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).

the state." The bona fide claims allowed against the estate were $3,906,429.82. Under a state statute which provided that insurance proceeds were not subject to creditors' claims the beneficiaries of the deceased received the $598,183. The Commissioner of Internal Revenue interpreted the deduction provisions to mean the claims *paid* by the estate, and since, after the payment of the claims of the creditors the insurance proceeds went to the beneficiaries, he imposed a deficiency tax upon the amount of the insurance. The Board of Tax Appeals held that the proper deductions were the allowable claims against the estate, and not those actually paid, and that since such allowable claims exceeded the assets, including the insurance, there was no taxable net estate. On appeal, *held*, affirmed. *Helvering v. Northwestern National Bank & Trust Co. of Minneapolis, et al.*[1]

In a similar case, *held*, the proceeds of the exempt insurance are taxable; the word "allowable" is properly construed to mean "paid." *Kahn et al. v. United States.*[2]

A literal interpretation of the statute as in the *Northwestern Bank* case makes the deceased's insolvency desirable for the beneficiaries of his policies from the tax point of view. For example if the insured's only assets are $100,000 in exempted life policies, and there are valid claims exceeding that amount, the beneficiaries will receive $100,000 and no tax will be paid.[3] If he has left assets, other than insurance, sufficient to pay his debts, the beneficiaries will received $100,000 and a tax will be collected on that amount. Thus, although insolvency of the insured does not determine the amount of insurance proceeds that the beneficiaries get, it does determine the amount of tax which is to be paid. Again, where the amount of insurance makes the difference between solvency and insolvency the government would be able to tax only the portion of the insurance in excess of the liabilities. Thus, where there are liabilities of $50,000, available assets of $25,000, and insurance of $100,000, $75,000 of the $100,000 which the beneficiary receives will be taxed. Insolvency, a genuine criterion in the ordinary tax case, yields completely arbitrary results in cases where exempt assets are included in determining the gross estate.

The estate tax is upon the privilege of transfer at death, rather than upon the right of succession.[4] Since actual assets in the form of exempt proceeds are *in fact* transferred from the insured to the beneficiaries,[5] such a transfer seems certainly within the intended scope of the estate tax statute. Furthermore, this interpretation of the statute results in tax exemptions where apparently none were intended. Express provision is made in the taxing statute[6] to protect the dependents of the deceased. Forty thousand dollars of the insurance proceeds are tax free.

[1] 89 F. (2d) 553 (C.C.A. 8th 1937); see also Com'r of Internal Revenue v. Strauss, 77 F. (2d) 401 (C.C.A. 7th 1935); Union Guardian Trust Co. v. Com'r of Internal Revenue, 32 B.T.A. 996 (1935); Estate of Suderov, 282 N.Y. Supp. 405, 156 Misc. 661 (1935); Baer v. Milbourne, 13 Fed. Supp. 998 (Md. 1936); Com'r of Internal Revenue v. Ames, 88 F. (2d) 338 (C.C.A. 8th 1937); Com'r of Internal Revenue v. Sarah T. Windrow, Exctrx., 89 F. (2d) 69 (C.C.A. 5th 1937); Com'r of Internal Revenue v. Lyne, 90 F. (2d) 745 (C.C.A. 1st 1937).

[2] 20 Fed. Supp. 312 (N.Y. 1937).

[3] The federal government will receive no tax from the individual recipients as there is no federal inheritance tax.

[4] Clark, Inheritance and Estate Taxes on Life Insurance 2 (1935).

[5] Chase National Bank et al. v. United States, 278 U.S. 327 (1929).

[6] Federal Estate Tax Law, Revenue Act 1926, Title III, § 302 (g).

Nor can these results be avoided by a legitimate construction of the statute; the statute is literally inadequate rather than ambiguous. The court in the *Kahn* case argued that since the tax lien under the statute attached to all of the estate except that part which was "used" to pay claims, this is equivalent to deducting *paid* claims. Thus, unless the tax lien provision and the tax provision were harmonized by construction, there would be the somewhat incongruous result that the tax lien would attach to an estate on which no tax was imposed. To harmonize the statute the word "allowed" was construed to mean "paid." But this construction is unsound, since "allowed," a technical word, is generally understood to mean "approved" rather than "paid."[7] Further, the tax lien section itself refers to that portion of the gross estate "used" to pay claims "allowed" against the estate. The substitution of "paid" for "allowed" in this section makes it clear that the two words are not interchangeable. Again, it could be argued that insurance to be included in the gross estate under the statute refers only to non-exempt insurance, and that the allowable claims, while deductible, cannot be set off against the exempt insurance. Unfortunately, if insurance cannot be included in the gross estate, it cannot be included in the net estate upon which the tax is imposed.

These cases then present a situation literally included within the act, but only because of an oversight on the part of the legislature. Until the tax statute is amended, the remedy lies, in the classic phrase, in interstitial judicial legislation, whether done openly or under the guise of statutory construction.[8]

Torts—Contracts—Liability of Dentist for Malpractice—[New York].—While the defendant, a dental surgeon, was extracting four teeth for the plaintiff, a gold inlay became detached from one tooth and became lodged in the plaintiff's throat. The plaintiff sued, alleging a contract by the dentist "to extract the said teeth and each and every part thereof from within the plaintiff's body," assigning as the breach the failure to extract the gold filling from his body, and demanding damages for the alleged breach of contract for medical attention, cost of medicines, and loss of earnings. On the defendant's motion, the trial court dismissed the complaint as stating no cause of action. *Held*, reversed. The defendant failed to perform the contract alleged; so a cause of action is stated regardless of the degree of care exercised by him. *Keating v. Perkins.*[1]

In allowing the plaintiff to avoid the difficulties of proof of negligence by the statement of his action for malpractice, the instant case is most unusual. The traditional action for malpractice is brought on the tort theory of breach of a law-imposed standard of diligence and skill arising from the relation of doctor and patient.[2] It has been stated that malpractice may be either tort or contract, on an implied undertaking to ex-

[7] Com'r of Internal Revenue v. Lyne, 90 F. (2d) 745 (C.C.A. 1st 1937); compare the dissenting opinion of Sibley, J., in Com'r of Internal Revenue v. Sarah T. Windrow, Exctrx., 89 F. (2d) 69 (C.C.A. 5th 1937).

[8] Church of the Holy Trinity v. United States, 143 U.S. 457 (1891), where it was held that an act prohibiting the importation of foreign contract labor did not apply to a contract between a foreign minister and a New York religious corporation.

[1] 250 App. Div. 9, 293 N.Y. Supp. 197 (1937).

[2] Ewing v. Goode, 78 Fed. 442 (C.C. S.D. Ohio 1897); Whitesell v. Hill, 101 Iowa 629, 70 N.W. 750 (1897); 3 Cooley on Torts, § 473 (4th ed. 1932).