THE LAW COMMISSION

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ADMINISTRATION BONDS, PERSONAL REPRESENTATIVES' RIGHTS OF RETAINER AND PREFERENCE AND RELATED MATTERS

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To the Right Honourable the Lord Hailsham of Saint Marylebone, Lord High Chancellor of Great Britain.

INTRODUCTION

1. It has long been a feature of English law that on the grant of letters of administration of a deceased's estate, the administrator is required to give a bond (normally with sureties) for the due administration of the estate. This requirement, which adds to the expense of administration, does not apply when a grant of probate is made to an executor appointed by the deceased's will. Doubts have often been expressed whether the additional safeguard of a bond and sureties is really necessary and in 1966 The Law Society proposed to us that the requirement should be abolished save for special cases where a residual discretion to order a bond should be retained by the Probate Court. In pursuance of our duty under section 3(1)(*a*) of the Law Commissions Act 1965 we considered this suggestion and consulted, among others, the President of the Probate, Divorce and Admiralty Division and the Senior Probate Registrar, both of whom were in agreement in principle with the proposal.

2. In this Report we set out our conclusions and append drafts of the legislation needed to give effect to them. In brief, we recommend the abolition of the administrator's bond and that sureties should be dispensed with save in exceptional cases. However, it seems to us that if these objectives are to be attained certain related changes in the law are desirable, notably the abolition of the personal representative's rights of retainer and preference. Accordingly, we first summarise the present legal position and then our proposals and the reasons for them.

THE PRESENT POSITION

3. The Supreme Court of Judicature (Consolidation) Act 1925[1] requires an administrator to whom a grant of administration of the estate of a deceased is made to give an administration bond "for duly collecting, getting in and administering the real and personal estate of the deceased." The only exceptions are where the grant is obtained by the Treasury Solicitor, the Solicitor of the Duchy of Lancaster[2] or the Public Trustee.[3] Sureties are required in the case of every bond unless Probate rules or orders provide otherwise.[4] Under the Rules[5] no surety is required if the administrator (or

1 s. 167.
2 Judicature Act 1925, s. 167(6).
3 Public Trustee Act 1906, s. 11(4).
4 Judicature Act 1925, s. 167(1) and (7).
5 Non-Contentious Probate Rules 1954, r. 38.

one of the administrators) is a trust corporation, or in certain other specified cases of less practical importance. One surety only is required if the surety is a corporation whose financial standing is satisfactory to the court or if the gross value of the estate does not exceed £500. Two sureties are required in all other cases. The bond must be for an amount double the gross value of the estate as sworn, unless the court orders a reduction in any particular case,[6] which in practice it rarely does except when there has been a minor miscalculation of the amount of the penalty. Often the surety is an insurance or guarantee company which undertakes to stand surety in return for the payment of a single premium. The amount of the premium varies with the value of the estate and works out, on average, at about 1s. per cent of the amount of the bond (i.e. twice the gross value of the estate). Hence, in the case of a £10,000 estate the premium is around £10. In the case of small estates the cost is proportionately higher (around seven or eight guineas in the case of an estate of £5,000 or less). In the case of large estates concessionary rates are given in many cases. A higher premium may, of course, be payable if it is thought that the facts of a particular case warrant it and a higher rate may be charged if no solicitor is acting for the administrator. To avoid the expense of a premium two private individuals (for example, relatives of the administrator) may act as sureties and this is not uncommon. In such cases it is not the practice to require the sureties to justify except in certain unusual circumstances,[7] so that normally there is no assurance that the sureties are good for the amount of the bond.

4. The form of the bond is set out in the Rules.[8] In effect it repeats the obligations of the administrator as specified in the oath which he is also required to make. In addition it contains an undertaking to the Senior Registrar of the Probate Division by the administrator and the sureties (when, as normally, there are sureties) to make good any default in the administration of the estate by the administrator. If the administrator defaults in his duty "well and truly to administer the estate according to law", for example, by mistakenly paying the wrong person, or by fraudulently misappropriating funds, any person interested in the estate (whether as beneficiary or creditor) who has been damnified thereby may apply to the court which, if satisfied that a condition of the bond has been broken, may order the assignment of it to the aggrieved party who may thereupon sue on it as if it had originally been given to him.[9] In practice, however, this occurs only when the aggrieved party wishes to enforce the bond against a surety; if he alleges maladministration by the administrator and wishes to sue him he will normally do so by starting an administration action in the Chancery Division. It is, indeed, extremely rare for any action to be taken on the bond. Very occasionally, however, it does provide a remedy against the surety in cases where no other means of recovery are available. For example, one case was drawn to our attention where, after some £12,000 had been distributed, it was discovered that the deceased was an illegitimate child and that the money had been wrongly distributed to the

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6 Court of Probate Act 1857, s. 82.
7 Set out in Non-Contentious Probate Rules 1954, r. 39(*a*)–(*f*).
8 Non-Contentious Probate Rules 1954, Form 1.
9 Judicature Act 1925, s. 167(4).

beneficiaries who would have been entitled had he been legitimate. It was not practicable to recover from them or from the administrator but liability was admitted by the insurance company acting as surety.

5. Hence the main purpose of the bond is to provide a remedy against the surety. However, in cases where a grant is obtained by a creditor as such the Probate Court has used it for a subsidiary purpose, namely, to exclude the administrator's rights of retainer and preference. These ancient rights entitle either an executor or administrator to retain a debt due from the deceased to himself in priority to other debts of the same class and to prefer one creditor of the same class to another instead of paying all pro rata. It is highly anomalous for a person in a fiduciary position to have rights of this sort. Normally a fiduciary must subordinate his own interests to the interests of those towards whom he is in a fiduciary position. The personal representative, however, is allowed to prefer himself to them. Moreover, the general principle of insolvency law (and the rights of retainer and preference are of practical importance only when the estate is or may be insolvent) is that one creditor must not be preferred to another. Payments by a debtor, who is unable to pay his debts as they fall due, if made within six months before the commencement of the bankruptcy with the intention of preferring one creditor to another, can be set aside as fraudulent preferences,[10] and the trustee in bankruptcy must strictly observe the pro rata principle as regards creditors of the same class.[11] Yet the personal representative of a deceased insolvent is allowed to breach these principles. Hence, by a courageous piece of judicial legislation,[12] since 1899 a creditor, who obtains a grant qua creditor, has been required to include in his administration bond an undertaking to waive his rights of retainer and preference and to pay rateably all creditors of the same class.[13] The result has been to exclude the rights of retainer and preference in the circumstances where they were most likely to be invoked, and to prevent one creditor from obtaining a grant and paying his own debt leaving insufficient to pay others. But this is still possible where the creditor is entitled to a grant in some other capacity, i.e., if he happens to have been appointed executor or because he is entitled to letters of administration in view of his relationship to the deceased.[14]

PROPOSED REFORMS

6. As the above discussion has shown, the administration bond achieves four purposes:—

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

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10 Bankruptcy Act 1914, s. 44.

