

F. W. Kitto K.C. (with him *J. P. Hannan*), for the appellant.

K. W. Asprey, for the respondents.

MCTIERNAN J. delivered the following written judgment in which the facts are sufficiently set forth :—This appeal is made under s. 26 (9) of the Federal *Estate Duty Assessment Act* 1914-1942 against a decision of a Board of Review given upon a reference for which ss. 24 (4) (*a*) (ii) and 26 (1) of the Act provide. The decision of the Board involves a question of law. The question is whether an amendment of an assessment increasing the liability of this estate for duty is a valid exercise of power under s. 20 of the *Estate Duty Assessment Act* 1914-1942.

The only two questions which have been raised are whether the second sub-section of s. 20 applies to the case, and, if not, whether the third sub-section applies.

The commissioner alleges that the respondents had not made to him a full and true disclosure of all the material facts necessary for the making of an assessment. The respondents deny this allegation. If this allegation is not sustained, s. 20 (2) does not apply.

The only fact within the class of facts defined in the sub-section which the commissioner alleges that the respondents did not fully and truly disclose was the value of a cottage, No. 26 Kent Street, Rose Bay, which was part of the estate left by the testatrix.

In the return of the estate made under s. 10 of the Act, and verified on 22nd November 1945 in compliance with s. 12, the respondents stated that the value of this cottage was £2,750. This statement refers to the value of the cottage at the date of the death of the testatrix. The date was 15th October 1945.

The respondents annexed to their return a certificate of valuation given by the Valuer-General of New South Wales under the State's *Valuation of Land Act*, 1916. The Valuer-General thereby certified

H. C. OF A. 1949-1950.

FEDERAL COMMISSIONER OF TAXATION v. WESTGARTH.

McTiernan J.

that the improved value of the property, that is the cottage and land, on 15th October 1945 was £2,750.

The notice of the original assessment is dated 28th May 1946. The original assessment does not show the amount at which No. 26 Kent Street was assessed for duty. The notice of the amended assessment is dated 30th September 1946. The amended assessment shows that the value for duty of the cottage was originally assessed at £2,750.

The material part of the amended assessment is as follows :— " Amended on account of increased value of 26 Kent St., Rose Bay, to agree with consent price of delegate of the Treasurer for sale thereof. Prev. Ass'd. £2,750. Now Ass'd. £3,200. Add : £450."

The value for duty of the estate was originally assessed at £15,807 and the duty payable thereon was previously assessed at £749 5s. 0d. The amended assessment added £450 to the value for duty and increased the duty payable by £40 16s. 10d.

The respondents paid the duty previously assessed before they received the notice of the amended assessment but this circumstance is not of any importance : see s. 20 (1).

The sale to which the commissioner refers in the amended assessment was a sale of the cottage to the tenant at the price of £3,200. The date of the contract was 29th July 1946.

The date of the respondents' return in which they stated that the value of the cottage on 15th October 1945 was £2,750 was 22nd November 1945, and the date of the Valuer-General's certificate, annexed to the return, was 30th October 1945.

The *National Security (Economic Organization) Regulations* applied to the sale. The Delegate to the Treasurer consented to the sale to the purchaser at the contract price, £3,200. That official acted it seems, upon a certificate of valuation which shows that the valuer, who gave it estimated that the " 10/2/42 market value of the existing property ", (No. 26 Kent Street) was £3,200.

In the present proceedings the commissioner called two expert witnesses who gave opinion evidence of the value of the cottage on 15th October 1945. Their opinions coincided. Each said in evidence that the value of the cottage on 15th October 1945 was £3,200.

The commissioner contends that the value of the cottage on 15th October 1945 was a fact and that this fact was not fully and truly disclosed by the statement in the return that the value of the cottage was £2,750.

It may be conceded that value is a fact. The full and true disclosure of all the material facts to which s. 20 (2) refers may involve the full and true disclosure of value.

In order to decide whether the respondents had not made a full and true disclosure of the value of the cottage on 15th October 1945 it is necessary to inquire what that fact was. The value was not a fact existing independently of the mind. It was not a fact like the cottage itself. The inquiry is about the sufficiency of the disclosure of a fact of which the apprehension was subjective. The realty of the value of the cottage was the value it was thought to have. It was a thing determined by the mind of the valuer.

The respondents stated that the value was £2,750. That was a disclosure of a fact if it represented what they thought was the value. The fullness and truth of that disclosure cannot be checked except by ascertaining the value which was actually determined by their minds. There is no proof whatever that the amount of £2,750 did not represent their genuine opinion. The respondents also furnished the certificate of valuation given by the Valuer-General. That also was the disclosure of a fact if it represented what he thought was the value. There is no suggestion that it did not do so.

The only question here is one of the true and full disclosure of the money's worth of the cottage on 15th October 1945. The matter of the disclosure could only consist of valuations of the cottage as at an appropriate date made before the original assessment.

Regarded as a fact, the value of £3,200 had no actual existence until the cottage was valued at that amount. Then that fact came into existence in the mind of the valuer. It is not suggested that before the original assessment anybody valued the cottage at 15th October 1945 at £3,200. If there were any proof that the cottage had been valued before assessment at more than £2,750 the respondents' knowledge of that valuation might be involved in the issue whether they had not made the full and true disclosure of value.

Section 20 (3) refers to material facts necessary for the making of an assessment. These facts obviously do not include a fact which had no actual existence before the assessment. It does not include a value, which before that time, nobody had estimated. There is no proof that there was in existence before the assessment a valuation of the cottage on 15th October 1945 at £3,200.

