WILLS—DOWER—PRIORITY OF WIDOW AS A PURCHASER

The testator's will left certain described real and personal property to his three sons and other similar property to his wife. It was stated in the will that she could take under the will in lieu of dower. The will had a residuum clause in favor of the wife which created the problem in the principal case of *Daniel v. Denham*.[1] The will did not state from what source or how the debts of the estate should be paid, although there were sufficient funds. The legacy to the wife would exceed the value of her dower and years support, which is why the appellants contend that she should abate with other legacies to pay the debts of the estate.[2] By holding for the widow, the Supreme Court of Georgia implied that if there is a residuary bequest to the wife in lieu of dower and years support, and if she elects to take under the will, that the debts and taxes may have to be paid from the specific and special bequests. This could have the effect of eliminating all specific and special bequests.

The Supreme Court of Georgia said that the widow obtained the status of a purchaser; therefore, she would have preference over other legatees.[3] In support of this position, the court cited *Clayton v. Akin*.[4] The idea that a widow who takes in lieu of dower is a purchaser was first announced in *Burridge v. Bradyle*.[5] This case has been relied upon as establishing the rule, which is the majority view, that a bequest in lieu of dower is entitled to a preference over other general legacies since the widow is a purchaser.[6] However, in *Burridge v. Bradyle* the court really seems to have based its decision on the fact that the widow's legacy was specific; therefore, it was to be preferred over a general pecuniary legacy. In order to determine if the wife has preference over other legatees, the trend of cases has not been to determine if the wife is a purchaser with a specific legacy, but rather to determine if she is just a purchaser.[7] The widow has preference as a purchaser, even if the widow's dower is less in value than her legacy.[8] However, the right of priority of the widow was apparently re-

1. 223 Ga. 544, 156 S.E.2d 906 (1967).
2. *Id. at* 547, 156 S.E.2d at 908.
3. *Id.* at 548, 156 S.E.2d at 909. *See generally* 2 A.L.R.2d 603 (1948).
4. 38 Ga. 320 (1868). It should be noted that this case accepted the idea that a widow who takes in lieu of dower is a purchaser. However, this case really concerned a question of abatement due to the fact that the estate was not large enough to pay off all of the legatees.
5. 24 Eng. Rep. 323 (Ch. 1710).
6. Von Lackum v. Hartman, 223 Iowa 405. 9 N.W.2d 359 (1943); Moore v. Alden, 80 Me. 301. 14 A. 199 (1888). The theory is that a wife cannot be deprived of her dower right, unless she consents to it. When the wife gives up her dower right, the estate receives a valuable consideration, which makes her a purchaser for value.
7. "Nothing is better settled than that the wife is a purchaser of a legacy, which she chooses, under a will in lieu of her dower." Clayton v. Akins, 38 Ga. 320, 332 (1868).
8. Muse v. Muse, 186 Va. 914, 45 S.E.2d 158 (1947); Davis v. Davis, 138 Va. 628, 123 S.E. 538 (1924); Ellis v. Aldrich, 70 N.H. 219, 47 A. 95 (1900).

stricted to the value of her marital right in *Dugan v. Hollins*.[9] The will does not have to expressly state that the legacy is in lieu of dower if it can be deduced that this is the plain intention of the testator.[10] The widow will be denied preference to a legacy or devise in lieu of dower where the wife has no dower interest,[11] as where the testator leaves no land of which the widow is dowable,[12] or where the will contains specific direction against preferences.[13]

There are other jurisdictions which hold that even if the widow is a purchaser, she should pay her part of the debts of the estate.[14] It would be inconsistent with the general rule, which states that specific legacies have priority over general legacies, to allow the widow who has a general or residuary bequest to have priority over a specific legacy.[15] The idea of these minority courts is that she should stand on the same ground as other legatees.[16] If the widow chooses to take under the will in lieu of dower it is a voluntary action on her part. She should not be excused from the payment of debts, but should take the estate subject to all claims against it. In these jurisdictions the widow does not have any right to require that the testator's other estate shall be applied to the exoneration of the estate devised to her.[17] Another idea which might give support to the minority view would be in a situation where the widow took personalty as a purchaser and the will left real estate to other heirs. If the widow was allowed priority, this would be contrary to the general principle that personalty is the primary fund for the payment of the testator's debts and real estate is the last resort.[18]

The General Assembly of Georgia has attempted to remedy the decision of the principal case by passage of the following statute:[19]

> Unless otherwise directed, the debts of a testator should be paid out of the residuum. Unless otherwise provided in the will, a bequest of the residuum or any part thereof, including a bequest to a widow in lieu of dower or year's support or both, shall be deemed a bequest of the net residuum or part thereof remaining after all debts and expenses of administration including taxes have been paid.