11 *Ibid*, s. 33.

12 Practice Direction [1899] W.N. 262.

13 See now Non-Contentious Probate Rules 1954, Form 1, footnote 11. The legislative authority for this requirement is s. 167(3) of the Judicature Act 1925 (replacing s. 81 of the Court of Probate Act 1857) which provides that the form of the bond is to be governed by rules: *Re Belham* (1901) 84 L.T. 300; [1901] 2 Ch. 52, C.A.; and *Re Leguia* (1936) 155 L.T. 270.

14 In that event the right of retainer (though not of preference) remains even though an order is made for the administration of the estate in bankruptcy under s. 130 of the Bankruptcy Act 1914. As long ago as 1957 the Report of the Committee on Bankruptcy Law (Cmnd. 221) recommended that the right of retainer should be abolished in such circumstances: paras. 190, 191.

(*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.

We are clear that none of these purposes demands the retention of the bond and that all of them can be better achieved in other ways.

Retainer and Preference

7. Of the four purposes it is convenient to deal first with (*d*)—exclusion of the rights of retainer and preference—for this, as already pointed out, has nothing to do with the original purposes of the bond, which has merely been used as a convenient instrument for drawing the sting of these ancient rights. Clearly it would be infinitely more satisfactory if the rights themselves were abolished or restricted by statutory provision rather than by the device of requiring the administrator to relinquish them by an undertaking in the bond or some other document.

8. The present position is that the rights remain in existence but cannot be used when a grant is obtained as a creditor. It would be possible to preserve this partial exclusion, but we have no hesitation in recommending instead abolition of the rights themselves. Their anomalous nature has already been stressed. The historical justification for the right of retainer is said to be to compensate the personal representative for his inability to sue the estate and thus convert his claim into a judgment debt.[15] But a judgment debt is no longer payable in priority to others and the abolition of the right of retainer will in no way interfere with the personal representative's rights to pay his own debt pari passu with others. An argument for its preservation is said to be that in the case of an insolvent estate it would be difficult to find anyone to undertake the administration unless he had a right to retain. If there were anything in that argument the answer, it is suggested, would be to empower the court to allow the personal representative proper remuneration. But in fact it seems clear that the evidence does not support the argument; the exclusion of the rights in the case of a grant to a creditor as such, which has been in operation for over 70 years, has not led to a refusal by creditors to take grants. The argument for the right of preference is that it may enable the personal representative to start paying debts notwithstanding that the full liability of the estate in respect of debts or death duties is not determined. If the estate should ultimately prove to be insolvent the payments made will be effective and proper because they can be regarded as made in exercise of the right of preference. In practice personal representatives protect themselves in another way, namely, by advertising for claims under the provisions of section 27 of the Trustee Act 1925 which relieves them of liability if they distribute after paying those claims of which they receive notice. In no circumstances, of course, can an exercise of a right to prefer creditors relieve

[15] *Att-Gen.* v. *Jackson* [1932] A.C. 365, 384.

the personal representatives of their personal liability for the estate duty which ultimately proves to be payable. As we see it, there is only one respect in which the right of preference may be said to perform a useful function. It protects a personal representative who, reasonably enough, has paid the tradesmen's bills without waiting until all claims are received in response to the statutory notice for creditors. Should the estate ultimately prove to be insolvent the personal representative will not be liable at the suit of creditors of the same class as those paid.[16] Real hardship might be caused to small tradesmen (and indeed to the widow and children of the deceased who may be dependent on their goodwill) if debts of this sort could not be paid promptly. We suggest, however, that this would best be dealt with by an express provision to the effect that where a personal representative reasonably and in good faith pays a creditor at a time when he has no reason to believe that the estate will be insolvent he shall not be liable to account to any creditor of the same class if the estate subsequently proves to be insolvent. We see no reason why this provision should not be capable of applying to one who has obtained a grant as a creditor, although it is unlikely that it would operate in such a case since the estate will usually be known to be insolvent. If, however, a creditor has obtained letters of administration to an estate which appears to be solvent we see no reason why he, to the same extent as any other personal representative, should not be allowed to pay the tradesmen immediately. What is objectionable is that he should prefer himself to the other creditors (i.e. exercise a right of retainer) and this the recommended provision does not permit. There is no need to provide any special protection to the creditors who have been paid ; as they are not volunteers, the payment cannot be followed into their hands and recovered from them.[17]

9. Subject to the provision suggested in the preceding paragraph we recommend that the rights of retainer and preference be abolished and that this should apply to executors as well as administrators. The only argument for treating executors differently is that they have been chosen by the testator who may have selected them in order that they may prefer their own debts (or those of others). We regard this argument as both unfounded and irrelevant. It is unfounded because we do not believe that one testator in a thousand has ever heard of these rights or that the very few who may have done so are likely to have selected their executors for that reason. The argument is irrelevant because, whereas a testator is entitled to say what should be done with his net estate, he is not entitled to say which of his debts should be paid and in what order. If he had lived and gone bankrupt his attempt to prefer one creditor to another might be set aside as a fraudulent preference. Why, because he has died, should he be entitled posthumously to prefer one creditor to another?

Statement of Administrator's Duties

10. Turning then to the original purposes of the bond, the first of these is to repeat the duties of the administrator. It is clearly unnecessary to

[16] He will not, however, be protected if creditors with priority come to light (for example, a back duty claim by the Revenue for tax not exceeding one year's assessment).
[17] *Thorndike* v. *Hunt* (1857) 3 de G & J 563.

retain the bond for this purpose. The statement of the duties in the bond is largely repetitive of the statement in the oath (which every administrator or executor has to make), and merely summarises the duties falling on personal representatives under the general law. It does so under four heads:

(*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.

Of these duties (*a*) and (*d*) are nowhere laid down by statute but depend on common law and equity and, in the case of (*d*), the inherent powers of the court. The other two, (*b*) and (*c*), are to some extent covered by statutory provisions since section 25 of the Administration of Estates Act 1925 provides that:

> "The personal representatives of a deceased person shall, when lawfully required to do so, exhibit on oath to the court a true and perfect inventory and account of the real and personal estate of the deceased, and the court shall have power as heretofore to require personal representatives to bring in inventories."

An apparent anomaly is that (*d*), unlike the others, is not repeated in the oath and is required to be stated in the bond only when administration is obtained on the basis of an intestacy. Yet if administration is granted with a will annexed or probate is granted of a will and a later will subsequently comes to light it may be equally necessary to require the delivering up of the grant. Moreover the wording of both (*b*) and (*c*) as expressed in the present form of bond is somewhat confusing in that it suggests that there are two separate circumstances in which personal representatives may be called upon to render inventories or accounts:

(i) " when lawfully called on to do so " and

(ii) when so required by the court.

In fact the position is that although any person interested in the estate may take steps to have inventories and accounts rendered by the personal representatives the steps that he must take (if the personal representatives are unwilling to comply with his request) are to apply by summons for an order.[18]

11. In our view it would make for simplicity and aid understanding if section 25 of the Administration of Estates Act were amended so as to state clearly and in modern language all four of the personal representatives' duties in these respects. We so recommend.