The result is, in my opinion, that the state of facts necessary for the application of s. 20 (2) is not shown to have existed.

There is the alternative contention that s. 20 (3) applies to this case. This contention implies a denial of the allegation made to sustain the amendment under s. 20 (2).

H. C. OF A. 1949-1950.

FEDERAL COMMISSIONER OF TAXATION v. WESTGARTH.

McTiernan J.

The amendment increases the liability of the estate. The power under s. 20 (3) upon which the commissioner relies is limited to the correction of an error in calculation or a mistake of fact. In reply to the respondents' objection to the amendment, the commissioner advised them that it was made to correct a mistake of fact and was justified by s. 20 (3). It was contended again in these proceedings that the amendment was made to correct a mistake of fact.

The alleged correction made by this amendment of "a mistake of fact" is the alteration of the value of the cottage from £2,750 to £3,200.

The amendment made a fresh assessment of the value of the cottage: it set aside the previous assessment. The words of the amendment are "Previously assessed £2,750 now assessed £3,200."

The amended assessment declares that the reason for amending the assessment is to make the value for duty, as assessed, agree with the price at which the Treasurer consented to the sale. The commissioner contends that this procedure is the correction of a mistake of fact. I do not agree.

Both the assessment and the amendment show clearly that the commissioner did originally assess the value of the cottage at death at £2,750. Regarding value as a fact, the fact as determined by the mind of the commissioner was £2,750. If it appeared that the commissioner assessed the value at £3,200 but wrote £2,750, the latter figure would be a mistake of fact. But that is not this case. In the present case the commissioner has not altered the value in the original assessment to make it agree with the value at which he originally assessed it. He has made a fresh assessment of the value of the cottage. The power under s. 20 (3) is limited to the correction of an error in calculation or a mistake of fact. The assessment of the value of the cottage as at 15th October 1945 at £2,750 may have been a mistake in the sense that £3,200 was a sounder or more reasonable valuation than £2,750. The power under s. 20 (3) is not a power to correct any mistake. It is a power to correct only a mistake of fact. The terms of the amendment show that the commissioner considered in the light of subsequent events that he made an error of judgment in assessing the value of the cottage at £2,750. A mistake of fact in the context of s. 20 (3) does not include an error of judgment.

The conclusions at which I have arrived are as follows:—

I am satisfied upon the evidence that it is not the fact that the respondents did not make to the commissioner a full and true disclosure of all material facts necessary for assessing the value for duty of the cottage in Kent Street.

I cannot doubt that upon the true construction of sub-ss. (2) and (3) of s. 20, the return and the schedules relating to this property and its value constituted a full and true disclosure of all the material facts necessary for assessing the value for duty of that property.

The fullness and truth of the disclosure made in the return and these schedules is not prejudicially affected to the smallest degree by the valuation subsequently made for the purposes of the *National Security* (*Economic Organization*) *Regulations*, or the official consent to a sale at that price, or the sale by the respondents at that price, or the evidence given at this hearing of the value of the property at the death of the testatrix.

I find also that the commissioner did not make the original assessment under any mistake of fact.

Taking the amendment itself and considering it with all the circumstances of the case, its effect is not to correct any error of calculation or mistake of fact. The conclusion which I reach is that the amendment was made in order to correct an error of judgment which the commissioner believed he made, after he received information that the Delegate to the Treasurer had consented to the sale at a price in excess of the figure at which the Valuer-General of New South Wales valued the property. There was much argument on the question whether value is a matter of fact or of opinion. The initial question is whether the subject matter of the correction made by the amendment is either an error in calculation or a mistake of fact. In my opinion it is neither of these things.

I dismiss the appeal with costs.

From that decision the commissioner appealed to the Full Court of the High Court.

The relevant statutory provisions are set forth in the judgments hereunder.

F. W. Kitto K.C. (with him *J. P. Hannan*), for the appellant. There was not a full and true disclosure of all material facts necessary for making the assessment, therefore under s. 20 (2) (*b*) of the *Estate Duty Assessment Act* 1914-1942 the commissioner had power to amend within three years. If sub-s. (2) of s. 20 does not apply then the matter comes within sub-s. (3) as being a case where although full and true disclosure was made the amendment was the correction of an error in calculation or a mistake of fact. The matter with which the commissioner was concerned was the value of the assets at the death of the deceased. The value of the property

H. C. OF A. 1949-1950.

FEDERAL COMMISSIONER OF TAXATION v. WESTGARTH.

