SOUTH AUSTRALIA

TWENTY-SECOND REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

RELATING TO ADMINISTRATION BONDS AND TO THE RIGHTS OF RETAINER AND PREFERENCE OF PERSONAL REPRESENTATIVES OF DECEASED PERSONS

1972

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

B. R. COX, Q.C., S.-G.

R. G. MATHESON.

K. P. LYNCH.

JOHN KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

TWENTY-SECOND REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO ADMINISTRATION BONDS AND TO THE RIGHTS OF RETAINER AND PREFERENCE OF PERSONAL REPRESENTATIVES OF DECEASED PERSONS

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

In consequence of your referring to us for consideration the Thirty-First Report of the English Law Commission on this subject we have the honour to report to you as follows.

In South Australia Section 31 of the Administration and Probate Act, 1919-1960, is as follows:—

> "31. Every person to whom administration is granted shall give bond to the Public Trustee, with one or more surety or sureties, conditioned for—
>
> (*a*) duly getting in and administering the estate of the deceased;
>
> (*b*) the delivery by such person at the office of the Public Trustee, within six months from the date of the administration or such extended time as the Public Trustee upon application by the administrator shall allow, of a statement and account, verified by his declaration of all the estate of the deceased, and of his administration thereof;
>
> (*c*) the delivery by such person to the Public Trustee of an account of his administration of such estate, verified by his declaration, whenever ordered by the Court so to do; and
>
> (*d*) the performance by him of all acts and things by this Act required to be performed by administrators."

This Section extends not only to persons dying intestate but also to persons to whom Letters of Administration are granted with the Will annexed. The Section is further extended to the resealing of grants of Letters of Administration made by Courts of competent jurisdiction outside South Australia by the terms of Section 18 of the Act.

The general provision as to the amount of the penalty of the bond is Section 32 of the Act which reads as follows:—

> "32 Such bond shall be in a penalty of the amount under which the estate of the deceased is sworn; but the Court may reduce the amount of such penalty in any case, and may also order that more bonds than one be given, so as to limit the liability of any surety to such amount as to the Court seems reasonable."

Our Section 32 differs from the English practice which normally requires the bond to be in a penalty of double the amount of the estate. The penalty of the bond in this State is the gross amount of the estate of the deceased.

There is no power under the ecclesiastical law to dispense with a bond altogether: see *In re The King of Siam* 29 *T.L.R.* 40. By Section 91 of our Act Public Trustee is exempted from the necessity of entering into such a bond and indeed it would be impossible for him to do so as the bond is given in favour of Public Trustee and by Section 33 of the Act a Judge of the Supreme Court may upon being satisfied by affidavit that it is beneficial or expedient so to do order that administration issue without any administration bond being given. On enquiry from the Deputy Registrar it appears that such orders are rarely made.

The forms of bond are contained in rules made by the Judges of the Supreme Court under Section 122 of the Act. The rules relating to administration bonds are contained in Rules 22-26 which read as follows:—

"22. The administration bond shall be attested by the Registrar or by a Commissioner or other person now or hereafter to be authorized to administer oaths. Every person attesting a bond shall express the time when and the place where he attests the same. Each separate sheet of any bond shall be signed by each of the obligors and by the person attesting the bond. In no case shall the bond be attested by the solicitor or agent of the party who executes it.

23. (1) Except in a case to which paragraph (2) of this rule applies or where a Judge otherwise orders there shall be two sureties to every administration bond: Provided that only one surety shall be required if the administrator is the husband or wife of the deceased or his or her representative, or the bond is given by a guarantee company approved by the Registrar.

(2) No surety shall be required on an application for a grant of administration if—

(*a*) the gross value of the estate does not exceed $200,

or

(*b*) the application is limited to the prosecution or defence of an action.

(3) The bond shall be in a penalty of the amount under which the estate of the deceased is sworn and the alleged value of such estate shall be verified by affidavit if required by the Registrar.

24. In all cases of limited or special administration, the administration bond shall be approved by the Registrar.

25. The Registrar shall so far as possible satisfy himself that every surety to an administration bond is a responsible person.

26. When any person takes administration in default of the appearance of persons cited, but not personally served with a citation, and when any person takes administration for the use and benefit of a lunatic or person of unsound mind, the sureties to the administration shall justify. This Rule shall also apply to every other grant of administration made to any person for the use and benefit of any other person, except a grant for the use and benefit of minors or infants, falling under Rule 19 hereof."

The forms of the bond are forms 6, 9, 22 and 23 under those Rules.

In Australia as in England the administration bond achieves four purposes:

(*a*) It repeats, albeit in vague and general terms, the duties of the administrator.

(*b*) It affords an aggrieved creditor or beneficiary an additional remedy against a defaulting administrator.

(*c*) Where there are sureties it affords an aggrieved creditor or beneficiary a remedy against the sureties in the event of default by the administrator.

(*d*) In the case of a grant to a creditor as such it is used as a device to exclude the administrator's rights of retainer and preference.

As far as the statutory duties of an administrator are concerned, these are at present covered by Sections 31 and 56 of the Act. We think that these duties should remain but that they should not be conditioned upon the filing of an administration bond except in certain specific circumstances to which we shall advert later. We agree with the English Report that the general duties of personal representatives are as follows:—

(*a*) Well and truly to administer the estate according to law.

