[HIGH COURT OF AUSTRALIA.]

FRANCIS . . . . . APPELLANT ;

AND

COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1953, *Dec.* 3, 4 ;

MELBOURNE, 1954, *March* 5.

Dixon C.J., Williams, Fullagar, Kitto and Taylor JJ.

Death Duty (N.S.W.)—Assessment and rate payable—Shares—Entitlement to occupy flat—Valuation by Valuer-General—Acceptance by commissioner—Assessment—Payment—Sale of shares—Increased valuation—Further assessment—"Discovered"—Value as at death—Ascertainment—Facts—Issue—Trial before judge—Stated case—Stamp Duties Act 1920-1949 (*N.S.W.*) (*Act No.* 47 *of* 1920—*No.* 37 *of* 1949), *ss.* 124, 128.

M., who died on 13th May 1949, owned 3,600 shares of £1 each in the Astor Pty. Ltd., the owner of a building in Macquarie Street, Sydney, known as "The Astor" and by virtue of the ownership of these shares, he was entitled to occupy a flat in that building at a rental. When M. died the shares were included in his estate at a value of £1 each, but the Commissioner of Stamp Duties required M.'s executor to obtain and file the Valuer-General's valuation of M.'s interest in "The Astor". On 6th October 1949, the commissioner made an assessment of death duty payable by the estate and, for the purpose of assessment, the commissioner accepted the Valuer-General's valuation of £4,750. On 12th October 1949, M.'s executor paid the death duty assessed and, on 4th November 1949, the shares were sold at public auction for £12,100. The commissioner, on 20th January 1950, claiming to be authorized to act under s. 128 of the *Stamp Duties Act* 1920-1949 (N.S.W.), made a further assessment of additional death duty based on the difference between the Valuer-General's valuation at the date of death and the amount realized by the sale of the shares. On a case stated by the commissioner under s. 124 of the Act the Supreme Court, by majority, held, in effect, that the commissmissioner was authorized by s. 128 to make a further assessment, but that the further assessment was not conclusive as to amount, and the court directed that the question whether any and what additional duty was payable should stand over for inquiry if the parties failed to agree.

Held by *Dixon* C.J. and *Fullagar* and *Kitto* JJ. (*Williams* and *Taylor* JJ. dissenting) that the decision of the Supreme Court was correct in substance, but that the order should be varied so as to direct merely that an issue should be tried before a judge of the Supreme Court without a jury as to the value at the date of the death of the deceased of the shares held by him in the Astor Pty. Ltd.

Per Dixon C.J., and *Fullagar* and *Kitto* JJ.: The word "discovered" in s. 128 (1) of the *Stamp Duties Act* 1920-1949 (N.S.W.) requires merely that the commissioner shall have reached a bona fide conclusion on materials before him that the duty payable has not been fully assessed and paid.

In the Estate of Murdoch (1947) 48 S.R. (N.S.W.) 213 approved.

Per Fullagar J.: Observations on the procedure by case stated in appeals against assessments of stamp duty.

Decision of the Supreme Court of New South Wales (Full Court), *Francis* v. *Commissioner of Stamp Duties* (1953) 53 S.R. (N.S.W.) 257; 70 W.N. 69, subject to the above variation in the form of the order, affirmed.

APPEAL from the Supreme Court of New South Wales.

A case stated by the Commissioner of Stamp Duties (N.S.W.) under s. 124 of the *Stamp Duties Act* 1920-1949 (N.S.W.), at the request of Wilfrid Edwin Robert Francis, the executor of the will of Frank David Muller, deceased, involved the construction of s. 128 (1) of that Act. That section in effect provides that it shall be lawful for the commissioner at any time after assessment or payment of duty or statement by him that no duty is payable, if it is discovered that any duty payable has not been fully assessed and paid, to make a further assessment of the duty so unpaid and to recover the same.

The case stated was substantially as follows:—

1. Frank David Muller (hereinafter called "the testator") died on 13th May 1949 domiciled in the State of New South Wales.

2. Probate of the last will of the testator was subsequently granted to Wilfrid Edwin Robert Francis the sole executor therein named (hereinafter called "the appellant").

3. Included in the property owned by the testator at the date of his death were 3,600 fully paid up shares of £1 each in "The Astor" Pty. Ltd. a company incorporated in the State of New South Wales.

4. That company was at all material times the owner of a building known as "The Astor" in Macquarie Street, Sydney, which contained a number of residential flats.

5. The articles of association of the company included the following:—

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"8. The shares of the Company shall be held by members in groups of shares consisting respectively of 4,000, 3,900, 3,800, 3,600, 3,500, 3,360, 3,000 and 2,700 shares. The holding of one of each of the said groups of shares shall entail on the holder thereof during the period of his holding, the rental by him of one of the homes in the building erected by the Company in Macquarie Street, Sydney, hereinafter specified as available for a holder of such group of shares at such rent as the Board may from time to time determine, but the said holder shall have the right of sub-leasing the said home to a tenant approved of by the Board.

The homes in the said building available for the holders of the aforesaid groups of shares shall be as follows:—For a holder of 4,000 shares—one of the homes facing Macquarie Street on the south-eastern corner of the said building and situated on the three lower floors thereof.

For a holder of 3,900 shares—one of the homes facing Macquarie Street on the north-eastern corner of the said building and situated on the twelve upper floors thereof. For a holder of 3,800 shares —the home on the seventh storey on the north-western corner of the Company's building.

For a holder of 3,600 shares—one of the homes facing Macquarie Street on the south-eastern corner of the said building and situated on the ten upper floors thereof, or one of those on the north-western corner of the said building and situated on the six upper floors thereof.

For a holder of 3,500 shares—one of the homes on the north-western corner of the said building and situated on the six lower floors thereof.

For a holder of 3,360 shares—the ground floor home on the north-eastern corner of the said building.

For a holder of 3,000 shares—one of the homes on the south-western corner of the said building and situated on the five upper floors thereof.

For a holder of 2,700 shares—one of the homes on the south-western corner of the said building and situated on the eight lower floors thereof".

6. It is agreed that on the hearing of this appeal reference may be made by either party to the memorandum and articles of association of the company as if the same had been incorporated in this case.

7. Prior to and at the time of his death the testator had occupied and was entitled to occupy (as the holder of the said shares) a flat in the said building being Flat No. 3 on the sixth floor thereof.

8. The appellant included in the inventory annexed to the stamp affidavit filed on his application for probate of the will of the testator the said 3,600 shares in the company which shares the appellant therein stated to be of the value of £3,600 0s. 0d.

9. The Commissioner of Stamp Duties requested the appellant to file a Valuer-General's valuation of the testator's interest in " The Astor " as at the date of his death.

10. The appellant caused to be lodged with the Commissioner of Stamp Duties a valuation by the Valuer-General dated 22nd August 1949 of the Improved Capital Value at 13th May 1949 of the said Flat No. 3 on the sixth floor of the building known as " The Astor ". The value of the said flat as therein certified was £4,750 0s. 0d. A copy of the said valuation was annexed.

11. The Commissioner of Stamp Duties made an assessment of death duty payable on the estate of the testator on 6th October 1949. For the purpose of that assessment the commissioner included in the dutiable estate of the testator " his interest in ' The Astor ' " at the value of £4,750. The amount of the death duty as so assessed was £2,948 18s. 0d.

12. Death duty as assessed as aforesaid was paid by the appellant on 12th October 1949.

13. On 4th November 1949 the said 3,600 shares were sold by the appellant at public auction for the sum of £12,100.

14. On the dates hereinafter mentioned other sales of shares in the company were made at the prices set forth below :—

16th February 1949	3,000 shares	£3,000
9th September 1949	3,900 shares	£13,100
30th September 1949	3,500 shares	£4,500
23rd December 1949	3,000 shares	£4,000
7th March 1950	3,600 shares	£13,600
20th April 1950	3,900 shares	£18,000
31st May 1950	3,600 shares	£11,000
9th June 1950	3,900 shares	£15,750

15. On 20th January 1950 the Commissioner of Stamp Duties claiming that he was authorized by s. 128 of the *Stamp Duties Act* 1920-1949 to re-assess the testator's estate made a further assessment of additional death duty payable on the estate of the testator. The basis of such assessment was that the final balance of the estate was treated as being £7,350 more than the final balance upon which the assessment mentioned in par. 11 hereof was made, the said sum of £7,350 being the difference between the sum of £4,750 mentioned in that paragraph and the sum of £12,100.

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20. The questions for the opinion of the court were as follows :—

(1) Was it within the power of the Commissioner of Stamp Duties under the provisions of the *Stamp Duties Act* 1920-1949 to make the further assessment of death duty made by him on 20th January 1950 ?

(2) Was the Commissioner of Stamp Duties precluded from making any further assessment of death duty on the basis that the shares were at the date of the testator's death of a value greater than £4,750 ?

(3) For the purpose of the assessment and payment of death duty, what was the value of the shares of the testator in the company at the date of his death ?

(4) What was the amount of death duty due and payable in respect of the estate of the testator ?

(5) How should the costs of this case be borne and paid ?

The Full Court of the Supreme Court ordered that questions 1, 2 and 3 as hereinafter stated be substituted for questions 1, 2, 3 and 4 of the stated case :—

(1) On the facts and circumstances set out in the case stated was the further assessment dated 20th January 1950 for £1,497 7s. 8d. lawfully made and was the said sum lawfully recoverable by the commissioner ?

(2) Had the commissioner power in the facts and circumstances set out in the stated case to issue any assessment other than the assessment dated 6th October 1949 or to recover any further duty beyond that assessed in the said assessment ?

(3) If the answer to question 2 is in the affirmative what is the amount of this further duty ?

(4) How should the costs of the case be borne and paid ?

The Full Court answered these questions as follows :—(1) Yes, but not as to the amount ; (2) Yes ; (3) The amount of additional duty to stand over for inquiry if the parties fail to agree ; and (4) The costs of the appeal to stand over until the conclusion of the inquiry (1).

From that decision the executor appealed to the High Court.

W. J. V. Windeyer Q.C. (with him *A. B. Kerrigan*), for the appellant. The further assessment was not authorized by s. 128 of the *Stamp Duties Act* 1920-1949 (N.S.W.). The dissenting judgment of *Owen* J. in the court below was correct. The answers given to the questions in the stated case as amended were erroneous for the following reasons : (i) it was not " discovered " that any

(1) (1953) 53 S.R. (N.S.W.) 257 ; 70 W.N. 69.

duty payable had not been fully assessed; (ii) if any additional duty was recoverable, which is not admitted, the amount claimed was wrong; (iii) on the true construction of the statute a changed opinion as to the value of an asset—or, if the value be regarded as a fact, a mistake as to that fact—can never be the ground of a further assessment under s. 128. A valuation can be reopened at the instance of the taxpayer but not at the instance of the commissioner. The commissioner, having chosen his method of valuation and made an assessment on the footing of such valuation, cannot, in the absence of fraud, reopen the valuation; and (iv) even if the valuation can be reopened, yet, on the facts of this case the court had no jurisdiction to order an inquiry. *As to reason* (i). What was discovered? The commissioner first said he had discovered "an additional asset". He treated the difference between the price the shares realized and the Valuer-General's valuation as an additional asset and claimed not merely the additional duty but also interest thereon according to s. 121. Later he alleged that the taxpayer had understated the value because he had accepted the Valuer-General's valuation which the commissioner had required. What really was discovered was that the valuation which was made in October as at 13th May may have been wrong. That is not such a discovery as s. 128 contemplates because (a) it does not follow that any duty has not been fully assessed, and (b) in any event the correct amount is not determined and a further assessment under s. 128 must be of the "duty so unpaid" (*Earl Beatty* v. *Inland Revenue Commissioners* (1)) and s. 125 of the *Income Tax Act* 1918 (Imp.) should be contrasted with s. 128 which postulates such a discovery as enables the duty to be assessed. That case has no direct bearing on this case, and very little is to be gained from it except what was gained by *Owen* J.

[TAYLOR J. Does not the view of *Street* C.J. in the court below that the Valuer-General's valuation may on inquiry prove to have been right mean that no discovery was made?]

Yes, and it is contended that therefore an inquiry should not have been directed. *Federal Commissioner of Taxation* v. *Westgarth* (2) arose from a different statute, that is the *Estate Duty Assessment Act* 1914-1942 and is not of any direct assistance to this Court. *As to reason* (ii). The onus is on the commissioner to show that his assessment is correct (*McCaughey* v. *Commissioner of Stamp Duties (N.S.W.)* (3)). It, obviously, was not correct because

(1) (1953) 2 All E.R. 758, at p. 761.
(2) (1950) 81 C.L.R. 396.
(3) (1945) 46 S.R. (N.S.W.) 192, at p. 207; 62 W.N. 230.

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the sale price could not be, as the commissioner claimed, " indisputable evidence " of the value as at the date of death. It was notorious that values of real estate had increased considerably. The controls imposed by the *Land Sales Control Act* 1948 had ceased to operate. An inference cannot be drawn from the sale in November of what would have been paid in the previous May, because, on the evidence, prices paid for shares in " The Astor " have fluctuated greatly, the flats having a special value depending on occasional demands. The conclusion as to amount was not a justifiable inference from the facts. A mistake, or a changed opinion, as to valuation can never, in itself, provide grounds for a further assessment. *As to reason* (iii). " Ascertainment of value " and " assessment of duty " are throughout the Act referred to as distinct processes. Ascertainment of value precedes assessment of duty. Contrast the use of the word " assess " as used in s. 8 of the *Estate Duty Assessment Act* 1914-1950 with that word as used in s. 117 (3) and s. 125 (3) of the *Stamp Duties Act* 1920-1949 (N.S.W.). The commissioner can choose the method of ascertaining value. He then assesses the duty and he is bound by his acceptance of the value. That construction accords with the provisions of the *Stamp Duties Act* 1920-1949 read as a whole and meets the need for finality essential in the administration of estates. If the commissioner can reopen an assessment because his view that the price realized indicates that his chosen valuer may have been mistaken, he can reopen for any other reason which makes him think the value he accepted was mistaken. The dicta in *In the Estate of Murdoch* (1) cut across that argument, although were not destructive of it. But *Jordan* C.J. was mistaken in putting in the same category omission of an asset, and inclusion of an asset at an under value. Where an asset is omitted it is not valued at all ; there duty is never assessed in respect of it. Therefore when the omission is discovered it is discovered that duty has not been fully assessed. The commissioner is then entitled when the additional asset has been valued to issue a further assessment under s. 128. But it is otherwise where the asset was valued and an assessment made on the footing of that value. It is not contended that s. 128 of the *Stamp Duties Act* 1920-1949 is limited to correcting mathematical errors. It is conceded that it applies, e.g. to errors in assessments resulting from failures to apply the relevant schedules of duty or the concessional rates for widows and children etc., or due to a mistake as to the domicile of a deceased. Section 128 has an ample scope and purpose without disturbing the finality of valuations. The taxpayer can

(1) (1947) 48 S.R. (N.S.W.) 213, at p. 218 ; 65 W.N. 60, at p. 63.

challenge the commissioner's ascertainment of values : see s. 125 (3) and s. 124 (2) (6), because the taxpayer's dissatisfaction with an assessment (s. 124 (1)) may arise from a dispute as to values which by s. 125 (3) is always appealable under s. 124 : *Commissioner of Stamp Duties (N.S.W.)* v. *Pearse* (1).