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18 Tristram and Coote's *Probate Practice* (23rd Ed.) 499.

Remedy against Defaulting Administrator

12. The second original purpose of the bond, to afford a remedy against the defaulting administrator, appears to us to be completely unnecessary. A creditor or beneficiary already has a remedy against a defaulting personal representative, and it is quite unnecessary to give him an additional remedy on the bond against an administrator—a remedy which has never been thought necessary or desirable against an executor. It is clear that an administrator can never be liable on the bond unless he has committed a breach of duty for which he would be liable whether or not there was a bond. But, anomalously, it would appear that if he were sued on the bond, the court would be deprived of its power under section 61 of the Trustee Act 1925 to relieve him wholly or in part from personal liability where he has acted honestly and reasonably and ought fairly to be excused. If that be correct, then to that extent the requirement of a bond theoretically affords those interested in the estate an additional protection. But it is a protection which is purely theoretical since in practice the administrator, as opposed to the sureties, is not sued on the bond and, if he were, and if the result were to be that the court was deprived of its power under section 61, that would appear to be unfair.

Remedy against Sureties

13. As already pointed out, the only real value of the bond is that it affords a remedy against the sureties. It is, therefore, to this third and last of the original purposes of the bond that we now turn. It will have been apparent from the foregoing that in our view there is no justification for retaining the bond in its present form of an undertaking by the administrators and, normally, one or two sureties. What is in question, however, is whether it is necessary to retain the general requirement that in the case of an administration (as opposed to an executorship) there should be a guarantee by sureties for twice the amount of the gross estate. The arguments against retaining this requirement are:—

(*a*) It puts the estate to additional expense. This expense is not just the amount of the premium payable where there is a professional surety such as an insurance or guarantee company. There is also the cost of preparing and having executed a separate document. The totality of these expenses is not particularly great in any one case, but neither is it insignificant, and the overall total each year must be truly formidable.

(*b*) Cases in which it proves necessary to enforce the guarantee are extremely rare.

(*c*) Executors have never been subject to this requirement. This is generally explained on the basis that the testator himself has chosen the executors and must be taken to be satisfied as to their honesty and competence. This explanation is not very convincing. The possibility of error is in most respects just as great whether the personal representative be an executor or administrator and those who suffer if an error is made are the creditors or beneficiaries and not the deceased testator. It is not easy to see why the creditors (if not the beneficiaries) should be denied the protection of sureties merely because the deceased happens to have selected the personal

representative. As regards protection of beneficiaries the need for sureties would appear to be rather less in the case of an intestacy than if there is a will since the administrators will normally be some of the principal beneficiaries, whereas an executor appointed by will may not be.

(*d*) In any event the requirement that the sureties should enter into a guarantee for *twice* the value of the gross estate seems quite unnecessary since it can only be in the rarest of cases that the loss can exceed the value of the gross estate.[19] Though the insurance and guarantee companies say that they assess the premium on the true risk and not on the amount of the guarantee the fact that the maximum liability is so high must tend to inflate the premium and, no doubt, to deter private individuals from acting as guarantors.

14. For these reasons, we strongly support the view expressed by The Law Society and by those whom we have consulted that the automatic retention of sureties in virtually all cases where there is an administration is unjustifiable. On the other hand, we do think that it is desirable to retain a power to require sureties in exceptional circumstances. If, however, this is to be a practicable solution a way must be found of enabling those applying for grants to know where they stand. We are convinced that it would not be regarded as an improvement on the present position if no one could be sure whether sureties would be demanded or not and would, in every case, run a serious risk of having the application for a grant stopped at the last moment. Hence, we recommend that the statute should give the court power to require sureties and should prescribe that their guarantee should enure for the benefit of every person interested in the estate (whether as creditors or beneficiaries) and should be expressed to secure the due performance by the administrator of his duties. In addition the Rules should lay down as clearly as possible the circumstances in which guarantees would or would not be required. After consultation with the President and Senior Registrar of the Probate Divorce and Admiralty Division, we recommend that the Rules should provide as follows:—

(1) Sureties would not be required except on any application for a grant to

(*a*) a creditor as such,[20]

(*b*) a person having no immediate beneficial interest in the estate,[21]

(*c*) an attorney of a person entitled to a grant,[22]

(*d*) a person to the use and benefit of a minor[23] or of someone incapable of managing his own affairs[24]

(*e*) a person who appears to the Registrar to be resident outside the United Kingdom, the Channel Islands, or the Isle of Man

19 This could occur if, for example, the value of the estate had substantially appreciated since the date of death and the administrator misappropriated the whole of it.

20 i.e., under Non-Contentious Probate Rule 21(4).

21 i.e., under *ibid.* r. 19(v), 21(4) or 27.

22 i.e., under *ibid.* r. 30.

23 i.e., under *ibid.* r. 31.

24 i.e., under *ibid.* r. 33.

or where the Registrar considers that there are special circumstances making it desirable to require sureties.

(2) Even in these five cases sureties would not normally be required where the applicant or one of the applicants was:—

(*a*) a trust corporation,

(*b*) a solicitor holding a current practising certificate,

(*c*) a servant of the Crown acting in his official capacity, or

(*d*) a nominee of a public department or local authority.

(3) If sureties were required, then, as at present, two would be needed except where the surety was a corporation whose financial standing was accepted as satisfactory or the gross value of the estate did not exceed £500, when one would suffice.

(4) The sureties would be required to guarantee the due fulfilment of the administrator's duties to an amount equal to the gross value of the estate (not twice the gross value) or such other sum as the Registrar directed.

(5) In all cases where sureties were required individuals would be required to justify (i.e., to satisfy the Registrar that they were good for the amount of the guarantee) unless the Registrar otherwise directed. The special cases in which sureties would be required are, in fact, very similar to those in which, under the existing rules, sureties are required to justify.[25]

15. The result of these recommendations would be that those applying for grants would normally be safe in lodging papers without a guarantee by sureties except in the five cases specified in paragraph 14(1) and where in addition the application was not by one of the persons mentioned in paragraph 14(2). In the five specified cases the applicants would know that normally a guarantee by one or two sureties (in accordance with paragraph 14(3)) would be required to an amount of the gross estate (not twice the gross estate as at present). They could, therefore, lodge the papers with a guarantee for this amount or, if they preferred, enquire of the Registry to see if a lesser amount[26] would be accepted or, indeed, if a guarantee could be dispensed with altogether. We are assured that steps will be taken to see that these enquiries are dealt with promptly. It is true that the Registrar would retain power (see the final words of paragraph 14(1)) to require a guarantee by sureties in cases not falling within the five specified cases. This residual discretionary power is regarded as essential, since all the circumstances where it might be reasonable to ask for sureties defy classification. But it is not envisaged that the residual power would be exercised save in very special circumstances. There would, of course, be the normal rights to a personal appearance before the Registrar to argue against the need for sureties or on the amount of the guarantee and to appeal against his decision.

