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).

ercise the required amount of skill.[3] Yet, since under either theory negligence is the gravamen of the suit, it is usually held that the complaint sounds in tort.[4] Thus, the tort statute of limitations has barred the suit, even though the evident intent of the plaintiff was to sue in contract.[5] Where, however, the doctor has contracted to accomplish a particular result, that special contract may be relied upon as the basis of suit, and the showing of a breach entitles the plaintiff to recovery irrespective of negligence.[6] This principle was relied upon by the court in the instant case upon the assumption that the contract alleged was admitted by the answer. But admission of a contract by failure to deny it submits the construction of the contract to the court.[7] The rule is well established that in construing a contract greater regard should be had for the intent of the parties than for particular words used in its expression.[8] It seems obvious that the parties in the instant case intended that the contract provide merely for the extraction of four teeth, and that the meaning assigned by the court is unduly literal. If the contract were construed as an agreement to extract four teeth, no breach could be shown, and the plaintiff would be forced to prove negligence. Even if the construction of the court were sound, difficulties might conceivably be encountered in applying the contract rule of damages, that recovery may be had of only those damages that were forseeable at the time the contract was made.[9] It is hardly conceivable that either the breach alleged or the damages resulting therefrom could have been foreseen in the instant case.

Strained construction of a contract in the instant case supplants proof of negligence in a situation traditionally considered tort. Thus absolute liability is imposed, for the defense by proof of due care is precluded. In this respect the result reached is strikingly similar to the development of liability of a manufacturer to an ultimate consumer on the notion of a warranty of quality,[10] which it has been suggested "runs with the

[3] Goble v. Dillon, 86 Ind. 327 (1882); Kuhn v. Brownfield, 34 W.Va. 252, 12 S.E. 519 (1890); Stokes v. Wright, 20 Ga. App. 325, 93 S.E. 27 (1917).

[4] Nelson v. Harrington, 72 Wis. 591, 40 N.W. 228 (1888); Carpenter v. Walker, 170 Ala. 659, 54 So. 60 (1910). But see Coon v. Vaughn, 64 Ind. 89 (1878).

[5] Trimming v. Howard, 52 Idaho 412, 16 P. (2d) 661 (1932) noted in 3 Detroit L. Rev. 204 (1933); Frankel v. Walper, 181 App. Div. 482, 169 N.Y. Supp. 15 (1918). *Cf.* Monahan v. Devinney, 223 App. Div. 547, 229 N.Y. Supp. 60 (1928).

[6] Conklin v. Draper, 229 App. Div. 227, 241 N.Y. Supp. 529 (1930).

[7] St. L. K. & S.E. R. Co. v. United States, 267 U.S. 346 (1925); Greeff v. Equitable Life Assur. Soc. of United States, 160 N.Y. 19, 54 N.E. 712 (1899); N.Y. N.H.& H.R.Co. v. Board of Comm'rs, 102 Conn. 488, 129 Atl. 384 (1925).

[8] Canal Co. v. Hill, 82 U.S. 94 (1872); Rest., Contracts, § 236 (1932).

[9] Hadley v. Baxendale, 9 Ex. Rep. 341 (1854); Rest., Contracts § 330 (1932); 5 Williston, Contracts, §§ 1347, 1356 (rev. ed. 1937).

[10] See Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928) (consumer is third party beneficiary to contract between manufacturer and dealer); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409 (1932) (dealer is agent of manufacturer and makes warranty to consumer for manufacturer); Madouros v. Kansas City Cocoa-Cola Bottling Co., 230 Mo. App. 275, 90 S.W. (2d) 445 (1936) (advertising of the manufacturer is an express warranty to the consumer). *Cf.* Winterbottom v. Wright, 10 M. & W. 109 (1842); MacPherson v. Buick, 217 N.Y. 382, 111 N.E. 1050 (1916).

goods."[11] But since a patient or client has ample opportunity to ascertain the qualifications of professional men and to make an intelligent choice, it would seem that an extension of liability is not justifiable. If the liability is to be extended, however, it should be made definable by an increase in the care required or a shift in the burden of proof,[12] rather than be made unpredictable by an occasional contractual recovery.

Torts—Liability for Mental Distress—Punitive Damages against a Principal— [Oklahoma].—The plaintiff on application for a life insurance policy with the defendant failed to disclose that he had been treated for syphilis. After making disability payments for fourteen months for a physical and mental breakdown from which the plaintiff was suffering, the defendant sent two agents to the plaintiff's house to seek rescission for the non-disclosure. As a result of the accusations of fraud and the threats of reprisals, the plaintiff suffered a relapse and his mental breakdown became permanent. In an action against the defendant, *held*, (four justices dissenting), the plaintiff is entitled to both compensatory and punitive damages. *Pacific Mutual Life Insurance Co. v. Tetirick.*[1]

It is now generally held that when one does an intentional act that is reasonably likely to cause emotional distress to another, and physical injury ensues from such distress, the actor is liable therefor.[2] However, courts disagree as to whether a negligent act of the same character should create liability.[3] Although opinion is not uniform as to whether an act intentionally directed toward a third person and only incidentally injuring the plaintiff is toward the latter an intentional[4] or negligent[5] aggression, in the instant case, since the defendant's act was directed at the plaintiff, the conduct would clearly seem to have been intentional.[6]

It seems questionable to impose too strict a rule of liability for harm caused by

[11] Steffen, Independent Contractor and the Good Life, 2 Univ. Chi. L. Rev. 501, 519 (1935).

[12] *Cf.* Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670 (1930) (holding that *res ipsa loquitur* cannot be applied to render a dentist liable for lodging of a piece of tooth filling in patient's throat even though patient was under general anesthetic at the time); Vale v. Noe, 172 Wis. 421, 179 N.W. 572 (1920) (refusing to apply *res ipsa loquitur* in action against dentist to recover for cuts in mouth).

[1] U.S. Law Week Aug. 3, 1937, p. 15 (rehearing pending).

[2] Wilkinson v. Downton, [1897] 2 Q.B. 57; Janvier v. Sweeney, [1919] 2 K.B. 316; Great A. & P. Tea Co. v. Roch, 160 Md. 189, 153 Atl. 22 (1931); Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933); *cf.* Price v. Yellow Pine Paper Mill, 240 S. W. 588 (Tex. Civ. App. 1922).

[3] *Denying recovery:* Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354 (1896); Alexander v. Pacholek, 222 Mich. 157, 192 N.W. 652 (1923); Howarth v. Adams Express Co. 269 Pa. 280, 112 Atl. 536 (1921). *Granting recovery:* Purcell v. St. Paul City R. R., 48 Minn. 134, 50 N.W. 1034 (1892); Kenny v. Wong Len, 81 N. H. 427, 128 Atl. 343 (1925); Clem v. Atchison, Topeka & Santa Fe R. R., 126 Kan. 181, 268 Pac. 103 (1928).

[4] Jeppsen v. Jensen, 47 Utah 536, 155 Pac. 429 (1916); Rogers v. Willard, 144 Ark. 587, 223 S.W. 15 (1920); Lambert v. Brewster, 97 W.Va. 124, 125 S.E. 244 (1924).

[5] Gaskins v. Runkle, 25 Ind. App. 584, 58 N.E. 740 (1900) (recovery denied); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890); Reed v. Ford, 129 Ky. 471, 112 S.W. 600 (1908) (recovery denied).

[6] *Op. cit. supra* note 2.