neither does it contemplate that when such school has been selected by the pupil, or the matter arranged by the board of education by contract, the tuition of the pupil should be paid by the district for eight months and then cease. The contemplation of the law is to place before the youth of the state the opportunity for a high school education, which includes graduation, if desired, and if the tuition were paid for but eight months in the year, for instance, in which the pupil was to graduate, then in order to graduate and get a diploma from such high school he would be compelled to pay the extra month's tuition himself, and this is certainly not the contemplation of the statutes, for the general tenor is that a pupil who is eligible for high school, who is willing to attend high school, should have all his tuition paid during such high school attendance by the board of education of the district in which such pupil resides.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1556.

INHERITANCE TAX LAW—WHAT ALLOWANCE OR DEDUCTION WIDOW ENTITLED TO RECEIVE BY WAY OF VALUE OF HER DOWER WHERE SHE SUCCEEDS TO LAND BY INHERITANCE ON DEATH OF HUSBAND, NO CHILDREN—PROVISION FOR YEAR'S SUPPORT AND HOMESTEAD RIGHT ARE IN SAME CLASS WITH DOWER.

Where a widow or widower inherits as heir of an intestate deceased consort, the value of the dower right of such widow or widower should be subtracted from the whole value of the premises in which it exists for the purpose of determining the value of the taxable succession against which exemptions are to apply. The same rule, save as qualified by section 5332-1 *G. C., is to be applied to the right to remain in the homestead and the allowance of a year's support.*

COLUMBUS, OHIO, September 10, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have requested the opinion of this department on the following question:

> "What allowance or deduction is a widow entitled to receive in an inheritance tax proceeding by way of the value of her dower where she succeeds to land by inheritance on the death of her husband, there being no children?"

In a recent opinion of this department the commission has been advised that where there is made in the will of the deceased husband provision for the widow, which is in lieu of dower, the dower interest does not arise at all and the value of the dower interest that might otherwise have arisen is not to be deducted from the value of the estate taken by the wife under the will.

The question which you now raise does not involve the doctrine of election nor the operation of the statutes relating thereto, referred to in the other opinion. Whatever interest the widow acquires in the property of her deceased husband by virtue of his death devolves upon her by operation of law.

In principle, though perhaps not in detail, the dower statute of Ohio follows the common law when it provides that:

"A widow or widower who has not relinquished or been barred of it, shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seized as an estate of inheritance at any time during the marriage," etc.

(Section 8606 G. C.)

Coupled with the dower right is that created by section 8607, which is "of remaining in the mansion house of the deceased consort, free of charge, for one year, if dower is not sooner assigned."

It is the universal holding at common law, and in states wherein rights analagous to dower rights at common law are provided for by statute, that the consummate estates which arise by virtue of the operation of the common law or such statutes vest in the surviving spouse in the marital right, and not by virtue of the operation of the rules or statutes of descent and distribution. In large part these rights are inchoate during the joint lives of the spouses, and in that sense they have their origin, as it were, *inter vivos,* becoming perfect and vested, however, only upon the event of death, except in certain instances. These general observations hardly require the citation of authority in their support.

The statutes of descent and distribution may be briefly considered.

"Sec. 8573. When a person dies intestate, having title or right to any real estate or inheritance in this state, which title came * * * from an ancestor, such estate shall descend and pass * * * to his * * * kindred in the following course:

1. To the children of such intestate, or their legal representatives.

2. If there are no children or their legal representatives living, the estate shall pass to and vest in the husband or wife, relict of such intestate, during his or her natural life."

"Sec. 8574. If the estate came not by descent, devise, or deed of gift, it shall descent and pass as follows:

1. To the children of the intestate and their legal representatives.

2. If there are no children ,or their legal representatives, the estate shall pass to and be vested in the husband or wife, relict of such intestate."