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[25] Non-Contentious Probate Rules 1954, r. 39(*a*)–(*f*).

[26] It would be within the power of the Registrar to require more than the gross value of the estate but this is not a power which it is intended shall be exercised save in very exceptional circumstances; the power is intended to be used so as to reduce the amount, not to increase it.

16. We are satisfied that the procedure suggested would reduce the number of cases in which sureties are required to a very small number and would thereby simplify and cheapen the process of obtaining letters of administration in the vast majority of cases. On the other hand, it must be pointed out that in the exceptional cases where sureties were required because of the existence of special circumstances, (see the final words of paragraph 14(1)) it may well be that insurance and guarantee companies would charge higher premiums than they do at present. But this additional risk of increased expense in the rare case must be set against the saving of trouble and expense in the vast majority. In the five specified cases we can see little justification for the automatic charging of increased premiums, especially having regard to the suggested reduction in the amount of the guarantee, a reduction which might also make it easier to find private individuals prepared to act. It is only when sureties were required as a result of the exercise of the Registrar's residual discretion that a much higher premium might well be justified. Since the exercise of that residual discretion would normally indicate doubts as to the suitability of the proposed administrator it would be no bad thing if the result was to persuade him to renounce when someone else was available.

17. The present form of the bond is expressed to be in favour of the Senior Registrar so that it cannot be enforced by the creditors or beneficiaries until assigned by him. An application has to be made to the court for this purpose and it is in effect, though not in form, an application for leave to enforce the bond. The need to obtain leave, which may be refused in the court's discretion,[27] fulfils a useful function since it prevents the sureties being harassed by an unreasonable creditor or beneficiary and enables the court, either by refusing leave or imposing conditions, to deal fairly with unusual situations such as that in which the various claims exceed the amount of the bond.[28] In the rare cases where a guarantee by sureties would be required if our recommendations are adopted, this guarantee could, in the event of default by the administrator, be enforced by anyone damnified. For the reasons mentioned above, however, we recommend that the rules should provide that no action should be brought on the sureties' guarantee except with the leave of the court and on such terms as the court may direct. In effect this will preserve the present safeguards.

18. In recommending that for the administrator's bond there should be substituted a guarantee by the sureties we are assuming that the present exemption from stamp duty on the bond[29] would be extended to the guarantee which would replace it in the special cases where sureties were required. This is, of course, essential since ad valorem stamp duty on the sum guaranteed would make the suggested alternative unduly expensive.

19. The foregoing recommendations should apply to cases where grants under the Colonial Probates Act 1892 are re-sealed in England. The present position is that it is a condition precedent to the re-sealing of letters of administration that on their grant security was given to an amount adequate

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[27] *In the Goods of Young* (1866) 1 P & D 186; *Re Weiss decd.* [1962] P. 136.

[28] cf. *Re Coates* (1879), unreported but referred to in Tristram & Coote's *Probate Practice*, 23rd Ed., at p. 580.

[29] Finance Act 1949, s. 35 and Schedule 8, Part I.

to cover the property in the United Kingdom.[30] In addition the Registry may require adequate security to be given for the payment of debts due to creditors residing in the United Kingdom.[31] We recommend that there should be substituted for these provisions a simple rule that the Registry may require a guarantee when the circumstances are such that it would have done so if the application had been for an original English grant. If adequate security had been given on the original grant abroad this is a factor that would be taken into consideration in deciding whether to dispense with a guarantee. We understand that the re-sealing of Scottish confirmations will be abolished, as recommended by the Working Party under Mr. Registrar Kenworthy, and that this is likely to be extended to the re-sealing of Northern Irish grants also. Accordingly we make no recommendation regarding either. The draft legislation appended to this Report is based on the assumption that the abolition of re-sealing in these cases will be effected prior to, or in another part of, the Bill containing that legislation. If this assumption proves to be unfounded the appended draft will need amending by inserting provisions similar to those applying to the re-sealing of grants under the Colonial Probates Act.

SUMMARY OF RECOMMENDATIONS

20. (*a*) The personal representatives' rights of retainer and preference should be abolished:

paragraphs 7–9.

(*b*) Nevertheless it should be provided that a personal representative who reasonably and in good faith has paid a creditor at a time when he had no reason to believe that the estate would prove to be insolvent shall not be liable to account to any creditor of the same class if it subsequently appears that the estate is insolvent:

paragraph 8.

(*c*) The duties of personal representatives should be specified by statute:

paragraphs 10–11.

(*d*) The administrator's bond should be abolished:

paragraphs 12–13.

(*e*) The Registrar should, however, retain power to require a guarantee by sureties for the due performance of the administrator's duties. This requirement should normally be limited to the five specified cases in paragraph 14(1) but the Registrar should have a residual discretion to require sureties where there are special circumstances:

paragraphs 14 and 15.

(*f*) The guarantee should be enforceable by those interested in the estate, should normally be for the gross value of the estate, and the exceptional cases in which it would normally be required should be set out in Rules on the lines specified in paragraph 14:

paragraphs 14–17.

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30 Colonial Probates Act 1892, s. 2(2) (*b*).
31 *Ibid.* s. 2(3).

(*g*) The foregoing recommendations should apply to the re-sealing of Colonial grants, and guarantees should be required only when they would have been required if the application had been for an original English grant:

paragraph 19.

21. Draft legislative clauses and draft amendments to the Non-Contentious Probate Rules to give effect to the foregoing recommendations are set out in Appendices A and B respectively.

(*Signed*) LESLIE SCARMAN, *Chairman.*
CLAUD BICKNELL.
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*
28 *August* 1970.

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TO

Amend the law with respect to the grant of administration by the High Court and the resealing by that court of administration granted outside the United Kingdom; to make provision with respect to the duties and rights of personal representatives; and for connected purposes.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Power to require administrators to produce sureties.

1. For section 167 of the Supreme Court of Judicature (Consolidation) Act 1925 (administration bonds) there shall be substituted the following section:—

"Power to require administrators to produce sureties.

167.—(1) As a condition of granting administration to any person the High Court may, subject to the following provisions of this section and subject to and in accordance with probate rules and orders, require one or more sureties to guarantee that they will make good, within any limit imposed by the court on the total liability of the surety or sureties, any loss which any person interested in the administration of the estate of the deceased may suffer in consequence of a breach by the administrator of his duties as such.

(2) A guarantee given in pursuance of any such requirement shall enure for the benefit of every person interested in the administration of the estate of the deceased as if contained in a contract under seal made by the surety or sureties with every such person and, where there are two or more sureties, as if they had bound themselves jointly and severally.

EXPLANATORY NOTES

Clause 1

1. This clause implements the principal recommendation in the Report, namely that the requirement of a bond should be abolished and replaced by a provision to the effect that, as a condition of granting letters of administration, one or more sureties may be required to enter into a guarantee for the due performance of the administrator's duties. This change is effected by substituting a new section for section 167 of the Supreme Court of Judicature (Consolidation) Act 1925.

