

May 1974

## The Personal Representative's Power to Sell Realty in Virginia

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Estates and Trusts Commons](#)

---

### Repository Citation

*The Personal Representative's Power to Sell Realty in Virginia*, 15 Wm. & Mary L. Rev. 949 (1974), <https://scholarship.law.wm.edu/wmlr/vol15/iss4/8>

Copyright c 1974 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

THE PERSONAL REPRESENTATIVE'S POWER  
TO SELL REALTY IN VIRGINIA

At common law, title to personal property passed to an executor or administrator upon the death of the owner, while title to realty vested immediately in the decedent's heirs or devisees.<sup>1</sup> During the period of administration, the personal representative's control over personalty was, and under present law remains, analogous to that of a trustee, there being few restrictions upon the power to dispose of the property for the benefit of the estate. With respect to realty, however, a personal representative at common law had neither title nor power to sell.<sup>2</sup>

Two general exceptions to the common law rules have evolved to expand the personal representative's power over realty. First, realty may be subjected by statute to the payment of debts of the estate when the personalty is insufficient for that purpose. Second, and more significantly, an executor may sell realty when vested with such power by the will.<sup>3</sup> This Comment will examine the development and present status in Virginia of these exceptions to the general rule against sale of realty by a personal representative and will suggest statutory reforms designed to bring Virginia law more in line with that in other jurisdictions in reflecting modern conditions.

POWER TO SELL REALTY FOR THE PAYMENT OF DEBTS

In Virginia, the devisee under a decedent's will, or, if there is no devise, the heir, has title to the real estate from the instant of the decedent's death, with an immediate right to possession and use of the realty to the extent it is not needed for the payment of the decedent's debts.<sup>4</sup> Although at common law the real estate of a decedent passed

---

1. This distinction represents a vestige of the feudal system of estates, under which fee to real property reverted to the feudal lord at the death of the feudal tenant. 3 W. HOLDSWORTH, *THE HISTORY OF ENGLISH LAW* 574-76 (1923); 2 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 334, 360 (2d ed. 1898).

2. In *Eppes v. Demoville*, 6 Va. (2 Call) 22 (1799), it was stated: "The heir is as much the legal representative of the testator as to the real estate, as the executor is as to the personal; and, with the land, the heir takes all deeds, and writings relating to them, whether for conveying the title or protecting his quiet enjoyment; with none of which could the executor intermeddle . . ." *Id.* at 37.

3. T. ATKINSON, *WILLS* § 123, at 668 (2d ed. 1953).

4. In some states the real estate is also liable for the expenses of administration of a

to the heirs or devisees free of all claims of creditors other than those who had obtained special secured rights against the property during the decedent's lifetime,<sup>5</sup> a Virginia statute<sup>6</sup> extends to general creditors the right to subject a decedent's realty to the payment of debts once the personalty has been exhausted.<sup>7</sup>

Statutes in every jurisdiction other than Virginia authorize the personal representative to sell, under court order, the decedent's realty to satisfy debts.<sup>8</sup> Nevertheless, the Virginia statute has been strictly construed, being in derogation of the common law, to give a personal representative neither a power of sale nor the right to sue devisees to compel the sale of realty for the payment of debts.<sup>9</sup> A recent amend-

---

decedent's estate. Although VA. CODE ANN. § 64.1-181 (Repl. Vol. 1973) provides that all real estate of a decedent shall be considered assets for the payment of his debts and other lawful demands against his estate, it has been held that this provision encompasses only lawful demands against the decedent, not administration expenses. *United States v. Willcox*, 73 F.2d 781 (4th Cir. 1934); *cf. Moore v. Kernachan*, 133 Va. 206, 112 S.E. 31 (1922) (costs of administration not debts within the meaning of a provision in a will directing sale of realty for payment of debts).

5. *Alexander v. Byrd*, 85 Va. 690, 8 S.E. 577 (1889); *Piper v. Douglas*, 44 Va. (3 Gratt.) 371 (1847).

6. VA. CODE ANN. § 64.1-181 (Repl. Vol. 1973) provides:

All real estate of any person who may hereafter die, as to which he may die intestate, or which, though he die testate, shall not by his will be charged with or devised subject to the payment of his debts, or which may remain after satisfying the debts with which it may be so charged or subject to which it may be so devised, shall be assets for the payment of the decedent's debts and all lawful demands against his estate, in the order in which the personal estate of a decedent is directed to be applied.

7. *Broadbuss v. Broadbuss*, 144 Va. 727, 130 S.E. 794 (1925). As between the real and personal property of the deceased, the personal estate in the hands of the executor or administrator is the primary fund for the payment of debts, and, unless there is a testamentary provision to the contrary, the real estate may not be sold until all the personal property in the estate has been exhausted. *See, e.g., Edmunds v. Scott*, 78 Va. 720 (1884). The personal property, without testamentary consent, will not be exonerated by a charge on the real estate. *New's Ex'r v. Bass*, 92 Va. 383, 23 S.E. 747 (1895).

8. T. ATKINSON, *supra* note 3, § 123, at 670; 3 AMERICAN LAW OF PROPERTY § 14.20, at 642 (A. J. Casner ed. 1952) [hereinafter cited as Casner].

9. *Peirce v. Graham*, 85 Va. 227, 7 S.E. 189 (1888). *See also Catron v. Bostic*, 123 Va. 355, 96 S.E. 845 (1918); *Daingerfield v. Smith*, 83 Va. 81, 1 S.E. 599 (1887); *Litterall v. Jackson*, 80 Va. 604 (1885); *Brewis v. Lawson*, 76 Va. 36 (1881); *McCandlish v. Keen*, 54 Va. (13 Gratt.) 615 (1857); *Tennent v. Pattons*, 33 Va. (6 Leigh) 196 (1835).

In *Catron v. Bostic*, *supra*, the Supreme Court of Appeals of Virginia stated: "The creditors have their remedy against the heirs to subject the real estate which is made assets for the payment of their debts by [section 64.1-181] of the Code, but the administrator has no such right. The real assets are not subject to be administered at

ment<sup>10</sup> does permit actions against devisees or heirs for the payment of debts in an amount equivalent to the value of assets received by descent. Nevertheless, although real assets may be subject to administration in a court of equity, including a decree ordering sale pursuant to a suit by creditors, the statute does not authorize the personal representative to sell the assets. Creditors, unable to maintain a direct action against the personal representative to compel the sale of realty, are thus left to their traditional remedy of suing the heirs or devisees.

