

allowed for that official year. (See Opinions of the Attorney General, 1914, Vol. I, page 71; and 1915, Vol. I, page 368.)

Such a method seems to be most just and reasonable, and following that precedent and the information gained from the history of the law in this case, and in the absence of any guide, the law being silent, the question never having been, as diligent search shows, before a court of record, it is presumed that the maximum of one hundred dollars expense for any board of visitors is to be used up by the board during its official term, i. e., from May 1st to May 1st in any year.

It is the opinion of the Attorney-General that the phrase "in any year" found in section 2973 G. C. refers to the official year of the members of the board and it is so held.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1622.

INHERITANCE TAX LAW—OPINION NO. 1556, DATED SEPTEMBER 10, 1920, SUPPLEMENTAL AS TO DOWER RIGHTS AND HOMESTEAD RIGHTS FOR PURPOSE OF INHERITANCE TAX.

No account need be taken in the valuation of estates for inheritance tax purposes of the right of the widow or widower to remain in the mansion house of the deceased consort free of charge for one year, if dower is not sooner assigned, existing under section 8607 of the General Code.

In cases in which the debts of the estate are such or the liens on the real property of the decedent are such as to require the sale of such real estate in order to pay such debts or discharge such liens, the amount of the homestead assignable to the widow under such circumstances should be considered as a charge on the real estate, together with the debts and encumbrances, and the net value of the real estate, after making all such deductions, considered as the value thereof for inheritance tax purposes.

COLUMBUS, OHIO, October 20, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your favor of recent date wherein you request an amplification of opinion No. 1556, dated September 10, 1920. In particular, the commission desires to be advised as to the method of treating certain statutory rights of a widow or widower (held in the opinion mentioned to be not subject to inheritance tax) in appraising or arriving at the value of the estate which is subject to the tax. The statutory rights referred to in the former opinion were described generally by the use of the term "homestead right," but, as pointed out in your request for a supplemental opinion, the nature and indeed the essential character of such rights vary with circumstances.

The general proposition laid down in the opinion referred to, to the effect that the statutory property rights conferred upon a surviving spouse in virtue of the marital right, rather than as distributee of a part of the estate of the deceased, are not subject to inheritance taxation as successions occurring "by intestate law," is abundantly supported by authority. Directly in point is *Re Kennedy*, 29 L. R. A. N. S., 428. In that case there was involved the question as to whether or not a homestead selected, designated and set apart to a widow under a statute of California providing for such homestead to be set apart absolutely to the widow, is no part of the estate of her deceased husband passing by intestate law. The principle

of this case is believed to be sound, and the question is as to its application to Ohio law.

In Ohio we have no exact counterpart of the California homestead. The laws of Ohio do not vest in the widow in the marital right the absolute title to any property. What we do have in Ohio is, first, the right or interest provided for by the dower act (section 8607 G. C.), and in certain circumstances the homestead right provided for in section 10795, 11730 and 11732 of the General Code. The nature of these respective interests and their significance in the determination of the amount of the inheritance tax on the taxable portion of the estate will be separately considered.

Section 8607 of the General Code provides as follows:

"The widow or widower may remain in the mansion house of the deceased consort, free of charge, for one year, if dower is not sooner assigned."

This interest, as held in *Conger vs. Atwood*, 28 O. S. 134, "is not restricted to a personal continuance in the house merely, but she (the widow) is entitled to a reasonable enjoyment of the possession of the premises, and may therefore * * * rent them." In the case cited it was held that the widow might maintain an action against the administrator of her deceased husband's estate for rents collected by him for the use of the mansion house of the decedent during the period mentioned in section 8607.

It seems clear therefore that the interest of the widow is valuable and serves to diminish the assets of the estate passing by intestate laws, to the extent of its value.

It is more difficult to arrive at any certain basis of valuation of this interest. If the right were to last definitely for the period of one year, it might be appraised as substantially the equivalent of an estate for one year. It is however, terminable by the assignment of dower. Under certain circumstances such termination would take place at the will or pleasure of the widow, as her affirmative action or at least her consent would be necessary before dower could be assigned. But in case of the sale of the real estate to pay debts, or its partition among the heirs at law of the decedent, the assignment of dower would take place without the concurrence of the will of the widow, and the time at which the assignment would take place would be contingent upon the pleasure of other persons than the widow or widower.

Other peculiarities which enhance the difficulty of the situation may be mentioned. If the mansion house constitutes the entire estate of the decedent, then upon the assignment of dower under section 12011 of the General Code, providing for such cases, the widow or widower's interest would be actually diminished in extent, in the sense that it will now be limited to one-third of the rents and profits, whereas formerly, as established by the case cited, it extended to the entire rents and profits, though limited in duration. On the other hand, if the real estate of the decedent is more extensive and is divisible, the assignment of dower may result in a yearly income in excess of that secured to the widow by the section under examination.