2. Subsection (1) provides that one or more sureties may be required to enter into a guarantee to make good, within any limit imposed, any loss which any person interested in the estate may suffer in consequence of a breach by the administrator of his duties as such. This is expressed to be subject to the other subsections, and to probate rules and orders. Subsection (4) says that no guarantee will be required where administration is granted to the public officials mentioned therein; this corresponds to the present statutory exemptions from giving a bond or from providing sureties under section 167(6), and under the Public Trustee Act 1906, section 11(4) and the Consular Conventions Act 1949, section 1(5). Further exemptions are provided in the draft amended Rules set out in Appendix B. Under new Rule 38 no guarantee will be required, except in special circumstances, when the applicant for the grant or one of the applicants, is a person specified in Rule 38(2) and in other cases will not be required except where the circumstances specified in (*a*) to (*f*) of Rule 38(1) apply or "the registrar considers that there are other circumstances making it desirable to require a guarantee": see paragraph 14(1) and (2) of the Report. The form of the guarantee, who may be sureties, how many sureties are required, and the limit of the liability are prescribed in new Rule 38(3)–(5).

(3) No action shall be brought on any such guarantee without the leave of the High Court.

(4) This section does not apply where administration is granted to the Treasury Solicitor, the Public Trustee, the Solicitor for the affairs of the Duchy of Lancaster or the Duchy of Cornwall or the Chief Crown Solicitor for Northern Ireland or to the consular officer of a foreign state to which section 1 of the Consular Convention Act 1949 applies, or in such other cases as may be prescribed by probate rules and orders."

Duties of personal representatives.

2. For section 25 of the Administration of Estates Act 1925 (duty of personal representatives as to inventory and account) there shall be substituted the following section:—

" Duty of personal representatives.

25. The personal representative of a deceased person shall be under a duty to—

(*a*) collect and get in the real and personal estate of the deceased and administer it according to law;

(*b*) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;

(*c*) when required to do so by the High Court, deliver up the grant of probate or administration to that court."

3. Subsection (2) provides that the guarantee shall enure for the benefit of every person interested in the administration of the estate (i.e., creditors and beneficiaries) as if contained in a contract under seal with them and that, where there are two or more sureties they shall be liable jointly and severally. Nevertheless, as subsection (3) says, no action may be brought on the guarantee without the leave of the Court. This preserves the desirable consequence of the present rule that an administration bond cannot be sued on until it has been assigned; see paragraph 17 of the Report.

4. The effect of subsection (4) is summarised in note 1 above.

Clause 2

1. This clause implements the recommendation in paragraphs 10 and 11 of the Report. It does so by substituting a new section for section 25 of the Administration of Estates Act 1925, the present terms of which are quoted in paragraph 10 of the Report. The new section is intended to state more clearly and comprehensively what are the duties of a personal representative, whether an executor or administrator. This is necessarily done in general terms—paragraph (*a*) embraces within the phrase "administer [the estate] according to law" a multitude of fiduciary duties and duties of care which it is neither necessary nor practicable to attempt to detail.

2. Clause 2, in addition to being desirable in itself as a more accurate summary of a personal representative's duties, is a necessary corollary of clause 1 since a guarantee required under the section substituted by clause 1 will be enforceable only on breach of those duties.

3. It will be observed that paragraph (*b*) refers to "the court" (i.e., the High Court and the county court when the latter has jurisdiction: see the Administration of Estates Act 1925, s. 55(1)(iv)) whereas paragraph (*c*) refers only to the High Court. This is because only the High Court has jurisdiction to grant probate or letters of administration so that, as paragraph (*c*) says, it must be that court which requires the grant to be delivered up to it. On the other hand a county court may have jurisdiction to order a personal representative to exhibit an inventory or to render an account.

Retainer preference and the payment of debts by personal representatives.

3.—(1) The right of retainer of a personal representative and his right to prefer creditors are hereby abolished.

(2) Nevertheless a personal representative who acting reasonably and in good faith pays another person who is a creditor of the deceased's estate at a time when the personal representative has no reason to believe that the estate is insolvent, shall not, if it subsequently appears that the estate is insolvent, be liable to account to a creditor of the same degree as the paid creditor for the sum so paid.

Sealing of Commonwealth and Colonial Grants.

4.—(1) The following provisions of section 2 of the Colonial Probates Act 1892, that is to say—

(*a*) subsection (2)(*b*) (which makes it a condition precedent to sealing in the United Kingdom letters of administration granted in certain overseas countries and territories that a sufficient security has been given to cover property in the United Kingdom) ; and

(*b*) subsection (3) (power of the court in the United Kingdom to require that adequate security is given for the payment of debts due to creditors residing in the United Kingdom) ;

shall not apply to letters of administration sealed by the High Court in England and Wales under that section, and the following provisions of this section shall apply instead.

(2) A person to whom letters of administration have been granted in a country or territory to which the said Act of 1892 applies shall on their being sealed by the High Court in England and Wales under the said section 2 have the like duties with respect to the estate of the deceased which is situated in England and Wales and the debts of the deceased which fall to be paid there as are imposed by section 25(*a*) and (*b*) of the Administration of Estates Act 1925 on a person to whom a grant of administration has been made by that court.

(3) As a condition of sealing letters of administration granted in any such country or territory, the High Court in England and Wales

Clause 3

1. This clause implements the recommendations in paragraphs 7–9 of the Report by—

(*a*) abolishing the personal representative's rights of retainer and preference (subsection (1)) but

(*b*) protecting a personal representative who, acting reasonably and in good faith, pays another creditor at a time when he has no reason to believe that the estate is insolvent (subsection (2)).

2. The object of subsection (2) is to preserve what is believed to be the only useful and desirable consequence of the archaic rights of retainer and preference by enabling a personal representative to make speedy payments of tradesmen's bills. So long as he acts reasonably and in good faith and at a time when he has no reason to believe that the estate will prove to be insolvent he will not be liable to account to a creditor of the same class if the estate subsequently proves to be insolvent. He will be liable to account to a creditor entitled to priority, but so he would under the present law, since the right of preference can be exercised only as between creditors of the same class, and no case has been made out for extending the present protection to cover this situation.

3. This clause does not apply in relation to the estates of persons dying before its coming into operation: see clause 6(4).

Clause 4

1. This clause implements the recommendation in paragraph 19 of the Report by applying the provisions of clauses 1 and 2 to cases where grants are re-sealed under the Colonial Probates Act 1892.

2. Subsection (1) disapplies the present provisions which make it a condition precedent to re-sealing that a sufficient security has been given to cover property in the United Kingdom and which empower the United Kingdom court to require security for the payment of debts here.