Present Virginia law hinders creditors whose claims exceed the value of personalty in the estate. Proceeding against heirs or devisees to have land sold under court decree requires joinder of all takers within the jurisdiction,<sup>11</sup> with the liability of each limited to a proportionate share

---

the suit of the administrator of an intestate, in the absence of a statute conferring such right." The court held that an action could not be maintained by an administrator who was also a creditor of the deceased and whose bill for sale of the decedent's land failed to disclose in what capacity suit was brought. *Accord*, Peirce v. Graham, *supra*. The personal representative may neither sue the heirs to have the realty sold to pay debts nor bring a bill as next friend to the heirs to compel creditors to sell the realty to pay debts. Although a personal representative is not authorized to maintain a suit against the heirs to subject realty to the payment of debts, the decree of a court with jurisdiction of the subject matter, even if erroneous, is binding until reversed. *Id.* at 236, 7 S.E. at 194.

10. By adding the words "personal representative," section 64.1-185 was amended to read as follows:

An heir or devisee may be sued in equity by the *personal representative* or any creditor to whom a claim is due for which the estate descended or devised is liable, or for which the heir or devisee is liable in respect to such estate; and he shall not be liable to an action at law for any matter for which there may be redress by such suit in equity. And any judgment or decree for such claim hereafter rendered against the personal representative of the decedent shall be prima facie evidence of the claim against the heir or devisee in such suit in equity. In any suit by the *personal representative* or any creditor pursuant to this chapter, he shall record a notice of lis pendens as required by § 8-142, at the time of filing such suit. The *personal representative* or creditor, as the case may be, shall show to the satisfaction of the court that there is not sufficient personal assets in the estate to satisfy all claims against the estate.

VA. CODE ANN. § 64.1-185 (Repl. Vol. 1973) (emphasis supplied).

Although the amendment may have been intended to give the personal representative a right to maintain a suit to sell realty for the payment of the decedent's debts, a strict construction would extend to the personal representative only the right previously reserved to the decedent's creditors, that is, the right to sue the heir or devisee to have the land sold under court decree. Although the courts have not yet construed the amended statute, it appears that the amendment fails to dislodge the prior case law prohibiting the representative from personally bringing a suit to sell realty for the payment of debts.

11. A bill filed by a single creditor against the devisees may be converted into a

of the debt not to exceed the value of the property received.<sup>12</sup> The heir or devisee, moreover, is not accountable for rents or profits accrued prior to a decree subjecting the realty to the payment of debts.<sup>13</sup> If the personal representative had power to pay debts from realty, the entire procedure for satisfying obligations of the estate could be expedited, since creditors would need deal with only one party in adjusting their claims against the estate.

The efficiency in settlement of claims which results from according greater power over realty to the personal representative suggests that the Virginia practice, considered obsolete in most other jurisdictions,<sup>14</sup> should be replaced by a statute authorizing the personal representative to bring suit to sell the decedent's realty in satisfaction of his debts. The suggested wording of such a statute is as follows:

When the personal estate of a decedent is insufficient for the payment of his debts, his personal representative may commence and prosecute a suit in equity to subject and sell the decedent's real estate for the payment thereof as provided in this article. The surviving wife or husband, heirs and devisees, if any, and all the known creditors of the decedent, shall be made defendants in such suit. If such suit is not brought within a reasonable time after the qualification of such personal representative, any creditor of such decedent, whether he has obtained a judgment at law for his claims or not, may institute and prosecute such suit on behalf of himself and the other creditors of such decedent, in which the personal representative, surviving wife or husband, heirs and devisees, if any, of the decedent shall be defendants. In every suit under this section anyone claiming to be a creditor of the decedent, whether he may have been made a party thereto or not, or whether he may have been served with process therein or not,

---

general creditor's suit according to the same rules and principles which apply to a bill filed by a judgment creditor to subject the real estate of a living debtor to the payment of his judgment. Although not required in either case, the more formal and better practice is for the plaintiff to file his bill on behalf of himself and other creditors similarly situated.

12. When one of the devisees has conveyed land to a bona fide purchaser and has become insolvent, other devisees are liable, not only for the proportionate share each would have borne in the first instance, but for the entire debt of the decedent, to the extent of land each received. *Ryan's Adm'r v. McLeod*, 73 Va. (32 Gratt.) 367 (1879). If land held by one of the devisees does not discharge his proportionate share of the debt, the remaining unpaid balance is to be apportioned among the others. *Lewis v. Overby's Adm'r*, 72 Va. (31 Gratt.) 601 (1879).

13. *Blow v. Maynard*, 29 Va. (2 Leigh) 29 (1830).

14. *Casner*, *supra* note 8, § 14.20, at 642.

may present his claim, and, upon such presentation, shall be deemed to have been made a party to the suit and to have been served with process therein. And evidence respecting such claim may be taken, and the same may be allowed and paid, in whole or in part, or rejected in the same manner and with the same effect, as if the claimant had been originally made a party and served with process.<sup>15</sup>

Under the proposed statute, a creditor would have four remedies: an action at law against the personal representative upon a judgment against, or any contract of, the decedent;<sup>16</sup> a separate bill in equity to compel payment of an individual debt from funds in the possession

---

15. This statute would specifically empower the personal representative to bring suit against the devisees to sell realty for the payment of debts and thus supersede prior cases holding to the contrary. It also permits creditors to institute suit if the personal representative fails to do so within a reasonable time. If, however, the personal representative commences a suit before a creditor brings a similar action, the representative's suit would constitute grounds for staying or dismissing that of the creditor. The opposite result would obtain if the creditor first commences a suit and the personal representative has failed to bring suit within a reasonable time after qualifying.

A specific time period might be established during which the personal representative's right to bring a suit would be exclusive, thus affording him sufficient time in which to adjust claims without being harassed by other litigants. A West Virginia statute gives the executor or administrator six months in which to bring suit. *W. VA. CODE ANN.* § 44-8-7 (1968); *see Hess v. Casto*, 120 W. Va. 158, 197 S.E. 292 (1938); *Tearney v. Marmion*, 103 W. Va. 394, 137 S.E. 543 (1927); *Gooch v. Gooch*, 70 W. Va. 38, 73 S.E. 56 (1911); *Reinhardt v. Reinhardt*, 21 W. Va. 76 (1882). Such exclusive time periods, however, prohibit creditor suits even when the personal representative has no intention of bringing a suit to subject the realty to the payment of debts. Because the creditor is concerned with the prompt payment of debts and the running of the statute of limitations on his claim, an exclusive privilege given an inactive personal representative may be detrimental to the creditor's interests. By employing the words "reasonable time," the proposed statute leaves to judicial discretion the option to allow a creditor to sue immediately upon a showing that the personal representative intends to remain inactive. An alternate solution is a substitution of the words "a reasonable time not to exceed six months," thereby placing an outside limit on the time during which a court may reserve to the personal representative the exclusive privilege of bringing suit.