[WILLIAMS J. The last sentence in the majority judgment in that case directly supports your argument (2).]

As to reason (iv). The court below found the further assessment was wrong as to amount. *Street* C.J. said that an inquiry might show that the Valuer-General's valuation was correct. The commissioner therefore failed. His further assessment was wrong. He did not establish to the satisfaction of *Street* C.J. or of *Owen* J. that the original valuation was wrong. He cannot, by making an unfounded claim, obtain a valuation by the Supreme Court. It is not a valuation tribunal. It is not to act as part of the governmental machinery for collecting the revenue by undertaking valuation inquiries on behalf of the commissioner. It is only required to make valuations when the taxpayer disputes value as a preliminary fact to assessment : s. 124 (6). The inquiry directed was really to ascertain whether or not the Valuer-General's valuation was wrong. But unless it was *first* established that duty had not been fully assessed, s. 128 could not come into operation at all. The words of *Rowlatt* J. in *Anderton & Halstead Ltd.* v. *Birrell* (3) are significant. An earlier passage in that judgment was criticized in *Commercial Structures Ltd.* v. *Briggs* (4) : see cases there referred to. But criticisms of the other passages are irrelevant to the present matter : see also ss. 101, 105, 113-115, 117, 124, 124A, 125, 125A, 125B, 126, 127, 127A.

G. Wallace Q.C. (with him *A. C. Saunders*), for the respondent. " Additional asset " is a phrase used in a descriptive sense. It only means " additional value ". The scheme of the Act emerges from ss. 101, 105 and 125. Sections 102 and 107 are in point to a lesser extent. The " final balance " in s. 105 (1) is described as being of the estate. The value is an estimation. The assessment is equivalent to assessing duty at schedule rate on the estimated value of the dutiable estate. By virtue of s. 125 the commissioner may form his estimate by any means which he thinks fit. He may use his own knowledge, or he may himself value. An appeal may be on any question of value. Section 124 protects the taxpayer by giving him a right of appeal. On such an appeal questions may

(1) (1951) 84 C.L.R. 490, at p. 518.
(2) (1951) 84 C.L.R., at p. 523.
(3) (1932) 1 K.B. 271, at p. 282.
(4) (1947) 2 All E.R. 659 ; (1948) 2 All E.R. 1041.

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be put and the court is expressly charged with the duty of itself assessing duty. The general intention of the legislature under s. 128 is to allow the commissioner to reopen where mistakes or inaccuracies have occurred. Any alteration must of necessity involve a further assessment. Section 128 (1) involves the meaning of the word " discover ", and in a given case of the expression " what he has discovered ". " Discover " means (i) " find out " (*Inland Revenue Commissioners* v. *Mackinlay's Trustees* (1), cited in *Commercial Structures Ltd.* v. *Briggs* (2); (ii) " comes to the conclusion " *R.* v. *Kensington Income Tax Commissioners* (3); *Williams* v. *Trustees of W. W. Grundy* (4); (iii) " if he honestly comes to the conclusion on information in his possession " (*R.* v. *Bloomsbury Income Tax Commissioners* (5) and *Earl Beatty* v. *Inland Revenue Commissioners* (6)). " To ascertain " means " to find out ". The phrase " any duty has not been fully assessed " includes a case where there has been a wrongful estimate of value, e.g. by (a) a wrongful exclusion of an asset, (b) a wrongful inclusion of an asset, and (c) a wrongful estimate of value. An estate cannot be correctly assessed unless there be a correct estimate of value. If the ascertainment of important estimates of value is wrong the matter properly comes within s. 128. In this case the important matter is to determine whether on the facts the commissioner was justified in having recourse to s. 128. The words " if it is discovered " incorporate " in the opinion of the commissioner ", or else, if the test be purely objective, they mean " if the estimate of value is changed". If the commissioner changes the estimate of value then the assessment is wrong. The intention under s. 128 is to give the commissioner a right to further assess where in his opinion there has not been a full assessment ; if he becomes aware of something for the first time. Although the facts are not clear in *Earl Beatty* v. *Inland Revenue Commissioner* (7), that case is not by any means unhelpful to the submission now made. The words " discover " and " or has been undercharged " were discussed in *Commercial Structures Ltd.* v. *Briggs* (8). In that case the discovery was the ascertaining that the suspicions were correct. The validity of the commissioner's resort to the sub-section should be examined by the court and if found to be incorrect or unreasonable the resort would be invalid. The form of the valuation was a factor. The subsequent sale of the shares was a factor in showing that the original estimate

(1) (1938) S.C. 765, at p. 771.
(2) (1948) 2 All E.R. 1041, at p. 1049.
(3) (1913) 3 K.B. 870.
(4) (1934) 1 K.B. 524, at pp. 531, 532.
(5) (1915) 3 K.B. 768.
(6) (1953) 2 All E.R., at p. 762.
(7) (1953) 2 All E.R. 758.
(8) (1948) 2 All E.R., at pp. 1044-1049.

of value was incorrect. Land sales control was not an appreciable factor, if any. The value in May 1949 should not differ materially from the value in November 1949. There was not any outstanding reason for such an increase in value during the relevant period. The matter rests upon the assumption that it was reasonable for the commissioner to hold that there was some undervaluation which entitled him to have recourse to the sub-section. There is not any reason why one should single out the valuation from all other factors which go to make an assessment. The further assessment was lawfully made even if the amount was not correct. The mere fact that the claim is disputed or that it is open to comment cannot be said to invalidate the assessment. If the commissioner acting, prima facie, with some reason behind him changes his estimate of value however obtained, it must follow that the assessment is wrong. The legal position is that it is a discovery if the discovery relates to an opinion or estimate. The real inquiry under s. 124 is whether the assessment is correct. The court has the duty of making its own value. The intention of s. 128 is to give the commissioner the right to further assess where in his opinion there has not been a full assessment. If a new asset were discovered then the question of its value would arise. According to the appellant the commissioner would have to be exactly accurate. The question of validity should be tested at the time when the commissioner makes the further assessment. The question whether there has been a discovery or not is a question closely allied to the issue of whether there has been an under assessment. The fact that the commissioner's assessment is wrong does not invalidate the further assessment. As to s. 124 it is perfectly correct in a stated case for the court to be asked to determine what is the correct amount to be assessed. It may well be the true construction of s. 128 that before any court can say that there has been a discovery there must be an issue of fact for some tribunal as to whether there has been such discovery, and it is not until that issue is determined that a further assessment can be made. The discovery by the commissioner can never be on the basis of undisputed facts. He claims to discover. The words " so unpaid " refer to the amount which in the opinion of the commissioner represents the unpaid amount. It cannot be said at this stage that there has not been discovery.

W. J. V. Windeyer Q.C., in reply. The word " assessment " may sometimes refer to the ultimate result of assessing duty—the result which is reflected in the notice of assessment. But in the context " assess duty " or " make an assessment of duty " the

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process which occurs after values are ascertained is meant. Unless the Court *must* under s. 124 (7) draw the inference that the Valuer-General's valuation was not a proper estimate of what a hypothetical prudent person would at the date of death have paid for the shares, then s. 128 never comes into operation. Moreover, if what was discovered was merely that there was some degree of under value, then the commissioner could not honestly simply add £7,350 to the total value of the estate and assess duty accordingly. He must have believed that was in fact the true amount of the undervalue. There were not, however, any grounds for such a belief. The construction put by the appellant gives the statute a perfectly satisfactory operation, and one which is harmonious with the statute as a whole.

G. Wallace Q.C., by leave, referred to *McEvoy* v. *Federal Commissioner of Taxation* (1).

Cur. adv. vult.

March 5, 1954.

The following written judgments were delivered :—.

DIXON C.J. The procedure which the provisions of Pt. V of the *Stamp Duties Act* 1920-1949 (N.S.W.) appoint for litigating disputes with respect to death duty is little likely to ascertain the facts with precision or define the true issues with clearness. But it is at least certain in this case that the Commissioner of Stamp Duties, who is the respondent in the appeal, claims that the shares of Frank David Muller, deceased, in " The Astor " Pty. Ltd. bore a value at his death of £12,100 and not £4,750 as he had at first assessed it and sought to enforce his claim by a further assessment upon the executor, who is the appellant, for the additional duty which resulted from the increase in the value assigned to the shares. It is equally certain that the executor denied the legal competence of the commissioner to make the further assessment. It is not quite so clear, on the case stated, that if, contrary to this denial on the part of the executor, the commissioner were competent to make the further assessment, the executor contests the value now assessed and insists that in truth the shares possessed at the date of death no greater value than that first adopted by the commissioner. But, no doubt, it is safe to assume that the executor does so insist.

Accordingly two questions might seem to arise, one contingent upon the answer to the other, and they might seem otherwise to be entirely separate and distinct. The first is whether it is lawfully

(1) (1950) 9 A.T.D. 206, at p. 211.

competent for the commissioner to make the further assessment. If that be answered in the affirmative then, and then only, it might seem that there should come the second question, namely what is the true value of the shares as at the date of death ; is it £12,100 or some other sum exceeding the value first assessed ? Like all other questions of valuation to be decided judicially it is simply a matter of fact and to be determined upon evidence.

But entirely separate and distinct as the two questions might be thought logically to be, the shadow of the second question seems ever to fall across the first and to obscure the answer to the inquiry into the competence of the further assessment. The cause of this is to be found in the use of the word " discovered " in s. 128 (1) of the *Stamp Duties Act* which confers the authority to make a further assessment. The sub-section provides that notwithstanding any assessment or payment of death duty or any statement that no duty is payable in respect of any person dying, it shall be lawful for the commissioner at any time thereafter, if it is *discovered* that any duty payable has not been fully assessed and paid, to make a further assessment of the duty so unpaid. The further assessment is made by sub-s. (4) liable to appeal under s. 124. The appellant lays great emphasis on the word " discovered " in the condition expressed in the words " if it is discovered that any duty payable has not been fully assessed and paid " which he says is a condition precedent to the exercise of the power further to assess. He asks—What was it that the commissioner " discovered " ? It is a simple answer for the commissioner to give that he discovered that the duty had not been fully assessed because the value he had placed upon the shares was £7,350 too little. If it be true that at the date of death the shares were worth £7,350 more than the amount at which the commissioner had assessed them, I for one should have thought that when he found this out he had made a discovery.

Thus it is easy to see that the correctness of his conclusion as to the true value of the shares would naturally be taken up and controverted by the executor as a matter entering into the question what had the commissioner " discovered " ; for his denial of the competence of the further assessment rests upon the contention that there was no fulfilment of the condition expressed in the words " if it is discovered that any duty payable has not been fully assessed and paid ". But is it right to let the question of the correctness of the further assessment enter into the question whether the condition expressed by these words has been fulfilled ? An appeal is expressly given by sub-s. (4) of s. 128 from the further

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assessment. The purpose of the appeal is to bring the claim for duty which the further assessment makes before the Supreme Court for determination. The procedure is by a stated case under s. 124 and sub-s. (4) of that section provides that on the hearing of the case the court shall determine the question submitted and shall assess the duty chargeable. Does s. 128 mean that the validity of the further assessment must depend upon its correctness? If so its validity can be attacked collaterally. How does such a meaning fit with the notion that the question whether and how far it is correct is to be determined on appeal and the right duty assessed by the court? The difficulty is not new with revenue provisions employing the infelicitous word " discover " in conferring a power of further assessment or amendment. In relation to the provision which now stands as s. 125 of the *Income Tax Act* 1918 of the United Kingdom it was fully examined by Lord *Reading* C.J. in *R.* v. *Bloomsbury Income Tax Commissioners* (1). The material words were " if the surveyor discovers that any person so chargeable has not made a full and proper or any return then he shall make an additional assessment ". His Lordship described the history of the income tax law relating to further assessment and showed that when such expressions as " a person chargeable " or " a person who ought to be charged " and " if he (the surveyor) shall find or discover " were used, it was not intended to make the authority to assess dependent upon actual legal chargeability or upon legal proof of the conclusion embodied in the discovery. These were matters to be raised for determination by appeal from the assessment. The expressions referred to the finding or conclusion of the surveyor, not the objective fact. " The surveyor may be mistaken in the ' discovery ', but if there is information before him upon which he could and did honestly believe the person to be liable to the duties the only remedy is by the appeal prescribed by the statutes " (2). Again his Lordship said—" I am therefore of opinion that it is for the Commissioners to decide whether or not a person assessed by the additional Commissioners, after ' discovery ' by the surveyor, is in fact chargeable. But there must be information before the surveyor which would enable him, acting honestly, to come to the conclusion that a person is chargeable " (3). The case was one in which the distinction between fulfilment of the condition precedent and the right of appeal was all important. For the remedy sought was a writ of prohibition.

(1) (1915) 3 K.B. 768; 7 T.C. 59.
(2) (1915) 3 K.B., at p. 782.
(3) (1915) 3 K.B., at p. 785.

In the same way it appears to me that s. 128 (1) should be interpreted as referring to a bona fide conclusion at which the commissioner has newly arrived on materials before him that duty payable has not been fully assessed and paid. To challenge the correctness of the claim made by the assessment that duty has not been fully assessed the party chargeable is put to his appeal.

