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Improving Georgia’s Probate Code: Sales by the Personal Representative and Enforcement of Installment Land Contracts

By Verner F. Chaffin*

I. INTRODUCTION

Under Georgia law when one dies intestate, the title to the decedent’s real property immediately descends to his heirs at law and the title to the personalty vests in the administrator of the estate for the benefit of the creditors and heirs. Title to all property passing by will, both realty and personalty, passes to the executor until he assents to the devise or legacy. During the course of the administration of an estate, it often becomes necessary to sell some of the assets of the estate to satisfy debts, taxes, administration expenses and general pecuniary legacies. Georgia law provides the machinery under which these sales may be made and gives the administrator the power to divest the heirs at law of whatever title they may have in the property.

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1. GA. CODE ANN. § 113-901 (1975); Epps v. Epps, 141 Ga. App. 659, 234 S.E.2d 140 (1977). The administrator has the right to possession of the entire estate, reality as well as personalty, and is the proper person to recover possession from third parties. GA. CODE ANN. § 113-907 (1975). If there is no personal representative, the heirs themselves may sue in their own name. The title of the heirs to intestate land is subject to divestiture by the administrator for paying debts or for making distribution. V. CHAFFIN, STUDIES IN THE GEORGIA LAW OF DECE...
Several concerns are at stake in the evaluation of any statutory scheme dealing with sales and conveyances by the personal representative. Adequate protection to the heirs, creditors and others who may have an interest in the estate property must be provided against any possible misuse of the property by the personal representative; the personal representative must be given sufficient power and latitude so that he is not constrained from acting in the best interest of the heirs and creditors; the costs of administration must be minimized; and the probate courts should not be burdened with unnecessary work.

This article will analyze the legislative machinery in Georgia governing sales by the personal representative. Attention will also be devoted to the enforcement of installment land contracts following the decedent vendor's death. It will be seen that, unless the will includes a power of sale, the personal representative generally cannot sell realty or personalty without probate court approval. The thesis will be developed that this constraint is wholly outmoded and that the burden of its time consuming and costly process far outweighs any protection it might afford.

Georgia law recognizes the installment land contract (bond for title) as a means for the long-term financing of the purchase of land. This arrangement binds the seller in a penal sum to make good title to the purchaser. It will be seen that the bond for title is virtually obsolete in Georgia, and that the statutory treatment of a bond for title as an entity separate from the contract to sell land serves no purpose.

II. SALES OF PROPERTY

A. In General

At common law the personal representative had the power without court order to pledge, sell, or dispose of the decedent's personal assets and pass good title to the purchaser. In the absence of a will containing a

(1975).

4. "The old-fashioned 'bond for title' or 'contract for deed' was usually a rather brief instrument. The modern 'installment land contract' is generally a much longer and more detailed instrument . . . ." O. Browder, R. Cunningham, J. Julin & A. Smith, Cases on Basic Property Law 1031 (3d ed. 1979). A bond for title is "an agreement to make title in the future, an executory or incomplete sale, which is sometimes called a 'bond for a deed.'" Ingram v. Smith, 62 Ga. App. 335, 342, 7 S.E.2d 922, 926 (1940); Black's Law Dictionary 162 (5th ed. 1979). "An agreement to buy and sell real estate on small monthly payments." "It is not a conveyance of legal title but merely a contract to convey and may ripen into an equitable title upon payment of the consideration." Black's Law Dictionary 162.

5. "At common law the personal representative is deemed to be the owner of the property to the extent of being able to sell the chattel interests and pass title to the purchaser." T. Atkinson, Handbook of the Law of Wills 664 (2d ed. 1953); J. Ritchie, N. Alford, R. Effland, Cases and Materials on Decedents' Estates and Trusts 1212 (5th ed. 1977).
power of sale, the decedent’s real property could not be sold except by order of the court. Unless changed by statute the common law rule prevails and no court order is necessary for sales of personalty. Legislation in many states requires court authority for all or certain kinds of sales. Some of these statutes are designed merely for the protection of the personal representative, and where this is the philosophy, a sale by him, even without court order, passes good title to the purchaser. In such, the representative is under no liability unless fraud or imprudence can be shown. In other jurisdictions the absence of court approval invalidates the sale.

Unless the will confers a power to sell, it is necessary to rely upon statutory authority for the sale of land. Virtually every state has legislation providing that land may be sold by court order in order to pay debts. These statutes generally are quite detailed in providing for judicial supervision over the sale and in affording safeguards against abuse.

B. Judicial Supervision Over Sales in Georgia

The personal representative must obtain a court order to perform virtually any sale that is not specifically authorized by the decedent’s will. The ostensible purpose in requiring judicial approval is to protect the interests of the heirs and creditors by allowing them to be heard by the probate court before a sale is ordered.

Any sale by an administrator without a valid court order will not pass any right or title to the purchaser. However, whether or not an order by the probate court is valid and therefore vests the administrator with authority to sell is not always a simple question. For example, even if an order of sale is obtained from the probate court, no title passes if the administrator sells the property outside the county without the special order referred to in section 113-1707. Further, a sale under a court order

6. This was based on the rationale that title to realty passed directly to the heirs or devisees without the intervention of the personal representative. Atkinson, Wills, supra note 5, at 688.
10. This purpose was reflected in the early case of Fussell v. Dennard, 118 Ga. 270, 45 S.E. 247 (1903), where the court held that a sale consummated without the requisite notice to the creditors of an estate is a nullity.
11. See note 9 supra.
cannot ratify or validate a prior illegal transfer.\textsuperscript{13} If a sale is made upon a court order but there has been no notice or advertisement as required by statute, no title passes.\textsuperscript{14} If the court order requires a public sale but the administrator makes a private sale, the purchaser receives no title.\textsuperscript{15}

The administrator must also comply with the other statutory procedures before he has authority to convey good title. An heir or creditor may void an irregular sale except where an innocent purchaser for value is involved.\textsuperscript{16} If a sale contains an irregularity of which the purchaser has knowledge, it is voidable at the election of an heir or creditor.\textsuperscript{17} However, if the purchaser has no knowledge of the irregularity, the sale cannot be attacked. Moreover, a "mere irregularity" does not prevent title from passing.\textsuperscript{18}

This has the effect of putting a purchaser who has inquired into the procedures and terms of a sale, thereby discovering an irregularity, in a worse position than the purchaser who has made no inquiry nor has notice of the irregularity. This result discourages purchasers from inquiring too closely and diminishes any protection given to the heirs and creditors by the statutory provision. Furthermore, it appears that an heir could void a sale even if the irregularity did not cause him any injury. In such a case there is no just reason for allowing him to void the sale. The provision also raises a question as to the marketability of the purchaser's title because of the possibility that it may be voided. The uncertainty of course decreases the value of the property, thereby harming the interests of the heirs or devisees.

