ambit of the new dispute. It is unreal, however, to view the arbitral power to vary entirely in a legal context. The Chief Justice in the present case accorded to the Arbitration Court both a powerful and a responsible position in the economy generally. He said:

> it would be absurd to suppose that it (an arbitral tribunal) was to proceed blindly in its work of industrial arbitration and ignore the industrial, social and economic consequences of what it was invited to do or of what, subject to the power of varation, it had actually done.[29]

That the High Court had its mind directed to these extra-arbitral consequences is apparent when, for instance, it spoke of the continued effectiveness of awards as being the responsibility of the Arbitration Court and hence necessitating a power in the court to control and supervise its awards. The liberal interpretation of the variation power in this case stresses the practically unchecked autonomy of the Commonwealth Arbitration Court in national industries and provides it with the means of ensuring a greater measure of harmony in those industries.

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DEATH DUTY

FRANCIS v. *COMMISSIONER OF STAMP DUTIES* (*N.S.W.*)

The importance of this decision[1] for the practitioner lies in the very wide power which the High Court's interpretation of s. 128 (1) of the Stamp Duties Act, 1920-1952 (N.S.W.), gives to the Commissioner of Stamp Duties to make further assessments of death duty, at any time after the original assessment is made.

Section 128 provides by sub-section (1):

> Notwithstanding any assessment or payment of death duty under this Act . . . or any statement of the Commissioner that no duty is payable, in respect of an estate . . . , 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.

It is also provided that any such further assessment shall be liable to appeal under s. 124 of the Stamp Duties Act, which entitles an administrator to have the Commissioner state a case to the Supreme Court on any disputed assessment. The Supreme Court may direct an inquiry to be made on issues tried if it considers that the questions submitted are not sufficiently set forth in the stated case.

The facts behind the appeal in this case were as follows.

The Commissioner had on 6th October, 1949, made an assessment of death duty payable by the estate of F. D. Muller, who died on 13th May, 1949. For the purpose of the assessment, the Commissioner had accepted the Valuer-General's valuation, as at the date of death, of £4,750 for a parcel of 3,600 £1 shares in Astor Pty. Ltd., the owner of a block of flats known as "The Astor". On 12th October, 1949, Muller's executor paid the death duty assessed and on 4th November, 1949, the shares were sold at public auction for £12,000. The Commissioner on 20th January, 1950, claiming to be authorised under s. 128, 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 realised by the sale of the shares.

The deceased's executor disputed the power of the Commissioner to make

[29] (1953) 89 C.L.R. 461, 474.
[1] (1954) 91 C.L.R. 368.

a further assessment and also the correctness of the further assessment and he required the Commissioner to state a case for the opinion of the Supreme Court under s. 124. The Supreme Court,[2] by a majority, held that the Commissioner was not precluded from making a further assessment of death duty under s. 128 of the Act on the basis that the shares in question were, at the date of Muller's death, of value greater than £4,750, and that the questions as to whether on the facts and circumstances additional duty should in fact be assessed and, if so, in what amount, should be stood over for inquiry if the parties failed to agree.

On appeal the majority of the High Court, composed of Dixon, C.J., Fullagar and Kitto, JJ. (Williams and Taylor, JJ. dissenting), took the view that the clause in s. 128 "if it is discovered that duty has not been fully assessed . . . " did not impose a condition precedent to the issue of a further assessment. This interpretation of the section appears to leave the Commissioner with a power to issue further assessments of death duty, as wide as his power to issue original assessments. Assuming that he acts *bona fide* in the discharge of his official duties, no court can interfere with the exercise of his jurisdiction in this respect, and the only ground on which an administrator may appeal is as to the amount of such a further assessment. The majority of the High Court rejected all arguments put forward by Counsel, which sought to impose any restriction on the Commissioner's power to issue further assessments.

First, it had been argued that the words "not fully assessed" referred only to cases where there had been some arithmetical miscalculation or the omission of some asset in the original assessment and could not include cases where assets were included in the first assessment, but had been under-valued. This argument was rejected on the authority of *In the Estate of Murdoch*,[3] Fullagar, J.[4] commenting that the words " 'not been fully assessed' clearly cover all cases where there has been an under-assessment from whatever cause proceeding . . . " To treat (the words) "as covering all cases of under-assessment except where the under-assessment is due to under-valuation would be to attribute a capricious intention to the legislature".