3. Subsection (2) says that on the grant being re-sealed in England and Wales the personal representative shall owe the like duties, with respect to the estate situated here and debts which fall to be paid here, as are imposed by the new section 25(*a*) and (*b*) of the Administration of Estates Act 1925 as substituted by clause 2. A reference to section 25(*c*) is omitted since the delivering up of the grant is a matter for the Colonial or Commonwealth court and not for the High Court.

may, in cases to which section 167 of the Supreme Court of Judicature (Consolidation) Act 1925 (administration bonds) applies and subject to the following provisions of this section and subject to and in accordance with probate rules and orders, require one or more sureties, in such amount as the court thinks fit, to guarantee that they will make good, within any limit imposed by the court on the total liability of the surety or sureties, any loss which any person interested in the administration of the estate of the deceased in England and Wales may suffer in consequence of a breach by the administrator of his duties in administering it there.

(4) A guarantee given in pursuance of any such requirement shall enure for the benefit of every person interested in the administration of the estate in England and Wales as if contained in a contract under seal made by the surety or sureties with every such person and, where there are two or more sureties, as if they had bound themselves jointly and severally.

(5) No action shall be brought on any such guarantee without the leave of the High Court.

(6) Subsections (2) to (5) above apply to the sealing by the High Court in England and Wales of letters of administration granted by a British court in a foreign country as they apply to the sealing of letters of administration granted in a country or territory to which the Colonial Probates Act 1892 applies.

(7) In this section—

"letters of administration" and "British court in a foreign country" have the same meaning as in the Colonial Probates Act 1892; and

"probate rules and orders" has the same meaning as in the Supreme Court of Judicature (Consolidation) Act 1925.

Extension of powers of Parliament of Northern Ireland.

5. No limitation on the powers of the Parliament of Northern Ireland imposed by the Government of Ireland Act 1920 shall apply in relation to legislation for any purpose similar to the purpose of any of the provisions of this Act other than this section so as to preclude that Parliament from enacting a provision corresponding to any of those provisions.

4. The effect of the remaining subsections is to apply the provisions of the new section 167 of the Supreme Court of Judicature (Consolidation) Act 1925 (see clause 1) to cases where grants are re-sealed here. In other words, a guarantee may be required in the same circumstances and to the same extent as if an original grant was being obtained here. The necessary adaptation of the Rules is effected by Rule 6 of the draft Rules in Appendix B. The form of guarantee in such cases is set out in Form 2 scheduled to the draft Rules.

Clause 5

This clause enables the Parliament of Northern Ireland to enact similar legislation should it think fit. The previous clauses do not extend to Northern Ireland: see clause 6(7).

Short title, repeals, saving, commencement and extent.

6.—(1) This Act may be cited as the Personal Representatives Act 1970.

(2) The enactments specified in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(3) The following provisions of this Act, that is to say—

(*a*) section 1 ;

(*b*) section 4 (other than subsection (2)) ; and

(*c*) the repeals made by this section, other than the repeal of section 34(2) of the Administration of Estates Act 1925 ;

shall not apply in relation to grants of administration made by the High Court before the day appointed for the coming into force of those provisions or to sealing by that court before that day of administration granted in any country or territory outside the United Kingdom, and the said repeals shall not affect administration bonds entered into before that day in connection with any such grant or sealing or any proceedings on or in connection with any such bond.

(4) Section 3 above and the repeal by this section of the said section 34(2) shall not apply in relation to the estates of persons dying before the coming into force of the said section 3.

(5) Sections 1 to 4 above and the repeals effected by this Act shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint ; and different days may be appointed under this subsection for different purposes.

(6) This Act shall not extend to Scotland.

(7) Sections 1 to 4 and subsections (2) to (5) above shall not extend to Northern Ireland.

Clause 6

1. Subsection (1) requires no explanation. Subsection (2) effects the necessary consequential repeals: see the Schedule to the Bill.

2. Subsections (3) to (5) effect the necessary transitional arrangements. Clauses 1 to 4 and the related repeals do not come into operation until a day to be appointed: subsection (5). When brought into operation, clauses 1 and 4 (other than subsection (2) of clause 4), and the related repeals, do not apply to grants or re-sealing of grants made before the appointed day and the repeals do not affect administration bonds entered into before the appointed day: subsection (2). Furthermore clause 3 (and the related repeal of section 34(2) of the Administration of Estates Act 1925) does not apply in relation to the estates of persons dying before the coming into force of that clause. The over-all effect is:—

(*a*) Clause 5 will come into operation immediately the Bill is enacted.

(*b*) Clauses 2 and 4(2) being merely clarifications of the existing law will apply generally once they are brought into operation.

(*c*) Clause 1 and the remaining subsections of clause 4 (and the related repeals) will apply only to grants and re-sealings made after the appointed day.

(*d*) Clause 3 (abolishing retainer and preference and substituting a new protection to the personal representative) will apply only to the estates of those dying after the appointed day.

These differences are regarded as essential if both fairness and the convenience of practitioners are to be achieved. Fairness demands that retainer and preference shall not be abolished except in relation to the estates of those dying after clause 3 comes into operation; an executor whose authority to act starts from the date of death could, in theory, have exercised a right of retainer or preference prior to obtaining a grant of probate. Convenience to practitioners demands that the requirement of an administration bond ceases to apply to any applications for grants or re-sealings after the appointed day; it would be highly inconvenient if that too depended on the date of the deceased's death.

3. Subsections (6) and (7) merely provide that the Bill does not extend to Scotland (where the law and procedure are different) or, except as regards clause 5 (and parts of this clause), to Northern Ireland.

SCHEDULE

ENACTMENTS REPEALED

Chapter	Short Title	Extent of Repeal
20 & 21 Vict. c. 77.	The Court of Probate Act 1857.	In section 73, the words " upon his giving such security (if any) as the court shall direct." Section 82.
39 & 40 Vict. c. 18.	The Treasury Solicitor Act 1876.	In section 2, the last paragraph both as originally enacted and as applied by section 3 of the Duchy of Lancaster Act 1920.
6 Edw. 7. c. 55.	The Public Trustee Act 1906.	In section 11(4), the words " upon the grant to him of administration, or " and the words " if administration is granted to him or ".
15 & 16 Geo. 5. c. 23.	The Administration of Estates Act 1925.	Section 34(2).
12, 13 & 14 Geo. 6. c. 29.	The Consular Conventions Act 1949.	In section 1(3) the words " (including liabilities under the administration bond) ". Section 1(5).

Schedule

This merely lists the enactments which, in accordance with clause 6(2), are consequentially repealed. All except the repeal of section 34(2) of the Administration of Estates Act 1925 are consequential on clause 1. Section 34(2) contains the only statutory reference to retainer and preference and is repealed in consequence of clause 3.

APPENDIX B

DRAFT NON-CONTENTIOUS PROBATE RULES

1. These rules may be cited as the Non-Contentious Probate (Amendment) Rules 1970 and shall come into force on

2.—(1) In these rules "the 1954 rules" means the Non-Contentious Probate Rules 1954 as amended.

(2) The Interpretation Act 1889 shall apply to the interpretation of these rules as it applies to the interpretation of an Act of Parliament.