at the date of death was a material fact which was not fully and truly disclosed. For this purpose, although not for the purpose of any liability for penalty, a person is affected by the non-disclosure of a fact which he did not know. If the commissioner can satisfy the appropriate tribunal that the true value was in fact more than the administrator had stated it to be then sub-s. (2) of s. 20 applies and he can, within the period of three years, collect the duty which really was payable under the Act. If an administrator mis-states, however honestly, the value of an asset sub-s. (2) of s. 20 applies. By virtue of s. 26 (9) it was not open to the respondents on this appeal to question the value of the property at £3,200; that could have been, but was not, challenged under ss. 24, 25. There cannot be here any challenge to value from the decision of the Board of Review, but there might have been from a decision of the Valuation Board. The High Court upon an appeal from the Board of Review, as distinct from an appeal from a decision by a Valuation Board, was not asked or allowed to deal with the question of value. If the question of value is to be made the subject-matter of an objection it can be pursued in two ways, one is direct to the Court when a question of law is involved under s. 24 (4) (*b*), then everything is open. The alternative courses are on value to a Valuation Board under s. 24 (4) (*a*) (i), on other questions to a Board of Review. The Valuation Board does but the Board of Review does not deal with value. In either case if a question of law be involved there may be an appeal to the High Court. This Court is not seized of any other matter than the one which was before the Board of Review: s. 26 (9). It was proved before *McTiernan* J. that at the date of the deceased's death the value of the subject property was £3,200. A State Valuer-General's certificate of valuation is not evidence for purposes of land tax (*Federal Commissioner of Land Tax* v. *Duncan* (1)). This is a case where there was only one question of fact, namely: What was the value of the property at the date of death? The commissioner and the administrators wrongly supposed that the value was £2,750 (see *Federal Commissioner of Taxation* v. *Hayden* (2)). Value is an objective thing however difficult it may be to ascertain. *McTiernan* J. confused the process of valuation with the value, which was an objective act, not to be looked for in a mind or minds which postulate particular individuals because if so there would be as many facts with regard to the value of land as there were people to consider.

(1) (1915) 19 C.L.R. 551.

(2) (1944) 7 A.T.D. 440, at p. 442.

[WILLIAMS J. referred to *Bisset* v. *Wilkinson* (1).]

The Act requires the duty to be assessed on the real value of property. Value is an ascertainable fact: see ss. 8-10, 15, 16A and 19. An erroneous statement of value is a mistake of fact. As shown by s. 48 there is a difference between non-disclosures which enable an amendment of the assessment to be made and those which result in criminal liability. Value is a question of fact (*Chesterman* v. *Federal Commissioner of Taxation* (2); *Trustees Executors and Agency Co. Ltd.* v. *Commissioner of Taxes (Vict.)* (3); *McCathie* v. *Federal Commissioner of Taxation* (4); *Commissioner of Succession Duties (S.A.)* v. *Executor Trustee and Agency Co. of South Australia Ltd.* (5)). The judge was in error in looking at this matter as if the value equalled valuation and was a subjective fact—a state of mind. The case falls within s. 20 (2). "Disclosure of all material facts" has the same meaning as "statement of all material facts." Knowledge of the value is immaterial, the only question is: Was the real value stated, that is, disclosed? The object of s. 20 is to get the correct amount of duty. The decision in *Noud* v. *Federal Commissioner of Taxation* (6) runs counter to the cases referred to above and to the true construction of the Act.

K. W. Asprey, for the respondents. There was a full and true disclosure within the meaning of s. 20 (2) of the Act. At the relevant time the real value was not capable of being known because the mere expression of opinion by anybody that the subject land was worth any particular amount was itself not a fact. In order to determine what was meant by the word "disclosure" in s. 20 (2) regard should be had to the Act to ascertain what it contemplated as the criterion of disclosure. That word cannot be so construed as to cast an obligation upon administrators to disclose something which at the time was not capable of being known. Value is not in itself a fact. It does not become so until a court translates it, by virtue of judicial process, into a final determination. Facts are matters upon which the court decides particular questions posed before it, and it is an exception to the general rule that the court does act in this and other kindred matters on opinion evidence. The court acts on the opinions of experts as to the value of particular land. In the original assessment the commissioner chose to accept the opinion of the Valuer-General of New South Wales, and when

(1) (1927) A.C. 177.
(2) (1923) 32 C.L.R. 362, at pp. 380, 388, 397, 398, 400.
(3) (1941) 65 C.L.R. 33, at pp. 36, 37, 40.
(4) (1944) 69 C.L.R. 1, at pp. 10, 11.
(5) (1947) 74 C.L.R. 358, at pp. 361, 370.
(6) (1949) 66 W.N. (N.S.W.) 186.

H. C. OF A. 1949-1950.

FEDERAL COMMISSIONER OF TAXATION v. WESTGARTH.

he purported to amend that assessment he accepted the opinion of the delegate to the Treasurer, but he did not make the mistake as to a fact. The value had not increased since the original assessment.

[LATHAM C.J. referred to *The Moreton Club* v. *The Commonwealth* (1).]

The commissioner showed that he was not mistaken in the first place as to fact and that all he did was to change his mind as to which opinion he preferred to adopt. The mistake, if any, must have been made prior to the date of the original assessment and there is not any such evidence. The opinion as to increased valuation was not given until a considerable time after that date. The respondents did all that they were able to do, that is, they disclosed their honest opinion. Price is not necessarily value. To prefer one opinion to another is not a mistake as to a fact. There was not any evidence before or finding by the judge appealed from of any value of £3,200: there was not any such evidence called before the Board of Review. The commissioner did not have any jurisdiction to issue the "amended" assessment. "Value" is a word which is not capable of easy definition. It determines nothing for any valuer to express to the commissioner what the value is of any particular land. Apart from whether it was a mistake of fact, there was not any evidence that there was any mistake. The onus of proof was upon the commissioner. He may have considered all these matters up to the date of the original assessment. Section 8 (1) casts upon the commissioner the duty of himself arriving at a value of the various items disclosed in an estate duty return. It is an opinion or estimate which the commissioner is required to give. Sections 14 and 16 show that in assessing, the commissioner assesses the value of the particular property and then calculates the duty payable upon the entire dutiable estate. He, himself, merely estimates the value of the property, or he may adopt the value of somebody else. This type of statutory provision was adverted to in *Denver Chemical Manufacturing Co.* v. *Commissioner of Taxation (N.S.W.)* (2).