It is clear enough that the commissioner in the present case adopted a new view as to the value of the shares and adopted it as a result of fresh information. It cannot be doubted that he reached a bona fide conclusion on materials that the value of the shares was £12,100 and not £4,750. But to say this is one thing; it is another thing on the same materials to pronounce his conclusion to be right judicially. It may well be right, but that can only be determined as an issue of fact upon evidence. The facts appearing from the stated case are simple enough. "The Astor" Pty. Ltd. is a company which owns a building containing a number of residential flats. Under the articles of association the shares which are of a denomination of £1, are grouped in certain numbers and a member must hold one of the groups. The holding of a group of shares confers upon the member a right, and imposes upon him the obligation, to become the tenant of a flat. The flats are classified and the number of shares in the group governs the shareholder's choice of the flat. The rent is as the board of directors determines but it represents only the due proportion of the expenses of owning, maintaining and managing the building. The deceased held 3,600 shares. The executor included them in his inventory at £3,600 but the commissioner requested him to file a valuation of the deceased's flat by the Valuer-General as if the shares were a title to realty. This disclosed a value of £4,750 and the commissioner adopted it as the value of the shares. A month after his assessment and six months after the death of the deceased, the executor sold the shares by auction. They fetched £12,100. On hearing of the sale the commissioner made a requisition that the increased price or value be disclosed as an additional asset and later wrote to the solicitors for the estate that the sale was "indisputable evidence" of the value of the shares. He eventually made the further assessment complained of. As against the "indisputable evidence" of the sale the executor points to some eight sales of groups of shares in the company in the year of the deceased's death and the following year exhibiting wide variations of price, and he also suggests that the expiry of the *Land Sales Control Act* 1948 on 19th September 1949, seven weeks before the sale, introduced a new factor. As the sale of the shares was not controlled by the Act the suggestion

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must be that the price of the flats moved in sympathy with an upward movement of the prices of other flats and buildings which theretofore had been controlled.

The suggestion may deserve investigation and consideration on the hearing of an issue, or upon an inquiry, as to the real value of the shares at the death of the deceased. But how can the question whether the condition expressed by the words " if it is discovered that any duty payable has not been fully assessed " be affected either by the variation in the prices obtained on the sales of other groups of shares or by the speculative inferences to be drawn from the lapse of land sales control ? If the Court were to hold as a fact that the value of the shares as at death was not substantially more than the £4,750 assessed that would end the case, but for another reason, namely because the further assessment was wrong in substance. But short of that, such evidentiary matters as those mentioned must surely be put aside. They may throw a doubt on the correctness of the assessment, but even if the view already expressed is not right, viz., that it is enough to constitute a discovery that on materials the commissioner came newly to the bona fide belief that the shares had been undervalued, nevertheless such a doubt cannot affect the question whether the condition was fulfilled. Either the commissioner's assertion as to value must be assumed to be correct or it must be found to be wrong. If the view expressed in *McCaughey's Case* (1), that the burden of proof is on the commissioner were adopted it might perhaps be possible for the court to say that he has not proved his valuation to the satisfaction of the court. But it seems evident that the parties never contemplated submitting that issue for decision on the materials in the stated case, and that is why an inquiry has been ordered by the Supreme Court in default of agreement. Moreover when all is said and done the sale of the shares at £12,100 is a weighty piece of evidence as to their worth at the date of the deceased's death, although it occurred six months earlier.

The thing which must be " discovered " is that any duty has not been fully assessed and paid. Full assessment and full payment are the final legal consequences of the computation of liability. It is a shortcoming in the result assessed that must be " discovered ". The cause of the shortcoming may lie in any mistake, misapprehension or want of information on the part of the commissioner or mistake, misrepresentation or failure to give information on the part of the executor or administrator. It may involve matter of law or matter of fact only. Whatever the cause the condition

(1) (1945) 46 S.R. (N.S.W.) 192 ; 62 W.N. 230.

enabling the commissioner to make a further assessment is fulfilled if the consequent failure to assess the full duty is discovered. For the executor the contention was pressed that undervaluation of an asset included in an inventory was outside the conception in s. 128 (1) of duty not having been fully assessed. Valuation it said was one thing; assessment of duty another. The distinction was drawn, so it was urged, in a number of sections of Pts. IV and V of the Act and s. 128 (1) was not meant to extend to the correction of values placed upon assets. It is difficult to accept this interpretation of the provisions. Valuation of an asset or assets is of course a matter to be distinguished from other elements upon which the total liability in an amount of duty depends and this is recognized by the language of provisions referring to valuation. But all such matters are steps leading to the ascertainment of the liability in an amount of duty which results in the assessment. There is no evidence of any intention to contradistinguish assessment from valuation and to exclude the consequences of mistaken undervaluation, when discovered, from the operation of s. 128 (1).

In *In the Estate of Murdoch* (1), a contention was negatived that s. 128 (1) was limited to the correction of mistakes made in the act of assessing and afterwards discovered. *Jordan* C.J. said: "The duty payable on the final balance of the estate may not have been fully assessed for any one or more of a number of reasons, for example, because an asset has been erroneously omitted or erroneously undervalued, or because a debt which was allowed as a deduction was not due and owing. Any of these is just as capable of preventing the duty payable on the final balance from being fully assessed as a mistake in making the assessment" (2). This seems the natural view to take of the meaning and operation of s. 128 (1) and no sufficient reason appears for departing from it.

Another suggestion for limiting the operation of s. 128 (1) was that it should be interpreted as referring only to the discovery of something existing at the date of the assessment which, if it had been known or understood or correctly applied, would have meant an increased duty. As the sale of the shares took place after the assessment, the discovery of the price they brought was accordingly not within s. 128. This contention seems to confuse evidence with the ultimate facts on which liability depends. The ultimate facts may exist antecedently though the evidence showing what they are comes into being later. Here what we are concerned with is the value of the shares at the death of the deceased. But the sale

(1) (1947) 48 S.R. (N.S.W.) 213; 65 W.N. 60.

(2) 1947) 48 S.R. (N.S.W.), at p. 218; 65 W.N., at pp. 63, 64.

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made six months later and a month after the assessment may evidence that value and indeed the commissioner thought it indisputable evidence showing what the value was at death.

Then it was said that the commissioner had merely changed his opinion about the value of the shares and a mere change of opinion was not a discovery. The source of this contention is the observation of *Rowlatt* J. in *Anderton & Halstead Ltd.* v. *Birrell* (1), about which it will be necessary to say something more. But clearly enough what moved the commissioner was the fresh information about the value of the shares afforded by the price given for them at the auction sale. With fresh information coming to his knowledge which in fact led him to believe that he had set down the shares at a great undervalue so that the duty payable had not been fully assessed, the commissioner's conclusion might fairly be described as a discovery that the duty payable had not been fully assessed and paid. In the case mentioned of *Anderton & Halstead Ltd.* v. *Birrell* (2), *Rowlatt* J. had before him a case stated by General Commissioners who had confirmed additional assessments made under s. 125 of the *Income Tax Act* 1918 of the United Kingdom by a surveyor who conceived that he had discovered that certain deductions on account of a bad debt had been wrongly allowed in assessments made some years before when an estimated part of the debt had been written off. The debtor was a company whose share capital the taxpayer held almost entirely and in the meantime the taxpayer had continued to sell to the company and to give it ever mounting credit. Seeing this the surveyor concluded that the estimated part of the debt deducted as bad could not have been a bad debt. He therefore made the additional assessments. The General Commissioners were not satisfied that the debt was a bad debt and submitted in the case stated the question whether they were entitled on the evidence before them to hold that it was not a bad debt. In dealing with s. 125, a provision to which reference has already been made, *Rowlatt* J. made the statement on which the executor relies. He said: "The word 'discover' does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion" (3). It will be noticed that his Lordship emphasizes as the basis of his statement the identity of the facts the figures and the question and its being a question of opinion. The passage has not escaped criticism but the grounds upon which his decision reversing the decision of the commissioners proceeds

(1) (1932) 1 K.B. 271, at p. 281; 16 T.C. 200, at p. 208.

(2) (1932) 1 K.B. 271; 16 T.C. 200.

(3) (1932) 1 K.B., at p. 281.

show clearly enough that his observation excluded cases where the formation of a different opinion was due to a new and relevant factor coming to the surveyor's knowledge. Those grounds were in substance that the growth of the indebtedness afforded no evidence on which the General Commissioners could find that the debt was not properly regarded as bad in the original assessment and no ground for their holding that the surveyor had discovered the debt not to be allowable as bad. On the second point *Rowlatt* J. said that the only way in which it could be put was that the subsequent growth of the indebtedness indicated that there must have been some fact at the earlier time which was not taken into account in the estimate of the value of the debt and would have made the estimate higher. But his Lordship thought that it was entirely guesswork in the circumstances of the case to infer that at the time there had been any reason to think the debt good. It is thus reasonably clear that if the surveyor had had before him materials capable of supporting a change of opinion *Rowlatt* J. would have regarded him as having "discovered" enough to warrant an additional assessment, whatever the decision on the issue raised as to the propriety of allowing an estimated part of the debt as bad and deductible.

With this decision it is necessary to compare that of *Finlay* J. in *Williams* v. *Trustees of W. W. Grundy* (1), where his Lordship said that he did not find it possible to apply what *Rowlatt* J. had said to every case in the sense of reading it as meaning that an inspector can never make a discovery if the making of that discovery involves only a change of opinion. In that case the "discovery" was that on the true construction of a will an interest falling to an infant was contingent on his attaining full age and not vested, as the surveyor had originally interpreted the limitation. It was a change of opinion as to the legal effect of an instrument but it was held to be a discovery.

Another such case is *Inland Revenue Commissioners* v. *Mackinlay's Trustees* (2). The instrument was a partnership deed containing a clause as to what the estate of a partner dying during an accounting period should receive in lieu of profits. The sum was held by the commissioners not to be assessable as income, but some years later they formed the contrary opinion and made an additional assessment to surtax. The Court of Session held that this was a discovery within s. 125. The opinion of Lord *Normand* given as Lord President is now accepted in England as well as Scotland

(1) (1934) 1 K.B. 524, at pp. 533, 534; 18 T.C. 271.

(2) (1938) S.C. 765; 22 T.C. 305.

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as authoritative: see per *Wrottesley* J. in *Multipar Syndicate* v. *Devitt* (1), per *Atkinson* J. in *Commercial Structures Ltd.* v. *Briggs* (2), and per *Tucker* L.J. and *Cohen* L.J. (3) and cf. per *Vaisey* J. in *Earl Beatty* v. *Inland Revenue Commissioners* (4). Lord *Normand* remarks that according to the ordinary use of language "discover" may be taken simply to mean "find out". His Lordship goes through the things mentioned in s. 125 as those to be found out and shows that an initial complete disclosure by the taxpayer is nothing to the point, if on the part of the revenue the effect of documents has been misunderstood, errors of law made, deductions allowed that ought not to have been made. These are matters which may be found out, "discovered".

In *Steel Barrel Co. Ltd.* v. *Osborne* (5), the taxpayer had agreed with the revenue authorities that a conventional figure representing old stock should be deducted from the opening and closing figures of stock over a specified period of years. The assessor did not make the same deduction from the opening figure of the year ensuing upon this period. Subsequently the surveyor came to the conclusion that he ought to have done so, rightly as the Court of Appeal held. His conclusion amounted to a "discovery".

In *Commercial Structures Ltd.* v. *Briggs* (6), the inspector who assessed, in taking into account a rent (payable by way of compensation), had failed to see the importance of a statutory provision requiring the addition of a sum equal to the cost of making damage good. How the significance of this came to his attention subsequently did not appear, but he had full information before him *ab initio*. He was held entitled to make an additional assessment as having discovered that the additional tax was chargeable. An oblique reference was made to the curious incident in the Court of Appeal in *British Sugar Manufacturers Ltd.* v. *Harris* (7), when the Attorney-General intervened so that the court did not decide the question whether the surveyor had made a discovery in that case (8). *Tucker* L.J. said that the Court of Appeal had not the benefit of reading the opinion of Lord *Normand*. *Atkinson* J. had made the same point more fully in the court below (9) and it had been made also by *Wrottesley* J. in *Multipar Syndicate Ltd.* v. *Devitt* (10). It is

(1) (1945) 26 Tax. Cas. 359, at p. 368.
(2) (1947) 30 Tax. Cas. 477, at pp. 485, 486.
(3) (1947) 30 Tax. Cas., at pp. 491-494.
(4) (1953) 2 All E.R., at p. 762.
(5) (1947) 30 Tax. Cas. 73.
(6) (1947) 2 All E.R. 659; (1948) 2 All E.R. 1041.
(7) (1937) 21 Tax. Cas. 528, at pp. 548, 549.
(8) (1948) 30 Tax. Cas., at p. 493.
(9) (1948) 30 Tax. Cas., at pp. 485, 486.
(10) (1945) 26 Tax. Cas., at p. 368.

difficult, therefore, to treat the course which but for the Attorney-General the Court of Appeal would have taken as now possessing any significance.

In truth there is a succession of cases, of which the most recent is *Earl Beatty* v. *Inland Revenue Commissioners* (1), in which the surveyor has been held to have made a sufficient discovery when he has simply adverted to a liability which the materials before him disclosed but which he had not seen in due time. The tendency disclosed by the cases is against restricting the word " discovery " whether in the manner indicated by *Rowlatt* J. or otherwise.

In the present case the facts seem to speak for themselves. Because of the sale of the shares the commissioner became aware that a buyer or buyers existed prepared to give two and a half times what the commissioner had estimated for the flat and so far as he was concerned he saw no reason to doubt that this must have been so at the time of death. He concluded that his value had been completely wrong and the right value was represented by the price given. If this were so he had become aware for the first time that duty had not been fully assessed. It therefore comes back to the point that the correctness of his conclusion that duty had not been fully assessed is to be decided as the issue of substance raised by the appeal and not as a matter going to the question whether a discovery had been made. For, if his conclusion is right it seems almost inevitably to follow that it has been discovered that duty has not been fully assessed, at all events within the ordinary meaning of language.

The questions in the case stated are not very happily framed and no doubt it would be better if the answers given by the Supreme Court had been expressed in the formal order with more precision. But in substance I think the decision of the majority of the Supreme Court is right. Although not much harm would result from leaving the order as it stands I am prepared to assent to the order *Fullagar* J. proposes. Subject thereto I think the appeal should be dismissed.

WILLIAMS J. This is an appeal from an interlocutory order of the Supreme Court of New South Wales made in a case stated under s. 124 of the *Stamp Duties Act* 1920-1949 (N.S.W.) which raises a question of general importance relating to the administration of the estates of deceased persons. It arises in this way. The appellant is the executor of the estate of Frank David Muller who died on 13th May 1949, domiciled in New South Wales. Amongst his assets were 3,600 fully paid shares of £1 each in " The Astor "

(1) (1953) 2 All E.R. 758.