Secondly, the majority refused to restrict the meaning of "discovered" in any way. It was argued that an under-assessment is not "discovered" until it is ascertained with some degree of certainty and that a mere unsubstantial change of opinion by the Commissioner is an insufficient ground for re-assessment. The appellant's argument was that objective facts only could form the basis of a discovery and not matters of subjective opinion. In support of this argument, Counsel relied on a statement made by Rowlatt, J., in *Anderson and Halstead Ltd.* v. *Birrell*[4a] that "the word 'discovery' does not include a mere change of opinion on the same facts and figures . . .being a question of opinion". It was also contended that in similar previous authorities, there had been "discovered" some mistake in the original assessments, through a miscalculation, or the omission of an asset. However, Dixon, C.J. considered later English authorities on this point[5] and decided[6] that "the tendency disclosed by the cases is against restricting the word 'discovered' ".[7] Kitto, J. also[8] "cannot think that the

[2] (1953) 53 S.R. (N.S.W.) 257.
[3] (1947) 48 S.R. (N.S.W.) 213, 218.
[4] (1954) 91 C.L.R. 368, 406.
[4a] (1932) 1 K.B. 271.
[5] *Williams* v. *Grundy's Trustees* (1934) 1 K.B. 524; *Inland Revenue Commissioners* v. *McKenlay's Trustees* (1938) Sess. Cas. 768; *Mulligan Syndicate* v. *Devitt* (1945) 26 Tax. Cas. 359; *Commercial Structures Ltd.* v. *Briggs* (1948) 2 All E.R. 1049; *British Sugar Manufacturers Ltd.* v. *Harris* (1938) 2 K.B. 238; *Beatty* v. *Inland Revenue Commissioners* (1953) 2 All E.R. 578.
[6] (1954) 91 C.L.R. 368, 387.
[7] It may be noted that, in this case, what was in issue was the relevance of a new fact, i.e. one which had clearly arisen after the first assessment, namely, the price obtained on sale of the shares. However, all the cases referred to by the majority (see *infra* n. 17) dealt with the rather different problem of whether legal liabilities which *existed* but had been overlooked, by reason of the misinterpretation or misapplication of the law, *at the time of the first assessment*, could be regarded as "discovered" in the same sense as "facts" which had not been disclosed at the time of the first assessment.
[8] (1954) 91 C.L.R. 368, 411.

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".

Thirdly, it is implicit in the judgments of the majority that the exercise of the Commissioner's power to re-assess is not conditioned on the discovery of fresh evidence, whether or not that evidence was in existence at the time of the first assessment or arose thereafter. The relevance to the true value of the shares of the sale made after the first assessment was left to be determined by the judge who was to assess that value under s. 124.

However, certain *dicta* of all the judges in the majority would appear to support the relevancy, and even the sufficiency of such evidence. Thus Dixon, C.J.[9] refuted the contention that the Commissioner's discovery must be of something *existing at the date of the original assessment* on the ground that it "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." Similarly, Kitto, J.[10] considered 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 recognise it as such except by hindsight after an appeal has been decided. However, neither Dixon, C.J., nor Kitto, J. give any authority in support of their views.

Williams and Taylor, JJ., who dissented from the majority, considered that if an administrator appeals against a further assessment, "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".[11] This opinion was in accordance with the view expressed in *McCaughey* v. *The Commissioner of Stamp Duties*[12] but not followed here by the majority.[13]

Both the dissenting judges, in deciding whether the Commissioner had discharged the onus of proof on him, found it necessary to consider the sufficiency and relevancy of the evidence before the Commissioner. They considered, *inter alia*, whether the Commissioner could make a reassessment of the value of assets solely on the ground of some fact arising after the first assessment. Williams, J.,[14] considered that "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". Consequently, he decided that the appeal should be allowed.

Taylor, J.,[15] also decided that

> the Commissioner had placed before the Supreme Court evidence which is quite incapable of establishing that the shares were under-valued 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 re-open the assessment. Nor is it to the point to say that an enquiry *may establish* that they were under-valued for no future judicial enquiry 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.

He concluded[16] that, since "the Commissioner has not, on any view of the word,

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[9] *Id.* at 383.
[10] *Id.* at 410.
[11] *Id. per* Williams, J., at 390.
[12] (1946) 46 S.R. (N.S.W.) 192.
[13] Thus Dixon, C.J. at 382 referred to *McCaughey's Case* as follows: "If the view expressed in (it) . . . 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". Fullagar, J. remarked parenthetically (at 402) that he supposed that the burden is on the Commissioner to establish that the shares were of greater value than in the first assessment.
[14] (1954) 91 C.L.R. 368, 395.
[15] *Id.* at 421.
[16] *Ibid.*

'discovered' that any death duty payable has not been fully assessed and paid", he had not fulfilled the condition precedent to a further assessment.[17]

A further distinction between the majority and minority is seen in the dissenting judges' approval of the distinction between a "discovery" and a "change of opinion".

Williams, J., after reviewing the facts of which the Commissioner was aware at the time of the original assessment, concluded that[18] "the Commissioner is really seeking to revise his previous opinion and correct a supposed error of judgment". Similarly, Taylor, J.,[19] considered 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 contributes the basis for the operation of 1. 126 (1).