\section*{III. Sale Of Personalty}

\subsection*{A. Categories of Personalty}

Georgia has several statutes dealing with the sale of various types of

\begin{itemize}
  \item In Empire Life Ins. Co. v. Mason, 140 Ga. 141, 78 S.E. 935 (1913), the agent for the defendant insurance company fraudulently obtained from a widow-beneficiary an assignment of the installments due her on the policy covering her husband. Although the "sale" was subsequently approved in an order from the ordinary, the court declared such an order to be a nullity in light of the prior fraud.
  \item Fussell v. Dennard, 118 Ga. 270, 45 S.E. 247 (1903).
  \item Such was the case in Sapp v. Cline, 131 Ga. 433, 62 S.E. 529 (1908).
  \item GA. CODE ANN. \S\ 113-1720 (1975).
  \item Id. Although this statute does not state who may void the sale, case law limits the power to do so to heirs and creditors. Fraser v. Rummele, 195 Ga. 839, 25 S.E.2d 662 (1943).
  \item The Georgia courts seem to have become a bit more lenient about slight departures from exact compliance with the statutory requirements. For example, in Adamson v. Petty, 230 Ga. 87, 195 S.E.2d 436 (1973), the actual terms of the administrator's sale were slightly different from those advertised. The court ruled that the discrepancy was insufficient to void the sale.
\end{itemize}
personalty, e.g., perishable property,\textsuperscript{19} insolvent or doubtful notes,\textsuperscript{20} stocks, bonds and notes,\textsuperscript{21} and livestock.\textsuperscript{22} There is no statutory reference to any other types of personal property or even to personalty in general.

The personal representative is required to sell perishable property at "as early a date as practicable," and specifications are established for seeking an order of sale and giving notice.\textsuperscript{23}

Corporate stock which is part of the decedent's estate may be sold by an administrator provided he follows the procedures required in the sale of real estate.\textsuperscript{24} An exception to this rule is that any stocks or bonds which are listed on an exchange or which are regularly quoted in a newspaper having general circulation in Georgia may be sold at a private sale so long as the sale price is not less than the published bid price.\textsuperscript{25} Under this exception the administrator is still required to obtain a court order and file a return.\textsuperscript{26}

A note or other evidence of indebtedness may be sold without a court order and at a private sale but only if the administrator can sell for the face value of the note.\textsuperscript{27} Otherwise, a court order and public sale are required.\textsuperscript{28} Provision is made for the discretionary sale of uncollectible evidences of debts, and the procedures leading up to the sale itself are set forth.\textsuperscript{29}

An administrator, upon obtaining a court order, may sell livestock at a public auction in whatever manner he deems most advantageous to the estate. He is still, of course, accountable in all respects for any lack of

\begin{footnotes}
\item[22] GA. CODE ANN. § 113-1734 (1975).
\item[23] At least ten days' notice must be given before perishable property may be ordered sold. GA. CODE ANN. § 113-1701 (1975). All personalty is regarded as perishable except evidences of indebtedness and shares of corporate stock. 2 REDFERN, WILLS AND ADMINISTRATION IN GEORGIA § 307 (4th ed. 1979). All crops, matured or unmatured, are personalty. GA. CODE ANN. § 85-1901 (1978).
\item[26] A waiting period of ten days is required between the application for permission to sell and the order allowing the sale. Once the sale is completed, the personal representative must file a return showing the date of the sale, name of purchaser, the bid price of the stock at time of sale and the proceeds realized therefrom. GA. CODE ANN. § 113-1732 (1975).
\item[27] GA. CODE ANN. § 113-1733 (1975).
\item[28] GA. CODE ANN. § 113-1724 (1975) provides that the sale of unlisted corporate stock shall be conducted in the same manner as the sale of land, i.e., upon petition and notice published once a week for four weeks before the hearing and order to sell is granted, as provided in GA. CODE ANN. § 113-1707 (1975).
\item[29] The sale is at public outcry, preceded by thirty days' notice given at the courthouse door and at least three other public places in the county. GA. CODE ANN. § 113-1705 (1975).
\end{footnotes}
good faith.30

Except for the sale of livestock, each of the statutes contains its own provisions concerning the petition for court order, the sale, and the requisite notice. Thus, a personal representative wishing to sell personal property consisting of an inventory of food, a note given the decedent, ten shares of corporate stock, a herd of cattle, and an automobile has the burdensome task of following the separate provisions of section 113-1701 for the food, section 113-1705 for the insolvent note, sections 113-1724, -1732, and -1733 for the corporate stock, and section 113-1734 for the cattle. However, the personal representative has no section to which he may refer to for directions concerning the sale of the automobile.

B. Miscellaneous Provisions

Property Held Adversely to the Estate. The sale of property which is held adversely to the estate by a third person is prohibited.31 While the cases construing this section have involved adverse possession of land, the language of the statute does not limit its application to realty. The evident purpose is to protect the estate from potential litigation as well as from the lower price that adversely held property would fetch in the marketplace. But the question must be asked: Is this section really necessary, or could the object of the statute be more efficiently attained by means of vesting the personal representative with a general fiduciary duty to act in the best interests of the estate?

Public or Private Sale. The Code makes no specific distinction between public and private sales of personalty. Section 113-1716, however, provides that certain private sales of land are contrary to public policy,32 and section 113-1717 declares that private sales of decedents' property are to be allowed only when specifically authorized by the will.33

31. GA. CODE ANN. § 113-1714 (1975) provides: “An administrator may not sell property held adversely to the estate by a third person; he shall first recover possession.”
32. GA. CODE ANN. § 113-1716 (1975) states: “A private sale of land by an administrator under an obligation or agreement to perfect the same by a compliance with legal formalities, is contrary to public policy, and such sales shall always be open to review at the option of parties at interest.”
33. GA. CODE ANN. § 113-1717 (1975). The Georgia courts have strictly construed testamentary provisions authorizing the sale of land or personalty. If the will does not provide for a private sale, the sale must be at public outcry. In Bonner v. Bell, 206 Ga. 98, 55 S.E.2d 612 (1949), the supreme court held the following language in a will to be insufficient to authorize an executrix to sell realty or personalty at private sale: “I desire that such executrix have full power to handle and dispose of my estate without making any bond, and that such executrix be in no manner restricted in the handling of my said estate.” Id. at 102, 55 S.E.2d at 615.
Although section 113-1716 is literally applicable only to private sales of land, it might well deter an administrator from consummating a private sale of personalty. And section 113-1717, by negative implication, looks askance on any private sale not specifically authorized by a testator. Yet without repealing these sections, the legislature in 1974 passed section 113-1702(b) which authorizes the private sale of personalty (and realty) to pay debts of the decedent or to effect distribution. Even if this 1974 amendment could be said to clarify the confusion surrounding the validity of private sales of personalty cast by section 113-1716 and section 113-1717, it imposes additional technicalities with which the personal representative must comply in order to consummate the sale. In addition to requiring the usual petition to the court for leave to sell, section 113-1702(b) generally directs that “the method of private sale shall be in the same manner as that prescribed for the sale of property by guardians under sections 49-203 and 49-204. . .” These guardianship sections add little, if anything, to what is already said, and section 49-204 serves only to create further confusion by authorizing the probate judge to grant an order for the sale of assets subject to the discretionary requirement “that any sale of land of the ward be at public outcry as in the case of administrator’s sales. . .”

