mainder of the title in the record mortgagee, it is generally held that a purchaser relies upon the apparent merger of record at his peril, for the subsisting mortgage might have been assigned, preventing an actual merger.[7]

Although the instant case is not the first to apply the general rule to the situation there presented,[8] it would seem that a distinction should be drawn between the purchaser who relies upon the record as he *finds* it, and the one who relies upon the record as he *makes* it or *procures it to be made.*[9] Ample authority for this distinction exists in other jurisdictions,[10] and the problem was one of first impression in Oregon. When the purchaser knows only that the encumbrance is released of record, a request that the releasor produce the note and mortgage would be unavailing, for the instruments, shown by the record to be valueless, would have been destroyed. But in a case in which the purchaser procures the release it is only reasonable that a request for the valuable instruments be made. When the negotiations for the conveyance and release were begun in the instant case, the record disclosed an unsatisfied mortgage; and a request that the mortgagee produce the instruments would, through his inability, have revealed the unrecorded assignment. A failure to make that request should give constructive notice of the encumbrance that it would have revealed.[11] Should the releasor produce a forged or fraudulently procured note or mortgage at the request of the purchaser, or should he give a written release which is recorded in a jurisdiction where the first recorded instrument gains priority,[12] the suggested rule should not be applied, for the purchaser would have done all that a reasonable search required.

The instant case probably would never have arisen had the Oregon statutes required, as a prerequisite to recording the release of a mortgage, that the releasor submit evidence to the recording officer that he is at the time the owner of the mortgage. Such evidence is required in at least one jurisdiction,[13] and the Oregon statute has been criticized for the omission.[14]

Sales—A.A.A. Tax Refunds—Rights of Purchaser against Processor—[Federal].—In 1935 the plaintiffs entered into contracts for the purchase of the defendant's com-

[7] Thauer v. Smith, 213 Wis. 91, 250 N.W. 842 (1933), noted in 29 Ill. L. Rev. 121 (1934), 82 U. of Pa. L. Rev. 547 (1934); Purdy v. Huntington, 42 N.Y. 334 (1870); Zorn v. Van Buskirk, 111 Okl. 211, 239 Pac. 151 (1925). *Contra,* Gregory v. Savage, 32 Conn. 250 (1864); Artz v. Yeager, 30 Ind. App. 677, 66 N.E. 917 (1903); Ames v. Miller, 65 Neb. 204, 91 N.W. 250 (1902).

[8] Ladd v. Campbell, 56 Vt. 529 (1884); Conn. Mut. Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N.E. 586 (1887); Napieralski v. Simon, 198 Ill. 384, 64 N.E. 1042 (1902); Cadwallader v. Sprengle, 131 Wash. 16, 228 Pac. 834 (1924); Mf'rs. Trust Co. v. People's Holding Co., 110 Fla. 451, 149 So. 5 (1933).

[9] See Windle v. Bonebrake, 23 Fed. 165, 167 (C.C. Kan. 1885).

[10] Porter v. Ourada, 51 Neb. 510, 71 N.W. 52 (1897) (holding that the purchaser who procured the release took subject to the prior unrecorded assignment, but that a purchaser from him takes free); Windle v. Bonebrake, 23 Fed. 165 (C.C. Kan. 1885); Assets Realization Co. v. Clark, 205 N.Y. 105, 98 N.E. 457 (1912); Metropolitan Life Ins. Co. v. Guy, 223 Ala. 285, 135 So. 434 (1931).

[11] See cases cited in note 12 *supra.*

[12] See Bacon v. Van Schoonhoven, 87 N.Y. 446 (1882). [13] See Rev. Stat. Mo. 1929, § 3078.

[14] See Oregon & Washington Trust Co. v. Shaw, 5 Sawy. (Fed.) 336, 340 (C. C. Ore. 1877).

modity. The price was based upon the cost of the commodity and the tax levied under the A.A.A. The agreement stipulated that any increase in the tax should be charged to the plaintiffs, and any decrease should be "credited against the contract prices in this contract." The defendant resisted payment of the tax to the government alleging the unconstitutionality of the A.A.A., and after its invalidation obtained the funds which had been impounded during the litigation. The plaintiffs then brought a class action to recover the amount paid as processing tax, alleging that they had merely put the defendant in funds to pay the tax. *Held*, action dismissed, because the tax was absorbed in the price. *O'Connor-Bills, Inc., et al. v. Washburn Crosby Co.*[1]

Where taxes are refunded to the seller-taxpayer because of improper assessments or the unconstitutionality of a taxing statute, the purchaser's right to recover from the seller, has, in a number of instances, been founded purely upon an existing contract.[2] However, a purchaser has been denied a right of action against a seller who had obtained the tax refund under contingencies not covered by the contract of sale, apparently on the general theory that the contractual provisions were exclusive,[3] or that the parties had substituted the contract for the equitable right to a refund and thereby extinguished all non-contractual claims.[4] Frequently litigation ensues where the seller obtained a tax refund, and the sales contract contained no refunding arrangements between the seller and purchaser. Under such circumstances the purchaser urges that he is entitled to a refund of the amount of the tax burden imposed upon him because the sales contract contemplated payment of a stated price plus necessary funds to enable the seller to discharge his tax obligation. As against this argument the seller contends that the amount of the tax was absorbed in the sales price as an incident in the cost of production or distribution. Under this formulation the controversy can be settled, apart from the possibilities of mistake of law, by a determination of the probable arrangement contemplated by the parties.[5]

It has been said that where the tax item is separated on the bill from the price, such tax was not absorbed and the buyer could recover from the seller, and hence a single composite tax determined tax absorption and precluded recovery.[6] Such a distinction, based in part upon a misconception of *United States v. Jefferson Electric Mfg. Co.*,[7] is illogical and economically unsound.[8] That case involved a suit by a taxpayer to obtain

[1] 20 F. Supp. 460 (Mo. 1937).