An additional advantage of the model statute is that it permits joinder of creditors even though they were not parties when the suit was filed. Furthermore, there is no requirement that a creditor have obtained a prior judgment at law for his claims. This unitary administration of claims clearly would hasten the satisfaction of decedents' debts.

16. *VA. CODE ANN.* § 64.1-144 (Repl. Vol. 1973) provides: "A personal representative may sue or be sued upon any judgment for or against or any contract of or with his decedent." Coupled with the proposed statute giving the personal representative authority over the realty, this provision would allow the creditor to sue the personal representative to subject the decedent's real estate to the payment of debts.

of the personal representative;<sup>17</sup> a bill on behalf of himself and other creditors to ascertain and distribute both the real and the personal assets;<sup>18</sup> and a bill against the heirs or devisees to compel sale of the real estate descended to them.<sup>19</sup> Enactment of this or a similar statute, while preserving the creditor's traditional remedies, would resolve uncertainties with respect to the personal representative's authority to dispose of the decedent's real estate and would bring to the Virginia procedure the efficiency found in other jurisdictions.

### TESTAMENTARY POWER OF SALE

The one clear means by which the personal representative in Virginia currently may acquire a power of sale over realty is through express testamentary grant or by assignment of such active duties that the power is necessarily implied to accomplish the objectives stated in the will. Such a power may be conferred for a variety of purposes, including payment of an allowance to the family, satisfaction of debts outstanding against the decedent or incurred in the administration of the estate, or payment of legacies. The power may be general—exercisable “for any and all ends”<sup>20</sup>—or limited to a specific purpose such as the payment of debts.<sup>21</sup> An examination of the case law interpreting the statutory basis in Virginia<sup>22</sup> for a testamentary grant

---

17. Funds in the hands of the personal representative would include any amount received pursuant to the sale of realty. The property liable for the payment of debts would include the decedent's realty where his personalty is insufficient, as prescribed in VA. CODE ANN. § 64.1-181 (Repl. Vol. 1973).

18. Under the proposed statute this remedy is subject to the right of the personal representative to bring such a suit within a reasonable time after his qualification. See note 15 *supra*. When a creditor's suit is instituted, the personal representative would be a necessary party because of his common law relationship to the personal estate and his statutory relationship to the real estate.

19. The proposed statute specifically preserves this traditional Virginia remedy. Such a suit may be brought under authority of VA. CODE ANN. §§ 64.1-181, 64.1-185 (Repl. Vol. 1973).

20. T. ATKINSON, *supra* note 3, § 123, at 668.

21. *Leavell v. Grasty*, 114 Va. 763, 77 S.E. 605 (1913). Where real estate was devised without authority to the executor to encumber it to pay debts, it was held that the executor could sell only so much thereof as was necessary to pay debts, but that he could not encumber any of the land. *Id.*

22. The Statute of Wills of 1540 authorized a devise of land to executors or trustees when instructions for sale and application of the proceeds were given. 32 Hen. VIII, c. 1 (1540). The Virginia counterpart of this rule appeared in a statute first enacted in 1785. The statute was amended in 1792 and 1819 and is currently codified as section 64.1-146 of the Virginia Code, which provides: “Real estate devised to be sold shall, if no person other than the executors be appointed for the purpose, be sold and

of power to sell realty and establishing the limits, types, and application of such powers will indicate a number of the problem areas which require attention in drafting a will. The desirability of statutory reform broader than that already proposed will become apparent.

### *Present Status in Virginia of the Testamentary Power*

#### *Express or Implied Power of Sale*

The existence of a testamentary power to sell realty and the extent of the power conferred depend upon the testator's intent, ascertained from express language in the will or by implication.<sup>23</sup> Although the difference between express and implied powers is a matter of degree, the language of the will must provide the basis for either, since a power of sale will not be found simply because it is desirable. No precise terminology is necessary to confer upon an executor authority to sell and dispose of real estate; rather, the intention to create such a power must be discerned from a reasonable construction of the will as a whole. "Like any other construction matter the entire scheme of the will, the nature of the property, the relationship of the beneficiaries, and other surrounding circumstances must be considered in connection with the words themselves."<sup>24</sup> Thus, it has been held that a testamentary direction that realty be sold without an express designation of the executor as vendor gives rise to an implied power of sale in the executor if the will authorizes the executor to select the lands to be sold<sup>25</sup> or directs the executor to distribute the proceeds of sale.<sup>26</sup> Of course, not every

---

conveyed and rents and profits of any real estate which executors are authorized by the will to receive shall be received by the executors who qualify, or the survivor of them." VA. CODE ANN. § 64.1-146 (Repl. Vol. 1973).

23. In *Neblett v. Smith*, 142 Va. 840, 855, 128 S.E. 247, 252 (1925), the court observed: "Executors, by virtue of their office as such, have no power over the real estate. Any power which they have must be conferred by the will itself, either in terms or by implication." See Annot., 23 A.L.R.2d 1000 (1952); Annot., 134 A.L.R. 378 (1941).

24. Casner, *supra* note 8, § 14.28, at 685.

25. *Virginia & W. Va. Coal Co. v. Charles*, 251 F. 83 (W.D. Va. 1917), *aff'd*, 254 F. 379 (4th Cir.), *appeal dismissed per curiam*, 252 U.S. 569 (1918). The testator's will provided: "It is my will . . . that all my just debts be paid, . . . all of which debts, costs and expenses shall be paid out of moneys arising from the sale of any part of my real estate that my executors may deem most proper to be sold for the above purpose." *Id.* at 108-09.

26. See *Elys v. Wynne*, 63 Va. (22 Gratt.) 224 (1872), in which the will stated: "[M]y wish is, that the said land shall return to my other heirs, and be sold, and the moneys arising from such sale to be equally divided among all my heirs." *Id.* at 230.



duty involving the sale of realty is sufficient to create a power of sale,<sup>27</sup> since it is the intention of the testator as manifested in the will read as a whole which controls.