In effect, then, a personal representative with several kinds of personalty to sell is faced with one procedure for the sale of perishable property, another for uncollectible debts, another for the private sale of personalty, another for stock, another for listed stocks and bonds, another for livestock, and no procedure for the public sale of anything other than a perishable good or an uncollectible debt. To be sure, the differences in the procedure present no monumental obstacle. Yet the technicalities are tedious and expensive, and there is currently no valid policy reason for the existence of such differences.

34. The text of the statute is contained in note 32, supra.
35. 1974 Ga. Laws 1135 (codified as Ga. Code Ann. § 113-1702(b) (1975)). Ga. Code Ann. § 113-1702(b) (1975) expressly authorizes the private sale of personalty (and realty) in order to pay debts as well as for distribution. The section also requires the usual court order pursuant to a petition and a hearing.
36. Notice of the private sale must be served on all heirs of an estate, and various requirements are set forth for notifying adult heirs, minor heirs, and incompetent heirs, both those who reside within Georgia and those who reside outside the state. Ga. Code Ann. § 113-1702(c) (1975). It may be presumed that these notice requirements apply only to private sales of realty and personalty under section 113-1702(b), because the “petition” mentioned in section 113-1702(c) apparently refers to the petition for a private sale under section 113-1702(b). Moreover, the other sections concerning the public sale of personality have their own respective notice requirements.
Terms of Sale. Section 113-1703 gives the personal representative the discretion to set the terms of the sale but holds him responsible for the sufficiency of any security given at the time of the sale. Although the section does not specify whether it applies to realty or personalty, it has been construed by the courts in situations involving both. This statute is to be commended for the flexibility it allows the personal representative. However, such latitude could more efficiently be realized in a general statute encompassing the fiduciary duties and powers of the personal representative.

Another statute requires that the personal representative state the terms of the sale in all advertisements. The statute does not indicate whether it applies to realty or to personalty, and the cases construing the section are too few to draw a conclusion about its applicability to both. There is, however, no reason to doubt its dual role. This statute has been cited by the Georgia courts but twice since its enactment in 1866. It is superfluous and there is no reason for its continued existence.

IV. Sale Of Real Property

A. In General

Because realty is divisible into fewer categories than personalty, the Code provisions concerning the sale of realty by a personal representative do not suffer from the problem of multiple rules of substance and procedure as much as those concerning the sale of personalty.

A private sale of land, accompanied by an agreement to perfect that sale by compliance with legal formalities, is declared to be against public policy. Although the Code does not flatly prohibit private sales, section 113-1717 permits them without court order only when a private sale has been specifically authorized by will. Private sale of real estate may be made in order to pay debts of the estate or to make distribution, but the usual court order pursuant to a hearing must be obtained and the specific

41. GA. CODE ANN. § 113-1718 (1975).
44. GA. CODE ANN. § 113-1717 (1975).
notice requirements in connection with the petition must be satisfied.46

The notice requirements as well as the directions for the time, place, and manner of public sales of land are set forth.46 Section 113-1702(a), enacted in 1974, adds other requirements for “all public sales” which presumably includes public sales of real estate.47

When land ordered to be sold lies in two counties, the sale may be held in either county.48 As is true with respect to personal property, the personal representative may exercise his discretion concerning the terms of the sale,49 but in any event the terms must be stated in any advertisement.50 Recital in the administrator’s deed of compliance with all legal requirements is prima facie evidence of compliance.51

The Code provides for two statutory consequences of the lawful sale of land by an administrator: (1) the sale divests any liens on the land and transfers them to the proceeds of the sale;52 and (2) any warranty given by the administrator in any conveyance or contract executed by him is of no effect, unless he intends to be bound personally.53 These provisions are designed to protect purchasers from liens and the estate from later claims

45. GA. CODE ANN. § 113-1702(b) (1975). See notes 35 and 36 supra and accompanying text.
46. GA. CODE ANN. § 113-1707 (1975) states:
   Every such sale shall be advertised in any newspaper having a general circulation in the county where the property to be sold is located, once a week for four weeks after the leave is granted and before the sale. It shall be held at public auction on the first Tuesday of the month between the usual hours of sale, and at the place of public sales in the county having jurisdiction of the administration, unless by special order, in the discretion of the judge of the probate court, land lying in another county is sold in that county.
47. GA. CODE ANN. § 113-1702(a) (1975).
49. GA. CODE ANN. § 113-1703 (1975). See notes 39 and 40 supra, and accompanying text discussing the application of section 113-1703 to personalty.
50. GA. CODE ANN. § 113-1718 (1975). See text accompanying notes 41 and 42 for criticism of this requirement.
51. GA. CODE ANN. § 113-1711 (1975). The deed must be accompanied by a valid order authorizing the administrator to sell. The order of sale must specify the land to be sold as definitely as possible, Edwards v. Sands, 150 Ga. 11, 102 S.E. 426 (1920), or else grant general authority for the sale of all estate realty. Davie v. McDaniel, 47 Ga. 195 (1872). Numerous cases have held that the mere recitation in the deed that the sale was under court order is not sufficient. See 2 REDFEARN, WILLS AND ADMINISTRATION IN GEORGIA § 311 (4th ed. 1979).
52. GA. CODE ANN. § 113-1709 (1975). The liens of judgments, mortgages, and taxes are divested and transferred to the funds realized at the sale. Reed v. Aubrey, 91 Ga. 435, 17 S.E. 1022 (1893) (judgment); Herrington v. Tolbert, 110 Ga. 528, 35 S.E. 687 (1900) (tax lien). Since a deed to secure debt is not a “lien” but a conveyance of title, the administrator’s sale would not affect it, and the purchaser would acquire only the right to redeem upon payment of the debt secured thereby. Daniel v. Wilson, 91 Ga. 238, 18 S.E. 134 (1892).
based on breach of warranty. While both purposes are legitimate, it would seem that their embodiment in the statute is unnecessary, and that protection could be afforded by judicial pronouncement.

Section 113-1715 authorizes the assertion of a claim by a third party against the real estate which an administrator proposes to sell and prescribes the venue for trial of that claim. The administrator must make a return to the probate court with respect to every sale. The return is to specify the property sold, the purchasers, the sale price and the terms of sale. There have been no cases under this particular statute, and it is not clear that this duty is enforceable. The obvious purpose is to furnish protection not only to the heirs and devisees but also to the personal representative, should an objection later arise.

This statute provides little, if any, protection to those interested in the estate. The failure to file a return does not create any additional rights in the heirs or creditors. Furthermore, the only way the return will inform those interested in the estate is if they go to the probate court and inspect the record. If there is any value in requiring these returns, it is that the administrator will make a written record of the transaction soon after it occurs. Even that justification, however, is diminished by the fact that the administrator is required to make an annual report which will include a record of all transactions. Moreover, in sales involving real property, the information contained in the return will merely duplicate that contained in the deed. Any significant sale of personal property will be evidenced by a contract, receipt, or some other writing, and the return is therefore a redundant formality.