(*b*) To make or cause to be made a true and perfect inventory when lawfully called on to do so and to exhibit the same to the Probate Registry when required by law to do so.

(*c*) To make a true and just account of the administration, whenever required by law to do so.

(*d*) If the grant is to be obtained on the basis that the deceased died intestate, to deliver up the grant if a will is discovered and proof of it is sought.

With the exception of (*c*) which is referred to in Section 31 of the Act, the other duties are covered either by the oath which can be enforced by the appropriate proceedings in the Court or by general rules of common law and equity.

The second purpose referred to in the English report, that of affording an aggrieved creditor or beneficiary an additional remedy against a defaulting administrator, seems to us, as it does to the English commentators, to be quite unnecessary because the remedy is always pursued against the sureties and in any case as the English report points out the present practice deprives the Court of the power which it otherwise has under Section 56 of the Trustee Act 1936 to relieve from liability a trustee who has acted honestly and reasonably and ought fairly to be excused for a breach of trust or omitting to obtain the directions of the Court in that matter.

The third of the four purposes is the real value of the bond at the moment, that is to afford a remedy against the sureties where the administrator has made default or defalcation.

It is frequently difficult to get private persons to act as sureties for obvious reasons and in many cases an insurance company acts as surety. The premiums on the policy are by no means insignificant and the policy has to be renewed and a fresh premium paid for each year or part of a year that the administration continues.

In our experience there are very few cases in which it is necessary to enforce the bond against the sureties and in any case of course executors have never been subject to such a liability.

We agree with the English recommendation 14, that the Act should be amended to give the Court a discretionary power to require a bond and sureties in proper cases but that a bond should not be required as of course and that the bond should not as at present be required to be assigned in order to be enforceable (see Section 57 of the Act) but should automatically enure for the benefit of every person interested in the estate either as creditors, claimants under the Testator's Family Maintenance Act or beneficiaries.

We agree with the English recommendation that sureties should be required only in the following cases:—

(*a*) a creditor as such,

(*b*) a person taking a grant to the use and benefit of a minor or of someone incapable of managing his own affairs,

(c) a person taking a grant who appears to the Registrar to be resident outside South Australia or where the Registrar considers that there are special circumstances making it desirable to require sureties.

There should be an exemption as in the present English Non-Contentious Probate Rules when the person taking the grant is a practitioner of this Court holding a current practising certificate.

We think it is a matter for government policy whether a surety or sureties ought to be required in very large estates—say those over $100,000.

To compensate for these alterations and to protect beneficiaries from defaulting administrators we recommend the following amendments to the present law—

(1) That Public Trustee be given *locus standi* to move for attachment of an administrator defaulting in any of his undertakings contained in the oath of administrator:

(2) That where administrators are in default in their duties towards Public Trustee either under Section 56 or Section 65 of the Administration and Probate Act 1919-1970 that Public Trustee have powers equivalent to those in Sections 223 and 225 of the Income Tax Assessment Act inserted in the Administration and Probate Act. Those powers would provide in substance that any person who failed to comply with Sections 56 or 65 or either of them without lawful justification after notice from Public Trustee commits an offence and that the Court hearing the prosecution may in addition to any penalty imposed order the administrator to do within a time to be specified in the order the act which he has failed neglected or refused to do and that the Crown Law Office act for Public Trustee in the carrying out of this part of his duties.

In any event Public Trustee, the Executor Companies and the Crown or any servant of the Crown or instrumentality of the Crown acting in his or their official capacity should be exempt from any requirements to give a bond or to find sureties.

The only remaining matter is the question of the personal representatives' rights of retainer and preference which at present apply equally to executors and administrators except as a matter of practice where a grant of Letters of Administration is obtained by a creditor in his capacity as creditor. See *Davies v. Parry* 1899 1 *Ch.* 602. We see no reason why today an executor or administrator should be able to prefer the debt of one creditor to that of any other creditor of the same class. There appears to be no such right if the estate of a deceased person is or is to be administered in bankruptcy: see Sections 248, 108 and 109 of the Bankruptcy Act 1966 and Section 29 of our Trustee Act 1936-1968 would not protect an executor in such a case—and we see no reason why it should apply in cases where the estate is solvent. As far as retainer is concerned a sole executor cannot sue himself and judgment debts still enjoy in this State a preference in payment. It is therefore possible for other creditors of the same class to gain preference over the executor or administrator by bringing action and obtaining judgment. Accordingly in our opinion the right of retainer should not be abolished as has been done in England by the Administration of Estates Act 1971 Section 10 but should continue to exist in this State.

We recommend that the existing right of preference be abolished both as to executors and as to administrators.

We acknowledge with pleasure the assistance we have received in comments from the Honourable the Chief Justice (Dr. Bray) and Miss Jean Gilmore and the careful scrutiny which the Public Trustee (Mr. Croft) has given to our proposals in relation to administration bonds. We have also been much assisted with statistics and other information furnished by successive Masters of the Court—the now Mr. Justice Forster and Mr. Boehm and the Deputy Registrar of Probates Mr. Ferrett.

We have the honour to be

HOWARD ZELLING

R. G. MATHESON

JOHN KEELER

KEVIN LYNCH

B. R. COX

The Law Reform Committee of South Australia