(3) The following provisions of these rules shall not affect administration bonds entered into before the day appointed for the coming into force of section 1 of the Personal Representatives Act 1970 in connection with any grant of administration made by the High Court or the sealing by that court of administration granted in any country or territory outside the United Kingdom or any proceedings on or in connection with any such bond.

3. In rule 5 of the 1954 rules (duty of registrar on receiving application for grant) there shall be added the following paragraph:—

"(4) The registrar shall not require a guarantee under section 167 of the Act as a condition of granting administration to any person, without giving that person or where the application for the grant is made through a solicitor, the solicitor an opportunity of being heard with respect to the requirement."

4. For rule 38 of the 1954 rules (administration bonds) there shall be substituted the following rule:—

"*Guarantee*

38.—(1) The registrar shall not require a guarantee under section 167 of the Act as a condition of granting administration except where it is proposed to grant it—

(*a*) by virtue of rule 19(v) or rule 21(4) to a creditor or the personal representative of a creditor or to a person who has no immediate beneficial interest in the estate of the deceased but may have such an interest in the event of an accretion to the estate;

(*b*) under rule 27 to a person or some of the persons who would, if the person beneficially entitled to the whole of the estate died intestate, be entitled to his estate;

(*c*) under rule 30 to the attorney of a person entitled to a grant;

(*d*) under rule 31 for the use and benefit of a minor;

(*e*) under rule 33 for the use and benefit of a person who is by reason of mental or physical incapacity incapable of managing his affairs;

NOTES ON DRAFT RULES

Rules 1 *and* 2

These are formal and require no explanation.

References in these rules to "the Act" are references (by virtue of the application of the Interpretation Act 1889 in Rule 2(2)) to the Supreme Court of Judicature (Consolidation) Act 1925.

Rule 3

This amends Rule 5 of the non-contentious probate rules 1954 so as to ensure that where it is proposed to require a guarantee under section 167 of the Supreme Court of Judicature (Consolidation) Act 1925, the applicant for a grant of administration, or his solicitor, is given an opportunity of making representations.

Rule 4

1. This substitutes a new rule for Rule 38 of the 1954 Rules. The principal feature is that the discretion of the court to require guarantees under the amended section 167 of the Judicature Act, as substituted by the Bill, is limited by paragraphs (1) and (2) of the rule. The broad principle, as set out in paragraph 14 of the Report is that they are to be required only in exceptional cases. But in order to let all concerned know where they stand, paragraphs (1) and (2) specify those cases where guarantees will, or will not, normally be required, while preserving the court's discretion to require them in other cases. Thus paragraph (1) provides that except in the six cases* listed, or in other exceptional cases, guarantees are not to be required. The cases listed are, broadly speaking, those in which the creditors or beneficiaries require special protection. Paragraph (2) imposes a further limit on the cases where guarantees may be required by excluding the exercise of power to do so (except in special cases) even in the six cases listed in paragraph (1), where the applicant for a grant falls within paragraph (2)(*a*)–(*d*), a class of applicants who may be expected to behave responsibly and be capable of meeting the claims of creditors and beneficiaries if anything goes wrong.

2. There are two further features worth noting:—

(*a*) If it is decided to require a guarantee, it must normally be given by two sureties, except in the case of small estates, the gross value of which does not exceed £500 or where one of the proposed sureties is a corporation (corporations have to satisfy the fairly rigorous requirements of paragraph (6)).

(*b*) The limit of the surety's liability under the guarantee will normally be the gross value of the estate, but the registrar will have power to direct some other amount.

* These are identical with the five cases mentioned in para. 14(1) of the Report where (*d*) includes both (*d*) and (*e*) of the rule.

(*f*) to an applicant who appears to the registrar to be resident elsewhere than in the United Kingdom, the Channel Islands and the Isle of Man;

or except where the registrar considers that there are special circumstances making it desirable to require a guarantee.

(2) Notwithstanding that it is proposed to grant administration as aforesaid, a guarantee shall not be required, except in special circumstances, on an application for administration where the applicant or one of the applicants is—

(*a*) a trust corporation;

(*b*) a solicitor holding a current practising certificate under the Solicitors Acts 1957 to 1965;

(*c*) a servant of the Crown acting in his official capacity;

(*d*) a nominee of a public department or of a local authority within the meaning of the Local Government Act 1933.

(3) Every guarantee entered into by a surety for the purposes of section 167 of the Act shall be in Form 1.

(4) Except where the surety is a corporation, the signature of the surety on every such guarantee shall be attested by an authorised officer, commissioner for oaths or other person authorised by law to administer an oath.

(5) Unless the registrar otherwise directs—

(*a*) if it is decided to require a guarantee, it shall be given by two sureties, except where the gross value of the estate does not exceed £500 or a corporation is a proposed surety, and in those cases one will suffice;

(*b*) no person shall be accepted as a surety unless he is resident in the United Kingdom, the Channel Islands or the Isle of Man;

(*c*) no officer of a registry or sub-registry shall become a surety;

(*d*) the limit of the liability of the surety or sureties under a guarantee given for the purposes of section 167 of the Act shall be the gross amount of the estate as sworn on the application for the grant;

(*e*) every surety, other than a corporation shall justify.

(6) Where the proposed surety is a corporation there shall be filed an affidavit by the proper officer of the corporation to the effect that it has power to act as surety and has executed the guarantee in the manner prescribed by its constitution, and containing sufficient information as to the financial position of the corporation to satisfy the registrar that its assets are sufficient to satisfy all claims which may be made against it under any guarantee which it has given or is likely to give for the purposes of section 167 of the Act:

Provided that the principal probate registrar may, instead of requiring an affidavit in every case, accept an affidavit made not less often than once in every year together with an undertaking by the corporation to notify the principal probate registrar forthwith in the event of any alteration in its constitution affecting its power to become surety under that subsection."

5. Rule 39 of the 1954 rules (particulars of estate to be filed and sureties to justify in certain cases) is hereby revoked.

6. In rule 41(2) (resealing under Colonial Probate Acts 1892 and 1927) sub-paragraph (*c*) and the proviso are hereby revoked, and after paragraph (2) there shall be inserted the following paragraph:—

" (2A) On an application for the sealing of a grant of administration—

(*a*) the registrar shall not require sureties under section 4 of the Personal Representatives Act 1970 as a condition of sealing the grant except where it appears to him that the grant is made to a person or for a purpose mentioned in paragraphs (*a*) to (*f*) of rule 38(1) or except where he considers that there are special circumstances making it desirable to require sureties ;

(*b*) rules 5(4) and 38(2), (4), (5) and (6) shall apply with any necessary modifications ; and

(*c*) a guarantee entered into by a surety for the purposes of the said section 4 shall be in Form 2."

7. After rule 41, there shall be inserted the following rule:—

" *Application for leave to sue on guarantee*

41A. An application for leave under section 167(3) of the Act or under section 4(5) of the Personal Representatives Act 1970, to sue a surety on a guarantee given for the purposes of either of those sections shall, unless the registrar otherwise directs under rule 60, be made by summons to a registrar of the principal registry, and notice of the application shall in any event be served on the administrator, the surety and any co-surety."