56. 2 REDFREARN, WILLS AND ADMINISTRATION IN GEORGIA § 313 (4th ed. 1979) states that section 113-1719 is merely directory and that the sale is valid even if no return is made.
57. As a general rule the personal representative must file his return each year within sixty days following the anniversary date of his qualification. GA. CODE ANN. § 113-1415 (1975). If the anniversary date is less than six months after he has filed his return, he does not have to file again until the second anniversary date. At that time he must report for the entire period from the last filed return. If the anniversary date is greater than six months, he must file another return within sixty days. GA. CODE ANN. § 113-1416 (1975). This rule applies only to fiduciaries who are by law required to file annual returns.

Fiduciaries who are not required to make annual returns by the terms of the will may elect to make intermediate final accountings under GA. CODE ANN. §§ 113-1417 to 1425 (1975). When they do so, the report is required to cover the entire period since qualification or the last intermediate final accounting, if any. GA. CODE ANN. § 113-1418 (1975). The decedent's will may dispense with the returns so long as this does not injure any creditors or third parties who are not legatees under the will. GA. CODE ANN. § 113-1414 (1975).
B. Authority to Make Sale

Payment of Debts or for Distribution. Land may be sold by the administrator for the payment of debts of the estate or to effect distribution. The procedure for petitioning for the necessary court order and for giving notice of that order is specified by statute. The statute also proclaims the effect of such order on all devisees under the will of a testator, and preserves the right of appeal by an heir as well as the rights of a bona fide purchaser who bought prior to the order.

The authorized purposes for sale are quite narrow. The personal representative should be given more latitude in administration by allowing a sale for any valid reason. The necessity of broader power can easily be discerned: Suppose a personal representative considers it wise for the estate to invest the value of a parcel of land in some other form of property, say, corporate securities. Section 113-1706, as written, would preclude such a sale because it is not technically "for the payment of the debts of the estate or for the purpose of distribution."

Wild Lands. Section 113-1704 provides that the sale of "wild lands" shall not be treated any differently from the sale of any other land. This legislation was enacted in 1958 to supersede the former law that allowed wild, uncultivated lands, situated in a county other than that of the administration, to be sold at a special private sale. However, since the earlier statute has been abolished, there is no reason for the retention of the new legislation that states the manifest conclusion that wild lands are to be treated in the same fashion as others.

Rights of Way or Easements. The probate code contains special provisions for the sale of a right of way or an easement by an administrator to the federal or state government or to any other party with the right of eminent domain. The only substantial difference between these and other conveyances is that these sales may be made privately. Thus these sections comprise an exception to the general rule that all sales must be

60. The probate court has no authority to order the administrator to sell land to pay debts or to make distribution upon the application of an heir. Only the administrator may petition for authority to sell land under section 113-1706. Ireland v. Matthews, 129 Ga. App. 592, 200 S.E.2d 318 (1973). The heirs may object to the application on the ground that the sale is not necessary for the payment of creditors or for distribution. Finch v. DuBignon, 117 Ga. 113, 43 S.E. 423 (1902); Thomas v. Couch, 171 Ga. 602, 156 S.E. 206 (1930). The courts favor a division in kind whenever this can be fairly done. Copelan v. Kimbrough, 149 Ga. 683, 102 S.E. 162 (1920); McCook v. Pond, 72 Ga. 150 (1883).
made publicly unless the probate court orders a private sale. It is still necessary, however, that the probate court give prior approval.\textsuperscript{65} There is no valid reason for limiting private sales to transactions of this nature. The personal representative should be able to convey any interest in property at private sale and without prior judicial approval.

**Land Held in Trust.** Most trust instruments give the trustee broad powers of sale, but if the trust instrument contains no such provision, a statutory procedure is provided for the sale of real estate held in trust when this is in the best interest of the beneficiaries.\textsuperscript{66} The statute requires advertisement followed by court order authorizing the sale. The requirement that "one hour's public notice of the commencement of the same shall be given at the courthouse door on sale day"\textsuperscript{67} adds further inefficiency to the procedure of selling a decedent's land.

**Contingent Interest or Estate.** If the deceased leaves a will which stipulates that certain real property is to be held until the beneficiary reaches the age of majority or until the happening of some future contingency, the executor may nevertheless sell the property to pay the debts of the estate if there is an insufficient amount of personal property to discharge the debts.\textsuperscript{68} Before any such sale can be consummated, it must be confirmed by the superior court.\textsuperscript{69} Also such sales must follow the procedures prescribed for sales by guardians,\textsuperscript{70} i.e., an order from the probate court is required before a guardian can proceed with the sale of his ward's property.\textsuperscript{71}

This legislation applies solely to the situation where land is devised under a testamentary direction that it be held intact until the devisee reaches majority or until some other future event occurs. Another requirement is that the estate not have sufficient personalty to discharge the indebtedness. At the time of the enactment of this legislation, no trust could exist under Georgia law unless the beneficiary was a minor or was a person of intemperate, wasteful, or profligate habits.\textsuperscript{72}

\begin{itemize}
\item \textsuperscript{65} Ga. Code Ann. § 113-1726 (1975) sets forth the procedure for making application to sell, provides for notice and hearing, and the appointment of a guardian \textit{ad litem} to represent unknown parties or those under a disability. The order of sale must recite that proper service has been made and that the vendee is a proper one. Ga. Code Ann. § 113-1728 (1975).
\item \textsuperscript{66} Ga. Code Ann. § 113-1708 (1975).
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} Ga. Code Ann. § 113-1721 (1975).
\item \textsuperscript{69} Ga. Code Ann. § 113-1722 (1975).
\item \textsuperscript{70} Ga. Code Ann. § 113-1723 (1975).
\item \textsuperscript{71} Ga. Code Ann. §§ 49-203 to 204 (1979).
\item \textsuperscript{72} Under Ga. Code Ann. § 108-114 (1979) no trust could be created unless the beneficiary was under a disability, i.e., minority, mental weakness, or intemperate or wasteful habits. Ga. Code Ann. § 108-111.1 (1979) enacted in 1950 impliedly repealed that portion of
\end{itemize}
Although section 113-1706 provides comprehensively for the sale of land, it has been held that the special legislation of sections 113-1721 to 113-1723 provides the exclusive method for the sale of land directed to be kept together by will. In addition, there is inconsistency and confusion as to whether the probate court or the superior court has jurisdiction to approve the sale.

The general trust statute, section 108-408, requires the trustee, absent an express power of sale in the trust instrument, to obtain an order of the superior court before he can sell the corpus of the trust estate. Section 113-1722 also requires that a petition for sale be filed in the superior court. Yet under section 113-1723 an order from the probate court is required since this is the method by which a guardian’s sale of his ward’s property would be authorized under section 49-203. The reason for the confusion concerning jurisdiction is that in 1920 when sections 113-1721 to 113-1723 were enacted, the superior court had jurisdiction over sales by guardians. In 1958, section 49-203 was amended to give the probate court jurisdiction over sales made by guardians, but no corresponding amendment was made in section 113-1722.