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Pty. Ltd., a company incorporated in New South Wales, which owns a building of several storeys situated in Macquarie Street, Sydney, containing a large number of residential flats. The articles of association of the company provide for the shares being held in certain aggregate numbers and for the holders of such aggregates becoming entitled to apply for a lease of a certain class of flat in the building. They provide that the " homes " in the building available for a holder of 3,600 shares shall be one of the homes facing Macquarie Street on the south-eastern corner of the building and situated on the ten upper floors thereof or one of those on the north-western corner of the building and situated on the six upper floors thereof. The title to each flat is a lease granted by the company to the holder of the necessary aggregate number of shares, the rent of the lease being adjusted so that the tenant of each flat pays a proportion of the expenses common to maintaining the building as a whole comprising the sums required to pay rates and taxes, repairs, painting, servicing the lifts and passage-ways etc.

The deceased was at the date of his death the tenant of one of the flats situated on the sixth floor available to a holder of 3,600 shares. For the purposes of State death duty the executor valued the shares at £1 each but the commissioner was not prepared to accept this value. He required a value by the Valuer-General. On 22nd August 1949, the Valuer-General valued the improved capital value of the flat at £4,750. He stated that the improvements comprised a flat containing two bedrooms, lounge room, dining room, entrance, vestibule, kitchen, bathroom, passage and balcony. The commissioner accepted this valuation as the value of the shares and on 6th October 1949 assessed the executor for death duty, the 3,600 shares in " The Astor " being valued for this purpose at £4,750. This method of valuing shares was certainly unusual but, as the real purpose of becoming a shareholder in " The Astor " is to become qualified to obtain a home and the rent is roughly equivalent to the annual outgoings that an owner of a dwelling would have to pay, the method does not on examination appear to be at all inappropriate to the particular circumstances. On 4th November 1949, the executor sold the 3,600 shares at public auction for £12,100. On 9th November 1949, the commissioner made a requisition requiring the executor to disclose the difference between the £4,750 and £12,100 as an additional asset. The executor refused to do so and on 20th January 1950, the commissioner issued a notice of further assessment of death duty in which he increased the value of the estate by £7,350 alleging that the value of the shares in " The Astor " had been understated by this amount and

claiming interest on the amount of additional duty at eight per cent per annum from 13th November 1949, to date of payment (that is from six months after death). In correspondence preceding the further assessment the commissioner claimed that the sale of the shares for £12,100 was indisputable evidence of their value at the death.

Section 128 of the *Stamp Duties Act* provides as follows :—

" (1) Notwithstanding any assessment or payment of death duty under this Act or of duty on the estate of any deceased person under any of the Acts hereby repealed, or any statement of the Commissioner that no duty is payable, in respect of the estate of any person whether dying before or after the passing of this Act, it shall be lawful for the Commissioner at any time thereafter, if it is discovered that any duty payable has not been fully assessed and paid, to make a further assessment of the duty so unpaid, and to recover the same in the same manner as if no previous assessment or payment had been made.

The Commissioner may at his discretion at any time cause to be made all such alterations in or additions to any assessment as he thinks necessary in order to insure its completeness and accuracy and notify the administrator accordingly.

Where any alteration in an assessment has the effect of reducing the death duty any duty overpaid shall be refunded by the Commissioner, but no refund shall be made unless application for the same is made by the administrator within three years from the date of the overpayment of duty.

(2) Except in the case of fraud an administrator shall not be personally liable for any death duty under any such further assessment by reason of having administered or distributed the estate of the deceased without retaining sufficient assets to satisfy the duty.

(3) Nothing in this section shall affect the operation of any settlement by way of composition under the next succeeding section.

(4) Any such further assessment shall be liable to appeal under section one hundred and twenty-four."

The executor disputed the power of the commissioner to make a further assessment and also the correctness of the amount and required the commissioner to state a case under s. 124 of the *Stamp Duties Act*. The material questions asked in the case stated (as amended) are as follows :

" 1. On the facts and circumstances set out in the stated case was the further assessment dated 20th January 1950 for £1,497 7s. 8d. lawfully made and was the said sum lawfully recoverable

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by the Commissioner? 2. Had the Commissioner power in the facts and circumstances set out in the stated case to issue any assessment other than the assessment dated 6th October 1949 or to recover any further duty beyond that assessed in the said assessment? 3. If the answer to question 2 is in the affirmative what is the amount of this further duty?" The Supreme Court, *Street* C.J. and *Herron* J., *Owen* J. dissenting, answered these questions as follows: 1. Yes, but not as to the amount. 2. Yes. 3. The amount of additional duty to stand over for inquiry if the parties fail to agree.

At first sight it would appear that the answer to the first question presupposes that the majority of the court was satisfied on the facts stated in the case that the shares were undervalued in the original assessment. The only fact that could be material is that the shares were sold for an enhanced price six months after the death but there is no finding that this fact is sufficient to prove that the value of the shares at the death exceeded £4,750 and I do not think that their Honours intended to preclude the executor from proving at the inquiry, if he could, that the shares were fully valued at £4,750.

It is only lawful for the commissioner to make a further assessment under the first paragraph of s. 128, and it is on this paragraph that he relies, if it is discovered that any duty payable has not been fully assessed and paid. The section does not specify who must make the discovery but it is the commissioner who is authorized to make the further assessment so that it must be the commissioner who makes the discovery or at least bona fide believes that he has done so in the first instance. He then makes the further assessment. If an administrator appeals the onus must then lie on the commissioner to prove that what he claims to have discovered is in fact a discovery that duty has not been fully assessed and paid. The discovery must be the discovery alleged by the commissioner but it might be necessary to order an inquiry to ascertain whether the discovery showed that duty had not been fully assessed and paid and to determine the amount of duty still unpaid. It is a condition precedent to the validity of the further assessment that it should be discovered that any duty has not been fully assessed and paid. The mere discovery that duty might not have been fully assessed and paid is not sufficient. The meaning of the word "discovered" must itself be discovered and on that problem the English cases decided upon the meaning of the word "discovers" in s. 125 of the English *Income Tax Act* 1918 are helpful.

This section authorizes the issue of further assessments in certain cases. They are authorized by sub-s. (1) :—

" If the surveyor discovers—that any properties or profits chargeable to tax have been omitted from the first assessments ; or that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments ; or that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act ".

It is unnecessary to refer to all these cases because the principal ones are discussed by the Court of Appeal in *Commercial Structures Ltd.* v. *Briggs* (1). The case closest to the present case on its facts is *Anderton & Halstead Ltd.* v. *Birrell* (2). The actual decision in that case has always been accepted as completely right. A sentence in the judgment of *Rowlatt* J. has, however, been questioned but only after a very literal meaning has been placed upon it. It reads as follows :—

" The word ' discover ' does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion " (3).

A sentence follows a few lines lower down to which no exception has been taken : " Moreover, it is to be remembered that income tax is an annual tax for the service of the year, and when one finds a provision for an additional assessment within a period of six years one is led to expect machinery, not for a mere revision, but for the bringing in of something which had been overlooked " (3).

To my mind the former sentence should be read, like every other passage in a judgment, *secundum subjectam materiam*, and so read does not appear open to criticism. The facts in *Anderton's Case* (2) were that the appellants had been assessed for two years on the basis of a writing down in each year successively of a doubtful debt. This was done by agreement with the inspector of taxes who had all the facts before him. Subsequently, by additional first assessments, the writing down of the doubtful debt was disallowed, on the ground that since the writing down of the debt was allowed, it had come to the surveyor's knowledge that the appellants had permitted the debtors to increase their indebtedness to them. The additional assessments were disallowed by *Rowlatt* J. His Lordship referred to r. 3 (1) of Cases I and II. He said : " Rule 3 (i) is as follows : ' In computing the amount of the profits or gains

(1) (1948) 2 All E.R. 1041.
(2) (1932) 1 K.B. 271.
(3) (1932) 1 K.B., at p. 281.

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to be charged, no sum shall be deducted in respect of', and then after a list, ' (i) any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad . . . ' What the statute requires, therefore, is an estimate to what extent a debt is bad, and this is for the purpose of a profit and loss account. Such an estimate is not a prophecy to be judged by after events, but a valuation of an asset de praesenti upon an uncertain future to be judged with regard to its soundness as an estimate upon the then facts and probabilities. It is not overthrown as an estimate in 1923 and 1924 by coming to the conclusion, as the General Commissioners have done, that in 1930 it had not been proved that the debts were to any extent bad " (1).

That was what *Rowlatt* J. thought would be " a mere revision " whereas s. 125 provided machinery for the bringing in of something which had been overlooked. In *Anderton's Case* (2) his Lordship was considering a claim to make an additional assessment because the surveyor on subsequent information considered that the debt had been originally undervalued. In the sentence criticized his Lordship was not considering whether an additional assessment could be made where income chargeable to tax had been omitted because the surveyor had placed a wrong interpretation upon the rights of a taxpayer under a deed or will or other document or under some statute. In *Williams* v. *Trustees of W. W. Grundy* (3), *Finlay* J. held that the additional assessments were justified because the income which a beneficiary derived from a share under a will had not been brought into charge because the surveyor wrongly considered that the share was vested in which case the income would not have been taxable whereas the share was only contingent and the interest was taxable. In *Commercial Structures Ltd.* v. *Briggs* (4) the premises of the taxpayer had been requisitioned under the Defence Regulations, and the taxpayer was entitled to compensation rent under the *Compensation (Defence) Act* 1939. A sum of £4,940 was arrived at by agreement. In assessing this figure for tax purposes, the inspector of taxes made a statutory deduction of one-sixth from that sum, leaving £4,113 as the figure on which tax under Schedule A would be payable. Payment of tax on this basis was made until April 1945, when the inspector became aware that the compensation rent was not a rack rent, since, by the provisions of s. 2 (1) (b) of the Act of 1939, the Minister of Works was liable to pay a sum equal to the cost of making good

(1) (1932) 1 K.B., at p. 282.
(2) (1932) 1 K.B. 271.
(3) (1934) 1 K.B. 524.
(4) (1948) 2 All E.R. 1041.

any damage to the building during his occupation. In purported pursuance of the *Income Tax Act* 1918, s. 125 (1), the inspector thereupon made additional assessments, increasing the net assessment to £4,525. It was held that the inspector had made a discovery within the meaning of this section when he found that a mistake had been made with regard to the effect of the general law on a particular set of facts.

In the English cases in which additional assessments have been upheld some mistake had been discovered which showed that some item of assessable income had been omitted. In the present case there is no evidence that anything relating to the value of the 3,600 shares whether of fact or law was overlooked. The commissioner was fully aware of the rights conferred on shareholders by the articles of association of " The Astor ", of the terms of the leases under which shareholders including the deceased became tenants of the company, and of the size and situation and general amenities of the flat of which the deceased was a tenant at his death. The fact that the shares were sold for £12,100 six months after death could be cogent evidence that the shares were undervalued at £4,750 at the death. But intervening circumstances, and in particular the cesser of land sales control, might well establish that the subsequent sale threw little light on the value of the shares at the death. The claim of the commissioner that the sale for £12,100 was indisputable evidence that the shares were of this value at the death cannot be sustained. The commissioner is really seeking to revise his previous opinion and to correct a supposed error of judgment. He has not discovered any mistake of fact or law which would give the shares any element of value which was not taken into account in the original assessment.

Section 105 (2) of the Act provides that save as in the Act expressly provided, the value of the property included in the dutiable estate shall be estimated as at the date of the death of the deceased. Section 115 (1) provides that duty shall become due and payable on the assessment thereof by the commissioner, or if not duly so assessed within six months from the death of the deceased then on the expiration of that period. Section 121 (1) provides that interest at the rate of eight per cent per annum shall become payable if the duty is not paid within six months after the death of the deceased. Section 117 requires an applicant for probate or letters of administration of the estate of any deceased person to lodge with his application an affidavit containing the prescribed particulars with respect to the dutiable estate and all allowances claimed in respect of debts owing by the deceased at the time of his death.

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It also provides that the applicant shall furnish the commissioner with such other evidence, including valuations by competent valuers, as may be prescribed or as the commissioner may in any case require to enable him to ascertain all the property liable to death duty and the value thereof, and all allowances to be made in respect of debts owing by the deceased, and to assess the duty payable. Section 125 provides that in every case in which the commissioner deems it necessary to ascertain the value of any property for the purpose of assessing duty under the Act he may ascertain such value by such means as he thinks fit and the commissioner may assess the duty payable on the footing of the value so ascertained. So it is the duty of the commissioner to make an estimate of the value of the property included in the dutiable estate as at the date of death, and to make this estimate expeditiously and if possible within six months after the death of the deceased on the materials then before him. If all the material circumstances are then disclosed he is in a position to attribute to any asset all its elements of value and an estimate of value reached in these circumstances is, in my opinion, a full assessment of its value. The policy of the Act is illustrated by s. 125A which was inserted in the Act by Act 13 of 1931, s. 7 (*a*). This section provides : " In every case in which it is necessary for the purpose of assessing duty under this Act to ascertain the value of any estate or annuity or interest for the life of any person or of any estate, annuity, or interest determinable on or subject to any contingency or the happening of any event or of any estate, annuity, or interest in remainder expectant on the death of any person or expectant on or subject to any contingency or the happening of any event, regard may be had in ascertaining the value of any such property as aforesaid to the death of the person having the life estate or annuity or interest or the happening of the contingency or event at any time before the assessment of duty under this Act is actually made ".

The words " at any time before the assessment of duty under this Act is actually made " must refer to the original assessment of duty. By clear implication these words would prevent the commissioner making a further assessment under s. 128 because some contingency or event which happened after this assessment had shown the valuation of the particular interest on which he had based the assessment had turned out to be erroneous. The happening of the contingency or event would probably demonstrate this error whereas a subsequent sale of an asset for a price higher than the valuation would at most throw doubt on the accuracy of the original estimate. But, nevertheless, the value

of the interest could not be reassessed. In other words, the interest would have been fully assessed.

In my opinion the fact that an asset is subsequently sold at an enhanced value is not evidence of a discovery that any duty payable has not been fully assessed and paid. Duty is fully assessed unless some element of value has been overlooked. If every element of value has been taken into account and estimated as at the date of death in the original assessment the duty has been fully assessed. As *Rowlatt* J. said in one of the passages I have quoted: "Such an estimate is not a prophecy to be judged by after events, but a valuation of an asset de praesenti upon an uncertain future to be judged with regard to its soundness as an estimate upon the then facts and probabilities" (1). In *Dodworth* v. *Dale* (2) *Lawrence* J. held that s. 125 of the English Act did not authorize an additional assessment by reason of facts which arose after the year of assessment, cf. *Multipar Syndicate Ltd.* v. *Devitt* (3). Any other construction would place the administration of every estate in jeopardy. The commissioner would have a complete power of revision from time to time of the value he had placed on every asset in an estate. Even if his primary estimate was challenged upon an appeal under s. 124 and the Court on an issue of fact decided the value, nevertheless the commissioner, on finding that the asset had subsequently realised more than the value fixed by the Court, could issue a further assessment under s. 128 and no *res judicata* could operate to estop him from doing so because s. 128 provides that the commissioner has power to make a further assessment of the duty unpaid and to recover the same in the same manner as if no previous assessment or payment had been made and he would therefore be exercising an independent power.