When the will confers a power of sale upon the executor, a court order is unnecessary for its exercise, unless the will by its terms requires prior judicial approval.<sup>28</sup> In some jurisdictions the courts refuse to grant an order of sale if the executor has power under the will to sell the real estate, on the ground that the judicial proceedings are an unnecessary expense.<sup>29</sup> The rule in Virginia is more flexible, the personal representative having the option to seek the assistance of a court of equity in effecting a sale, such as through a petition for a decree ordering sale.<sup>30</sup> The objection that such a procedure may be wasteful of the resources of both court and estate is countered by the fact that a judicial sale, unlike a private sale authorized in a will, protects the executor from liability for defects in title.<sup>31</sup>

### *Mandatory or Discretionary Powers*

When an executor is commanded to sell realty, the power is mandatory; however, a fine line separates such powers from those the exercise of which is discretionary with the executor. The distinction between

27. 2 J. WOERNER, *THE AMERICAN LAW OF ADMINISTRATION* 1126-27 (3d ed. 1923). *Contra*, J. SCHOULER, *LAW OF WILLS, EXECUTORS AND ADMINISTRATORS* § 2418 (6th ed. 1923).

28. T. ATKINSON, *supra* note 3, § 123, at 668.

29. Casner, *supra* note 8, § 14.28, at 688.

30. Sproul v. Hunter, 122 Va. 102, 109, 94 S.E. 179, 181 (1917); Shepherd v. Darling, 120 Va. 586, 91 S.E. 737 (1917); see Gooch v. Old Dominion Trust Co., 121 Va. 29, 92 S.E. 846 (1917); Terry v. Coles, 80 Va. 695 (1885). See also B. LAMB, *VIRGINIA PROBATE PRACTICE* §§ 129-33 (1957).

The Uniform Probate Code contains a provision similar to, although stricter than, the Virginia rule. The Code provides:

Section 3-704. [Personal Representative to Proceed Without Court Order; Exception.] A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the Court, but he may invoke the jurisdiction of the Court, in proceedings authorized by this Code, to resolve questions concerning the estate or its administration.

UNIFORM PROBATE CODE § 3-704. This section emphasizes the expeditious settlement and distribution of a decedent's estate, permitting resort to judicial proceedings only where necessary to resolve questions of administration.

31. See Sproul v. Hunter, 122 Va. 102, 109, 94 S.E. 179, 181-82 (1917); Shepherd v. Darling, 120 Va. 586, 592, 91 S.E. 737, 739 (1917).

the powers is blurred by such cases as *Brown v. Armistead*,<sup>32</sup> in which the court, discussing a *mandatory* power of sale, stated: "[The executors] were bound to exercise a proper *discretion* in the matter, bound to use all proper means to effect a sale . . . ."<sup>33</sup> The provision in question empowered the executors to sell the testator's land at public sale if, in their judgment, the anticipated revenue from such a sale was equal to the value of the land.<sup>34</sup> Although not explicit on the point, the opinion in *Brown* apparently supports the proposition that a testamentary power to sell realty should be deemed mandatory, notwithstanding that the exercise of such power is based upon the executor's judgment, if the testator has set sufficient standards to guide and delimit the exercise of that judgment.

The above situation is to be distinguished from one in which the executor's decision vis-a-vis sale of realty is not subject to controlling considerations found in the will. The will at issue in another early case, for example, provided that the executor had full power and authority to sell a farm five years after the testator's death if it was determined that the best interests of the testator's family would not be served by the widow's retention of the realty for a longer period.<sup>35</sup> When, five years after the testator's death, the executor advertised the farm for sale, the widow sought an injunction. The court, finding that a power of sale was present because the testator had given his executor great discretion in its exercise, stated that such a power could be exceeded only through fraudulent or improper motive or clear mistake of the executor's duty.<sup>36</sup>

An executor typically is allowed a reasonable time within which to exercise his power of sale, reasonableness being determined by market conditions, the purpose of the sale, and other factors pertinent to the proper administration of the estate.<sup>37</sup> Directions to sell realty within a designated time do not ordinarily prevent a sale thereafter, unless the will expressly forbids sale beyond a specified date.<sup>38</sup> When the power is mandatory the court may compel the executor to sell within a reasonable time, but if the will directs a sale to be made at a designated

---

32. 27 Va. (6 Rand.) 663 (1828).

33. *Id.* at 669 (emphasis supplied).

34. *Id.* at 664.

35. *Dixon v. McCue*, 55 Va. (14 Gratt.) 540 (1858).

36. *Id.* at 548. See *Gregory v. Gates*, 81 Va. 262 (1885) (provision that executors, if they believed it would be in the interest of the wife and children, should sell any of the real and personal estate other than the homestead).

37. *Casner*, *supra* note 8, § 14.28, at 688.

38. *T. Atkinson*, *supra* note 3, § 123, at 669.

future time, or upon the happening of a contingency, a sale before the prescribed time is void.<sup>39</sup> Finally, if the executor is granted wide discretion concerning the time or terms of the sale, he is not liable for any loss which results from delay in selling the property of the deceased if he has acted in good faith.<sup>40</sup>

*Power "Coupled with an Interest" or Naked Power*

Absent a power of sale created in the will, at common law title to realty passed directly to the heirs and devisees.<sup>41</sup> Whether a power of sale alters the devolution of realty in a given case, however, depends upon construction of the power as "coupled with an interest" or as a naked power. Virginia courts generally have held that the will transfers title to the executor when the power of sale is deemed coupled with an interest,<sup>42</sup> or, stated differently, when the testator intended to create a testamentary trust.<sup>43</sup> If only a naked power of sale is conferred, the

---

39. In *Raper v. Sanders*, 62 Va. (21 Gratt.) 60 (1871), the court held that "[w]here the testator gives an authority or power, upon the happening of an event which he specifies, that authority or power does not attach from the happening of a different event, although the effect be the same upon the condition of his estate, or the status and interests of those who are to be affected by the exercise of the power." *Id.* at 71. See *Jackson v. Ligon*, 30 Va. (3 Leigh) 161, 179 (1831), where the will stated: "[A]fter my wife's death or marriage, my land shall be sold . . ." The wife renounced the will, but, because she was still alive and unmarried when the executor sold the land, the court held that "the sale of the executor, under these circumstances, was not authorized by the will. Call it a naked power, or a power blended with a trust; construe it strictly or liberally; still you cannot make it a power to sell the land . . ." *Id.* at 193.

40. *Wimbish v. Rawlins' Ex'r*, 76 Va. 48 (1881). The testator, who died in January 1861, desired his debts paid as soon as convenient and directed that his land in Virginia be sold on such terms as his executor might deem advisable. The executor delayed sale for almost two years, at which time he received Confederate money for the land, but was held not accountable for the resulting loss since he had acted in good faith.

41. *Broaddus v. Broaddus*, 144 Va. 727, 130 S.E. 794 (1925).

42. A power coupled with an interest has been defined as a power "coupled with other trusts and duties which require the execution of the power of sale." *Mosby's Adm'r v. Mosby's Adm'r*, 50 Va. (9 Gratt.) 584, 593 (1853).