F. W. Kitto K.C., in reply.

Cur. adv. vult.

June 8.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a judgment of *McTiernan* J. on an appeal from a review of an assessment by a Board of Review under the *Estate Duty Assessment Act* 1914-1942.

(1) (1948) 77 C.L.R. 253.

(2) (1949) 79 C.L.R. 296.

The administrators of the estate of Ina Mary Campbell deceased made a return under the Act setting forth as required by s. 10 (2) the description and values of the items comprising the estate. A house belonging to the deceased was included in the return at a value of £2,750 as at the date of the death of Miss Campbell, 11th October 1945. Attached to the return was a certificate of the Valuer-General of New South Wales stating that the value of the property on that date was £2,750. On 29th July 1946 the house was sold for £3,200, the delegate of the Treasurer having consented under the *National Security* (*Economic Organization*) *Regulations* to a sale at that price. The commissioner then amended the assessment by increasing the value of the house to £3,200. This amendment was made on 30th September 1946 and was therefore made within three years from the date when the duty became due and payable under the original assessment. The amendment increased the liability of the estate to duty. The amended assessment stated—" Amended on account of increased value of 26 Kent St., Rose Bay, to agree with consent price of delegate to the Treasurer for sale thereof Prev. Ass'd. £2,750. Now Ass'd. £3,200. Add : £450."

There was evidence before the learned judge upon the appeal that the value of the house on 11th October 1945 was £3,200.

The commissioner contended that the amendment of the assessment was authorized under s. 20 (2) or, alternatively, s. 20 (3) of the Act.

Section 20 (1) provides that, subject to the section, the commissioner may amend assessments. Section 20 (2) is as follows :—" Where an administrator has not made to the commissioner a full and true disclosure of all the material facts necessary for the making of an assessment, and there has been an avoidance of duty, the commissioner may—(*a*) where he is of opinion that the avoidance of duty is due to fraud or evasion—within twelve years—from the date upon which the duty became due and payable under the assessment ; and (*b*) in any other case—within three years from the date upon which the duty became due and payable under the assessment—amend the assessment by making such alterations therein or additions thereto as he thinks necessary to correct an error in calculation or a mistake of fact or to prevent avoidance of duty, as the case may be."

There is no suggestion of fraud or evasion. The commissioner contends that the administrators did not make the full and true disclosure of material facts referred to in the section because they did not in their return state the true value of the house, and that

H. C. OF A. 1949-1950.

FEDERAL COMMISSIONER OF TAXATION v. WESTGARTH.

Latham C.J.

therefore he was entitled under par. (*b*) to amend the assessment to correct a mistake of fact therein, namely a wrong statement as to the value of the house.

Section 20 (3) is as follows :—"Where an administrator has made to the commissioner a full and true disclosure of all the material facts necessary for the making of an assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the estate in any particular shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the date upon which the duty became due and payable under that assessment."

Alternatively with the argument already mentioned the commissioner contends that, if it should be held that full and true disclosure was made, nevertheless in making the amendment he corrected a mistake of fact, namely a wrong statement as to the value of the house.

McTiernan J. agreed with the Board of Review in holding that there had been a full disclosure of all the material facts necessary for the making of the assessment and that the amendment of the assessment by the commissioner was not a correction of a mistake of fact.

If either argument for the commissioner is correct, the commissioner may at any time within the specified period of three years increase the assessed value of any item in an estate if he thinks fit to do so. The result would be that in relation to any question of value, whether or not there had been full and true disclosure of the material facts, the commissioner would be at liberty to change his mind at any time within the three years mentioned in the section. If this is the case an estate could not be distributed with safety to the executors and beneficiaries until the expiry of three years from the date when duty became due and payable under an assessment. The object of the section to secure some certainty and security as to the amount of duty payable would therefore largely be defeated.

I propose to deal in the light of these considerations first with the subject of disclosure, and then with the meaning of the word "fact" in s. 20.

The information which the Act requires to be disclosed is information relating to the description of the property included in the estate and the value thereof: s. 10 (2). In the present case it is not disputed that the administrators fully and truly stated what they

knew as to the items constituting the estate and what their opinion was as to the value of the house. It is contended, however, that a material fact is the true value of the estate so that if a return does not state what may ultimately be found to be the true value of any item in the estate it follows that there has not been a full and true disclosure, even though the administrators did not know what that true value was. Section 20 refers to "disclosure" of material facts and not to statement of material facts. Where the word "disclose" is used with reference to information to be provided it should in my opinion be understood as requiring a statement of the relevant information which is in the possession of the person who is required to make the disclosure for a particular purpose or to bring himself within some particular statutory or other provision. In other words, a person cannot be said to fail to disclose something which he never knew. In the present case it is not contended that the administrators did not disclose everything that they knew or that they believed which was relevant. There is no evidence that the administrators either knew or believed that the value of the house at the date of death was more than £2,750.

It is now necessary to consider whether a non-disclosure of actual true value, if there is such a non-disclosure, is a non-disclosure of a fact and whether an amendment which substitutes true value—or alleged true value—for another value is a correction of a mistake of fact.

In some contexts questions of fact are questions which are to be distinguished from questions of law, as, for example, when it is asked whether a question is to be determined by a judge or by a jury or when it is asked whether a case stated has been stated upon what is truly a question of law. In this sense a determination of value is a determination of fact: see, e.g. *Chesterman* v. *Federal Commissioner of Taxation* (1).

