Although the word "owner" appears nowhere in the Illinois statute, the court says liability is "confined to personal operation by a non-resident *owner*."[19] Cited in support of this position is a case[20] decided under the New York act, but after an amendment which specifically stated the requirement of ownership. It is unlikely that the court foresaw the ultimate significance of this requirement. Suppose a non-resident individual injures an Illinois citizen while personally operating a car owned by a third party. If service is made under the statute with the ownership requirement, the court must deny validity merely because the non-resident operator did not *own* the car. Such a result could not have been contemplated by the court. The "potential harm" is as great whether the operator or another holds title.[21]

Taxation—Constitutionality of Use Tax—Burden on Interstate Commerce—[Washington].—The plaintiff sought to enjoin the state tax commissioners from collecting a use or compensating tax which a Washington statute[1] imposed upon the privilege of using within its boundaries any article of tangible personal property not already subject to local or out-of-state sales tax. The plaintiff's equipment, which could only be purchased outside of the State of Washington, was stored within the state until used in the operation, maintenance and repair of the plaintiff's intermingled intrastate and interstate telephone and telegraph system. *Held*, for the plaintiff. Exaction of the tax is an unlawful burden upon interstate commerce. *Pacific Telephone and Telegraph Co. v. Henneford et al., Tax Commissioners*.[2]

As a result of the depression many states turned to the sales tax as a source of much needed revenue.[3] The inapplicability of these taxes to interstate sales because of the interstate commerce clause, led to many out-of-state purchases and consequently to loss of business by local merchants and revenue by the states.[4] In an effort to prevent this avoidance of the sales tax, a number of states have recently turned to the use tax, as was the situation in the instant case.[5]

The adoption of the use tax has not solved the problems arising from state taxation of interstate commerce. Although it has widened the field of state taxation in foreign-purchase home-consumption cases, the problem of determining when goods are a part of interstate commerce, and as such subject to state taxation, still remains. Immunity from state taxation depends on the supreme courts' ever-varying determination of the requisite degree of closeness to a prior or subsequent transportation into or out of the

[19] Jones *et al.* v. Pebler *et al.*, 296 Ill. App. 460, 16 N.E. (2d) 438 (1938).

[20] Wallace v. Smith, 238 App. Div. 599, 265 N.Y. Supp. 253 (1933).

[21] Culp, *op. cit. supra* note 3, at 345.

[1] Wash. L. 1935, c. 180, § 4, 726–728; amended in Wash. L. 1937, c. 191, 943–946.

[2] 81 P. (2d) 786 (Wash. 1938).

[3] Twenty states now have general sales taxes: Alabama, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Washington, Wyoming.

[4] Perkins, The Sales Tax and Transactions in Interstate Commerce, 12 N. C. L. Rev. 99, 100 (1933); Ahern, State Sales and Use Taxes, 25 Geo. L. J. 714 (1937).

[5] Eleven states—California, Colorado, Iowa, Kansas, Michigan, Mississippi, Ohio, Oklahoma, Utah, Washington and Wyoming—now have separate use taxes, while Arkansas and Louisiana include a use tax provision in their sales tax.

state. In *Helson and Randolph v. Kentucky*[6] the Supreme Court held that tax on the use of gasoline to propel a ferry engaged in transportation between states was an unconstitutional burden on interstate commerce even though the tax was confined to such only of the gasoline as was used within the limits of the state. Five years later, however, in *Edelman v. Boeing Air Transport Inc.*[7] the court ruled that a state may validly tax the use to which gasoline is put in withdrawing it from storage within the state and placing it in the tanks of an airplane which is about to carry goods across interstate lines. A desire to uphold the tax enabled the court to find in the transfer of the gasoline from the tank to the plane a "use" within the state prior to and apart from use in interstate commerce, although more fuel was being burned in interstate commerce than in the *Helson* situation where almost all of it was burned within the state.[8]