43. Upon finding that the executor was vested with a power of sale, the court in *Mills v. Mills*, 69 Va. (28 Gratt.) 442 (1877) held that "[t]he estate did not devolve on the heirs for an instant, either at law or in equity, but enured at once to the executors for the purposes of the will." *Id.* at 460. In *Kellow v. Bumgardner*, 196 Va. 247, 83 S.E.2d 391 (1954), it was held that where a nonresident testator by will created various trusts in the residuum of his estate and gave executors and trustees full power to sell and convey his realty, the powers, interests, rights, and duties relative to the testator's realty in Virginia devolved upon the administrator c.t.a. In *Coles' Heirs v. Jamerson*, 112 Va. 311, 71 S.E. 618 (1911), however, a direction in a will that land be sold by executors was held to give them only a power of sale, and

land descends to the heir or passes to the devisee under the will, entitling either to use the property until the executor or the trustee executes the power.<sup>44</sup>

A starting point for distinguishing a power coupled with an interest from a naked power is the general proposition that "[t]he power is commonly said to be 'coupled with an interest' if the estate as well as the power is in the donee."<sup>45</sup> Thus, an express devise of realty to the executor with instructions to sell clearly grants a power coupled with an interest.<sup>46</sup> On the other hand, it is equally clear that only a naked power is conferred when realty is devised to a named beneficiary expressly authorized to take possession subject to the debts of the testator or to the payment of legacies.<sup>47</sup> When, however, the testator makes no devise of his realty but authorizes the executor to sell it and distribute the proceeds to a designated beneficiary, or when the realty is devised to one beneficiary but the executor is authorized to sell it and distribute the proceeds among various beneficiaries, including or excluding the devisee, there is scant precedent in Virginia classifying the nature of the interests conferred.

One early case is indicative of an apparent inclination of Virginia courts to find an executor's power of sale coupled with an interest. In *Mosby's Administrator v. Mosby's Administrator*,<sup>48</sup> a will instructed the executors in their discretion to sell specified undevised portions of the testator's land and distribute the proceeds to certain beneficiaries. Noting that the intent of the testator determines whether a power of sale is "coupled with an interest" and considering the will as a whole

---

no interest in the land; title to the land devolves upon the heirs upon the death of the testator, subject to divestiture only by the lawful execution of the power of sale.

44. *Machir v. Funk*, 90 Va. 284, 286, 18 S.E. 197, 199 (1893).

45. Evans, *The Survival of Powers of Joint Executors to Sell Land*, 85 U. PA. L. REV. 154, 162 (1936).

46. S. CROSWELL, *THE LAW OF EXECUTORS AND ADMINISTRATORS* § 330 (1889) observes: "It is said to be now settled that if the land is devised to the executor to sell . . . this passes the interest in the lands to the executor. . . ." See *Coles' Heirs v. Jamerson*, 112 Va. 311, 316, 71 S.E. 618, 619-20 (1911).

47. In *Machir v. Funk*, 90 Va. 284, 18 S.E. 197 (1893), the will provided that "[a]ll the rest and residue of my estate shall be sold after my death by my executors hereinafter named, and, after paying all my just debts and the legacies aforesaid, the residue, if any, I give to Mary Ellen Jamison." *Id.* at 286, 18 S.E. at 198. The court, in construing this provision, concluded that "although the will directs it to be sold by the executors, the obvious intention was to confer on the executors a naked power." *Id.* at 288, 18 S.E. at 199. See also *Elys v. Wynne*, 63 Va. (22 Gratt.) 224 (1872) (naked power where executors had authority to sell realty devised to testator's heirs).

48. 50 Va. (9 Gratt.) 584 (1853).

together with the facts and circumstances surrounding its execution, the court reasoned as follows in concluding that the testator intended to pass title to his executors:

The testator obviously did not design that until a sale of the land it should devolve on his heirs. He intended to break the descent . . . . He did not expect the devisees to hold any of the property jointly, but intended that all of it should be divided, and they should receive their several portions. The land he intended should, be divided not in kind . . . but by a sale and division of the proceeds . . . . He seems to have contemplated, as a matter of course, that his executors would hold all . . . .<sup>49</sup>

*Mosby's Administrator* aligns with the common law rule providing for the imposition of a trust when the active testamentary duties imposed on the executor are such that granting him legal title is reasonably necessary to accomplish the avowed purposes of the will and when the trust thus implied sustains, rather than defeats, the disposition made in the will.<sup>50</sup> Virginia courts, it is submitted, are likely to apply such a rule in the future unless the will clearly shows the testator's contrary intent, since imposing a trust in the executor pending sale of the realty profits the beneficiaries and the estate by encouraging efficiency of administration and maximizing the sale price.

Whether the executor has a right to possession of the realty generally is governed by the same considerations determinative of legal title; that is, absent an express grant,<sup>51</sup> the executor has no right to possession of realty unless an implied grant may be found in the terms of the will. As with title to realty, an implied right to possession may be founded upon the existence of a power of sale coupled with an interest.<sup>52</sup> Since it has been held that an executor who holds legal title has a right to

---

49. *Id.* at 594-96. See Annot., 94 A.L.R. 1140, 1143-46 (1935). See also *Brockenbrough v. Turner*, 78 Va. 438 (1884) (will directing that land not specifically devised be sold by the executor for payment of debts and legacies held to vest legal title to the land in the executor).

50. Annot., 134 A.L.R. 378 (1941); see Annot., 23 A.L.R.2d 1000 (1952); 54 AM. JUR. *Trusts* § 65 (1945).

51. An executor is entitled to possession of real estate charged by the will with the payment of debts, regardless of whether personalty is sufficient for such payment. *Tapscott v. Cobbs*, 52 Va. (11 Gratt.) 172 (1854).

52. It should be noted, however, that the power to take possession of real estate and the power to sell it are two entirely distinct powers, either of which may be conferred or exercised without reference to the other.

possession,<sup>53</sup> it appears that title is determinative of possessory rights when the will is silent on the point.<sup>54</sup>

### *Title Conveyed*

If the power of sale is properly exercised by the personal representative, he conveys good title to his grantee. An attempted exercise beyond the scope of the power granted or by an unauthorized person, however, passes no title, since a purchaser has a duty to inquire into the sufficiency of the testator's title and the authority of the executor to sell under the will.<sup>55</sup> Nevertheless, a conveyance is not subject to attack simply because the executor was acting in violation of his trust if the purchaser had no knowledge of such violation and in good faith paid the purchase price.<sup>56</sup> An executor selling land under a testamentary

---

53. *Mosby's Adm'r v. Mosby's Adm'r*, 50 Va. (9 Gratt.) 584 (1853).