"Sec. 8575. When a person dies intestate, having title or right to any real estate or inheritance, as provided in section eighty-five hundred and seventy-three, and leaves husband or wife, relict of himself or herself and there is no person who, under the provisions of that section, would be entitled to inherit it, * * * save and except such husband or wife, * * * then the estate shall pass to and vest in the husband or wife of the intestate as an estate of inheritance. * * *"

The above quotations from the statutes of descent and distribution will be sufficient for the purposes of this discussion. It is obvious that in certain contingencies the husband or wife, relict of the decedent, may become entitled to the entire estate had by the intestate. In order for these statutes to operate it is necessary that the conditions set forth in section 8573 and by appropriate reference embodied in the other sections be satisfied; in other words, the estate or right upon which the statutes of descent and distribution operate is "the title or right to any real estate or inheritance in this state" "having" which the intestate died. It is believed that the true meaning of this language is that the statute operates upon such title or right of the deceased intestate as vested in him or her at the instant of death, and might appropriately be seized upon by the statutes of descent and distribution for disposition. In other words, a dower in the estate of the surviving consort, vested in right though not in possession at the moment

of death, is at that moment no part of the estate of the decedent but constitutes an interest charged upon or carved out of the "title or right to any real estate or inheritance" of the decedent. As a mere matter of statutory interpretation this view is inescapable, though it must be established by implication rather than by express provision of statute—for neither the dower statute nor the statute of descent and distribution expressly deals with the combined effect of the two statutes when the same person is the beneficiary of each. This is true because, manifestly, the first clause of section 8573, for example, does not operate on the entire interest of the decedent unqualified by the dower right of the surviving consort; so that what passes thereunder "to the children of such intestate or their legal representatives" is "the title or right to any real estate or inheritance" of the person who has died intestate subject to the dower right of the surviving consort. In no other way could effect be given to the dower statute.

From another point of view, the "title or right" of the decedent even during his life was always qualified by the inchoate marital right of his consort; and by "inchoate right" we mean one that is potent to ripen into a right consummate. Hence, the title or right of the decedent was always qualified, so that if that title was otherwise a fee simple, for example, it was nevertheless a fee simple subject to the inchoate dower right of the consort, and upon the death of the holder of the title that inchoate right automatically enlarged into a consummate right.

What is true of the paragraphs of the principal sections of the statutes of descent and distribution, other than those which confer rights upon the surviving consort as heir, must as a matter of statutory interpretation be likewise true of the latter described paragraphs themselves. The estate which passes under the statutes of descent and distribution to the widow or widower is the same estate which passes to the children, for example, for the statutes do not deal with one estate of the decedent in devolving it upon one set of heirs and with another and different estate when devolving it upon another set of heirs.

Coming now to the inheritance tax law, it is clear that thereunder dower rights, as such, are not taxable successions. Section 5332 of the General Code enumerates the taxable successions. None of the clauses of that statute is appropriate to reach the dower interest, as such; whereas section 5342 of the General Code impliedly recognizes the non-taxable character of the dower interest when it provides a method of determining the value "of any dower interest of other estate or interest upon which any estate or interest the succession to which is taxable under this chapter is limited."

However, the inheritance tax law does impose a tax upon successions "by intestate law," and if as a result of the operation of the intestate law, i. e., statutes of descent and distribution, the dower interest is indirectly reached in a given set of circumstances, it might be possible to hold that under such circumstances there should be no deduction on account of the value of such dower interest.

What has already been said is sufficient warrant for the conclusion that the dower interest itself is not one that is created by "intestate law." Indeed, with a few exceptions, dependent upon local peculiarities, the authorities are unanimous in so holding, and need not be cited. The only argument which can be adduced to support the conclusion that when the widow or widower takes a life estate in the entire real property of the deceased consort or an estate in fee simple, or such other estate as the decedent may have possessed, no deduction for dower should be made, is that which might be predicated upon the doctrine of merger. That doctrine, succinctly stated, may be described by saying that when the same person acquires two interests in the same property the greater interest will by absorption of that which is lesser extinguish the latter, so that the person holds not two estates but only that which is greater, and the lesser estate comes absolutely to an end. But this doctrine of merger deals with results—not processes; it appertains to the quality in which,

or the manner by which, an entitled person *holds* his interest, and not with the manner in which he *acquires* it. Thus, if A. acquires an estate for years in land from B. and the remainder in fee in the same land from C., the result is that the estate for years is extinguished—but not until after A. acquires both estates; and the extinguishment of the estate for years does not obliterate the fact that A. acquired it from B.

Now, the inheritance tax, as is well known, is laid on the right to acquire. The word "succession," for example, is defined in the statute as meaning "the passing of property in possession or enjoyment, present or future." In other words, the subject of the tax, as defined in the law itself and as it would doubtless be defined by judicial interpretation, were there no such definition, is not the estate or interest which emerges from a certain process but the process itself.

