It may be added that the present county auditor, having knowledge of the facts should proceed in compliance with the statute to place the correct amount of omitted taxes on the duplicate for the five years preceding the current year. Indeed, this is his mandatory duty. State ex rel. vs. Crites, 48 O. S. 142.

Obviously, the penalties will fall with the principal taxes which have been erroneously assessed. Whether the proceedings of the present auditor should be under section 5398 or under section 5399 depends upon whether or not the returns of the taxpayer for the years in question were "false" within the meaning of section 5398. Mr. Thrailkill asserts that the taxpayer made his tax returns in good faith and failed to list these assests through a mistake of law. This is, of course, a question of fact upon which the present auditor must pass, and no opinion is expressed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1470.

INHERITANCE TAX LAW—IN EVENT OF TESTATE SUCCESSIONS WHERE CASE FOR AN ELECTION ARISES AND WIDOW ELECTS TO TAKE UNDER WILL INSTEAD OF UNDER LAW—NO DEDUCTION TO BE MADE FOR INHERITANCE TAX PURPOSES FROM VALUE OF ESTATE WHICH SHE THUS TAKES UNDER WILL ON ACCOUNT OF DOWER INTEREST OF WHICH SHE HAS THUS BARRED HERSELF.

In the event of testate successions, where a case for an election arises, and the widow elects to take under the will instead of under the law, no deduction is to be made for inheritance tax purposes from the value of the estate which she thus takes under the will on account of the dower interest of which she has thus barred herself.

COLUMBUS, OHIO, July 29, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the commission's request for the opinion of this department, as follows:

> "In the administration of the inheritance tax law this commission has suggested to probate judges throughout the state that they should follow what seems to be the weight of authority and exempt dower estates from inheritance tax.
>
> The question now arises in a case where under a will a widow takes the fee in the realty, shall any allowance or deduction therefrom be made on account of her dower in the same land, or shall inheritance tax be assessed on the full value of the land without regard to dower?"

The rule in New York, from the statutes of which state our own inheritance tax law of 1919 is very largely copied, is to the effect that where a testamentary provision for the widow is made in lieu of dower, the whole succession thus accruing is taxable without any deduction for dower.

> Matter of Gordon, 172 N. Y. 25;
> Matter of Riemann, 87 N. Y. Supp. 731;
> Matter of Barbey, 114 N. Y. Supp. 725.

This rule seems to be followed in other states.

> State vs. Simms (Utah), 173 Pac. 964;
> State vs. Lane (Ark.), 203 S. W. 17.

It is apparently repudiated in Nebraska, where on a rehearing and by a divided court the opposite result seems to have been reached.

> Re Sanford, 90 Neb., 410, as reported with rehearing in 45 L. R. A. n. s., 228, 236.

It is, of course, clear that the common law or statutory vested right of dower is not a transfer or succession by will or intestate law, and hence is not itself taxable, although there are, as you intimate, some decisions to the contrary. It is probably true also that such estate being vested the widow can not be deprived of it except by electing to take a testamentary provision that is wholly inconsistent with such dower. That is to say, in the absence of statute it would be presumptively true that the widow would be entitled to her dower and to whatever provision might be made for her by will; so that unless there were some necessary inconsistency between the two the provision by will would be deemed to be simply cumulative of the provision made for her by law; and where that result were reached the value of her dower interest should be deducted from the total value of the property passing to her in appraising her succession for inheritance tax purposes.

In Ohio, however, the presumption is exactly reversed by force of sections 10566 et seq. of the General Code. The following pertinent provisions of these sections may be quoted·

> "Section 10566. If provision be made for a widow or widower in the will of the deceased consort, * * * the probate court * * * shall issue a citation to such widow or widower * * * to elect whether to take such provision or to be endowed * * *."
>
> "Section 10569. No widow or widower shall be entitled both to dower and the provisions of the will in her or his favor, unless it plainly shows that such provision was intended to be in addition to dower and a distributive share of the estate."
>
> "Section 10572. If the widow or widower elects to take under the will, she or he shall be thereby barred of dower and such share of personalty, and shall take under the will alone, unless as provided in section ten thousand five hundred and sixty-nine. * * *."

So that in Ohio the presumption is that a provision in a will is intended to be in lieu of dower. Of course, in the case which you suppose it could hardly be otherwise with respect to the lands devised to the widow in fee.

The effect of the sections which have been quoted is such as that unless it clearly appears that the provision made in the will for the widow is to be in addition to dower and a distributive share of the personal estate, the widow's election to take under the will simply deprives her of dower. As section 10572 puts it, she takes under the will alone and her statutory dower simply does not pass to her. Having elected to take under the will, she takes all as a testamentary succession and subject to the tax.

Upon the authority of the cases which have been cited, therefore, and particularly in view of the explicit provisions of the Ohio statutes with respect to the effect of an election to take under the will, the commission is advised that where a case for an election arises, and the widow elects to take under the will instead of under the law, no deduction is to be made from the value of the estate which she thus takes under the will on account of the dower interest of which she has thus barred herself.

Respectfully,

JOHN G. PRICE,

Attorney-General.