54. If the executor in possession holds title under a testamentary trust, the beneficiaries are entitled to the rents accruing before sale of the land. *Id.* at 595.

55. In *Brock v. Philips*, 2 Va. (2 Wash.) 68, 70 (1795), it was held: "The executor by law has a right to the possession . . . of personal estate, and a right to sell [it]. But he has no right to sell lands, unless under a special authority. A purchaser therefore of land, from an executor, is bound to look for, and to understand the extent of that power, and consequently the [principle of] caveat emptor strictly applies in such a case." See *Syme v. Johnson*, 7 Va. (3 Call) 558 (1790) (where the executor stated at the sale that he sold only as his testator, *held*: it was the duty of the purchaser to inquire into the state of the property).

56. *Staples v. Staples*, 65 Va. (24 Gratt.) 225 (1874); *Moss v. Moorman*, 65 Va. (24 Gratt.) 97 (1873). See also *Brockenbrough v. Turner*, 78 Va. 438 (1884). In accordance with the general rule, the Uniform Probate Code provides:

Section 3-714. [Persons Dealing with Personal Representative; Protection.]

A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or of the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in Section 3-504, no provision in any will or court order purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

UNIFORM PROBATE CODE § 3-714.

power is bound to convey with only a special warranty against himself and all persons claiming under him,<sup>57</sup> and a purchaser who takes no covenants against defects of title is without relief, unless, of course, the personal representative has been guilty of such fraud as will vitiate the contract.

If an executor is given a discretionary power of sale, a purchaser, acting in good faith, is unaffected by the manner in which the executor exercises that discretion. In *Davis v. Christian*,<sup>58</sup> for example, the court held that "[i]t was not the duty or business of the purchaser to inquire into the necessity or expediency of the sale . . . . He had a right to presume, in the absence of all direct or plain proof to the contrary, that the executor was exercising his power fairly and faithfully, in conformity with his duty."<sup>59</sup> Moreover, the purchaser is not obligated to ensure proper application by the executor of the proceeds of the sale.<sup>60</sup>

### *Survival of a Power among Joint Executors*

Even when the language of a will clearly creates a power of sale, questions remain if such power is vested in joint executors. Unless some basis for the survival of the power can be found,<sup>61</sup> a sale by fewer than all executors is void.<sup>62</sup> Determining whether a power sur-

57. *Grantland v. Wight*, 19 Va. (5 Munf.) 295 (1816) (executor not bound to convey with covenant of general warranty, notwithstanding a written agreement, after the sale, that he would make "a good and indefeasible title" to the purchaser, because such agreement is to be understood in reference to the terms of the sale). See also *Pennington v. Hanby*, 18 Va. (4 Munf.) 140 (1813).

58. 56 Va. (15 Gratt.) 11 (1859).

59. *Id.* at 50.

60. *Id.* See *Brockenbrough v. Turner*, 78 Va. 438 (1884); *Meeks' Adm'r v. Thompson*, 49 Va. (8 Gratt.) 134 (1851). Section 3-714 of the Uniform Probate Code adopts the same rule. Of course, an executor will be compelled to account for the proceeds of real estate sold by him pursuant to the directions of the will. *Nimmo's Ex'r v. Commonwealth*, 14 Va. (4 Hen. & M.) 57 (1809).

61. See *Deneale v. Morgan*, 9 Va. (5 Call) 407 (1805); *Johnston v. Thompson*, 9 Va. (5 Call) 248 (1804). Where one of several executors refuses to qualify, a conveyance by the others named in the will is justified. *Geddy v. Butler*, 17 Va. (3 Munf.) 345 (1811). Where fewer than all the executors convey the real estate, the invalid sale can be ratified by the other executors and the title to the purchaser validated. See *Mills v. Mills*, 69 Va. (28 Gratt.) 442 (1877); *Nelson v. Carrington*, 18 Va. (4 Munf.) 332 (1814).

62. *Rae v. Farrow*, 14 Va. (4 Hen. & M.) 444 (1809) (conveyance by two of three qualified executors not valid in law). But see *Roberts v. Stanton*, 16 Va. (2 Munf.) 129 (1810) (conveyance by one of three executors validated by court of equity).

Although the Uniform Probate Code supports the general rule, it has delineated a number of situations in which joint action is not required:

Section 3-717. [Co-representatives; When Joint Action Required.] If two

vives among joint executors, however, is a problem which has long engaged the attention of the courts, legislatures, and writers.<sup>63</sup>

Because the power of sale survives only if it is attached to the office, rather than to the person, of an executor,<sup>64</sup> survival generally is not permitted when the power is expressly made joint among designated individuals.<sup>65</sup> Moreover, although a discretionary power to sell realty is less likely to survive than is a mandatory power, mere discretion is not fatal to the survival of a power.<sup>66</sup>

At early common law, a distinction was made between naked powers and those coupled with an interest, survival being permitted only in the latter case.<sup>67</sup> To prevent some of the designated joint executors from frustrating the testator's intent merely by refusing to qualify, thereby precluding sale by the qualified executors, later common law<sup>68</sup>

---

or more persons are appointed co-representatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any co-representative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a co-representative has been delegated to act for the others. Persons dealing with a co-representative if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

UNIFORM PROBATE CODE § 3-717. It is submitted that the exceptions for emergency action, delegation of powers, and the protection of bona fide purchasers are reasonable and merit the attention of courts which oversee the administration of estates.

63. See *Hofheimer v. Seaboard Citizens Nat'l Bank*, 154 Va. 896, 156 S.E. 581 (1931); *Shepherd v. Darling*, 120 Va. 586, 91 S.E. 737 (1917). See also *Evans, The Survival of Powers of Joint Executors To Sell Land*, 85 U. PA. L. REV. 154 (1936); *Kales, Survival of Powers as Unaffected by Statutes*, 6 ILL. L. REV. 447 (1912); 2 J. WOERNER, *supra* note 27, at 1126-39.

64. Casner, *supra* note 8, § 14.28, at 691.

65. *Davis v. Christian*, 56 Va. (15 Gratt.) 11 (1859).

66. VA. CODE ANN. § 64.1-142 (Repl. Vol. 1973) provides:

When discretionary powers are conferred upon the executors of any will heretofore or hereafter executed and some but not all of such executors die, resign or become incapable of acting, the executors or executor remaining shall thereafter exercise the discretionary powers given in such will, unless it be expressly provided in such will that the discretionary powers cannot be exercised by any number less than all of the original executors named.

See also *Davis v. Christian*, 56 Va. (15 Gratt.) 11 (1859).