Even if the inconsistency over jurisdiction were cleared up, it is difficult to see the need for special legislation in the probate code dealing with the sale of trust realty for the payment of debts and administration expenses. Although gifts of realty and personalty of the same classification are now subject to sale for the payment of debts and claims against the estate, section 113-1721 requires the sale of personalty before realty in order to pay claims and expenses. This distinction, which is based on the classification of wealth, is anachronistic and indefensible. As seen earlier, section 113-1706 gives the personal representative the power, exercisable under order of court, to sell land of the decedent in order to raise the necessary funds for the satisfaction of creditors’ claims.

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73. Mutual Benefit Life Insurance Co. v. Wilson, 189 Ga. 344, 6 S.E.2d 716 (1939), held that where section 113-1721 applied, a sale by virtue of an order of the court of probate granted under section 113-1706 did not divest the title of the devisees.


75. “For the payment of debts realty and personalty shall be alike liable.” GA. CODE ANN. § 113-821 (1975). Under the older view, legacies and bequests were resorted to before devises were taken. 6 PAGE, THE LAW OF WILLS § 53.16 (W. Bowe & D. Parker rev. ed. 1962).
The title of devises and legacies does not vest in the devisee or legatee until the executor gives his assent. Before assent is given, the title is in the executor for the purpose of paying the debts of the estate. Unless the will provides for a method by which the debts are to be paid, the residuum is to be used first, the general legacies and devises next and the specific legacies last.

If no provision is placed in the will regarding the procedures of sale, the executor is to follow the procedures outlined in the statutes which apply to administrators. If property is left in trust through a will, it will be dealt with in the same manner as any other devise or legacy. Therefore no special provision needs to be made in chapter 113-17 for these types of dispositions.

Proscribed Sales. Two types of realty sales are expressly prohibited by the Code. Property held adversely to the estate by a third person may not be sold until the personal representative first regains possession. An attempted sale of land which is in the adverse possession of a third party is void and no title is conveyed to the purchaser. Obviously, the sale of such property would not bring its full value, and possession could not be given to the vendee.

What has been said concerning the applicability of this prohibition to the sale of personal property is equally apposite to the sale of real property. The ultimate purpose of the statute—protecting the estate—is a legitimate end; but could not this objective be more efficiently attained by vesting the personal representative with a general fiduciary duty to act in the best interests of the estate?

Other legislation precludes the sale, during the lifetime of a widow, of any reversionary interest in land set apart as dower, unless the sale is necessary to pay debts. Conveyances of rights of way and easements are excepted from the latter prohibition. The prohibition of such sales has the legitimate goal of protecting widows whose rights vested prior to the abolition of dower in Georgia. Because the Act abolishing dower applies

76. GA. CODE ANN. § 113-801 (1975).
78. GA. CODE ANN. § 113-1714 (1975).
80. See note 31 supra and accompanying text.
82. 1969 Ga. Laws 123.
only prospectively, section 113-1710 may still affect those dower rights which vested prior to the 1969 legislation. However, protection of widows under this rare circumstance can be more efficiently effected by the personal representative's fiduciary duty to act with due care.

C. Notice, Order and Terms of Sale

To ascertain the proper course for petitioning the court for leave to sell and to determine the proper procedure for the public sale itself, the personal representative must consult several sections of chapter 113-17. Section 113-1706 requires notice of the petition to be published in the county organ. Section 113-1707 sets the requirements of the public sale itself. Additionally, the personal representative must not overlook section 113-1702(a), for it adds even more technical requirements for the public sale of a decedent's real estate.

The provisions requiring notice, hearing, court order, advertisement and substantial compliance with statutory procedures are intended to protect heirs, devisees, and creditors against the possibility that the administrator might sell property without their knowledge and to their detriment. These provisions guarantee them an opportunity to present their interests before the probate court.

When the decedent dies testate but his will makes no provisions for the sale of property, the executor must follow the same procedure as an administrator. However, in a well-drafted will the executor will be given the authority to sell without following these statutory procedures. Why do the heirs of an intestate and the devisees under a poorly drafted will need this protection when it is not needed by the devisees under a well-drafted will?

What has been said concerning the applicability of sections 113-1703 and 1718 to the sale of personal property holds equally true for their applicability to the sale of realty. Their respective ends, while legitimate, could be more efficiently realized by one statute incorporating general fiduciary powers and duties. Similarly, section 113-1712, authorizing the probate judge to order the sale of land lying in more than one county to be held in either county, perhaps does no harm; but does the existence of this discretionary power require that a code section be devoted to it?

D. Public or Private Sale

The confusion concerning the validity of private sales of realty is even more pronounced than that concerning private sales of personalty. The

84. See notes 39-42 supra and accompanying text.
inconsistent provisions of section 113-1716 (private sale of land by an administrator against public policy), section 113-1717 (allowing private sales without leave of court only if will authorizes same), and section 113-1702(b) (authorizing private sales to pay debts or for distribution) leave the personal representative in something of a quandary. Although section 113-1702(b) specifically authorizes the private sale of land, it would appear that section 113-1716 specifically prohibits the private sale of land since such a sale would invariably be accompanied by "an obligation or agreement to perfect the same by a compliance with legal formalities."85 Furthermore, the objections to the additional procedural technicalities of the private sale of personalty apply likewise to the private sale of realty.

A fundamental question should be posited at this point: Is it really necessary to distinguish between public and private sales of either realty or personalty? The private sale was once thought to fetch a lower price than a public sale. Moreover, the private sale was thought to provide a potential opportunity for a conniving personal representative and third party to reap an iniquitous windfall.

It is impossible to make a rule specifying the best method of sale under all circumstances; the administrator is best able to act in the interest of the estate by exercising his own judgment. Moreover, a private sale is often the most efficient and least costly method of liquidating real or personal property of the decedent. Any lingering opportunity for bad faith on the part of a personal representative can be handled by charging him with a statutory fiduciary duty.

E. Realty vs. Personalty

Another fundamental question should be posed at this time: Is it really necessary to distinguish between sales of realty and personalty? Is there really a greater need to protect the interests of the heirs in the real property of the estate by placing increased restrictions on the administrator's latitude in dealing with realty?86

The distinction perhaps made sense in an earlier day when a man's wealth was, more often than not, measured by his land holdings, and when land was the basis of virtually the entire economic system. However, to require court supervision today of the sale of a 200-square-foot lot but not of 50,000 shares of IBM is hard to justify; therein lies the flaw of distinguishing between the sale of real and personal property in the

85. GA. CODE ANN. § 113-1716 (1975) outlaws as contrary to public policy private sales of land under the quoted provision of the statute appearing in the text.
modern world. Such holdovers from yesteryear tend to invite cynicism concerning the law and the legal profession.