But in some contexts a relevant distinction is that between a matter of fact and a matter of opinion. The existence of an opinion is itself a matter of fact, but the distinction between a statement of fact and a statement of opinion is well recognized, not only in law (*Bisset* v. *Wilkinson* (2)), but also as a matter of every-day experience.

When, as in this case, a choice has to be made between two competing interpretations of a statute, either of which is open upon the words used, it is proper to take into account the object

(1) (1923) 32 C.L.R. 362.

(2) (1927) A.C. 177.

H. C. OF A. 1949-1950.

FEDERAL COMMISSIONER OF TAXATION v. WESTGARTH.

Latham C.J.

of the statute as disclosed by its terms. It is evident that the object of s. 20 is, while securing what is considered to be adequate protection against fraud, to attain certainty in the determination of the amount of taxation payable in respect of the estates of deceased persons if the condition of full disclosure of material facts is satisfied. Even when there has not been such disclosure some degree of protection is given to administrators and beneficiaries if there has not been any fraud—s. 20 (2). For the purpose of assessing estate duty two matters are relevant—the items of which the estate consists and their respective values. On the contention for the appellant the result would be that, however honest and careful an administrator had been in making his return, the commissioner could always increase assessed values at any time within three years of an assessment. This result is avoided if the section is interpreted as requiring, in order that s. 20 (3) should come into operation, " disclosure " of facts only as distinguished from " disclosure " of law, and, as to values, disclosure of opinions in fact held as to value and not " disclosure " of what has been called in argument " the true value "—a " value " which can ultimately appear only as an end result and not as a preliminary premise.

In my opinion, therefore, the distinction between fact and opinion as well as that between fact and law should be recognized in the application of sub-ss. (2) and (3) of s. 20. The material facts to which s. 20 (2) and (3) refer are, so far as values are concerned, facts known to the administrators. The value of land must be determined as a matter of fact and not as a matter of law, but it is nevertheless necessarily determined as the result of an estimate or opinion as to value. Any such estimates and opinions must be fully and truly stated in order to make a full and true disclosure. In the present case there was no fraud or any form of dishonesty. All the material facts known to the administrators were stated. It is not suggested that they did not truly state their opinions. When the commissioner made the amendment of the assessment he was not, in my opinion, correcting a mistake of fact, but was recording a change of mind. In my opinion, therefore, the decision of the learned judge was right and the appeal should be dismissed. This conclusion, I agree with my brother *Fullagar*, produces the result that the commissioner cannot, in favour of the taxpayer, use s. 20 (4) to reduce an over-valuation merely upon the ground that there has been an over-valuation. It might be thought proper that this provision should receive the further attention of Parliament.

WILLIAMS J. This appeal raises two questions of law of some importance in the assessment of estate duty under the provisions of the *Estate Duty Assessment Act* 1914-1942. It will be convenient to state a few facts before approaching them. The respondents are the administrators of the estate of Ina Mary Campbell, deceased, who died on 15th October 1945. One of the assets in the estate was a cottage situated in Kent Road, Rose Bay. In their estate duty return the respondents showed the cottage as an asset in the estate. They set forth the description of the cottage as " property No. 26, Kent Road, Rose Bay, being lot 24 ' The Knoll ' estate and under Old System Title £2,750 0s. 0d." This was the value of the cottage on 15th October 1945 shown in an accompanying certificate of valuation under the *Valuation of Land Act* 1916 (N.S.W.) dated 30th October 1945.

The appellant accepted this value for the purposes of the original assessment, notice of which was given to the respondents on 28th May 1946. On 29th July 1946, the respondent sold the cottage for £3,200, the sale at this price being consented to by the delegate to the Treasurer under the provisions of the *National Security (Economic Organization) Regulations*.

The appellant then amended the assessment increasing the value of the cottage for the purposes of estate duty from £2,750 to £3,200 and gave notice of the amended assessment to the respondents on 30th September 1946. The amended assessment stated that it had been amended " on account of increased value of 26 Kent Street, Rose Bay to agree with consent price of the delegate of the Treasurer for the sale thereof. Previously assessed £2,750. Now assessed £3,200. Add : £450." The respondents objected to this increase but the appellant decided against them. The respondents requested the appellant to refer his decision to the Board of Review which decided in their favour. The appellant appealed to this Court under s. 26 (9) of the *Estate Duty Assessment Act*. The appeal came on for hearing before *McTiernan* J. and was dismissed with costs. The appellant has now appealed to this Full Court. Before *McTiernan* J. evidence was given by two valuers that in their opinion the value of the cottage on 15th October 1945 was £3,200.

The questions of law may now be approached. They arise under s. 20, sub-ss. (2) and (3) of the *Estate Duty Assessment Act*. The appellant very properly has made it clear that he is not of opinion that any avoidance of duty was due to fraud or evasion. But he contends that the respondents did not make a full and true disclosure of all the material facts within the meaning of s. 20 (2)

H. C. OF A. 1949-1950.

FEDERAL COMMISSIONER OF TAXATION v. WESTGARTH.

Williams J.

necessary for making the original assessment and that he was therefore entitled to amend this assessment by making the alteration in the value of the cottage to correct a mistake of fact. He contends in the alternative that, if the administrators did make such a disclosure, he made a mistake of fact in valuing the cottage at £2,750 and was entitled under s. 20 (3) to amend the assessment to correct this mistake. The respondents contend that the appellant fails on both grounds and that the amended assessment was not authorized by the *Estate Duty Assessment Act* and is void.