67. Annot., 36 A.L.R. 826 (1925).

68. 21 Hen. VIII, c. 4 (1529).



and a present Virginia statute<sup>69</sup> provide for survival of naked powers as well as those coupled with an interest.

In view of the uncertainty engendered by the concept of survival among joint executors, it may be argued that survivorship should be permitted in all cases unless expressly restricted by the will.<sup>70</sup> Nevertheless, it is submitted that the intent of testators would be better served by restricting survival to those instances in which the power conferred evidences no reliance upon the personal qualifications of the named executors.

### *Administrator c.t.a.*<sup>71</sup>

Assuming that a will confers upon the executor a power to sell realty, the question arises, upon an executor's failure to qualify or the termination of his appointment, whether the testamentary power may be exercised by an administrator with the will annexed. Permitting exercise of a power of sale by an administrator c.t.a. is not supported by the arguments in favor of such exercise by one or more of several executors, for, in the former case, the testator has expressed no confidence in the appointed administrator. It is generally held, therefore, in the absence of a statute or express provision in the will, that an administrator c.t.a. may not exercise a testamentary power of sale.<sup>72</sup> The opposite rule is laid down by statute in Virginia, that is, the administrator c.t.a. may generally exercise a mandatory or discretionary power of

---

69. VA. CODE ANN. § 64.1-146 (Repl. Vol. 1973). See also *Brown v. Armistead*, 27 Va. (6 Rand.) 594, 665-66 (1828).

70. The Uniform Probate Code permits survival in every case unless it would be contrary to the testator's intent as expressed in the will. This is based upon the questionable assumption that the decedent would not consider the powers of his executors personal. The Code provides:

Section 3-718. [Powers of Surviving Personal Representative.] Unless the terms of the will otherwise provide, every power exercisable by personal co-representatives may be exercised by the one or more remaining after the appointment of one or more is terminated, and if one of 2 or more nominated as co-executors is not appointed, those appointed may exercise all the powers incident to the office.

UNIFORM PROBATE CODE § 3-718.

71. An administrator with the will annexed (*cum testamento annexo*) is judicially appointed either when no executor was named or when the sole surviving named executor dies, is incompetent, or refuses to act.

72. Casner, *supra* note 8, § 14.28, at 692. In such case, however, a court of equity could appoint a trustee to exercise ordinary powers of sale conferred by the will. *Id.* at 693.

sale.<sup>73</sup> An exception to this rule operates to deny such power to the administrator c.t.a. when it appears that the testator manifested particular confidence in the named executor and would not have wished that the power be exercised by a successor.<sup>74</sup> It has been suggested that when a testator creates a power of sale coupled with an interest and indicates his confidence and trust in the individual recipient of the power, the administrator c.t.a. is without authority to exercise the power.

---

73. VA. CODE ANN. § 64.1-147 (Repl. Vol. 1973) provides:

When any will heretofore or hereafter executed gives to the executor or executors named therein power to sell the testator's real estate and such executor or executors die, resign or become incapable of acting and an administrator or administrators with the will annexed are appointed, such administrator or administrators with the will annexed may sell such real estate unless it is expressly provided to the contrary in such will.

In addition, the last sentence in Virginia Code section 64.1-146 provides that "the administrator with the will annexed shall sell or convey the lands . . . devised to be sold . . . as an executor might have done." VA. CODE ANN. § 64.1-146 (Repl. Vol. 1973). *Id.* § 64.1-142 provides:

When discretionary powers are conferred upon the executors of any will heretofore or hereafter executed and all the executors named in such will die, resign or become incapable of acting, or when there is only one executor named and such sole executor dies, resigns or become incapable of acting, then in such event the administrators with the will annexed or administrator with the will annexed appointed by the court shall exercise the discretionary powers vested in the original executors or executor, unless the discretionary powers in such will are by express language limited or restricted to the executors or executor named therein.

In *Mosby's Adm'r v. Mosby's Adm'r*, 50 Va. (9 Gratt.) 584 (1853), the court stated:

[T]he administrator with the will annexed was authorized to sell and convey the land; and being authorized to do that, he was authorized to hold the land and receive the rents and profits until the sale. The will created but one trust in regard to the land . . . . This entire trust devolved on the executors during the existence of their authority; and must, if any part of it, devolve on the administrator with the will annexed, not having been completed by the executors, and their authority having ceased. . . . The statute [section 64.1-146] having expressly conferred on the administrator with the will annexed the principal power to sell and convey embraced in the trust created by the will, the power to hold and rent out the land in the mean time, embraced in the same trust, would seem to pass as a mere incident to the former.

*Id.* at 600; *cf. Coles' Heirs v. Jamerson*, 112 Va. 311, 71 S.E. 618 (1911) (An administrator without the will annexed does not succeed to the powers of the executor with reference to sale of the estate.). An administrator c.t.a. has been held to be without right to exercise a power of sale conferred by the will when he was a major creditor of the testator and attempted to sell realty charged by the will with the payment of debts but previously conveyed without consideration to the testator's devisee. *Watson v. Fletcher*, 48 Va. (7 Gratt.) 1 (1850).

74. VA. CODE ANN. § 64.1-147 (Repl. Vol. 1973). The Uniform Probate Code is in accord with the Virginia general rule and the exception thereto: "Section 3-716.

On this basis, it is argued that an administrator c.t.a. should be able to exercise only a naked power of sale.<sup>75</sup> In Virginia, nevertheless, it is clear that an administrator with the will annexed may exercise a power coupled with an interest.<sup>76</sup>

### *The Necessity of a Clearly Drafted Will*

Due in large part to the unnecessarily complicated melange of judicial doctrine with respect to a personal representative's testamentary power to sell realty, there is a particular necessity in Virginia for a clearly drafted will. Much of the frustration of a testator's intent which results when courts attempt to infer meaning from imprecise language can be avoided simply by foreseeing the likely areas of confusion concerning the authority of the personal representative prior to the time a will is executed.

Before drafting any will, an attorney should ascertain whether the testator wishes his executor to assume the responsibility of caring for real as well as personal property. Should the testator so desire, the will should grant the executor express authority and provide guidance for all actions necessary to take possession, manage, encumber, and sell the real estate. If the testator desires that the executor have a power of sale over the realty, the will should delineate the parameters of the executor's authority, including the specific realty subject to the power and the purposes for which there may be a sale. Furthermore, the will should specify whether the nature of the power is mandatory or discretionary, whether the executor is to have title and possession prior to sale, whether the power of joint executors survives, and whether the power is exercisable only by the named executor.