F. Claims at Sales

After an executor or administrator has advertised his intent to sell real or personal property of the estate, any person who claims an interest in the property may file an affidavit, claiming that property, in the probate court of the county of administration.\(^87\) The judge of the probate court has the duty to transmit the claim affidavit to the superior court,\(^88\) where a determination of the validity of the claim will be made.\(^89\)

Upon receiving notice of the affidavit, the administrator or executor is directed to postpone the sale.\(^90\) Although the statute states that "[w]hen a claim has been interposed . . . the sale . . . shall be postponed until after the termination of the claim . . . ,"\(^91\) this language has been held to be advisory only.\(^92\) If an administrator sells property after a claim is interposed, the purchaser is allowed to remain in possession until the outcome of the claim is determined. If the superior court holds in favor of the claimant, the sale is null and void. Otherwise, the title vests in the purchaser.\(^93\)

The statutes assume that the claimant receives notice of the administrator's intent to sell by the required advertisement.\(^94\) The claim affidavit

87. \textit{Ga. Code Ann.} §§ 113-1801 to 1803 (1975). No bond or security is necessary to the validity of the claim, Falls v. Griffith, 25 Ga. 72 (1858), but the jury may assess damages against the claimant if it appears that the claim was interposed for delay only. Crawford v. Crawford, 139 Ga. 68, 76 S.E. 564 (1912).


90. "When a claim has been interposed as provided in the preceding sections, the sale of the property advertised and claimed shall be postponed until after the termination of the claim case." \textit{Ga. Code Ann.} § 113-1804 (1975).

91. \textit{Id.}

92. Luttgen v. Andrews, 174 Ga. 778, 163 S.E. 892 (1932) (where the administrator proceeds with the sale despite the claim, his deed is voidable and not void, and the purchaser in possession thereunder may sue to enjoin the claimant from alleged acts of continuing trespass).

93. \textit{Id.}

94. There must be advertisement of the petition to sell real property in a decedent's estate. \textit{Ga. Code Ann.} § 113-1706 (1975). This also applies to a petition to sell personal property. \textit{Ga. Code Ann.} §§ 113-1724, -1702 (1975), 49-204 (1979). There must also be ad-
may be filed immediately after application for leave to sell is made, or it may be filed at any time after the order of sale is granted and before the sale occurs. The right to file a claim exists only if the personal representative is required to obtain a court order before selling the estate property. There is no right to file a claim under these sections if a will gives the executor the authority to make sales.

Even when the right to file exists, it is of limited value. A purchaser at an administrator's sale does not receive a title superior to that of the decedent. Whether a claim is filed does not affect either the title of the purchaser or the claim of title by the person asserting the claim.

Chapter 113-18 is not the only method by which conflicting claims may be settled. When there is an actual controversy, conflicting claims to the title of property may be made under section 110-1101. In addition, one claiming title to property advertised for sale by a personal representative may settle the issue by a suit in ejectment in the case of realty, or trover if the subject matter is personalty. The claims procedure under

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95. Harwell v. Foster, 102 Ga. 38, 28 S.E. 967 (1897) (claim affidavit may not be filed prior to personal representative's application for leave to sell).

96. The right to file a claim applies only to sales which are judicial in their nature, e.g., sales under order of the court of probate. 2 REDFEARN, WILLS AND ADMINISTRATION IN GEORGIA § 314 (4th ed. 1979). A sale by an executor under a power in a will is not judicial, and therefore no claim can be interposed to such a sale. Harwell v. Foster, 102 Ga. 38, 28 S.E. 967 (1897); Davis v. Davis, 28 Ga. App. 306, 110 S.E. 919 (1922). The appropriate remedy in such a case would be an application to equity to enjoin the sale, or a suit in ejectment in the case of realty, or trover if the subject matter is personalty. 2 REDFEARN, WILLS AND ADMINISTRATION IN GEORGIA § 314 (4th ed. 1979).

97. It is unclear whether one who claims to be an heir or devisee, but has not been declared as such, may utilize Chapter 113-18 to seek to prevent a sale until the issue of his status has been settled. However, in Brewton v. McLeod, 216 Ga. 686, 119 S.E.2d 105 (1961), an action brought by one claiming to be a devisee under Chapter 113-18 was treated as if the claimant were proceeding under the declaratory judgment statutes. Those statutes specifically confer on a potential heir, devisee or creditor the right to request a determination of whether he is an heir, devisee or creditor. GA. CODE ANN. §§ 110-1107 (1973). Furthermore, one may request that the administrator or executor be restrained from doing any act in his fiduciary capacity pending construction of the will. GA. CODE ANN. §§ 110-1107 (1973).


100. Details of the action of ejectment are contained in GA. CODE ANN. §§ 33-101 to 121 (1980). The judgment is conclusive as to title between the parties, and upon verdict and judgment in favor of the plaintiff, a writ of possession is issued by the clerk. GA. CODE ANN. §§ 33-119, -120 (1980).

101. GA. CODE ANN. §§ 107-101 to 107 (1968). Plaintiff may elect to accept an alternative verdict for the property or its value, verdict for damages alone, or for the property alone and its hire, if any. GA. CODE ANN. § 107-105 (1968). The highest value proved between the time
chapter 113-18 is merely cumulative and gives the plaintiff an election to proceed with the court of probate as the statute prescribes or to sue in ejectment or trover.\textsuperscript{108}

In addition to the general problems of chapter 113-18, relating to its limited applicability and usefulness, the individual code sections suffer from internal deficiencies. Sections 113-1801, -1802, -1803, and -1715 contain overlapping, repetitive and redundant provisions. Section 113-1801 declares that a person claiming realty about to be sold by the personal representative may file a claims affidavit in the probate court. Section 113-1802 directs that a claim against realty be resolved in the county where the land is located. Section 113-1803 states that the claim concerning personalty is to be tried in the county where the personal representative resides. As if the venue needed further clarification, section 113-1715 again directs that claims against a decedent's real property are to be tried in the county where the land lies and claims against personalty are to be tried in the county where the personal representative resides. There is no justification for having four code sections to convey the simple idea that a person claiming property of a decedent about to be sold by court order may file a claims affidavit, and that the venue for a case concerning realty is where the land lies and in the case of personalty where the representative resides.

The conclusion is that chapter 113-18 confers no substantial right or protection on a claimant of estate property about to be sold by a personal representative that is not accorded by other remedial devices, e.g., ejectment, trover, injunctive relief and declaratory judgment action. The entire chapter is unnecessary and should be repealed.

G. \textit{Suggestions for Reform}

Georgia's legislative provisions concerning sales by the personal representative suffer from several basic shortcomings. The code sections are needlessly lengthy, technical, and confusing. There is little organization of conversion and the trial may be recovered. Ga. Code Ann. § 107-103 (1968).