Section 8 of this Act provides that, subject to this Act, estate duty shall be levied and paid upon the value, as assessed under this Act, of the estates of persons dying after the commencement of this Act. Section 10 (1) provides that for the purposes of assessment and levy of estate duty every administrator shall . . . prepare and furnish in the prescribed form . . . a statement setting forth a full and complete return of all the estate in Australia of the deceased. Section 10 (2) provides that the statement shall set forth the descriptions and values of the items comprising the estate before deducting any debts or other charges upon the estate, and shall also set forth in detail all the debts and other charges upon the estate, distinguishing between secured and unsecured debts and describing and valuing any security for any such debts. Section 20 (2) provides that where an administrator has not made to the commissioner a full and true disclosure of all the material facts necessary for the making of an assessment the commissioner may . . . within three years from the date upon which the duty became due and payable under the assessment make such alterations therein or additions thereto as he thinks necessary to correct . . . a mistake of fact. Section 20 (3) provides that where an administrator has made to the commissioner a full and true disclosure of all the material facts necessary for the making of an assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the estate in any particular shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the date upon which the duty became due and payable under that assessment.

The first question is whether the respondents made a full and true disclosure of all the material facts relating to the cottage necessary for the making of the original assessment. It is contended for the appellant that they failed to do so because they declared that the value of the cottage at the date of death was £2,750 whereas

its true value was in fact £3,200. Apart from the provisions of s. 10 (2) of the Act I should have thought it would only be necessary for an administrator to make a full and true disclosure of the descriptions of the items of property comprising the estate to enable the commissioner to make an assessment. But the administrator is required in his statement to set forth the descriptions and values of the items comprising the estate and this would seem to require him to make a full and true disclosure of the values as well as the descriptions of the items. Even so, an administrator can only make a full and true disclosure of facts which are capable of being ascertained and, in the case of values, he has to disclose, not an objective fact, but information which is only a fact so far as a matter of estimation and opinion can be a statement of fact. It is true, as Mr. *Kitto* said, that the value of property is often an issue in a court, and this issue has often been described as an issue of fact. But the contrast is between questions of law and issues of fact, and it is in this respect that an adjudication upon the value of property is an issue of fact. The task of the court in assessing compensation was described by *Dixon* J. in *Minister of State for the Navy* v. *Rae* (1) as follows: "In reaching a conclusion as to compensation for the taking of a piece of property such as that now in question, it is necessary, or at all events wise, to pursue as many means of estimation as are open, to compare them, and then, as an exercise of judgment, to fix what, upon considerations this process suggests, appears to be a fair compensation." In *Hazeldell Ltd.* v. *The Commonwealth* (2), *Isaacs* A.C.J. said, "The value of land, where there is no market price, is always a matter of opinion." In *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (3), Lord *Hobhouse*, delivering the judgment of the Privy Council, said: "It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others." The extent to which a statement of opinion is a statement of fact was discussed in *Bisset* v. *Wilkinson* (4) and *Fitzpatrick* v. *Michel* (5). The administrator is not often a skilled valuer. He must usually rely on the valuations of experts. In my opinion, an administrator who makes a full and true disclosure of the description of each item of property comprising the estate, places a value on it which he honestly believes to be its true value, and makes a full and true disclosure of the

(1) (1945) 70 C.L.R. 339, at p. 344.
(2) (1924) 34 C.L.R. 442, at p. 452.
(3) (1901) A.C. 373, at p. 391.
(4) (1927) A.C., at pp. 182, 183.
(5) (1928) 28 S.R. (N.S.W.) 285, at pp. 288, 289; 45 W.N. 69, at pp. 70, 71.

H. C. OF A. 1949-1950.

FEDERAL COMMISSIONER OF TAXATION v. WESTGARTH.

Williams J.

expert valuations on which he relies, makes a full and true disclosure of its value for he discloses all that he knows or is capable of knowing of its value. This is what the administrators did in the present case and the appellant cannot therefore rely on s. 20 (2).

It remains to consider whether the appellant can rely on s. 20 (3) and claim that the amended assessment was made to correct a mistake of fact. But it necessarily follows from what I have already said that, in my opinion, the appellant did not make a mistake of fact. He was in possession of all the facts and, if he placed a wrong value on the cottage, he made, as *McTiernan* J. said, an error of judgment and not of fact. In *Noud* v. *Federal Commissioner of Taxation* (1), *Street* J. held in a similar case that the commissioner had erred in forming his opinion which is to my mind another way of saying the same thing. I agree with the opinions of *McTiernan* J. and *Street* J. that the mistake was not a mistake of fact within the meaning of s. 20 (3).

In my opinion the appeal should be dismissed with costs.

WEBB J. I think the judgment of *McTiernan* J. was right.

The value of property for present purposes is the price upon which a hypothetical vendor and a hypothetical purchaser would agree, but what that price is can be only a matter of opinion of some person or persons, whether a court or others: something which a mind or minds apprehend as being the money equivalent of the property according to the test in *Spencer* v. *The Commonwealth* (2). When the Commissioner of Taxes receives a return from an administrator under s. 10 of the *Estate Duty Assessment Act* and considers that the administrator has been mistaken as to the value of an item of property, and the commissioner's view is supported by a competent court, it might seem that a mistake of fact on the part of the administrator has been established; but I think the better view is that the court finds the administrator's opinion erroneous, and not that the administrator made a mistake of fact within the ordinary meaning of that expression.