Rule 5

This revokes Rule 39 of the 1954 Rules which empowers the registrar to require

(*a*) a declaration of the particulars of the estate, and

(*b*) sureties to justify in certain cases.

It is thought that the first would no longer serve any useful purpose and the second is superseded by the new Rule 38(5) and (6).

Rule 6

This amends Rule 41 of the 1954 Rules so as to achieve for grants sealed under the Colonial Probates Acts 1892 and 1927 similar results to those achieved by the amending rules for English grants.

Rule 7

This inserts a new rule in the 1954 Rules so as to secure that every application for leave to bring an action on a surety's guarantee is made in the first instance to the registrar and that notice of the application is given to all interested parties.

8. In Schedule 1 to the 1954 Rules, for Forms 1 and 2 there shall be substituted the Forms set out in the Schedule to these Rules.

SCHEDULE

FORM 1

SURETY'S GUARANTEE

In the High Court of Justice

The ([1]) Probate Registry

In the Estate of ([2]) deceased

Whereas ([2]) of ([3])

died on the day of 19

and [and]([4])

(hereinafter called "the administrator(s)") is/are([5]) the intended administrator(s) of his estate.

Now Therefore:

I. I/We([5]) of

[and of]([6])

hereby [jointly and severally]([7]) guarantee that I/we([5]) will, when lawfully required to do so([8]) make good any loss which any person interested in the administration of the estate of the deceased may suffer in consequence of the breach by the administrator(s) of his/her/their([5]) duty—

(*a*) to collect and get in the estate of the deceased and administer it according to law and, in particular, to pay the debts of the deceased according to the priorities required by law and, so far as possible having regard to those priorities, proportionately;

(*b*) when required to do so by the court, to exhibit on oath in the court a full inventory of the estate and, when so required, to render an account of the estate; or

(*c*) when so required by the court, to deliver up the grant to the court.

II. The giving of time to the administrator(s) or any other forbearance or indulgence shall not in any way affect my/our([5]) liability under this guarantee.

([1]) Insert "Principal" or "..... District" (stating name).

([2]) Full name of deceased.

([3]) Address of deceased.

([4]) Full name(s) and address(es) and description(s) of proposed administrator(s).

([5]) Delete whichever is inapplicable.

([6]) Full name(s), address(es) and description(s) of surety(ies).

([7]) Delete if only one surety.

([8]) An action on the guarantee may only be brought with the leave of the court.

NOTES ON DRAFT RULES

Rule 8

This substitutes new forms for Forms 1 and 2 in Schedule I to the 1954 Rules.

Schedule

This sets out new simple forms of guarantee to be entered into by sureties in connection with English and Colonial Probates Acts grants respectively, replacing the old administration bond to which administrator as well as the sureties were parties. Under paragraph I of the new forms, the sureties guarantee jointly and severally to make good on demand any loss which persons interested in the estate may suffer in consequence of a breach by the administrator of his duties. These duties are summarised in paragraphs (*a*), (*b*) and (*c*) in terms identical with the amended section 25 of the Administration of Estates Act 1925, as substituted by the Bill, except that (*a*) has been somewhat amplified so as to refer specifically to the duty to pay creditors in accordance with the priorities prescribed by law and, subject thereto, rateably.

2. The forms contain two additional conditions. It is a well established rule of the general law about guarantees that, in the absence of provision to the contrary, the giving of time or other forbearance by a creditor to a debtor releases the surety whether he is prejudiced thereby or not. There is a danger that this principle might be held to apply, and accordingly paragraph II of the new forms excludes it, as all formal written guarantees normally do.

3. Paragraph III specifically declares that the liability of the surety is continuous. The effect of this is to ensure that the guarantee will endure until the administration of the estate has been completed. The paragraph also provides that the surety's liability will, within the limits of the guarantee, be for the whole amount of the loss suffered by any person in consequence of a breach of the administrator's statutory duty. The object of this provision, apart from specifying the limit on the surety's liability, is to exclude the risk that the courts might apply by analogy a rule that "where the surety has given a continuous guarantee, limited in amount to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is as between the surety and the creditor to be construed . . . as applicable to a part only of the debt, coextensive with the amount of the guarantee:" *Ellis* v. *Emmanuel* (1876) 1 Ex. D. 157 at 163, 164.

4. It is understood that the exemption from stamp duty at present applying to administration bonds will be extended to these types of guarantees: see paragraph 18 of the Report.

III. The liability under this guarantee shall be continuing and shall be for the whole amount of the loss mentioned in paragraph I above, but [my] [our aggregate] total liability shall not in any event exceed the sum of £ .(9)

(9) Insert gross value of estate (unless a Registrar has directed otherwise).

Dated this day of 19 .

Signed, sealed and delivered by the above named

in the presence of

a Commissioner for Oaths.

[Further attestation clauses]

FORM 2

SURETY'S GUARANTEE
ON APPLICATION FOR SEALING UNDER
COLONIAL PROBATES ACTS 1892 AND 1927

In the High Court of Justice

The Principal Probate Registry

In the Estate of (1) deceased

Whereas (1) of (2)

died on the day of 19

and letters of administration of his estate were on the

day of 19 granted by the (3)

to

[and

](4) and are about to be sealed in England and Wales under the Colonial Probates Acts 1892 and 1923.

Now Therefore:

I. I/We(5) of

[and

of](6)

hereby [jointly and severally](7) guarantee that I/we(5) will, when lawfully required to do so(8), make good any loss which any person interested in the administration of the estate of the deceased in England and Wales may suffer in consequence of the breach by the administrator(s) of his/her/their(5) duty—

(*a*) to collect and get in the estate of the deceased which is situated in England and Wales and administer it according to law and, in particular, to pay those debts of the deceased which fall to be paid in England and Wales according to the priorities

(1) Full name of deceased.

(2) Address of deceased.

(3) Description of court by which grant was issued.

(4) Full name(s) and address(es) and description(s) of administrator(s).

(5) Delete whichever is inapplicable.

(6) Full name(s), address(es) and description(s) of surety(ies).

(7) Delete if only one surety.

(8) An action on the guarantee may only be brought with the leave of the court.

required by law and, so far as possible having regard to those priorities, proportionately ;

(*b*) when required to do so by the court, to exhibit on oath in the court a full inventory of the estate which is situated in England and Wales and, when so required to render an account of that estate.

II. The giving of time to the administrator(s) or any other forbearance or indulgence shall not in any way affect my/our(5) liability under this guarantee.

III. The liability under this guarantee shall be continuing and shall be for the whole amount of the loss mentioned in paragraph I above, but [my] [our aggregate] total liability shall not in any event exceed the sum of £ .(9)

(9) Insert gross value of estate in England and Wales (unless a Registrar has directed otherwise).

Dated this day of 19 .

Signed, sealed and delivered by the above named

in the presence of

a Commissioner for Oaths.

[Further attestation clauses]

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