\textsuperscript{102} 2 Redfearn, \textit{WILLS AND ADMINISTRATION IN GEORGIA} § 314 (4th ed. 1979). Although the remedies of ejectment and trover are available in lieu of the Chapter 113-18 claim, the latter precludes an application in equity to enjoin the sale by affording a complete and adequate remedy at law. Matson v. Crowe, 193 Ga. 578, 19 S.E.2d 288 (1942).

This chapter vests jurisdiction over these claims in the superior court rather than the probate court because the latter has no authority to determine conflicting claims of property, Hartsfield v. Hartsfield, 87 Ga. App. 707, 75 S.E.2d 276 (1953), nor does it have the authority to construe a will, Dennis v. McCray, 237 Ga. 605, 229 S.E.2d 367 (1976). The probate court does, however, have the power to ascertain the identity of the heirs at law. Ga. Code Ann. § 113-2801 (1975). To require these claims to be sent to the superior court is simply an advantageous timesaving device.
or internal coherence;\textsuperscript{103} there is inconsistent overlap among some parts;\textsuperscript{104} and many of the sections that have accumulated over the years are simply superfluous. A more serious defect is that the personal representative must utilize the cumbersome and expensive process of obtaining a court order to perform virtually any act that is not specifically authorized by a testator. This process is necessary even when there is no disagreement among the decedent's heirs or devisees. Every sale is considered an adversary proceeding to which the heirs and devisees must be made parties.\textsuperscript{105}

The emphasis placed by Georgia law on protection of the assets of the estate and the provision for close judicial supervision of sales by the personal representative is excessive. The elaborate safeguards against abuses must be complied with even when there is no objection to the sale. The process is cumbersome, complicated, and expensive; it calls for numerous trips to the courthouse by the personal representative's attorney. These precautions and formalities are not justified in the vast majority of situations. It is clear that there exists a need for revision of the substantive and procedural requirements of the current law.

There is no reason for the separate treatment of sales of specific subject matter, such as wild lands, corporate stock, livestock, etc. All such legislation should be eliminated. One comprehensive section dealing with the conveyancing of a decedent's assets by his personal representative would be sufficient. There is no need to limit the availability of an order to sell to instances where a sale is necessary to pay debts or to distribute the estate. A sale should be authorized for any legitimate purpose. There is also no need to continue any distinction between public and private sales, or distinctions between the sale of realty and personalty.

The authority of the administrator to sell estate property should not be conditioned upon notice, hearing, a valid court order and substantial compliance with statutory procedure. The law currently provides that an administrator must make an inventory of the estate,\textsuperscript{106} and that it shall

\textsuperscript{103} For example, "Sale of Wild Lands" (§ 113-1704) appears between "Terms of Sale; Credit; Security" (§ 113-1703) and "Sale of Insolvent or Doubtful Notes, Judgments, etc." (§ 113-1705).

\textsuperscript{104} For example, the statutes concerning private sales: §§ 113-1702(b); -1716; -1717.

\textsuperscript{105} This philosophy is criticized in Fletcher, Washington's Non-Intervention Executor — Starting Point for Probate Simplification, 41 WASH. L. REV. 33 (1966). Professor Fletcher calls for a reversal in attitude:

[R]ather than make all persons and all probates go through the elaborate machinery in order to be sure that all persons are protected, allow the mass of them to be wound up in a simple manner, providing, to be sure, machinery adequate to detect or prevent wrongdoing and adequate avenues by which the adjudicatory process and strong arm of the court can be invoked. \textit{Id.} at 75.

\textsuperscript{106} GA. CODE ANN. § 113-1402 (1975).
be appraised upon a request by an heir or creditor.107 This supplies sufficient notice. If any interested party has a legitimate reason why some property should not be sold, provision should be made for him to petition the probate court to prohibit any such sale. It should also be noted that an administrator is currently required to carry a sufficient bond.108 These provisions along with the requirement that the administrator act as a fiduciary should furnish sufficient protection for the heirs and creditors.

There is no reason why heirs and creditors should be able to void a sale upon mere procedural irregularities in the execution of that sale. Unless the administrator has acted in a self-dealing manner, purchasers should be able to obtain a good, non-voidable title. There is also no need to provide for the filing of post-sale returns now mandated in section 113-1719. Although the filing of these returns may not cause a substantial increase in the costs of administration nor occupy a large amount of time in the probate court, the costs still outweigh any benefits. Finally, since sections 113-1721 to 1723 are internally inconsistent as to which court has jurisdiction, and because other portions of Title 113 sufficiently deal with property left in trust by a will, these sections should be repealed.

Instead of attempting to patch up the many shortcomings in existing law, it would be preferable to repeal chapters 113-17 and 113-18 in their entirety and to adopt the provisions of the Uniform Probate Code relating to sales by the personal representative.

H. The U.P.C. Approach

The Uniform Probate Code sheds the traditional court-supervised procedures by requiring the personal representative to proceed without court order unless specifically directed to the contrary.109 The only notice that the personal representative is absolutely required to give is a general notice of his appointment within thirty days of same to all interested heirs and devisees.110 The Uniform Probate Code provides the personal representative with a "power over title"111 of all property of the estate and

108. GA. CODE ANN. § 113-1217 (Supp. 1980).
110. U.P.C. § 3-705. Of course, notice to creditors is also required.
111. The concept of "power over title" is designed to ease the succession of decedents' assets of which the personal representative does not have actual possession. If the power is
authorizes the exercise of such power without notice, hearing, or leave of court. Moreover, the Code enumerates some twenty-seven specific transactions authorized for a personal representative "acting reasonably for the benefit of interested persons." One such power is to "sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for the unpaid balances." There is no distinction between the Code's treatment of realty and personalty.

The power given a personal representative is, of course, not without its limitations. The personal representative is subject to being held personally liable to any interested party for damage caused by breach of his fiduciary duty. Moreover, any transaction by the personal representative involving a conflict of interest is subject to scrutiny and may be held voidable by an interested party. Also, any interested party may require the personal representative to furnish a bond.

The Uniform Probate Code eliminates the unnecessary substantive rules and procedural technicalities of chapter 113-17, as, for example, the distinction between sales of personalty and realty and the distinction between public and private sales. More importantly, the passive role of the court would reduce the necessary time and cost of the conveyancing process. The personal representative is treated as a fiduciary vested with general powers, but the necessary safeguards of the old system for the protection of any interested party (at his election) would be preserved.

If the Uniform Probate Code approach to sales is adopted, two minor additions should be considered. First, the general power of the personal representative could be more definitively described by a statute similar to North Carolina's:

[A] personal representative has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent man would perform incident to the collection, preservation, liquidation, or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate

unexercised by the personal representative before his discharge, the title of the heirs or devisees is clear. See Goldsworthy, Uniform Probate Code — Abolishing the Distinction Between Real and Personal Property in Administration, 46 N.D. L. Rev. 311 (1970).

112. U.P.C. § 3-711.
113. U.P.C. § 3-715. Such powers are subject to order of abatement in U.P.C. § 3-902, as follows: (1) property not disposed of by the will; (2) residuary devisees; (3) general devisees; (4) specific devisees. Such abatement is "without any preference or priority as between real and personal property." U.P.C. § 3-902(a).
114. U.P.C. § 3-717(23).
116. U.P.C. § 3-713.
117. U.P.C. § 3-605.
and expeditious manner. . . .