So far I have assumed an honest and reasonable valuation made in the light of the known facts, as in this case. Of course, if the administrator makes an unreasonably high valuation s. 20 (2) has no application: for s. 20 (2) to apply there must be an avoidance of duty. But in the case of an unreasonably high valuation by the administrator, e.g., one made inadvertently or in ignorance of notorious facts, s. 20 (1) and (4) would apply. There would then, I think, be a mistake of fact. If s. 20 is given the meaning which

(1) (1949) 66 W.N. (N.S.W.) 186. (2) (1907) 5 C.L.R. 418.

I think it has, justice is done both to the administrator and the commissioner, subject to the time limits s. 20 imposes.

I would dismiss the appeal.

FULLAGAR J. Ina Mary Campbell died on 15th October 1945. An asset in her estate was a cottage at Rose Bay, which was included in the estate duty return and therein valued at £2,750. That value was the value put upon it by the Valuer-General of New South Wales. The Commissioner accepted this value, although he increased the value of certain shares comprised in the estate, and on 28th May 1946 assessed duty accordingly. The duty became due and payable on 27th June 1946. On 29th July 1946 the property was sold for £3,200, the approval of the delegate to the Treasurer under the *National Security* (*Economic Organization*) *Regulations* being given to a sale at that figure on a valuation made by Mr. W. E. Newton. On 30th September 1946 the commissioner amended the assessment of duty by increasing the value of the cottage from £2,750 to £3,200. The consequent increase in the duty assessed was £40 16s. 10d. The administrators appealed to the Board of Review, which held that the amendment of the assessment was not authorized by the *Estate Duty Assessment Act* 1914-1942. An appeal from the Board's decision was dismissed by *McTiernan* J., and the commissioner now appeals to this Court. The sole question arising is the question of law whether the making of the amendment was authorized by the Act. The commissioner submits that it was authorized by sub-s. (2), or alternatively by sub-s. (3) of s. 20 of the Act. A further argument based on sub-s. (8) of s. 20, which was submitted to the Board and rejected by it, was not put before *McTiernan* J. or before this Court.

Sub-sections (2) and (3) of s. 20 are in the following terms :— " (2) Where an administrator has not made to the commissioner a full and true disclosure of all the material facts necessary for the making of an assessment, and there has been an avoidance of duty, the commissioner may—(*a*) where he is of opinion that the avoidance of duty is due to fraud or evasion—within twelve years from the date upon which the duty became due and payable under the assessment ; and (*b*) in any other case—within three years from the date upon which the duty became due and payable under the assessment, amend the assessment by making such alterations therein or additions thereto as he thinks necessary to correct an error in calculation or a mistake of fact or to prevent avoidance of duty, as the case may be. (3) Where an administrator has made to the commissioner a full and true disclosure of all the

H. C. OF A. 1949-1950.

FEDERAL COMMISSIONER OF TAXATION v. WESTGARTH.

Fullagar J.

material facts necessary for the making of an assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the estate in any particular shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the date upon which the duty became due and payable under that assessment."

Since one of the two critical expressions in these sub-sections occurs also in sub-s. (4), it is desirable to set out that sub-section also. It is in the following terms :—" (4) No amendment effecting a reduction in the liability of an estate under an assessment shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the date upon which the duty became due and payable under that assessment."

No suggestion of " fraud or evasion " is—or, so far as the evidence goes, could possibly be—made. Paragraph (*a*) in sub-s. (2) is, therefore, not directly relevant.

Since sub-s. (2) deals with all cases in which " a full and true disclosure of all the material facts necessary for the making of an assessment " *has not* been made, and sub-s. (3) with all cases in which such a disclosure *has* been made, the two sub-sections between them cover all possible cases. The period within which an amendment may be made is the same in each case—three years from the date upon which the duty became payable under the original assessment. But the power of the commissioner, in a case where the " disclosure " required has not been made, is wider in two respects than his power in a case where such disclosure has been made. In the latter case an amendment may only be made " to correct an error in calculation or a mistake of fact." In the former case amendments may be made " to correct an error in calculation or a mistake of fact *or to prevent avoidance of duty*," and the amendments which may be made are such amendments as the commissioner " thinks necessary " for any of those purposes, so that, within limits defined by law, the commissioner's opinion is the decisive factor. The word " avoidance " is, I think, to be contrasted with the word " evasion." It involves, I think, no notion of escaping by any device or artifice, but conveys simply the notion of actually escaping through not being called upon to pay.

The position then is this. The case must fall within either sub-s. (2) or sub-s. (3). If it falls within sub-s. (2), it seems clear that the commissioner had power to make the amendment in question : he could reasonably think it necessary to make it in

order to prevent avoidance of duty. The first question, therefore, is whether the case does fall within sub-s. (2), and this depends on whether the administrators made to the commissioner a full and true disclosure of all the material facts necessary for the making of an assessment. If they are held not to have made such a disclosure, that is the end of the matter. If they are held to have made such a disclosure, the case falls automatically within sub-s. (3), and the second question arises, which is whether the amendment was an amendment " to correct a mistake of fact." It was not, and could not be, suggested that it was " to correct an error in calculation."

