Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Master in Equity of the Supreme Court of Victoria v. *Eliza Laura Pearson and others, from the Supreme Court of the Colony of Victoria; delivered 9th December* 1896.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The Respondents are the executrix and executors of the will of the Hon. William Pearson who died on the 10th of August 1893. Probate of his will having been granted by the Supreme Court on the 20th of September 1893 to the Respondents, they filed a statement of the estate in Victoria in the office of the Master in Equity, pursuant to section 97 of the Administration and Probate Act 1890. Upon this statement two questions arose between the Master in Equity and the Respondents, and the former in accordance with section 98 of the same Act stated a special case for the opinion of the Supreme Court. The first question related to five deposit receipts of the City of Melbourne Bank which but for a difference in the dates and the times when due were all in the following form "Deposit receipt "in the City of Melbourne Bank Limited for "900*l.* dated 16th June 1893 due 16th June "1898 at 4½ per cent. payable half yearly valued "at 15*s.* in the £ . . . 675*l.*" These items in the

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statement are denoted by the letters (*a*) to (*e*) and the question with respect to them is :—

"As regards items (*a*) to (*e*) inclusive the "market value of the deposit receipts being less "than the principal sums appearing on their "face as payable, should the said principal sums "be treated for the purposes of the said state- "ment as the value of the deposit receipts? Or "may the executors treat the price which the "said deposit receipts would fetch in the market "as being the value for the purposes of the said "statement?"

The Supreme Court in answer to this question said that the principal sums should not be treated for the purposes of the statement as the value of the deposit receipts, and that the executors might treat the price which they would fetch in the market as being the value.

The second question related to shares in the Colonial Bank of Australasia, the City of Melbourne Bank, the Commercial Bank of Australia, and the Bank of Victoria, denoted in the statement by the letters (*f*) (*g*) (*h*) (*i*) and there said to be of "No market value." The testator at the time of his death held these shares as ordinary shares, in pursuance of certain schemes of arrangement, and there then remained capital not paid up in respect of the shares in the Colonial Bank of Australasia 6*l*. 10*s*. per share, of the shares in the City of Melbourne Bank 2*l*. 10*s*. per share, of the shares of the Commercial Bank of Australia 5*l*. 15*s*. per share and of the shares in the Bank of Victoria 7*l*. 10*s*. per share. There was then a liability in respect of the shares in the Colonial Bank of Australasia to the amount of 2*l*. per share in respect of the scheme of arrangement relating to that bank, payable at the times mentioned in the scheme. There were also a similar liability in respect of the shares in the City of Melbourne Bank to the

amount of 1*l.* 5*s.* per share; a similar liability in respect of the shares in the Commercial Bank of Australia to the amount of 5*l.* 15*s.* per share; and a similar liability in respect of the shares in the Bank of Victoria to the amount of 2*l.* 10*s.* per share. In the case it is stated that at the time of the testator's death the shares in these banks had not any market value and at that time it would be necessary for the executors to pay money in order to induce persons to take the shares off their hands.

The second question is as follows: "As "regards items (*f*) (*g*) (*h*) and (*i*) are the "sums which are payable in respect of the "bank shares at the times mentioned in "the several schemes of reconstruction debts "due by the deceased within the meaning of "Section 97 of the Administration and Probate "Act, 1890? And if not is any deduction to be "made in the said statement in respect of the "said sums respectively? and if so how is the "deduction to be assessed?"

The answer of the Supreme Court to this question is that as regards (*f*) (*g*) (*h*) and (*i*) the sums which are so payable are debts due by the deceased within the meaning of Section 97.

The present appeal is from an order of the Full Court of the Supreme Court of the 12th November 1894 (entered up on the 16th February 1895) which contains these answers.

Their Lordships agree with the learned Judges of the Supreme Court in their answer to the first question. In their Lordships' opinion the price which the deposit receipts would fetch in the market was to be treated as their value for the purposes of the statement. This indeed was not disputed on the argument of the appeal.

The second question involves three separate queries, the first of which admits, in their Lordships' opinion, of only one answer, which

has been given by the Court below. It is clear that all sums which at the time of the deceased's demise, were payable by him at future dates, under these reconstruction schemes, are debts of the deceased within the meaning of Section 97 of the Act of 1890. Their Lordships may add that, in their opinion the amount of these debts is the amount actually payable, under deduction (it may be) of any interest which might accrue upon the money required for their payment, in the hands of the executors, before payment is actually made. Section 97 plainly directs that such amount is to be deducted from the sum total of the assets, in ascertaining the balance of assets liable to probate duty.

The second and third queries are alternative, and are not submitted at all, except in the event of the first query being answered in the negative. In that event, which has not occurred, the second query raises the question whether, if these future debts are not debts within the meaning of Section 97, any deduction ought to be made in the statement, in respect of them; and the third query, which is really a part of the second, enquires, "if so, how is the deduction to be "assessed?"

Counsel for the Appellant endeavoured to raise under these second and third queries, the question whether, in valuing the shares referred to in the first question, the obligation of the executors to pay the calls made under the reconstruction schemes, ought to be taken into account. They argued that if the executors, in realizing the shares, undertook to communicate to the purchasers the benefit of the obligation incumbent upon them, they would enhance the value of the shares beyond *nil* which would be their market value, if the purchaser had to pay the calls. And they further argued, with much

plausibility, that the executors could not, in fairness, treat these calls as debts which they must pay, and on the other hand estimate the value of the shares as if they were under no such liability.

The difficulty which their Lordships have felt in dealing with that argument arises from the fact that it does not appear to be raised by the special case, which is so framed as to exclude the question. Apart from the shape of the second question, which only enables their Lordships to deal with the second and third queries in the event of the first query being negatived, these queries do not necessarily relate to the valuation of assets; and the case contains no statement of fact which indicates that any such question had arisen, and was meant to be submitted. The Court below has, in consequence, declined to dispose of the question, which they thought, so far as their Lordships see, rightly, was not before them.

Their Lordships, in these circumstances, are of opinion that there is no course open to them, except to humbly advise Her Majesty to affirm the order of the 12th November 1894 and to dismiss the appeal. The Appellant will pay the Respondents' costs of the Appeal.