A second additional provision, perhaps in the Judicial Sales section of the Code, could specify a simple and unified procedure for public sales. This statute would provide the personal representative with some direction should he opt to convey any of a decedent's property at a public sale.

V. THE INSTALLMENT LAND CONTRACT (BOND FOR TITLE)

When a person executes a bond for title to land or a contract for the sale of land and dies without executing a deed in compliance therewith, the holder of the instrument may apply to the probate court having jurisdiction over the administration of the decedent vendor's estate for an order requiring the personal representative to make title according to the terms of the instrument. This right becomes operative when the decedent made no provision for performance in his will and the holder has complied with the conditions or obligations stipulated in the bond for title.

The Code sets forth a detailed procedural scheme to implement the enforcement of the bond for title and the contract for the sale of land. The petitioner must give ten days' written notice to the administrator or executor, and, unless waived, notices must also be given to the heirs of the decedent by publication in the official organ of the county once a week for four weeks. The probate judge is to hear any objections and is to decide whether the conditions of the bond or contract have been satisfied and whether justice compels him to order the title to be made. Either party may appeal the decision of the probate judge to the superior court.

The heirs of the deceased vendee under a bond for title or contract for sale have the right to petition the probate judge having jurisdiction over the decedent's estate to order the seller to give title to the estate of the deceased holder. If both the vendee and vendor die before the bond or the contract is fulfilled, notice is to be given to the legal representative of

the vendor who shall make title to the estate of the vendee.\textsuperscript{123} The costs of the procedure are to be paid by the representative of the estate of the vendor, unless the time for the making of title and for payment of money elapsed before the death of the obligor; in the latter event, the costs are to be paid by the petitioner.\textsuperscript{124}

Georgia is the only state which gives the bond for title independent legal significance. In other states a bond for title is regarded legally as a contract to convey land\textsuperscript{125} and is indistinguishable in its ordinary operation and effect from a simple agreement for the same purpose.\textsuperscript{126} A Texas court has stated that the bond for title is only a contract to convey; however, the court held that the bond for title may ripen into an equitable title upon payment of the consideration.\textsuperscript{127} Arkansas courts have declared that the bond for title is more than an executory contract but have assigned it no additional significance.\textsuperscript{128}

The detailed statutory scheme in chapter 113-16 is unique to Georgia. For example, New York law simply provides that an action may be maintained by and against the executor in all cases in which an action might have been maintained by or against his testator.\textsuperscript{129} In Virginia a transfer by the representative of the decedent pursuant to decedent's contract will be as effective as if made by the decedent, and the contract is to be filed with the deed.\textsuperscript{130} Massachusetts simply provides that specific performance is the proper remedy to compel conveyance of title in satisfaction of the decedent's contract and gives concurrent jurisdiction to the probate court and the trial court.\textsuperscript{131}

A statutory scheme similar to Georgia's for the specific enforcement of a contract for the sale of land pending at the death of the testator or intestate was repealed by Florida in 1974. The statute was replaced by a provision which confers on the personal representative of the deceased the power to "[p]erform or compromise, or when [proper,] refuse performance of, the decedent's contracts."\textsuperscript{132} This statute in essence gives a contract for the sale of land the same legal effect as all other enforceable

\textsuperscript{125} See, e.g., Sanders v. Danley, 289 Ala. 324, 267 So.2d 169 (1972); Kenton Coal & Oil Co. v. Petroleum Explorers, 287 Ky. 563, 154 S.W.2d 556 (1941).
\textsuperscript{127} Faddell v. Taylor, 239 S.W. 931 (1922).
\textsuperscript{128} White v. Page, 216 Ark. 632, 226 S.W.2d 973 (1950).
\textsuperscript{129} N.Y. Est., Powers & Trusts Law § 11-3.1 (McKinney 1967).
\textsuperscript{130} Va. Code §§ 64.1-148 (1980).
contracts entered into by the decedent. The Florida provision for powers of the personal representative is identical to that provided by the Uniform Probate Code.

As the security deed has come into frequent use, the bond for title, formerly extensively used, is now seldom used in Georgia. With one exception, the question of enforcement of a bond for title or sales contract for land has not been addressed by the Georgia courts for thirty years.

Both in Georgia and in other states, a contract for the sale of land made by a decedent is enforced on the same basis as all other contracts entered into by the decedent. Other Georgia statutes provide that the executor or administrator must fulfill all enforceable contracts entered into by the decedent. There is no valid reason why a contract to convey land, the enforceability of which is governed by reference to general contract principles, requires independent treatment in Georgia's probate code. The time is long past for the repeal of our bond for title legislation.

133. FLA. STAT. ANN. § 733.612(2) also confers on the personal representative the power to perform, compromise or refuse performance of the decedent's contracts in general.
135. The security deed (also called deed to secure debt or loan deed) operates as a transfer of the legal title to the collateral to the creditor. The grantor generally remains in possession, but the creditor has right of entry in case of default. When the debt is paid, title reverts to the grantor. GA. CODE ANN. § 67-1301 (1967); S. MITCHELL, REAL PROPERTY IN GEORGIA 587-89 (2d ed. 1960).
A bond for title (formerly used extensively but now seldom used) combines to some extent the features of a warranty deed from the seller to the buyer, and a security deed from the buyer to the seller. It binds the vendor to make warranty title. The vendor in a bond for title is a trustee of the vendee for the conveyance of the title and the vendee is trustee for the payment of the purchase money. It has been called a muniment of title. A bond for title, with the purchase money paid, is a complete title.
(citations omitted), Id. at 321, 180 S.E.2d at 352.
138. GA. CODE ANN. § 113-1525 (1975) provides as follows:
The administrator, as far as possible, shall fulfill the executory and comply with the executed contracts of the decedent, and he shall have a corresponding right to demand the same of the parties contracted with. If, however, the personal skill of the intestate entered into the consideration of the contract, his death renders the execution impossible, and the contract, though entire, shall be considered as divisible and closed at his death, and the part execution by the deceased shall authorize and require a corresponding compliance by the other contracting party.
VI. Conclusion

Georgia deserves an efficient system by which a personal representative may convey real and personal assets of his decedent. A probate code should not be cluttered with unnecessary technicalities of substance or procedure which are better left to judicial utterance, if to anything at all. The fact that a particular statute is harmless is no reason for retaining it; nothing should remain on the books unless it can be affirmatively justified.

Our existing legislation is a historical hodgepodge of provisions which are often conflicting and inevitably confusing. The various substantive rules and procedural pitfalls of the present Georgia Code which have accumulated haphazardly over the years need to be eliminated. The goal is to develop a fair but efficient system for the sale and conveyance of estate assets by the personal representative. The recommendations set forth in this article would be a step in the direction of a modern probate code for Georgia. Once this task is accomplished, we will wonder why we waited so long.