In addition, the will should specify whether the executor may purchase the land himself. Inasmuch as the prevailing law precludes purchase by a fiduciary at his own sale, whatever the fairness of the trans-

---

[Powers and Duties of Successor Personal Representative.] A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will." UNIFORM PROBATE CODE § 3-716.

75. Annot., 116 A.L.R. 158 (1938). In *Brown v. Armistead*, 27 Va. (6 Rand.) 663 (1828), the court, after finding that the executors were given a mere naked power to sell, held that the administrator c.t.a. had the power to sell, stating: "The executors were mere instruments for effecting this purpose. . . . [No] peculiar personal confidence is reposed in them." *Id.* at 669.

76. See note 73 *supra*.

action,<sup>77</sup> an executor with power to sell realty cannot purchase the lands directly or indirectly unless the testator clearly provides the authority to do so in the will.<sup>78</sup> A purchase by the executor, nevertheless, is not void, but merely voidable at the option of the party beneficially interested. Such a rule protects the beneficiaries against a breach of fiduciary obligations while reserving to the executor the opportunity to purchase from the estate if the beneficiaries forego their right to avoid the sale.<sup>79</sup> Even if the sale is voided by the beneficiaries, however, the executor may yet receive title if, after the initial attempted purchase, a higher purchase price cannot be obtained at a second sale.<sup>80</sup> An express provision in the will specifying the executor's authority to purchase realty from the estate would obviate any problems in this area.

One further item which should be addressed in drafting a will is the type of sale the executor may conduct to dispose of the realty. According to the prevailing rule, a power to sell realty conferred upon the executor which fails to direct whether the sale should be public or

---

77. *Smith v. Miller*, 98 Va. 535, 37 S.E. 10 (1900); *Harrison v. Manson*, 95 Va. 593, 29 S.E. 420 (1898); *Ferguson v. Gooch*, 94 Va. 1, 26 S.E. 397 (1896); *Davies v. Hughes*, 86 Va. 909, 11 S.E. 488 (1890); *Howery v. Helms*, 61 Va. (20 Gratt.) 1 (1870); *Bailey v. Robinsons*, 42 Va. (1 Gratt.) 4 (1844); *Buckles v. Lafferty*, 41 Va. (2 Rob.) 307 (1843); *Moore v. Hilton*, 39 Va. (12 Leigh) 1 (1841). The earlier rule was that an executor could purchase at his own sale as long as it did not violate the will of the testator and it appeared that his conduct at the sale was fair and correct. Earlier decisions reasoned that the practice was so common in Virginia that to hold otherwise would operate to render voidable the title to a great amount of property. See *McKey v. Young*, 14 Va. (4 Hen. & M.) 430 (1809).

78. Although an executor may not lawfully, directly or indirectly, purchase at his own sale, it has been held that he may purchase for his own benefit property previously purchased by his vendor from himself as executor provided that the transaction is real and bona fide. *Wayland v. Crank*, 79 Va. 602 (1884); *Hurt v. Jones*, 72 Va. 341 (1881); *Staples v. Staples*, 65 Va. (24 Gratt.) 225 (1874).

79. The Uniform Probate Code states:

Section 3-713. [Sale, Encumbrance or Transaction Involving Conflict of Interest; Voidable: Exceptions.] Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless

(1) the will or a contract entered into by the decedent expressly authorized the transaction; or

(2) the transaction is approved by the Court after notice to interested persons.

UNIFORM PROBATE CODE § 3-713. Note that the Code gives the right to void the sale to any person interested in the estate but permits court approval of a voidable sale.

80. *Bailey v. Robinsons*, 42 Va. (1 Gratt.) 4 (1844).

private authorizes the executor to select the method which, in his judgment, will yield the better price.<sup>81</sup> If the testator authorizes a private sale, provision for notice to parties interested in the estate might be included to afford opportunity for timely objection to the terms upon which the property is to be disposed.

### A PROPOSED STATUTE

A statute has already been suggested to permit satisfaction of the testator's debts without the necessity for individual creditor suits against heirs or devisees. It is submitted that administration of estates in Virginia would be enhanced by enactment of a broader provision giving the personal representative the same powers and duties over realty that he presently has over personalty. Whatever the historical necessity of protecting devisees and heirs by restricting the authority of the personal representative over realty,<sup>82</sup> the present trend in other jurisdictions is to vest in the personal representative the same powers in trust over both real and personal assets of the estate.<sup>83</sup>

An effective statute should delineate the circumstances under which a sale may be made in the absence of a testamentary power and pro-

---

81. *Moss v. Moorman*, 65 Va. (24 Gratt.) 97 (1873).

82. One author has suggested that the powers of a personal representative may have been limited to protect the heirs and devisees from his bad judgment. Word, *Updating Virginia's Probate Law*, 4 U. RICH. L. REV. 223, 226 (1970).

83. UNIFORM PROBATE CODE §§ 3-711 and 3-715 provide as follows:

Section 3-711. [Powers of Personal Representatives; In General.] Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

Section 3-715. [Transactions Authorized for Personal Representatives; Exceptions.] Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in Section 3-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly

....  
 (6) acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset ...

....  
 (23) 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 unpaid balances ....

vide a means to obtain judicial approval of a proposed sale. Such a statute might be worded as follows:

When a sale of the property is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies; or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, that the real estate, or some part thereof, be sold, or that said sale would alleviate expense or hardship to, or be to the best financial interest of, the estate or those interested in the estate, including the minor heirs, if any, or if all heirs petition for such sale, the personal representative may sell any real as well as personal property of the estate, upon the order of the court.

A statute of this type would authorize the personal representative to petition a court for permission to sell realty and cause title and possession to vest in trust in the personal representative upon the court's decree pending sale. The personal representative could satisfy the obligations of the estate from the decedent's real and personal property, thus eliminating the necessity of suing the heirs or devisees to subject the realty to sale.

#### CONCLUSION

The distinction between realty and personalty which persists in the law governing administration of estates in Virginia is based upon a concept of real property as the foundation of private wealth—a concept not in harmony with modern economic and social realities. Efficient administration requires that someone preserve and manage a decedent's real estate immediately after his death and prior to administration, and the personal representative is a logical repository of such powers. If a sale of the realty is necessary to satisfy creditors' claims or otherwise to serve the interests of the estate, the personal representative should have the power to sell realty. Under present Virginia law, however, a "personal representative may be hamstrung by lack of administrative powers, absent a well-drawn will."<sup>84</sup> It is submitted that the settlement of decedents' estates could be greatly facilitated if the distinctions between the power of personal representatives to sell real and personal property were obliterated.

---

84. Word, *supra* note 82, at 226.