To my mind the issue on this appeal has already been decided *mutatis mutandis* by the last passage in the judgment of the majority of the Court in *Commissioner of Stamp Duties (N.S.W.)* v. *Pearse* (4). This judgment has recently been affirmed on appeal by the Privy Council. It is in the following words: "Lastly it was submitted that if the amount of profit costs exceeded the original estimate from time to time the Commissioner could re-assess the estate for further duty from time to time under s. 128 of the Act. But the bounty is an interest which is capable of valuation and must, subject to s. 125A of the Act, be actuarily valued as at the date of death. Once this has been done and duty

(1) (1932) 1 K.B., at p. 282.
(2) (1936) 2 K.B. 503.
(3) (1945) 1 All E.R. 298.
(4) (1951) 84 C.L.R. 490.

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paid on that value, the duty has been fully assessed and paid and there is no room for the operation of s. 128 " (1).

We were referred to the decision of the Supreme Court of New South Wales in *In the Estate of Murdoch* (2), and particularly to the passage in the judgment of *Jordan* C.J. where his Honour said : " It has been contended that all this enables the Commissioner to do is to make a further assessment, if he finds that a mistake has been made in the act of assessing which has prevented the full duty from being assessed and paid, for example, attributing to property given by the will to a privileged beneficiary a value lower than its true value. I see no reason for giving this restricted meaning to the section. The duty payable on the final balance of the estate may not have been fully assessed for any one or more of a number of reasons, for example, because an asset has been erroneously omitted or erroneously under-valued, or because a debt which was allowed as a deduction was not due and owing. Any of these is just as capable of preventing the duty payable on the final balance from being fully assessed as a mistake in the making of the assessment " (3).

The material statement in this passage for present purposes is the statement that the commissioner can issue a further assessment under s. 128 because an asset has been erroneously undervalued. If this statement is intended to cover the case where the commissioner seeks subsequently to revise an estimate on which he has based his original assessment without evidence that he has discovered some new element of value which he had previously failed to take into account because of some mistake as to the nature or attributes of the asset or its legal quality I am unable to accept it. But the statement could cover many cases where an asset had been erroneously undervalued for one of these reasons and to that extent I agree with it.

Section 128 contains, of course, a second paragraph authorizing the commissioner to cause to be made all such alterations in or additions to any assessment as he thinks necessary in order to ensure its completeness and accuracy. This paragraph was not relied upon by the commissioner in the Supreme Court or before us and its meaning was not argued so that I shall not express any concluded opinion upon it. It may well have a limited operation. It could not be intended to give the commissioner a wider power to make a further assessment than that conferred by the first paragraph of s. 128. It is a power to make alterations in or additions to

(1) (1951) 84 C.L.R., at p. 523.
(2) (1947) 48 S.R. (N.S.W.) 213 ; 65 W.N. 60.
(3) (1947) 48 S.R. (N.S.W.), at p. 218 ; 65 W.N., at pp. 63, 64.

any assessment and not to make the assessment itself and would appear to be incidental to the main powers of the commissioner to make assessments conferred by s. 117 (4) and the first paragraph of s. 128.

In conclusion let me say that I agree entirely with the statement in the judgment of *Owen* J. that : " Two conditions must be fulfilled before s. 128 (1) can be brought into play. There must have been an omission to take into account some relevant circumstance existing at the date of the original assessment, and the circumstance must be of such a character that had the truth been known at the date of assessment the duty payable must have been greater than the amount in fact assessed " (1).

For these reasons I would allow the appeal.

FULLAGAR J. This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales, given on a case stated by the Commissioner of Stamp Duties under s. 124 of the *Stamp Duties Act* 1920-1949. The duty in question is death duty under Pt. IV of the Act on the estate of Francis David Muller, of whose will the appellant is the executor.

The general scheme of Pt. IV of the Act is of a familiar character. It is provided (s. 101) that on the death of any person death duty at the rate mentioned in the Third Schedule shall be assessed and paid upon the final balance of the estate of the deceased as determined in accordance with the Act. The " dutiable estate " is to be ascertained in the manner prescribed, and the " final balance " of the estate is to be computed (s. 105) as being the total value of the dutiable estate after making allowance for the debts of the deceased. The " value " (apart from immaterial exceptions) is to be estimated as at the date of death. The duty is to be assessed and collected by the commissioner (s. 113), and is to constitute a debt due and payable to Her Majesty out of the estate (s. 114). It becomes due and payable on assessment (s. 115). In the present case the commissioner made an assessment, the amount of which was duly paid by the executor. At a later date he made a further assessment which had the effect of increasing substantially the dutiable value of the estate. His power to do this, and the effect of the further assessment made, are the matters in question in this case. The questions depend on s. 128 of the Act, which occurs in Pt. V, but it will be convenient to postpone a reference to the terms of that section until the facts of the case have been briefly stated.

(1) (1953) 53 S.R. (N.S.W.) 257, at p. 269 ; 70 W.N. 69.

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Mr. Muller died on 13th May 1949. His dutiable estate included 3,600 fully paid shares of £1 in a company named "The Astor" Pty. Ltd. That company was the owner of a large building in Macquarie Street, Sydney, which contained a number of residential flats. Under the company's articles its shares were to be held by its members in "groups" consisting respectively of 4,000, 3,900, 3,800, 3,600, 3,500, 3,360, 3,000 and 2,700 shares. The holding of any such group "entailed on the holder" the renting by him of one of the flats in the building, a particular class of flat being assigned to each group. The rent payable was calculated at a sum which was intended to spread equitably over all the tenants the cost of maintenance, cleaning, etc. The deceased occupied until his death Flat No. 3, which was a flat of the class assigned to a holding of 3,600 shares.

In his inventory for purposes of death duty the executor included the deceased's 3,600 shares as being of a value of £3,600. The commissioner required the executor to obtain and file "Valuer-General's valuation of deceased's interest in 'The Astor'". The Valuer-General "certified" that at the date of death "the improved capital value of *property being Flat No.* 3" in the company's building was £4,750. He went on to describe the "improvements" as "comprising a flat containing two bedrooms, lounge room", etc. Some confusion is apparent at this stage. The deceased's estate certainly included shares in "The Astor" Pty. Ltd. It may also have included a lease of a flat in "The Astor", the unexpired term of which we do not know. If it did, the value of the shares would be, in effect, conditioned by any value attributed to the unexpired term of the lease. If the shares were to be valued on the basis on which presumably they were ultimately sold, i.e. on the basis that they carried an immediate right to a lease of the flat, it would seem to be wrong to attribute any separate value to any existing lease. If, on the other hand, a value were attributed to the lease, the right which the shares carried would have to be treated as a reversionary right, and the value of the shares reduced accordingly. But what the Valuer-General seems to have been invited to value, and to have valued, was an interest in "The Astor", an interest in real property. His certificate was meaningless on any other view. The deceased had, of course, owned no such interest. It was on this certificate that the commissioner apparently acted, valuing an asset which did not exist at £4,750. The assessment was made on 6th October 1949, and the duty assessed was paid on 12th October 1949. On 4th November 1949 the executor sold the 3,600 shares by public auction for the sum of £12,100. This sale

did not pass unnoticed by the commissioner, who, after some correspondence, in the course of which he said that " it is considered the sale price of the shares is indisputable evidence of their value ", reassessed duty on 20th January 1950. It is thus clear that what the commissioner was valuing on the reassessment was the shares. The reassessment increased the value of the dutiable estate by the difference between £12,100 and £4,750, the increase in the amount of duty assessed being £1,497. The proceeding before the Full Court of New South Wales was, in substance, an appeal against this reassessment. That court by a majority (*Street* C.J. and *Herron* J., *Owen* J. dissenting) (1) held, in effect, that the commissioner had power, subject to appeal in accordance with the machinery provided by the Act, to reassess duty. Obviously, however, the sale price realized on 4th November 1949 was not conclusive evidence that the value of the shares on 13th May 1949 was £12,100, though it might well be thought to suggest strongly that they would have been considerably undervalued as at that date at £4,750, and two of the other sales mentioned in par. 14 of the case strongly suggest the same thing. The court accordingly ordered an inquiry as to the value of the shares at 13th May 1949. Actually the order of the court took the form of providing answers to certain questions, and neither the questions nor the answers are altogether satisfactory. What has been stated above, however, represents the substance of the matter. From the judgment of the Full Court the executor appeals to this Court.

The power of the commissioner to make the second assessment depends on s. 128 of the Act. That section, so far as material, is in the following terms :—" (1) Notwithstanding any assessment or payment of death duty under this Act or of duty on the estate of any deceased person under any of the Acts hereby repealed, or any statement of the Commissioner that no duty is payable . . . it shall be lawful for the Commissioner at any time thereafter, if it is discovered that any duty payable has not been fully assessed and paid, to make a further assessment of the duty so unpaid, and to recover the same in the same manner as if no previous assessment or payment had been made. The Commissioner may at his discretion at any time cause to be made all such alterations in or additions to any assessment as he thinks necessary in order to insure its completeness and accuracy and notify the administrator accordingly. Where any alteration in an assessment has the effect of reducing the death duty any duty overpaid shall be refunded by the Commissioner, but no refund shall be made unless application for the

(1) (1953) 53 S.R. (N.S.W.) 257 ; 70 W.N. 69.

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same is made by the administrator within three years from the date of the overpayment of duty. (2) Except in the case of fraud an administrator shall not be personally liable for any death duty under any such further assessment by reason of having administered or distributed the estate of the deceased without retaining sufficient assets to satisfy the duty . . . (4) Any such further assessment shall be liable to appeal under section one hundred and twenty-four".

It will be convenient, before proceeding, to refer to s. 124, which is mentioned in sub-s. (4) of s. 128. Section 124 provides that, if an administrator is dissatisfied with the commissioner's assessment of duty, he may, within thirty days after notice of the assessment, and on complying with certain conditions, require the commissioner to state a case for the opinion of the Supreme Court. The commissioner must then state and sign a case, setting forth the facts before him on the making of the assessment, the assessment made by him, and the question to be decided. On the hearing of the case the court is to determine the question submitted and to assess the duty chargeable. The court is at liberty to draw inferences from facts and documents stated in the case. If it appears to the court that the facts necessary to enable the questions submitted to be determined are not sufficiently set forth *or are in dispute*, it may direct all such inquiries to be made or issues to be tried as it deems necessary, and power is given to amend the case stated.

It is obvious that the validity or correctness of an assessment of stamp duty is just as likely to depend on a question of fact as on a question of law. The value of an asset, for instance, is very likely to come into controversy, and a question of value is, of course, a question which can only be decided on evidence. In such cases the procedure by way of " case stated " is prima facie an inappropriate and defective procedure, because the normal function of a case stated is to place ultimate (as distinct from evidentiary) facts before a court with a view to obtaining a decision on a question of law which those ultimate facts raise : see *Mack* v. *Commissioner of Stamp Duties (N.S.W.)* (1) and cf. *Press* v. *Mathers* (2). Section 124, however, of the New South Wales Act now in force, is very different from the section of the Act of 1898 which was in question in *Mack's Case* (3). It expressly envisages cases where facts are in dispute. And not only is the Supreme Court expressly empowered to draw inferences from the facts stated (see *McCaughey* v. *Commissioner of Stamp Duties* (4)), but it may direct inquiries to be made

(1) (1920) 28 C.L.R. 373, at p. 381.
(2) (1927) V.L.R. 326, at p. 330.
(3) (1920) 28 C.L.R. 373.
(4) (1945) 46 S.R. (N.S.W.) 192, at p. 208 ; 62 W.N. 230.

or issues to be tried, and an issue may even be directed to be tried with a jury. It seems clear, therefore, that the requirement of a "case stated" is to be regarded merely as a convenient method of bringing before the Supreme Court any question of fact or of law which may be in dispute between the commissioner and a taxpayer, and that the powers given to the Supreme Court make the procedure equally apt for the determination of questions of fact and of questions of law and (if these indeed belong to a separate category, as to which see *Westgarth's Case* (1)) of questions of value for duty. The position in Victoria under what is now s. 33 of the *Stamps Act* 1946 was held to be different in *Cuming Campbell Investments Pty. Ltd.* v. *Collector of Imposts* (2), but the Victorian section does not contain provisions which now appear in the corresponding New South Wales section. In the *Cuming Campbell Case* (2), a taxpayer sought vainly to challenge a statement in the case stated by the collector that certain property was of a particular value. No ground appears for saying that the decision is incorrect, but it does not follow that the taxpayer was without a remedy. Apart from certain suggestions made by *O'Bryan* J. (3) it is to be pointed out that it is not impossible to "state a case" in such a way as to raise a question of value to be decided on evidence, and it may well be that a Victorian taxpayer who wishes to challenge a valuation of property may by mandamus compel the collector to state a case in such a way as to raise the question of value. In any case, whatever may have been the position under the New South Wales Act of 1898, and whatever may be the position in Victoria, the position under s. 128 of the existing New South Wales Act seems quite clear.

In the matter now before us, the case stated by the commissioner asked in substance two questions. The first was whether the making of the further assessment was authorized by s. 128. The second was: "What was the value of the shares of the testator in the company at the date of his death?" If one looked at those questions without reference to the statute, one would be disposed to think that the second question did not arise unless and until the first question were answered in the affirmative. But the reality of the position is, in my opinion, that the answer to the first question depends on the answer to the second. For s. 128 gives power to make a further assessment "if it is discovered that any duty payable has not been fully assessed and paid". The commissioner claims to have discovered that the shares were, at the date of death, of a greater

(1) (1950) 81 C.L.R. 396.
(2) (1940) V.L.R. 153.
(3) (1940) V.L.R., at pp. 165-166.