The instant decision, rendered by the Washington State Supreme Court, is typical of the treatment given the interstate commerce issue by the United States Supreme Court. In finding the case at bar readily "distinguishable" from the *Edelman* and similar cases, the court said: "The *Edelman* case, like the *Nashville* case, has to do with the application of a tax only to storage or withdrawal from storage. It was not as in the case at bar, a tax upon the use of an instrumentality of interstate commerce."[9] Both attempts to reconcile the holding with those of the United States Supreme Court seem equally illogical. It is difficult to understand why gasoline used to propel a plane loaded with merchandise across state lines is not as much an instrumentality of interstate commerce as is telephone equipment used to facilitate the transfer of messages. Moreover, despite the court's statement that any retention of equipment by the plaintiff within the state was not storage but an inseparable part of its use in rendering uninterrupted carrier service,[10] the fact remains that the equipment was retained within the state for an appreciable length of time before it was actually used in the interstate transaction. If transferring gasoline from a tank car to an airplane is a "use" within the state, retaining telephone equipment—for certainly a longer period than is required to fuel a plane—can also be considered a "use" within the state. Regardless of such determination, however, the court could easily have reached the result of the *Edelman* case had it desired to do so. Instead of calling the tax a "direct and undue burden" on interstate commerce, it could have used its other stereotyped phrase—"indirect and incidental burden"—and upheld the statute.[11] What the United States Supreme Court would have decided in this case is, of course, a matter of conjecture. Aside from the question of the rationale of the critieron used, however, the fact remains that where the tax is ruled invalid, the local merchant remains at a disadvantage and the state loses revenue.

Various suggested remedies, such as a general federal tax on interstate sales with a subsequent apportionment among the states,[12] and congressional consent to non-

[6] 279 U.S. 245 (1929).

[7] 289 U.S. 249 (1933).

[8] For similar holdings see Nashville C. & St.L. Ry. Co. v. Wallace, 288 U.S. 249 (1933); Eastern Air Transport v. South Carolina Tax Commission *et al.*, 285 U.S. 147 (1932).

[9] P. 789.

[10] P. 797.

[11] See Southern Pacific Co. v. Corbett *et. al.*, 23 F. Supp. 193 (1938).

[12] Suggested by the court in Robbins v. Shelley County Taxing District, 120 U.S. 489 (1887).

discriminatory state taxation of interstate transactions,[13] raise as many problems as they solve.[14] In view of the half-hearted success of state attempted solutions, it would seem that a better approach to the solution of state income difficulties must lie along national lines. It is submitted that a general federal tax on all sales—interstate and intrastate—with an apportionment back to the states on a population-wage rate basis is a possible solution.

Torts—Liability for Accountants' Misrepresentations—[New York].—The defendant accountant, employed by a corporation which subsequently became insolvent, prepared ten copies of a financial statement with knowledge that they were to be used to obtain credit. The corporation did use one of these statements to secure a $300,000 loan from the plaintiff. Material facts as to the stagnancy of accounts receivable and the possible inadequacy of reserves set up, of which the defendant had knowledge, were not indicated on the balance sheet in accordance with usual accounting practice, but were disclosed in a single copy of a letter sent to the corporation thirty days later. This action was brought for damages which the plaintiff suffered by reliance on the defendant's negligently made financial statement. On appeal from a judgment of Appellate Division affirming a judgment for the defendant, *held*, reversed. The evidence was sufficient to support a finding of gross negligence raising an inference of fraud. *State Street Trust Co. v. Ernst and Ernst.*[1]

The New York court in *Ultramares Corporation v. Touche*[2] repudiated the view adopted a short time previously that one who made a negligent misrepresentation to another with knowledge of such other's intention to induce thereby the reliance of a third party, should be held liable.[3] The court there decided that a negligent misrepresentation of this type which would be passed on to an indefinite class of possible reliers should not be actionable as negligence and could support liability only if the circumstances under which it was made indicated evidence of such gross negligence that the inference of fraud could be drawn. The principal case purports to follow the *Ultramares* case in that it places in the fraud category liability to third parties for gross negligence. The constant reliance for authority, however, by both the majority and dissenting opinions in the case indicates the difficulty of applying the doctrine.[4] In imposing liability the court recognized the need of stricter requirements of accuracy in financial statements because of the increasing dependence by business on such reports.[5]

[13] Such a bill was passed by the United States Senate in 1934—78 Cong. Rec. 4598 (1934)—but died in the House Committee on Interstate and Foreign Commerce.

[14] Johnson, State Sales Taxes and the Commerce Clause, 24 Calif. L. Rev. 155, 170 (1936); Lowndes, State Taxation of Interstate Sales, 7 Miss. L. J. 223 (1935); Perkins, The Sales Tax and Transactions in Interstate Commerce, 12 N. C. L. Rev. 99, 108 (1933).

[1] 278 N.Y. 104, 15 N.E. (2d) 416 (1938).

[2] 255 N.Y. 170, 174 N.E. 441 (1931).

[3] Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922); International Products Co. v. Erie Ry. Co., 244 N.Y. 331, 155 N.E. 662 (1927).

[4] Baldwin, Liability of Public Accountants, 52 Journal of Accountancy 342 (1931).

[5] 3 Corp. Proc. Rev. 57 (1931). George S. Olive, Conduct of an Accounting Practice, American Institute of Accountants (October, 1929). Consider Securities and Exchange Commission of the federal government.