The effect of this law will be to overrule *Daniel v. Denham*.[20] This law will

9. 11 Md. 41 (1857).
10. Plum v. Smith, 70 N.J.Eq. 602, 62 A. 763 (1906).
11. Borden v. Jenks, 140 Mass. 562, 5 N.E. 623 (1866).
12. In Re Parsons' Estate, 6 N.Y.S.2d 534 (1938).
13. Von Lackum v. Hartman, 223 Iowa 405, 9 N.W.2d 359 (1943).
14. Chambers v. Davis, 54 Ky. 522 (1854).
15. GA. CODE ANN. §113-82 (1959 Rev.); GA. CODE ANN. §113-1509 (1959 Rev.). *See generally* 57 AM. JUR. *Wills* §1458 (1948).
16. Mitchener v. Atkinson, 62 N.C. 23 (1886).
17. Chamber v. Davis, 54 Ky. 522 (1854).
18. Baker v. Baker, 319 Ill. 320, 150 N.E. 284 (1926). *See generally* 57 AM. JUR. *Wills* §1467 (1948).
19. Ga. Laws 1968, p. 1070.
20. 223 Ga. 544, 156 S.E.2d 906 (1967).

probably help to preserve the testator's true intention, for it does not seem logical that the testator would leave a specific legacy which could possibly be extinguished if the widow elected to take under the will in lieu of dower.

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CONSTITUTIONAL LAW—EQUAL PROTECTION—SUNDAY CLOSING LAWS

In *Hughes v. Reynolds*,[1] the Georgia Supreme Court ruled unconstitutional the Georgia General Assembly's effort at a Sunday closing law. Earlier, in *Berta v. State*[2] the same court upheld another law on Sunday closing. Perhaps by comparing the principal case with the decision in *Berta*, we can find the grey area of acceptability and constitutionality as seen by what was upheld and what was overruled in the same year by the same court.

As early as March 2, 1762, the legislature of Georgia passed a Sunday closing act.[3] The religious nature of these laws was unquestioned at the time of their adoption and inception. However by the Nineteenth Century, these laws were being tested in the courts as a violation of the state and federal constitutional guarantees against establishment of religion. The courts refused to strike down these laws on religious grounds and instead upheld them as a valid police power that was meant to benefit the public health and welfare. The Supreme Court of Georgia followed this pattern in 1892 with *Hennington v. Georgia*.[4] The Georgia Sunday closing law was upheld by the court as a valid police power, and on appeal the Supreme Court of the United States upheld and affirmed the Georgia court's decision.[5] This was the first time the United States Supreme Court had considered a case involving the religious freedom clause of the First Amendment.[6]

The great majority of cases involving Sunday closing laws are now concerned not with separation of church and state but with due process and equal protection, and it can be safely said that this trend results from the laying to rest of the religious issue by a wealth of precedent. These two areas of conflict—due process and equal protection—come from two sections of the Georgia Constitution.[7] The main due process controversy re-

1. 223 Ga. 727, 152 S.E.2d 746 (1967).
2. 223 Ga. 267, 154 S.E.2d 594 (1967).
3. *See* Hennington v. Georgia, 163 U.S. 299 (1896).
4. 90 Ga. 306, 17 S.E. 1009 (1892).
5. Hennington v. Georgia, 163 U.S. 299 (1896).
6. S. Lipnick, *A New Trend in Civil Rights Litigation? Sunday Laws, Released Time and Bible Reading in the Public Schools As Affected By the First Amendment*, 28 GEO. WASH. L. REV. 579 (1959-1960).
7. GA. CONST. art. I, §1, paras. 2, 3 (1945).