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value than that on which the original assessment was based. If the shares were in fact of a greater value, then duty was not fully assessed by the original assessment, the commissioner's claim to have discovered this fact is substantiated, and the further assessment is shown to have been authorized to the extent of the additional value found. If, on the other hand, the shares were not of a greater value, then duty *was* fully assessed by the original assessment, the commissioner's claim to have made a discovery fails, and the further assessment is shown *not* to have been authorized. (I should suppose, though the point was not argued, that the burden of proof is on the commissioner). This is, in my opinion, the whole substance and essence of the matter, and the judgment of the majority of the Supreme Court, although I think that the actual order made needs modification, gives effect to this view.

The majority of the Supreme Court was, in my opinion, right in rejecting an argument for the taxpayer which has been put forward and rejected in a number of English cases, in a Scottish case, and in an earlier case before the Supreme Court of New South Wales. The argument appears to rest fundamentally on something in the connotation of the word " discovered " which was said to necessitate a limitation of the scope of s. 128 to certain classes of case which did not include the present case. It was said that the section would cover a case where a mistake had been made in the original assessment through a miscalculation or where an asset had been omitted, but would not cover a case where an asset had been erroneously undervalued.

It does not appear to me that this *is* simply a case in which an asset was originally undervalued. The case stated indicates to my mind that the commissioner did not value the shares at all when he made the original assessment, but valued something which was not really an asset in the estate. In the later assessment he seems to me to have treated the shares as an asset for the first time, his valuation of the shares having the effect of increasing the dutiable value of the estate. The case may, therefore, be regarded rather as one in which an asset was erroneously omitted from the assessment than as one in which an asset was erroneously undervalued. Making the taxpayer's assumption, however, I am unable to see any real foundation for his argument. As *Jordan* C.J. (with the concurrence of *Davidson* J. and *Street* J.) pointed out in *In the Estate of Murdoch* (1), duty which has been once assessed may not have been " fully assessed " for any one or more of a variety of reasons.

(1) (1947) 48 S.R. (N.S.W.), at p. 218; 65 W.N. 60, at p. 63.

It may be that an error in calculation has been made in the commissioner's office. It may be that the deceased has been erroneously regarded as domiciled outside New South Wales. It may be that an asset was fraudulently or innocently omitted from the inventory submitted by the executor or administrator. It may be that an erroneous construction of a will has led to the charging of duty at too low a rate on part of the estate. It may be that a particular asset has been undervalued. It may be that a debt, which has been allowed as a deduction, was not in fact owed by the testator at his death. No distinction can be drawn between any one of these cases and any other. In each of them it will be equally true to say that duty has not been fully assessed and paid. The words are quite plain. The duty referred to is the duty which the Act requires to be paid. If the original assessment is in any respect incorrect, and the result is that less duty has been assessed than the Act requires, then, according to the clear meaning of the words used, duty has not been fully assessed. (The words "and paid" add nothing of substance.) And, if the commissioner finds out that the original assessment was incorrect, with the result that less duty has been paid than the Act requires, then, according to the clear meaning of the words used, he discovers that duty has not been fully assessed. The taxpayer can always, by requiring the commissioner to state a case, challenge the "discovery", and this is so whether what the commissioner claims to have discovered is that the duty was miscalculated, that a will was wrongly construed, that an asset was omitted or undervalued, that an erroneous view of a question of general law was entertained, or that for any other reason there has been an under-assessment. And in every case alike the question whether a discovery has been made must depend on the truth or correctness of what the commissioner claims to have discovered. I assume, of course, throughout, that he is acting in good faith.

There are a number of decided cases which, with one doubtful exception, support the view which I have expressed. The English and Scottish cases arose under s. 52 of the *Taxes Management Act* 1880 (43 & 44 Vict., c. 19) and s. 125 of the *Income Tax Act* 1918 (8 & 9 Geo. V., c. 40). Each of these sections provides that "if the surveyor discovers", *inter alia*, that a taxpayer has been "undercharged in the first assessments", then a further or additional assessment may be made. In *R.* v. *Kensington Income Tax Commissioners* (1) *Bray* J. said that the word "discovers" meant "comes to the conclusion from the examination he makes

(1) (1913) 3 K.B. 870, at p. 889.

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and from any information he may choose to receive ". *Avory* J. (1) said that it meant " has reason to believe ". *Lush* J. said that it meant " finds " or " satisfies himself " (2). In that case the application was for a writ of prohibition, and the effect of the decision was that the remedy of the taxpayer (if any) was by way of appeal against the additional assessment. The decision of the Divisional Court was reversed by the Court of Appeal (3), but on grounds which have no bearing on the present case, *Pickford* L.J. saying (4) that he saw no reason to dissent from the views expressed below on s. 52 of the *Taxes Management Act*. In *R.* v. *Bloomsbury Income Tax Commissioners* (5), where again the application was for prohibition, the view of *Bray*, *Avory* and *Lush* JJ. was, in effect, accepted, and it was held that the word " discovers " in s. 52 of the *Taxes Management Act* meant " honestly comes to the conclusion upon the information in his possession ".

The case of *Anderton & Halstead Ltd.* v. *Birrell* (6), came before *Rowlatt* J. on a case stated by the commissioners for Blackburn —in effect, on appeal from their decision. The " discovery ", which was supposed to have been made, was that in a past assessment too large an allowance had been made for a bad or doubtful debt. There is no reason to doubt the correctness of the actual decision of *Rowlatt* J., who held that there was no reason for thinking that an excessive allowance had been made, but his judgment may legitimately be used to support the argument of the appellant in the present case. In particular he said :—" The word ' discover ' does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion " (7). But the passage in which this sentence occurs was considered by *Finlay* J. in *Williams* v. *Trustees of W. W. Grundy* (8). In that case the question of liability to tax depended on the construction of a will, and the revenue authorities, after discussion with the trustees, had accepted a construction which involved exemption from taxation. Later the successor of the official who had accepted that construction formed the opinion (which was held to be correct) that that construction was erroneous and that tax was payable, and he made an assessment accordingly. *Finlay* J. held that a " discovery " had been made within the meaning of s. 125 of the *Income Tax Act* 1918. He expressed agreement with what had been said in *R.* v. *Kensington Income Tax*

(1) (1913) 3 K.B., at p. 897.
(2) (1913) 3 K.B., at p. 898.
(3) (1914) 3 K.B. 429.
(4) (1914) 3 K.B., at p. 445.
(5) (1915) 3 K.B. 768.
(6) (1932) 1 K.B. 271.
(7) (1932) 1 K.B., at p. 281.
(8) (1934) 1 K.B. 524.

Commissioners (1), and then proceeded to consider the judgment of *Rowlatt* J. in *Anderton & Halstead Ltd.* v. *Birrell* (2). He expressed the opinion that *Rowlatt* J. was not to be regarded as speaking " otherwise than with reference to the particular case which was before him " (3). He added : " Clearly one would think there could be no doubt as to the correctness of the result of that case, but I do not find it possible to apply the words I have quoted to every case in the sense of reading them as meaning that an inspector can never make a discovery if the making of that discovery involves only a change of opinion. I cannot think that that was what was meant and it does not seem to me that that view is consistent with the authorities to which I have already referred " (4). In *British Sugar Manufacturers Ltd.* v. *Harris* (5), *Finlay* J. had taken the same view, where the mistake said to have been " discovered " was a mistake of law. The Court of Appeal did not find it necessary to consider the question, but *Greene* M.R. said : " Of course, it will not be taken . . . that it means that we are necessarily in agreement with the decision of the Court below " (6). However, the point came again before the Court of Appeal in *Commercial Structures Ltd.* v. *Briggs* (7). In the meantime it had been considered in Scotland in *Inland Revenue Commissioners* v. *Mackinlay's Trustees* (8), in which again a mistake of law was said to have been " discovered ", and in which Lord *Normand* (with the concurrence of the other members of the Court) had expressed an opinion which was in accord with that expressed in *R.* v. *Kensington Income Tax Commissioners* (9), and *Williams* v. *Trustees of W. W. Grundy* (10). Lord *Normand* said :—" The question is whether a discovery that a mistake, essentially a mistake of law, has been made is a discovery within the meaning of s. 125. I think the word ' discover ' in itself, according to the ordinary use of language, may be taken simply to mean ' find out ' " (11). In *Commercial Structures Ltd.* v. *Briggs* (7), which again was a case of a mistake of law, a statutory provision having been apparently overlooked, the Court of Appeal accepted what had been said by Lord *Normand*, and, by clear implication, what had been said by *Finlay* J. as to the observations of *Rowlatt* J. in *Anderton & Halstead Ltd.* v. *Birrell* (12). What is essentially the same view has been taken by the Full Court of New South Wales in *In the Estate*

(1) (1913) 3 K.B. 870.
(2) (1932) 1 K.B. 271.
(3) (1934) 1 K.B., at p. 533.
(4) (1934) 1 K.B., at pp. 533, 534.
(5) (1938) 2 K.B. 220.
(6) (1938) 1 K.B., at p. 238.
(7) (1948) 2 All E.R. 1041.
(8) (1938) S.C. 765.
(9) (1913) 3 K.B. 870.
(10) (1934) 1 K.B. 524.
(11) (1938) S.C., at p. 771.
(12) (1932) 1 K.B., at pp. 281, 282.

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of *Murdoch* (1), and by *Vaisey* J. in *Earl Beatty* v. *Inland Revenue Commissioners* (2). In *Murdoch's Case* (1), which arose under the same statutory provision as the present case, the "discovery" was, as in the present case, that certain shares had been undervalued in an original assessment. It was held that the case was within the section. *Jordan* C.J. said :—"It has been contended that all that this enables the Commissioner to do is to make a further assessment, if he finds that a mistake has been made in the act of assessing which has prevented the full duty from being assessed and paid . . . I see no reason for giving this restricted meaning to the section" (3). I entirely agree, with respect, with *Jordan* C.J. The impossibility of translating the word "discover" in any rational way which will exclude such a case as the present is demonstrated by *Cohen* L.J. (as he then was) in *Commercial Structures Ltd.* v. *Briggs* (4). If it is appropriate to a case where what is made to appear is an error of law, how can it be said that it is inappropriate to a case where what is made to appear is an error in valuation ?

Mr. *Windeyer* sought to distinguish the cases cited above—apart from *In the Estate of Murdoch* (1), which cannot be distinguished and which we should have to overrule if we gave effect to the appellant's contention. For this purpose he laid the emphasis rather on the words "fully assessed" than on the word "discovered", though he did, of course, call in aid a connotation which he attributed to the latter word. He said that Pt. IV of the Act prescribed two processes, which were entirely different and distinct—valuation and assessment. And he said that s. 128 dealt only with cases where something had gone wrong in the process of assessment itself, and not with cases where something had gone wrong with the antecedent process of valuation. It is true, of course, that the two processes are distinct, and that the one must precede the other. But the words "not been fully assessed" clearly, in my opinion, cover all cases where there has been an underassessment, from whatever cause proceeding. That is what the words mean, and indeed it seems to me that to treat them as covering all cases of underassessment except cases where the underassessment is due to undervaluation would be to attribute a capricious intention to the legislature. Such an intention would seem all the more capricious when it is remembered that there are

(1) (1947) 48 S.R. (N.S.W.) 213 ; 65 W.N. 60.
(2) (1953) 2 All E.R. 758.
(3) (1947) 48 S.R. (N.S.W.), at p. 218 ; 65 W.N., at pp. 63, 64.
(4) (1948) 2 All E.R., at p. 1049.

likely to be cases where the undervaluation has been procured by fraud, as by the production of a deliberately falsified balance sheet. Section 136 provides a penal sanction for such cases, but it does not itself protect the revenue. Section 128 (apart from a provision as to the liability of the administrator) does not distinguish between cases of fraud and cases of innocence, and, if the argument of the taxpayer in this case is sound, the commissioner could not reassess in a case in which an undervaluation had been obtained by fraud.

It was said that s. 128, as I have construed it, operates harshly to the taxpayer, in that it enables the reopening of any valuation of any asset at any time. The section imposes no time limit, as do the English sections to which reference has been made. It makes no distinction, as does s. 20 of the *Estate Duty Assessment Act* 1914-1950 (Cth.), between cases of fraud and other cases. It might well have been thought that such provisions as those of s. 20 of the Commonwealth Act would afford ample protection to the revenue and be more reasonable from the taxpayer's point of view. But I can find no relevant ambiguity in s. 128, and, in the absence of ambiguity, the *argumentum ab inconvenienti* has no weight.

The commissioner, for some reason which is not very clear to me, did not rely on the second sentence of sub-s. (1) of s. 128. In the view which I take, of course, it was not necessary for him to rely on it.

The appeal, in my opinion, fails in substance. The answers actually given by the order of the Supreme Court to the questions asked, however, do not appear to me to be entirely correct, because question 1 cannot, strictly speaking, be answered until question 3 has been answered. The most satisfactory course might be to reframe the questions, but I think the simplest course for this Court will be to discharge the order of the Supreme Court and in lieu thereof simply order that an issue be tried before a judge of the Supreme Court without a jury as to the value at the date of the death of the deceased of the shares held by the deceased in " The Astor " Pty. Ltd., and that the costs of the proceedings up to and including the order of the Supreme Court be reserved. The appellant should pay the costs of the appeal to this Court.

KITTO J. The facts of this case are simple, and I shall not restate them in detail. The death duty payable on the estate of the deceased under the provisions of the *Stamp Duties Act* 1920-1949 (N.S.W.) was assessed and paid on the footing that assets of the estate consisting of 3,600 shares in a company were of the value of £4,750 only. Thereafter the commissioner learned that the shares

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had been sold for £12,100, and from this he concluded that the duty payable had not been fully assessed and paid. He went further: he asserted that the sale price of the shares was indisputable evidence of their value. If he meant their value as at the death of the deceased—and that is the only meaning he could have intended the executors to place upon the word—the assertion was preposterous. It could not have reflected the commissioner's actual opinion. But there is no denying that he considered that the shares had been undervalued to some extent and that as a consequence too little duty had been exacted. He proceeded to make a further assessment of the duty payable, relying for his power to do so upon s. 128 (1) of the Act.

The question which this appeal brings before us is whether in the circumstances of the case there was a fulfilment of the condition precedent which s. 128 (1) expresses in the words " if it is discovered that any duty payable has not been fully assessed and paid ".