A study of the dissenting judgments suggests that Williams and Taylor, JJ., considered that s. 128 (1) imposed on the appellate court a duty to decide whether the Commissioner had exercised his jurisdiction validly. Thus it was necessary for them to decide whether the Commissioner had fulfilled the condition precedent which their interpretation of s. 128 (1) placed on him, viz., whether a discovery had been made by the Commissioner.

Although the dissenting judges do not expressly say so, it is apparent that they placed a more limited interpretation on the jurisdiction given to the Commissioner than do the majority and it seems that they do not consider that the Commissioner had jurisdiction to determine whether his jurisdiction exists.

As a matter of statutory interpretation, it has been the tendency of English courts to interpret narrowly statutes which delegate judicial power to non-judicial officers. In particular, the courts have generally refused to concede an administrative officer the power to determine whether he has jurisdiction to exercise the statutory powers given to him.

It is suggested that it is this very question which is at the root of the appeal in this case. Did the Commissioner have the right to exercise his power of reassessment without supervision so that when he issued a further assessment the Court to whom an administrator appealed had no power to decide whether such reassessment was validly made, but could only say whether the actual amount of the further assessment was mathematically correct.

The majority in the High Court considered that if the Commissioner come to the conclusion on any ground which he considers sufficient, that the original assessment was inadequate, he may issue a further assessment, assuming that he is acting *bona fide*.

Since the majority refused to impose any condition limiting the Commissioner's power, as was done by the minority, their interpretation of s. 128 (1) is, it is submitted, that the Commissioner has the right to determine whether he has jurisdiction as well as the right to exercise that jurisdiction.

The distinction between the majority and the minority approach to s. 128 (1) is well drawn by Lord Esher in *R.* v. *Special Income Tax Commissioners*.[20]

It is submitted that this interpretation of s. 128 (1) by the High Court has resulted in a decision which, from the viewpoint of administrators and practi-

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[17] Both Williams and Taylor, JJ. were influenced by *dicta* in the High Court judgment on *Commissioner of Stamp Duties* v. *Pearse* ((1951) 84 C.L.R. 490, 523):

> 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.

[18] (1954) 91 C.L.R. 368, 393.

[19] *Id.* at 418.

[20] (1921) Q.B.D. 313, 317 ff. *Cf. Bunbury* v. *Fuller* (1853) 9 Exch. 111; *R.* v. *Ludlow, Ex p. Barnsley Corpn.* (1947) K.B. 634; *Williamson* v. *Barking Corpn.* (1948) 1 K.B. 721.

tioners interested in large estates, contains possibilities of endless expense and litigation, in two directons.

The first lies in the refusal of the High Court to place the onus on the Commissioner to justify his issue of a further assessment.

This means that the only way in which further assessments may be reviewed is by the rather circuitous and expensive procedure of having all the facts which could possibly be relevant to the amount of the assessment put before the Supreme Court for its determination, after lengthy and costly inquiries.

The second lies in the refusal of the Court to lay down any rule as to the kind of evidence on which the Commissioner may base his decision that the first assessment was too low.

The possible scope left to the Commissioner was encompassed by Williams, J.,[21] who considered that, on the argument accepted by the majority, "the Commissioner has a complete power of revision from time to time of the value he had placed on every asset in the 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 stop 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".

As no time limit is placed on the exercise of his powers by the Commissioner under this section, it may be possible for him to claim, even after an estate has been completely distributed, that some later but comparable sale enabled him to impose further duty, thus necessitating a further adjustment between beneficiaries.

Such an interpretation is in sharp contrast with the general policy of the law to put an end to litigation: *interest reipublicae ut sit finis litium*. Apart from considerations of convenience, then, this decision of the High Court would appear to be out of accord with British and Australian legal traditions.

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CHARITABLE TRUSTS

INLAND REVENUE COMMISSIONERS v. *BADDELEY AND OTHERS*

The recent[1] *dictum* of Viscount Simonds on the law of charities in *Inland Revenue Commissioners* v. *Baddeley and Others*[2] will cause considerable concern to those lawyers who prefer versatile if rather confused principles of law to definite but rigid ones.

For many years the courts have accepted the classification of trusts laid down by Lord Macnaghten in *Pemsel's Case*.[3] The relevant passage reads as follows:

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any one of the preceding heads.

This well-turned and easy to understand sentence has occasioned a great deal of litigation the results of which have been deplored by more than one writer.[4] However, despite the multiplicity of decisions on the law of charities the case

[21] *Id.* at 395.

[1] 17th February, 1955.

[2] (1955) 2 W.L.R. 552.

[3] (1891) A.C. 531.

[4] See N. Bentwich, "The Wilderness of Legal Charity" (1933) 49 *L.Q.R.* 520; J. Stone, *The Province and Function of Law* (1946) 446.