[2] Solomon Tobacco Co. v. Cohen, 184 N.Y. 308, 77 N.E. 257 (1906); Friend v. Rosenwald, 124 App. Div. 226, 108 N.Y. Supp. 701 (1908); Kerber Straw Hat Corp. v. Lincoln, 239 App. Div. 727, 268 N.Y. Supp. 745 (1934) aff'd 266 N.Y. 410, 195 N.E. 130 (1934); see also *In re* Engelmeyer Baking Corp., 296 N.Y. Supp. 76 (App. Div. 1937).

[3] Moore v. Des Arts, 1 N.Y. 359, 364 (1848); Fireproof Prod. Co., Inc. v. Amerlux Steel Prod. Corp., 160 Misc. 879, 290 N.Y. Supp. 995 (1936); *cf.* Kerber Straw Hat Corp. v. Lincoln, 239 App. Div. 727, 268 N.Y. Supp. 745 (1934).

[4] Casey Jones, Inc. v. Texas Textile Mills, Inc., 87 F. (2d) 454, 456 (C.C.A. 5th 1937).

[5] But see *dicta* in Tager v. Wood Ray Prod. Corp., 160 Misc. 19, 20, 289 N.Y. Supp. 541, 543 (1936) and Texas Co. v. Harold, 153 So. 442, 445 (Ala. 1933) (in absence of a refunding arrangement buyer denied recovery if tax was shifted).

[6] Christopher v. Hoger & Co., Inc., 160 Misc. 21, 289 N.Y. Supp. 105, 106 (1936).

[7] 291 U.S. 386 (1934); 50 Harv. L. Rev. 477, 480 ff. (1937).

[8] See Lash's Products Co. v. United States, 278 U.S. 175, 176 (1929).

a tax refund; and the significance there attached to separate invoicing was controlled by a specific Treasury Regulation.[9]

One method of adjudicating the controversy between the buyer and seller was suggested by Justice Cardozo in *Wayne County Prod. Co. v. Duffy-Mott Co.*[10] where the purchaser paid a designated price plus a ten per cent tax, which was paid by the seller to the government. The seller obtained a refund because the merchandise were held not taxable under the statute. The court permitted the buyer to recover the amount paid on account of the tax, saying in effect that the seller could not compute the tax on the basis of the invoice selling price and then later urge that the tax was absorbed in the price on the ground that the full invoice amount represented the selling price. "The contract, therefore, in effect, was this and nothing more, that whatever moneys were necessary for the payment of a tax would be furnished by the buyer."[11] Of course if the tax is a flat sum per unit commodity, as in the instant case, the situation is somewhat different. But other factors might be important. For instance, if a cash discount allowed by the seller had been computed on the total invoice amount, or if the seller's accounting records charged the tax to expense, the seller's contention might carry greater weight.

In the instant case, the contract of sale stipulated that an increase or decrease in the processing tax should, under certain conditions, be charged or credited to the purchaser. It would seem that this case is analogous to *Casey Jones Inc. v. Texas Textile Mills, Inc.*,[12] where the purchaser was denied recovery against the seller because the particular contingency which occurred was not covered by the contract. But even in the *Casey Jones* case tax absorption was determined not simply on the theory that the refunding provisions were exclusive, but by evidence admitted to aid in such an interpretation of the agreement.[13] In the present case there are a number of factors aiding the purchasers' cause, which the court overlooked. Cognizance might have been taken of the general uncertainty concerning the constitutionality of the A.A.A. at the time of the formation of the contract;[14] of the seller's insistence that, independently of the alleged contract price, funds be provided to meet a tax increase; and of the seller's injunctive proceedings to prevent the collection of the tax.[15] All these considerations tend to show a contractual agreement which should have permitted recovery.

Taxation—Estate Tax—Deductions of Insurance Proceeds When Estate Is Insolvent—[Federal].—The decedent's statutory gross estate was $1,114,892.67, of which $598,183 was in insurance. The federal estate tax law provides that insurance shall be included in determining the gross estate, and that deductions to ascertain the net estate are to include, among other things, such bona fide claims "as are allowed by the laws of

[9] See Johnson, AAA Tax Refunds: A Study in Tax Incidence, 37 Col. L. Rev. 910, 919 (1937); and see Lash's Products Co. v. United States, 278 U.S. 175, 176 (1929).

[10] 244 N.Y. 351, 155 N.E. 669 (1927). *Contra:* Heckman & Co., Inc. v. I. S. Dawes & Son Co., Inc., 12 F. (2d) 154 (App. D.C. 1926); Kastner et al. v. Duffy-Mott Co., Inc., 125 Misc. 886, 213 N.Y. Supp. 128 (1925).

[11] 244 N.Y. 351, 354 ff., 155 N.E. 669 (1927).

[12] 87 F. (2d) 454 (C.C.A. 5th 1937). [13] *Id.* at 456.

[14] 83 The New Republic 320 (1935); 13 Tax Mag. 298, 486 (1935).

[15] See Wayne County Prod. Co. v. Duffy-Mott Co., 244 N.Y. 351, 353, 155 N.E. 669 (1927).