So here, the thing that is taxed to the widow is that which comes to her by the intestate laws—not that which by result of combination of the intestate laws and the statute of dower is found vested in her at the death of the testator; for even though it be conceded that in contemplation of law the consummation of the dower right and the vesting of the estate under the statutes of descent and distribution occur at the same instant of time, viz., the death of the testaor; yet the manner in which the two interests become united in the widow or widower with the resultant merger differs in the one case from that which takes place in the other.

These things being true, it will not be profitable to discuss further the doctrine of merger nor the manner in which, nor the extent to which, if any, it applies to a case of the kind described by you. See, however, Moore vs. Moore, 7 N. P. 320; affirmed 3 C. C., n. s., 178.

There are many authorities which might be cited upon various points in the above discussion; some of them will be found collated in the notes to

> In re Kennedy, (Cal.), 108 Pac. 280; 29 L. R. A. n. s. 428; and
> In re Bullen (Utah), 151 Pac. 533; L. R. A. 1916C, 670-675.
> See also: Cases cited in Gleason & Otis Inheritance Taxation, 185 et seq.

In few, if any, of these cases, however, was the exact question raised by the commission's inquiry involved. The headnote in *Re Kennedy,* supra, however, is as follows:

> "The statutory homestead and allowances set apart by the court to the family of a decedent pending administration * * * are not within the provisions of a statute providing for a succession tax on property which shall pass by will or by the intestate laws of the state, and it is immaterial that had the property not been so set apart it would have passed to the widow under the will."

In most of the cases there were heirs other than the surviving spouse, so that the question as to the effect of merger which has been discussed in this opinion was not involved.

For the reasons above stated, it is the opinion of this department that the dower estate of a widow who is also the heir of her deceased consort should be appraised in the manner provided for by section 5342 of the General Code, supra, and subtracted from the value of the property belonging to the decedent intestate to which it relates; and the difference only considered as the estate to which a taxable succession has taken place. It follows naturally from this conclusion that the widow's exemption under section 5334 of the General Code is to be subtracted from the difference arrived at by the above method. It is also to be remarked that provision

for a year's support and homestead right are in the same class with dower, save as the former is expressly made in part a taxable succession by the provisions of section 5332-1 of the General Code, which need not be quoted.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1557.

BLIND RELIEF—RESIDENTIAL QUALIFICATIONS—INFIRM BLIND—WHERE APPLICANT MOVED FROM ONE COUNTY TO ANOTHER.

On the facts stated, Mr. A. H. G. has the residential qualifications for blind relief, in Franklin county.

COLUMBUS, OHIO, September 10, 1920.

HON. HUGO N. SCHLESINGER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Hon. Ralph J. Bartlett, assistant prosecuting attorney of Franklin county, recently wrote this office, asking for a ruling on the question of whether Lucas county or Franklin county should furnish blind relief to one A. H. Gackenheimer. Mr. Bartlett's letter contained the following statement of facts, which he and Hon. Allen J. Seney, the prosecuting attorney of Lucas county, agree upon as correctly stating the situation:

"Mr. A. H. Gackenheimer while living in Lucas county applied for blind relief in 1916 which was granted and Lucas county continued to pay said relief until July, 1918. In February, 1918, he was sent to Columbus by the Lucas county authorities to work in the state broom factory where he worked until July, 1918, earning about $6.00 per week; he then became sick and was taken to the Protestant hospital of this city as a charity patient where he remained a period of six weeks. Upon leaving the Protestant hospital, he was taken to the State Hospital for Insane located in this city where he was confined until the 31st day of May, 1919. On being released from the state hospital he remained in the city of Columbus and was partly supported by the Seventh Day Adventist church, which contributed $5.00 per week to his landlady for board and room. Since July, 1919, except about four months during the winter, he has been selling books and pamphlets for this church and making about $1.25 per day, when working.

In June, 1919, he filed an application with the board of commissioners of this county for blind relief which was denied on the ground that he did not have the proper residential qualifications. In May of this year, the commissioners of this county requested an opinion from this office as to whether Mr. Gackenheimer had the proper residential qualifications for blind relief. On May 11th this office advised said board that Mr. Gackenheimer had 'not gained a residence in Franklin county, Ohio, and is therefore not entitled to relief from this county, but instead is still entitled to blind relief from Lucas county.' We also advised said board of commissioners that the proper course to pursue was to notify the authorities of Lucas county of the facts herein and request them to either continue to furnish Mr. Gackenheimer the blind relief to which he was entitled or that they remove him to Lucas county at the expense of that county; and if Lucas county failed to furnish the relief and he thereby becomes a public charge, Franklin county should follow the provisions of section 3482 G. C., and send him