I will consider first sub-s. (2) of s. 20. The " disclosure " which is required to be made is a disclosure of " all the material facts necessary for the making of an assessment." The assessment contemplated is (s. 15) an assessment " for the purpose of ascertaining the amount upon which duty shall be levied." The duty is imposed (s. 8 (1)) upon " the value, as assessed under the Act, of the estates of persons dying." It seems to me that the value of each asset in the estate must be a " material fact necessary for the making of an assessment." The two things which it is essential to know before an assessment can be made are (1) the assets comprised in the estate and (2) the value of each of those assets. And s. 10 accordingly requires the administrator to " furnish " a statement setting forth " the descriptions and values of the items comprising the estate." When s. 20 (2) refers to a " full and true disclosure of all the material facts necessary for the making of an assessment," it must, I think, have in contemplation the statement required by s. 10. And it must, therefore, I think, have in mind the " values " as well as the " descriptions " of assets. It could hardly be doubted that a fraudulent understatement of value would attract the attention of par. (a) in s. 20 (2). But this cannot be so unless " value " is a " material fact " required to be fully and truly disclosed. In my opinion, the value of an asset is a " material fact " within the meaning of s. 20 (2).

In the present case the value of the asset in question was set forth in the statement as being £2,750. And for the purposes of this appeal it must be assumed that the true value was £3,200. It does not, however, follow, in my opinion, that the value of the asset was not fully and truly " disclosed " within the meaning of s. 20 (2). The critical word in this sub-section is, indeed, I think, the word " disclosure." Apart from the ancient saying that " *lex non cogit ad impossibilia*," both the etymology of the verb " disclose " and its normal and popular use involve, in such

H. C. OF A. 1949-1950.

FEDERAL COMMISSIONER OF TAXATION v. WESTGARTH.

Fullagar J.

a context, the idea of revealing to others something which is known to oneself. If I honestly and reasonably believe (perhaps even if I honestly but unreasonably believe) that fact A exists, and I accordingly assert that fact A exists, I may, when it is proved that fact A does not exist, be properly said to have asserted something which was not true. But I cannot, if any regard is to be had either to natural fairness or to propriety of language, be said to have failed to disclose that fact A did not exist. So far as statements as to value are concerned, I am of opinion that the most that is required by s. 10 and contemplated by s. 20 (2) is that the administrator shall honestly form an opinion as to value and truly state the opinion which he has formed. These things it is conceded that the administrators did in the present case. The case therefore falls, in my opinion, outside sub-s. (2) of s. 20.

It necessarily follows, as I have shown, that it falls within sub-s. (3). But the power of the commissioner under that section, so far as material, is only a power to make an amendment " to correct a mistake of fact." It must be assumed, as I have pointed out, for the purposes of this appeal, that the true value of the asset in question was £3,200. The assessment was based on a value of £2,750. There was, therefore, a mistake on the part of the commissioner as to the value of the asset in question. Was this mistake a mistake of fact ? I cannot see any escape from the view that it was. The value of a piece of land or of a chattel is matter of fact. It is peculiarly a matter on which opinions may differ, and it is matter on which expert opinions are admissible and may be violently in conflict. So are such matters as the cause of death in a murder trial, or the nature of the inventive step taken by a holder of letters patent in an action for an infringement of the granted monopoly. In each case there is an ultimate question at issue, and the question is a question of fact. There are different degrees of difficulty, the nature of the evidence that is admissible will vary, and the degree of confidence that can be felt in the finding will vary also. But there is, in actuality as well as in theory, a fact to be ascertained. Where the value of an asset is in question, we are told by *Spencer* v. *The Commonwealth* (1) and other cases just what the question is that has to be decided. That question is a question of fact. There *is* a value, and the value is a fact. Neither the difficulty of its ascertainment nor the controversial character of any finding upon it can affect the position that he who assesses a value finds a fact. If he makes a mistake in assessing it, I think that he makes a mistake of fact within the ordinary meaning of that

(1) (1907) 5 C.L.R. 418.

expression and within the meaning of sub-s. (3) of s. 20 of the *Estate Duty Assessment Act* 1914-1942.

I would add two observations. The first is that s. 20, which was inserted by s. 8 of the Act of 1942, took the place of a defective predecessor, and was obviously the result of considerable care in conception and draftsmanship. I cannot help thinking that it would be remarkable if the case of an error in the valuation of an asset, made in good faith by the administrator and accepted by the commissioner, were not dealt with by the section. The second is that the opposite view to that which I have taken would seem to make it impossible for the commissioner to correct, in favour of the taxpayer, an excessive valuation of an asset in an estate, however clearly it might be established that the asset had been over-valued, and however gross the over-valuation. For s. 20 (4) prohibits an amendment *in favour of* the taxpayer unless there be "an error in calculation or a mistake of fact." Unless "mistake of fact" included "mistake as to value," sub-s. (4) could operate in a very unfair way to the taxpayer.

In my opinion, this appeal should be allowed, the judgment of *McTiernan* J. and the decision of the Board of Review set aside, and the appeal of the respondents to the Board of Review dismissed.

The question of costs remains. It is obvious that the matter is of vastly greater importance to the revenue than to the respondents, and the commissioner—very properly, I thought—undertook, by his counsel, Mr. *Kitto*, to abide by any order which this Court should see fit to make as to costs, and I took the undertaking to apply to all costs incurred by the parties. I think, on the whole, that it is proper to order the commissioner to pay the costs of the appeal to *McTiernan* J. and of the appeal to this Court. No such order could, of course, have been made if the commissioner had not given the undertaking which I have mentioned, but, in all the circumstances, I do not think that there is anything fundamentally unjust about such an order.

Appeal dismissed with costs.

Solicitor for the appellant, *K. C. Waugh*, Crown Solicitor for the Commonwealth.

Solicitors for the respondents, *Dudley Westgarth & Co.*

J. B.