It would be easy to dispose of the question now under consideration by treating the right to remain in the mansion house of the deceased consort as a mere temporary provision, to be ignored for inheritance tax purposes by reason of its ultimate absorption into the dower right. That is to say, the thing that is to be appraised for inheritance tax purposes is not the value of assigned dower, but the value of a vested dower right, whether assigned or not. This results from the primary principle of inheritance tax law, which is to the effect that all interests are to be appraised

and ascertained, if possible, as of the date of the decedent's death. The subsequent assignment of dower is to be regarded therefore as of the same character as a subsequent partition among heirs entitled under the statutes of descent to estates in common. Inasmuch, therefore, as the dower right is to be valued as of the death of the decedent, it would seem reasonable to exclude the interest created by section 8607 of the General Code from consideration; for if we conceive of dower as an interest arising immediately upon the death of the decedent for inheritance tax purposes, we thereby assume the immediate vesting of the dower right and take a position inconsistent with the existence of the right mentioned in section 8607.

While the question is not free from doubt, it is believed that the above reasoning may properly be indulged and that the interest described in section 8607 of the General Code is to be ignored for inheritance tax purposes. That is to say, if dower were in point of fact immediately assigned at the death of the decedent, then the interest described in section 8607 of the General Code would never arise; and inasmuch as we are to appraise the dower for purposes of deduction as an interest arising at the death of the decedent, we may carry the analogy to its logical conclusion and wholly ignore the interest described in section 8607 of the General Code.

It is different with the interest described in section 10795 of the General Code and the other sections referred to. These sections may be quoted as follows:

"Sec. 10795. If the deceased left a family homestead, and a widow or a minor child or children, or both, entitled to have a homestead set off, the court shall order the appraisers first to set off and assign such homestead (in proceedings to sell real estate of the decedent to pay debts). If he left a widow entitled to dower in the premises, the court *also* shall order them to set off and assign to her in each, or in one or more of the tracts of land, by metes and bounds, one-third part of the whole lands in which she is entitled to dower, as and for such dower, and to appraise the whole premises either as a whole or in parcels, subject to such *homestead* and *dower*.
* * *"

It is apparent from this section that the homestead right of which it speaks is to be enjoyed by the widow in addition to her dower right.

"Sec. 11732. On petition of executors or administrators, to sell to pay debts, the lands of a decedent who has left a widow, * * * the appraisers shall set apart a homestead as required in section eleven thousand seven hundred and thirty-four. Except as otherwise provided in sections ten thousand seven hundred and ninety-four, ten thousand seven hundred and ninety-five and ten thousand seven hundred and ninety-six, it shall remain exempt from sale on execution, and exempt from sale under order of court so long as the widow * * * resides thereon."

"Sec. 11730. * * * a widow * * * may hold exempt from sale on judgment or order, a family homestead not exceeding one thousand dollars in value. * * *"

(See *Allen vs. Russell*, 39 O. S. 336, as to interpretation.)

"Sec. 11740. Nothing in this chapter shall impair the right of dower or the mode provided by law for enforcing that right."

Omitting the citation of other sections which might be considered, it is apparent that the right of homestead mentioned in these sections, and arising in various forms under different circumstances, is an absolute one as contrasted with the right previously examined in this opinion, which is merely temporary in character. Without

going into detail, it is the opinion of this department that when the debts of the estate of a decedent are such that there is no net personal estate and it will be necessary to sell real estate to pay such debts, the value of the homestead right of the widow should be ascertained substantially as a life estate in property of the designated value, or where money is received in lieu of homestead the amount of such money should be taken into account, and in either instance the sum so arrived at or ascertained should virtually be added to the debts of the decedent and deducted from the value of the real estate, for the purpose of arriving at the net taxable value thereof for inheritance tax purposes.

Another way to look upon the homestead right arising under these circumstances would be to regard it, for inheritance tax purposes, as if it were an encumbrance upon the real estate subject to be sold for the payment of debts or the satisfaction of liens. It is elementary, of course, that in valuing real estate for inheritance tax purposes the "equity" of the decedent determines the taxable value. So here, the statutory right not being a succession under the inheritance tax law, the practical result to be aimed at can be achieved by treating the homestead right as an encumbrance and deducting it, with the debts and costs of administration, from the value of the real estate.

The commission suggests in its letter that such a procedure might not be proper save when the homestead has actually been set off. The statutes quoted, however, are mandatory, and though the actual allowance of the homestead is contingent upon the institution of proceedings to sell the real estate, yet the same might be said of any ordinary encumbrance.

In accordance with the foregoing principles the commission is advised that no account need be taken in the valuation of estates for inheritance tax purposes of the right of the widow or widower to remain in the mansion house of the deceased consort free of charge for one year, if dower is not sooner assigned, existing under section 8607 of the General Code; but that in cases in which the debts of the estate are such or the liens on the real property of the decedent are such as to require the sale of such real estate in order to pay such debts or discharge such liens, the amount of the homestead assignable to the widow under such circumstances should be considered as a charge on the real estate, together with the debts and encumbrances, and the net value of the real estate, after making all such deductions, considered as the value thereof for inheritance tax purposes.

Respectfully,

JOHN G. PRICE,

Attorney-General.