The court's reasoning is sound. If the federal tax is on the estate and is payable out of the estate by the executor or administrator, this part of the estate is not transferred later to the heirs or devisees. If the state tax is on the right to receive property, the appraisal should include only property which has been received by the transferees.[8] In some states the statutes expressly provide whether the federal tax should be deducted,[9] but most states are similar to Missouri in that their statutes are silent as to this matter.

Cases contra to *In re Rosing's Estate* do not agree as to reasoning. *In re Sanford*,[10] held that since the Iowa statute made a number of express deductions, in which the federal tax was not included, the legislature therefore must not have intended to provide for such deduction. Early cases are based on holdings that the federal tax is on inheritances, but these cases all were decided before the passage of the federal tax laws of 1916 and 1917.[11] The Supreme Court of Wisconsin held that since the state tax is not a tax on property but merely on the right of succession, neither the property nor the value thereof necessarily determines the basis for the tax, and since there was no express provision in the statute for deducting the federal tax, the court saw "no warrant for reading into the statute provision for the deduction of any amount which the legislature did not see fit to insert."[12]

J. C. L. '36.

TAXATION—PARTNERSHIPS—SALES.—Petitioner and four others owned all the stock in the Houde Engineering Corp. Sept. 26, all five gave a 30 day option to Krauss & Co. Oct. 11, Krauss & Co. agreed to take it up. But by the agreement of the 26th, it could only be exercised "by the payment of cash before its expiration." Oct. 22, Chisholm and his brother formed a partnership to which they transferred their shares of stock in the Houde Co. Oct. 24, Krauss & Co's assignee took up the option and paid the price agreed upon.

The brothers had formed the partnership so that one brother could be relieved of business matters, the other actively managing their interests—

Northern Trust Co. (1919) 289 Ill. 475, 124 N. E. 662, 7 A. L. R. 709; State v. First Calumet Trust and Savings Bank of East Chicago (1919) 71 Ind. App. 467, 125 N. E. 200; Jones v. Bowman (1925) 118 Kan. 343, 234 Pac. 953; Bingham's Admr. v. Com. (1922) 196 Ky. 318, 244 S. W. 781; State v. Probate Court of Hennepin County (1918) 139 Minn. 210, 166 N. W. 125; Bugbee v. Toebling (1920) 94 N. J. L. 438, 111 Atl. 29; Tax Com. v. Lamprecht (1923) 107 Ohio St. 535, 140 N. E. 333, 31 A. L. R. 985; In re Inman's Estate (1921) 101 Ore. 182, 199 Pac. 615, 16 A. L. R. 675; In re Knight's Estate (1918) 261 Pa. 537, 104 Atl. 765; In re Young's Estate (1935), 33 Wyo. 317, 239 Pac. 286.

[8] See 7 A. L. R. 714.

[9] In re Watkinson's Estate (1925) 191 Cal. 591, 217 Pac. 1073.

[10] (1919) 188 Ia. 833, 175 N. W. 506.

[11] In re Gihon (1902) 169 N. Y. 433, 62 N. E. 561.

[12] In re Week (Wis. 1919) 172 N. W. 733.

an arrangement which existed at the time of the suit. Although such a plan is clearly legitimate, it is also true that it was formed at the particular time to avoid income tax liability—the increment of the shares being considerable. The Commissioner assessed a deficiency against each of the brothers on the capital gain, but, on review of decision of Board of Tax Appeals the court found them not liable for the tax. *Chisholm v. Commissioner of Internal Revenue.*[1]

The Court first points out that when partners transfer property to a firm, which in turn sells it, the taxation of any appreciation in its value before the transfer must await dissolution.[2]

Thus, three questions arise: A. Was there a partnership? B. Was there a sale by the brothers to the partnership? C. When was the option exercised?

A. (a) Was there an occupation with the meaning of the U. P. A. as adopted by New York? By that law "business includes every trade, occupation, or profession"[3]—a definition which clearly takes in a genuine pool of joint capital managed jointly. (b) The commissioner, nevertheless, contended that the intent of the brothers to have the partnership as a device to avoid the tax law defeated the true existence of a partnership. Here the court relies on the decision of the Supreme Court of the United States in *Gregory v. Helvering*,[4] in which the Court was "solicitous to reaffirm the doctrine that a man's motive to avoid taxation will not establish his liability if the transaction does not do so without it." The fact that there was also an intention for a purpose within the terms of the statutory license was sufficient to form a valid enterprise. The case involved a corporation and the question of the disregard of the corporate entity. Parenthetically, these decisions might have very far-reaching effects on partnership and corporation law—they seem to recognize, when taken together, that a partnership has a separate entity and that a corporation exists under state license rather than contract.

B. Although the fact that the brothers were the partners in the firm, the bona fide existence of the partnership would prevent the sale being vitiated unless the sellers reserved a power to themselves. In this matter the court refers to cases in which the sellers owned the stock of the corporate purchaser.[5] Again the separate entity question appears, and the partnership and corporation cases considered analogous.

C. Against the contention that the option was exercised Oct. 11, the Court points out that the original option agreement provided for exercise by payment—hence the mere notice was a nullity and the actual purchase occurred Oct. 24.

W. H. M. '36.

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[1] (C. C. A. 2, 1935) 79 Fed. (2) 14.

[2] Helvering v. Walbridge (C. C. A. 2, 1934) 70 Fed. (2) 683.

[3] U. P. A., sec. 2.

[4] (1935) 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596.

[5] Jones v. Helvering (1934) 63 App. D. C. 204, 71 Fed. (2) 214; Burnet v. Commonwealth Improvement Co. (1932) 287 U. S. 415, 53 S. Ct. 198, 77 L. Ed. 399.