I do not find it possible to assent to the argument addressed to us by counsel for the executor as to the meaning of the words " fully assessed and paid ". It depended upon finding in the Act a sharp and consistently observed distinction between the process of valuation and the process of assessment. The reference in s. 128 (1) to a full assessment of duty, it was said, must be understood as a reference to the due completion of a process of assessment which does not commence until valuation is complete. So the conclusion was reached that if every asset which is included or deemed to be included in an estate is brought into account at some value in the assessment of the duty, the fact, if it be a fact, that one of the assets has been undervalued does not justify a conclusion that the assessment has not been fully made. In my opinion there is insufficient foundation in the Act for the proposition that valuation and assessment are processes between which so clear a line is drawn that duty must be regarded as fully assessed within the meaning of s. 128 (1) notwithstanding that it has been undercharged in consequence of the undervaluation of an asset. A careful study of the Act has not enabled me to see any reason to doubt that the words " any duty payable has not been fully assessed " are satisfied whenever the amount of duty assessed is less than it should have been. Even confining attention to the process of assessment subsequent to valuation, it seems to me perfectly natural to say that the duty has not been fully assessed whenever an assessment has resulted in too low a figure, and to my mind it makes no difference whether the trouble has arisen from taking an incorrect commencing

figure in consequence of a mistake in valuation or from making an error at a subsequent stage of the process.

The more substantial argument advanced in support of the appeal depended upon implications derived from the words "if it is discovered". They must mean, of course, if it is discovered by the commissioner. Moreover they postulate that an underassessment has in truth occurred. There are really two conditions precedent laid down, namely that the duty payable has not been fully assessed and paid, and that that fact is discovered by the commissioner. Several alternative views as to the construction of s. 128 (1) appear to be suggested. The first is that the sub-section is inapplicable to the case of an underassessment of duty in consequence of the undervaluation of an asset, because value is essentially a matter of opinion and when the commissioner takes the view that an asset has been undervalued he should be described, not as having "discovered" that the duty was not fully assessed, but merely as having undergone a change of mind as to value and consequently as to the sufficiency of the assessment. A second form of the argument appears to be that an underassessment, whether it is said to have arisen from an undervaluation or from any other form of error, is not "discovered" until it is ascertained with some degree of certainty; a mere suspicion or doubt is insufficient; and in this case the alleged undervaluation was far from being established when the commissioner assumed to make his amended assessment. A third view suggested is that even if an underassessment due to an undervaluation can be "discovered", it cannot be so described unless an omission to allow for a circumstance existing at the time is found to have occurred in the original making of the assessment; and no such omission is alleged by the commissioner in this case.

It seems to me that a broad answer may be made to the executor's argument in each of its forms. The value of the shares, though it is a matter of opinion, is capable of being conclusively determined as between the commissioner and the estate. Suppose that hereafter the value is determined, not necessarily at the full amount of £12,100, but at a figure in excess of £4,750, and that one is then asked to say when it was that the commissioner first discovered that the duty had not been fully assessed. I should think the answer ought to be, when the news of the sale at a figure much higher than the valuation upon which he had acted in making his assessment brought him to that conclusion, and not when the court's decision proved his conclusion correct. His conclusion was, of course, an opinion, but I do not see why that prevents the

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formation of it from being called a discovery, if it is an opinion which the court will hold to be well-founded. Nor do I see why it matters that it is an opinion based upon the ascertainment of some newly happened event which the commissioner thinks, rightly or wrongly, sheds new light upon the matter, and not based upon the ascertainment of a circumstance existing at the date of the original assessment but omitted from consideration when that assessment was being made. There is nothing in the expression "if it is discovered", as used in the context of s. 128 (1), which carries to my mind an overtone of greater significance than would arise from such an expression as "if it is perceived" or "if it is detected" —and the words "perceive" and "detect" are both to be found in dictionary definitions of "discover". Of course, if it turns out not to be true that the shares were undervalued the commissioner was wrong in thinking that he had discovered an underassessment; but if it is true no reason suggests itself to me why one should hesitate to say that he was right in so thinking.

There are many cases other than those of undervaluation of assets in which one could hardly deny that an underassessment has been discovered when a new conclusion, subsequently verified, is formed, though it is a conclusion upon a matter which is essentially one of opinion. Take the case in which an asset has been omitted in the original amount of duty. To conclude that the deceased owned the asset at his death, or made a gift of it within three years before his death (to take two examples) is only to form an opinion, based upon a belief concerning such matters as the authenticity and the interpretation of documents of title, and the credibility of persons who vouch for events, all of which are matters necessarily resting in opinion. So it is with a conclusion that a supposed debt should have been deducted as having been actually due and owing at the death; or that the deceased (or a creditor, see s. 108) was domiciled in or out of New South Wales at the death; or that beneficiaries are so related to the deceased that the concessional rates provided for by s. 112 apply. In all such cases, when the commissioner takes a view which, if it is correct, means that the full amount of duty has not been assessed or paid, either he has discovered an underassessment or he erroneously supposes that he has; and, since the only way of resolving a contest as to the correctness of the view is to obtain a decision of the court on an appeal against a further assessment, it must surely follow that the formation of the commissioner's view is not to be denied the description of a discovery simply because some people or most people may not recognize it as such except by hindsight after an

appeal has been decided. I cannot think that the meaning of the sub-section is that the commissioner may increase an unduly low assessment if, but only if, its inadequacy is attributable to something which is beyond the possibility of difference of opinion at the time when he makes the further assessment, or, *a fortiori*, was so at the time when he made the original assessment. To adopt either of these meanings would be to give the words of condition a force which they do not necessarily have and which it is extremely difficult to suppose that the legislature would be in the least likely to have intended them to have.

It may be objected that what I have said is open to the criticism that it does not differentiate between an objective fact, the existence of which is not a matter of opinion though the discovery of it may be, and a matter of personal judgment which cannot have objective existence. The point of the criticism may be made by saying that one may speak of a discovery that a particular portrait is by Holbein, because, though a belief in the fact cannot be more than an opinion, if the portrait is in truth by Holbein that is a matter of immutable historical fact and is therefore a possible subject of discovery ; but it is not permissible to say that one has discovered that a portrait by Holbein is preferable to a portrait by Rubens, because a judgment between the two is not the discovery of a fact but is simply an application of one's own scale of artistic values. So, here, it may be said, whether or not the deceased's shares were worth more than £4,750 is a question of individual opinion only, and is not a question as to a fact which admits of discovery. In my opinion the answer which ought to be given to this is that the value of property for the purposes of death duty depends upon the application of an objective standard—the scale of money values which in fact was current in the relevant community at the relevant time—and the task of valuation is the task of deciding how the property in question stood at that time in relation to that standard. It is naturally frought with uncertainty, but the end result at which it aims is the ascertainment of an actual historical situation. The case is really not different from the examples already given of cases which depend upon opinion because the truth or falsity of the fact said to be discovered is practically unverifiable. The discovery in such a case must necessarily consist of the formation of a judgment which ultimately will be accepted as correct.

The construction I have placed upon the material words in s. 128 (1) appears to me to be in line with the current of authority in England. I have nothing to add to the discussion of the cases which

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is contained in the judgment of the Chief Justice and my brother *Fullagar*.

The question whether it is true in the present case that duty was not fully assessed by the commissioner's original assessment awaits decision in these proceedings, and upon the answer to that question the whole case appears to me to depend. I am accordingly of opinion that the appeal fails in substance and that the order proposed by my brother *Fullagar* should be made.

TAYLOR J. This is an appeal by leave from an order of the Full Court of the Supreme Court of New South Wales which contained the answers of the court to questions raised by a case stated under the provisions of s. 124 of the *Stamp Duties Act* 1920-1949.

The appellant is the executor of the will of Frank David Muller who died on 13th May 1949. At that date the deceased was the holder of 3,600 fully paid shares of £1 each in the capital of " The Astor " Pty. Ltd., a company which at all material times was the owner of a building situated in Sydney and which contained a large number of residential flats. The shares in the company were held by the members of the company in fixed groups or parcels and the holding of a group of shares entitled the holder to possession of a particular flat in the building. The number of shares varied from one type of group to another, and, in all, there were eight different types of groups. That group held by the deceased entitled him to possession of flat No. 3 on the sixth floor of the building and his membership of the company obliged him to become the lessee of that flat at such rent as the board of directors might determine. Prior to his death the deceased entered into possession of the flat and assumed the obligations of a lessee under the company's usual form of lease.

After his death the usual " affidavit of value in the prescribed form verifying an account containing the prescribed particulars with respect to the dutiable estate of the deceased " was duly lodged. Included in this account was a reference to the deceased's 3,600 shares in the company and the account purported to place a value on them of £3,600. The respondent commissioner, however, was not satisfied with this valuation and called upon the appellant to file a valuation by the Valuer-General of the " deceased's interest in ' The Astor ' ". Such a valuation was obtained about 22nd August 1949 and thereupon lodged with the commissioner. This valuation certified that " at the 13th May 1949, the Improved Capital Value of property being Flat No. 3 on the Sixth Floor of

the building known as 'The Astor' . . . was Four Thousand seven hundred and fifty pounds (£4,750)". Apparently this method of arriving at the value of the deceased's shares, and the resultant figure, was acceptable to the commissioner and, accordingly, he adopted that figure in valuing or assessing the deceased's estate for death duty purposes. Death duty, as so assessed, was duly paid on 12th October 1949. On 4th November 1949, however, the deceased's shares were sold by public auction for the sum of £12,100 and shortly thereafter the commissioner sought to reassess the death duty payable by the estate by increasing the value of the estate for that purpose by the difference between that sum and the amount of £4,750.

Before the Supreme Court and upon this appeal it was claimed that such a reassessment was justifiable under the provision of s. 128 (1) of the *Stamp Duties Act* which is in the following terms :

"Notwithstanding any assessment or payment of death duty under this Act or of duty on the estate of any deceased person under any of the Acts hereby repealed, or any statement of the Commissioner that no duty is payable, in respect of the estate of any person whether dying before or after the passing of this Act, it shall be lawful for the Commissioner at any time thereafter, if it is discovered that any duty payable has not been fully assessed and paid, to make a further assessment of the duty so unpaid, and to recover the same in the same manner as if no previous assessment or payment had been made.

The Commissioner may at his discretion at any time cause to be made all such alterations in or additions to any assessment as he thinks necessary in order to insure its completeness and accuracy and notify the administrator accordingly.

Where any alteration in an assessment has the effect of reducing the death duty any duty overpaid shall be refunded by the Commissioner, but no refund shall be made unless application for the same is made by the administrator within three years from the date of the over-payment of duty".

In terms of this section it is contended that the commissioner discovered that duty had not been fully assessed and paid and, therefore, that he was entitled to make a further assessment of the duty so unpaid. There was, of course, on this appeal considerable discussion as to the meaning, in its context, of the word "discovered" and we were referred to a number of English decisions in which its meaning was considered, and also to the observations of *Jordan* C.J. in *In the Estate of Murdoch* (1). A number of earlier

(1) (1947) 48 S.R. (N.S.W.) 213 ; 65 W.N. 60.

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English cases was discussed in *Commercial Structures Ltd.* v. *Briggs* (1). In the first instance *Atkinson* J. had held that the word " discovers " in s. 125 (1) of the *Income Tax Act* 1918 (Imp.), was appropriate to embrace a mere change of opinion on the part of the taxing authorities, the case stated being " silent about what led them to do so ". In the course of his reasons *Atkinson* J. said :

" It is plain on the admissions that the appellants were undercharged in the first assessments. The only point is : Can the surveyor be said to have *discovered* this mistake ? Sometimes a surveyor learns some new fact which he did not know at the time of the first assessment. Sometimes a decision of the courts tells him that some view he has taken was wrong. There are instances of that kind where it could fairly be said that the surveyor had ' discovered ' something which he did not know before. But here the appellants' case is that there was a mere change of view. It is not, they say, suggested that there was any additional information which came to the surveyor, indeed it is found as a fact that full information as to the terms of the letting was reported to the inspector of taxes by the company's agents on Apr. 2, 1942. In other words, it is argued, the surveyor had everything before him then, and there is no suggestion of anything happening or anything being discovered which would indicate to him that he had made a mistake. I think, therefore, that this case has to be argued simply on the basis that the surveyor changed his mind without anything new coming to his attention or without his learning anything from other surveyors or those above him. On that it is said that the surveyor cannot say he has discovered anything " (2).

Thereafter his Lordship adverted to a number of previous decisions in which the problem of applying this word to different circumstances had arisen and then said : " Although I see the greatest force in *Rowlatt* J.'s view (in *Anderton and Halstead Ltd.* v. *Birrell* (3)) that a mere change of opinion may well not be a ' discovery ', I do not think it is necessary for me to express my own view, because I feel that, on the cases as they are, it is my duty to follow the decision of *Finlay* J. (in *Williams* v. *Grundy Trustees* (4) and in *British Sugar Manufacturers* v. *Harris* (5)), and of the Court of Session (in *Inland Revenue Commissioners* v. *Mackinlay's Trustees* ' (6)) " (7).

The decision of *Atkinson* J. was upheld by the Court of Appeal. Considerable stress was there laid on the observations of Lord

(1) (1947) 2 All E.R. 659 ; (1948) 2 All E.R. 1041.
(2) (1947) 2 All E.R., at p. 661.
(3) (1932) 1 K.B. 271.
(4) (1934) 1 K.B. 524.
(5) (1938) 2 K.B. 220.
(6) (1938) S.C. 765.
(7) (1947) 2 All E.R., at p. 665.

Normand in the last-mentioned case, *Tucker* L.J. citing the following passages: " Accordingly, it remains to consider whether in this case the commissioners are entitled to say that such a discovery has been made. In considering that question we have, of course, to assume *pro veritate* that the first assessment to sur-tax laid upon the trustees was mistaken, and that the additional assessment now laid on will be a correct assessment. The question therefore is whether a discovery that a mistake, essentially a mistake of law, has been made is a discovery within the meaning of s. 125. I think the word ' discover ' in itself, according to the ordinary use of language, may be taken simply to mean ' find out '. What has to be found or found out is that any properties or profits chargeable to tax have been omitted from the first assessment. Now, it is clear that what has happened here is within the literal meaning of these words. If the additional assessment is a correct assessment, then it is plain that certain profits chargeable to tax have been omitted. I go on to the next paragraph of s. 125 (1), which is an alternative to the first paragraph. There the discovery which must be made is stated in alternative forms of which the first is that a person chargeable has not delivered any statement or has not delivered a full and proper statement. There is an express finding in the case that a full and proper statement has been made. But then we have to go on and give effect to the alternative which follows: ' Or has not been assessed to tax, or has been undercharged '. I think that, since these words must apply where the person chargeable has delivered a full and proper statement, they are apt to cover the case of a discovery of a mistake in the assessment caused by a mistake in the construction of the partnership deed or, it may be, caused by a mistake in the law applicable to such a deed, even where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based. I do not think it is stretching the word ' discovers ' to hold that it covers the finding out that an error in law has been committed in the first assessment, when it is desired to correct that by an additional assessment . . . . That again seems to me rather to point to the discovery that a deduction claimed upon a true representation of the facts has been allowed, although it is contrary to those provisions in the Act which authorise deductions to be made. That is to say that again that third paragraph appears to be intended to apply to the discovery of an error in law just as much as to an error in fact. Of course, if there were any reason in the context for restricting the word ' discover ' to the discovery of an error in fact, that restriction would necessarily receive effect,

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but, in my opinion, the context points, not to any such restriction, but on the contrary to so wide a meaning that the word ought to be held to cover just the kind of discovery which was made here, when the Special Commissioners found out that, by reason of a misapprehension of the legal position, certain of the profits chargeable to tax had been omitted from the first assessment" (1).

Thereafter his Lordship said: "It is true that that opinion is not binding on this court, and that the Court of Appeal in 1938, in the *British Sugar Manufacturers' Case* (2), had not got the benefit of reading that opinion of Lord *Normand*. All I can say, with respect, is that what is there stated by Lord *Normand* appears to me completely to fit the present case, and I can do no more than say that the way he puts it convinces me that the argument of the Crown is the one which should be accepted by us. I can do no more than adopt the language of Lord *Normand*, and will not attempt to say the same thing in poorer language" (3).

It will be observed that Lord *Normand's* analysis of s. 125 of the *Income Tax Act* (Imp.) provided a cogent basis for his conclusion that the word "discovers" should be given a wide meaning and it was that analysis which led the Court of Appeal to say that the surveyors might, even without the discovery of any new fact or circumstance, discover that a person chargeable had been undercharged in the first assessment. But the same considerations do not present themselves upon a perusal of s. 128 of the *Stamp Duties Act*. Nevertheless in *Murdoch's Case* (4) *Jordan* C.J. said: "As regards s. 128 (1), this provides that notwithstanding any assessment or payment of duty, etc., if it is discovered that any duty payable has not been fully assessed and paid, the Commissioner may at any time make a further assessment of the duty so unpaid, and recover the same as if no previous assessment or payment had been made. It has been contended that all that this enables the Commissioner to do is to make a further assessment, if he finds that a mistake has been made in the act of assessing which has prevented the full duty from being assessed and paid, for example, attributing to property given by the will to a privileged beneficiary a value lower than its true value. I see no reason for giving this restricted meaning to the section. The duty payable on the final balance of the estate may not have been fully assessed for any one or more of a number of reasons, for example, because an asset has been erroneously omitted or erroneously under-valued,

(1) (1948) 2 All E.R., at pp. 1047, 1048.
(2) (1938) 2 K.B. 220.
(3) (1948) 2 All E.R., at p. 1048.
(4) (1947) 48 S.R. (N.S.W.) 213; 65 W.N. 60.

or because a debt which was allowed as a deduction was not due and owing. Any of these is just as capable of preventing the duty payable on the final balance from being fully assessed as a mistake in the making of the assessment. Further, since the rate of duty is graduated and increases with the amount of the final balance of the estate, and is also variable according to the relationship to the deceased of the beneficiaries, the only practicable way of making a further assessment of the duty unpaid is by making a complete re-computation and re-assessment on the correct basis, allowing credit for any duty already paid " (1).

The observation that duty payable on the final balance of an estate " may not have been fully assessed . . . because an asset has been . . . erroneously under-valued ", was relied upon by the commissioner as authority for the proposition that a mere change of opinion as to the value of property concerning which an original assessment has issued may form the basis for a discovery that duty has not been fully assessed. But his Honour's remarks were intended primarily to deal with the argument advanced in that case—as it was on this appeal—that *valuation* of the assets of a deceased person does not constitute part of the process of *assessment* of death duty on the final balance of the estate. This argument was rejected by his Honour and, notwithstanding the fact that some sections of the Act provide some ground for suggesting a distinction between *valuation* and *assessment*, it should also be rejected on this appeal. The language of s. 128 (1) is, in my opinion, obviously appropriate to cover the case of omitted assets and, this being so, is equally appropriate to cover the case where disclosed assets have been undervalued. But it does not necessarily follow that every case where assets have been undervalued falls within the scope of s. 128 (1). Whether any particular case will or will not must depend upon the significance of the word " discovered ". No doubt in cases where material facts are withheld from or otherwise not known to the commissioner at the time of the first valuation a " discovery " of these facts will justify a reassessment. So, no doubt, would a " discovery " that the original valuation had proceeded from some error of fact. But is there any real justification for saying that duty has not been fully assessed or that that fact has been discovered when, duty having been assessed in accordance with the Act and with a full knowledge and appreciation of the relevant facts and law, the commissioner merely changes an opinion formerly held by him ? Whether it is said that the word " discover " means " find out " or some other such expression, it is difficult

(1) (1947) 48 S.R. (N.S.W.), at p. 218 ; 65 W.N., at pp. 63, 64.

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to see that the section could have any operation in such a case. The assessment of death duties, it should be observed, depends, in the ultimate result, not upon the commissioner's opinion of the value of a deceased person's assets but upon their real value and in cases of dispute the latter falls to be determined judicially. From this it seems to me to follow that a mere change of opinion on the commissioner's part following upon an original assessment cannot, of itself, constitute a discovery that death duty has not been fully assessed; it is the *fact* that death duty has not been fully assessed which constitutes the basis for the operation of s. 128 (1). This may be shown by the discovery of omitted assets or the discovery of some error of fact or, possibly, of law in the valuation of disclosed assets. But in the circumstances of this case it is unnecessary to attempt the impossible task of specifying the multifarious circumstances which may be said to constitute a discovery that death duty has not been fully assessed.

In the present case no "relevant" discovery of any kind was made. Upon knowledge of the sale of the shares in question reaching the commissioner he caused a requisition to be sent to the appellant in the following terms:

"Ref. Schedule No. 1—3600 shares 'Astor Pty. Ltd.' These shares were included in the dutiable estate at a total value of £4,750 but it is understood that such shares were recently sold for £12,100.

Please disclose as an additional asset".

In answer the executor wrote saying that he did not intend to treat any part of the purchase money as an additional asset for the reason that the amount of £4,750 on which duty was assessed was the value of the asset at the date of the death of the deceased. The commissioner thereupon, on 9th December 1949, wrote to the appellant saying that: "It is considered the sale price of the shares in 'The Astor' Pty. Ltd. is indisputable evidence of their value and it is proposed to assess duty on that basis". The letter added that "Authority to reassess is given by Section 128 of the *Stamp Duties Act* 1920-1940". Nothing could be clearer than that the assertion that the sale price of the shares, sold, as they were, on 4th November 1949, was indisputable evidence of their value at the date of the death of the deceased, is erroneous. The case stated shows that the prices paid for groups of these shares were subject to violent fluctuations at or about the relevant times, some of the reasons for which were adverted to in the reasons of the members of the Supreme Court. *Street* C.J. pointed out that the shares in question were of a very unusual nature and that

evidence of other sales which took place in September 1949 showed the difficulty of fixing a value in any particular instance. Thereafter he said : " I think that the time which elapsed between the death of the testator and the sale of these shares was sufficiently proximate to permit the use of the amount realized on sale in order to test whether the original valuation was correct, and for the purpose of ascertaining what was the true value of the shares six months before, but I do not think that the matter can be determined by looking merely to those two figures and to nothing more. It may be that circumstances intervened which completely changed the market value of this asset, and reference was made in Court to the lifting of the land sales control provisions which took place in September, 1949. Whether or not those regulations controlled the price of these shares as a matter of law, or whether they operated previous to their repeal to depress the price, would need investigation. It may be that the explanation for this apparent increase of 250 per cent on the estimated value could be due to the fact that these shares were sold in an open market, whereas at the date of the death of the testator they could only be sold in a restricted market, with limits as to the price which could be paid and accepted. If that were so, then a sale in November would not be an accurate guide to the value of the same shares in the previous May, and the Commissioner would not be entitled then to increase the assessment by the amount which he had in fact added to the original. But there are not sufficient materials before this Court to enable an answer to be given to this question, and the Court would therefore need to direct an enquiry under s. 124 (6) before it could discharge the duty cast upon it by s. 124 (4) of assessing the duty properly payable " (1).

Herron J., in commenting upon the evidentiary value of the subsequent sale, said :

" The extent of the influence which the lifting of the controls in September had upon this sale is a matter which I am unable to decide on this appeal. I think it was open to the Commissioner to decide, as he did decide, that the sale indicated that the first assessment was not a full assessment, but to what extent this is so is a matter of evidence. It seems to me that the facts necessary to enable the questions submitted to be determined are not sufficiently set forth in the case and as they are in dispute an enquiry, in my opinion, should be directed in order to ascertain to what extent, if any, the purchase of the shares for the sum of £12,100 was affected

(1) (1953) 53 S.R. (N.S.W.), at p. 264 ; 70 W.N. 69.

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by facts and circumstances which operated subsequently to the death of the testator " (1).

Street C.J. and *Herron* J. constituted the majority of the Full Court which answered favourably to the commissioner the questions ultimately raised by the case. These questions and answers were as follows :

" 1. On the facts and circumstances set out in the stated case was the further assessment dated 20th January 1950 for £1,497 7s. 8d. lawfully made and was the said sum lawfully recoverable by the Commissioner ? A. Yes, but not as to the amount.

2. Had the Commissioner power in the facts and circumstances set out in the stated case to issue any assessment other than the assessment dated the 6th October 1949 or to recover any further duty beyond that assessed in the said assessment ? A. Yes.

3. If the answer to question 2 is in the affirmative what is the amount of this further duty ? A. The amount of additional duty to stand over for enquiry if the parties fail to agree.

4. How should the costs of the case be borne and paid ? A. The costs of the appeal to stand over until the conclusion of the enquiry".

Now it would be quite consistent with the views expressed by these members of the court if as a result of the inquiry contemplated by the answer to Question 3 that question should be answered " nil ". This would be the answer if the value of the shares at the date of the death of the deceased should be found not to have exceeded £4,750 and the possibility of such a finding is distinctly conceded by the reasoning of both *Street* C.J. and *Herron* J. How then can it be said that the commissioner has discovered that duty has not been fully assessed and paid ? It may perhaps be said that the commissioner has become aware of a fact which has caused him to doubt whether the shares were fully valued for the purpose of the first assessment but mere suspicion does not call the provisions of s. 128 (1) into play. Nor, even if the formation of an opinion that the original valuation was erroneous constitutes a " discovery " that duty has not been fully assessed, can the formation of such an opinion be sufficient unless it is formed on proper grounds. The documents in the case show that the commissioner's view was that the sale price was indisputable evidence of the value of the shares. His letter of 9th December 1949, expresses this view and I assume in his favour that he meant—though he omitted to say so—that the sale price represented the value of the shares *at the date of the death of the deceased.* The adjustment sheet which accompanied the new assessment showed that the basis of the

(1) (1953) 53 S.R. (N.S.W.), at p. 284 ; 70 W.N. 69.

reassessment was the addition to the final balance of the estate, as previously ascertained, of £7,350 representing " 3,600 shares 'The Astor' Pty. Ltd.—included at £4,750 but sold for £12,100 ". On the facts as disclosed by the stated case, including the sale of the shares for the latter sum, it is quite impossible to say whether the shares were undervalued originally or not and the reasons of the Full Court admit the possibility that an enquiry may establish that they were not. On the other hand it may establish that they were. But in the meantime can the commissioner be said to have discovered anything? He has placed before the Supreme Court evidence which is quite incapable of establishing that the shares were undervalued in the first instance, or, that he has discovered that they were, and in those circumstances it should be held that he was not entitled to reopen the assessment. Nor is it to the point to say that an inquiry *may establish* that they were undervalued for no future judicial inquiry as to the value of the shares as at the date of the death of the deceased can be relevant to or disclose what the commissioner discovered before the second assessment. The plain fact is that the commissioner has not, on any view of the word, " discovered " that any death duty payable has not been fully assessed and paid.

Although s. 128 (1) provides that in cases where that sub-section operates the further assessment may be made " in the same manner as if no previous assessment or payment had been made " it should be borne in mind that there is a marked distinction between an original assessment and a further assessment made under this section. The commissioner's power to make an original assessment is not open to question, but the preliminary question which arises in the case of a further assessment is whether the necessary condition precedent has been fulfilled. In the case of a further assessment this is a question which arises immediately where a case is stated under s. 124 which requires that the case stated shall set forth the facts before the commissioner " on making the assessment ". The vital question of fact in this case is whether the commissioner has discovered that any duty payable has not been fully assessed and paid. The case does not establish this and as I have already said the result of a future judicial inquiry as to the value of the shares in question will not and cannot establish that the commissioner discovered anything before making his further assessment. On this view of the matter it is, strictly, unnecessary to consider whether if, at any time after an original assessment made with full knowledge and appreciation of all the relevant facts, the commissioner merely changes his opinion as to the value of one or

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some of the assets in a deceased's estate, he can be said to have discovered that duty has not been fully paid. That question, however, already appears to have been answered by the observations of the majority of this Court in *Commissioner of Stamp Duties (N.S.W.)* v. *Pearse* (1) where, speaking of the assessment of duty upon a testamentary gift constituted by a direction that a solicitor-trustee should be entitled to charge professional costs for work done, it was said :

" Lastly it was submitted that if the amount of profit costs exceeded the original estimate from time to time the Commissioner could re-assess the estate for further duty from time to time under s. 128 of the Act. But the bounty is an interest which is capable of valuation and must, subject to s. 125A of the Act, be actuarily valued as at the date of death. Once this has been done and duty paid on that value, the duty has been fully assessed and paid and there is no room for the operation of s. 128 ".

It is, I think, difficult, if not impossible, to say that once death duty has been assessed with a full knowledge and appreciation of *all* the relevant facts and without any mistake of law that it can thereafter be said that the duty was not fully assessed. Accordingly a very cogent argument should be required to induce the Court to depart from the view expressed in the passage last quoted.

For the reasons given I am of opinion that the appeal should be allowed.

Order of the Supreme Court discharged and in lieu thereof order that an issue be tried before a Judge of the Supreme Court without a jury as to the value at the date of death of the deceased of the shares held by the deceased in " The Astor " Pty. Ltd. and that the costs of the proceedings up to and including the order of the Supreme Court be reserved to be dealt with by the Supreme Court. Subject to the foregoing order appeal to this Court dismissed with costs.

Solicitors for the appellant, *Rawlinson, Hamilton & Francis.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.

(1) (1951) 84 C.L.R. 490, at p. 523.