

serious attacks on the government, it is insisted, in return, that a policy of speech abridgement has so strong a tendency to foment dissatisfaction that its exercise is properly forbidden. A more serious objection to Holmes' rule is that it apparently sets up a purely subjective standard. In the hands of a terrified magistrate it is not at all clear that a student who had drawn the Communist Manifesto from the college library and used it to support his class argument would be protected by this rule from an extensive jail sentence. See Chafee, *Freedom of Speech*, c. III, especially at 146-48 (1920); *Sacramento Criminal Syndicalism Cases*, 4 *Internat'l Jurid. Ass'n Bull.*, no. 6, p. 4 (1935). See also *People v. Flanagan*, 65 Cal. App. 268, 279, 223 Pac. 1014, 1019 (1924); *Abrams v. United States*, 250 U.S. 616, 621 ff. (1919).

Since Holmes' rule is, however, a much healthier point of view than Sanford's and since no greater protection has been suggested save the scorned rule of absolute freedom, it is important to determine whether or not Sanford's rule is still supported by the majority of the Court. In *Near v. Minnesota* (283 U.S. 697 (1931)), a publisher used his journal to stir up public feeling against a minority group. Enjoined under a state journalist nuisance statute, he appealed to the United States Supreme Court on the ground that the statute violated the principle of freedom of the press. This time the so-called conservatives were in the minority in insisting that the legislature had reasonably interpreted the state's welfare needs. It was the majority who, though disapproving the material published, found the state's interference constitutionally unjustifiable. An important difference between the *Near* case and the criminal syndicalism cases makes the former of doubtful authority: *Near's* propaganda, while dangerous from the point of view of the minority group assailed, was not directed against the government, and the injunction was aimed at malicious nuisance, not at sedition. But the minority relied heavily on the "malice" involved, perhaps more justifiably than did McKenna, J., in his astonishing conclusion that one who opposed the World War *must* have been motivated by malice. *Gilbert v. Minnesota*, 254 U.S. 325, 333 (1920). Except for reasoning like McKenna's, the defendants in the criminal syndicalism cases will not be accused of malice, and for that reason will tend to be accorded more protection. Since the *Near* case is ambiguous, however, it is regrettable that the Court did not seize upon the *De Jonge* case to cement the overruling of the *Gillow* doctrine and restore significance to the personal liberties.

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Constitutional Law—Taxation—State Tax on Production of Energy for Instrumentalities of Interstate Commerce—[Federal].—The plaintiff corporation operated interstate pipe lines for the sale and transportation of gas. Pressure necessary to move the gas was created by compression pumps driven by internal combustion engines. A Louisiana statute, in levying a sales tax upon producers and distributors of electricity, provided that a corporation which used "electrical or mechanical power of more than 10 horsepower" and which did not procure all the power required from a corporation subject to the sales tax, should pay a privilege tax of \$1.00 "for each horsepower of capacity of the machinery or apparatus, known as the 'prime mover' or 'prime movers' operated by such . . . corporation . . . , for the purpose of producing power for use in such . . . business. . . ." La. L. 1932, no. 6, §§ 1, 2, 3. The plaintiff, having been assessed a tax measured by the number of horsepower of the engines used to drive its pumps, applied for an injunction to prevent the collection of

the tax, on the ground that the tax was a burden upon interstate commerce. *Held*, preliminary injunction granted. *Arkansas-Louisiana Pipe Line Co. v. Coverdale*, 17 F.Supp. 34 (La. 1936).

Any attempt to analyze this case in the light of prior decisions of the Supreme Court reveals the hopeless conflicts which exist among cases dealing with state taxation of interstate commerce. While it is not true that all taxes upon interstate activities are invalid, it has been held that no tax may be levied upon the subject matter carried interstate. *State Freight Tax Cases*, 15 Wall. (U.S.) 232 (1872); 2 Willoughby, Constitutional Law 1061 ff. (1931). Nor may a state tax the privilege of engaging in interstate transportation. *Sprout v. South Bend*, 277 U.S. 163 (1928); *Interstate Transit Co. v. Lindsey*, 283 U.S. 183 (1931); *Helson v. Kentucky*, 279 U.S. 245 (1929). But a property tax upon the instrumentality itself requiring the carrier to pay a fair share of the local burden of the tax bill has been sustained. *American Refrigerator Co. v. Hall*, 174 U.S. 70 (1899); *Pullman's Palace Car. Co. v. Pennsylvania*, 141 U.S. 18 (1891). It is necessary that the instrumentality have acquired a situs in the state for such a property tax to be valid. *Union Transit Co. v. Kentucky*, 199 U.S. 194 (1905); see Powell, Taxation of Things in Transit, 7 Va. L. Rev. 167, 245, 429, 497 (1920). The engines in the principal case, being immovable, were clearly situated in the state; thus this tax might be considered a property tax. But the engines as property had already been taxed to the full constitutional limit; therefore this tax can only be sustained if it be regarded as an excise tax upon intrastate activity.

In determining the validity of a state tax on an instrumentality of commerce, it is necessary to ascertain when that instrumentality first became engaged in interstate commerce. This is determined by reference to the time at which the goods it transported or propelled first started on their interstate journey. *Kelley v. Rhoads*, 188 U.S. 1 (1903) (continuous interstate movement must be intended); *Coe v. Errol*, 116 U.S. 517 (1886); cf. *Champlain Realty Co. v. Brattleboro*, 260 U.S. 366 (1922). In the principal case the compression pumps performed the dual function of drawing gas from the wells through a purifying apparatus and of propelling it interstate. Although the purification was a manufacturing process which would leave this operation subject to local regulation (*Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923)), the fact that the gas continued across state lines without stopping made the activity of the pumps a mixed interstate and intrastate activity and therefore subject only to federal regulation. *Leoup v. Port of Mobile*, 127 U.S. 640 (1888). This is not conclusive of the invalidity of the tax, however. Since the plaintiff's pumps were operated by mechanical energy produced by internal combustion engines, a distinction might be drawn between the manufacture of this energy and its actual use by the pumps. Thus, this manufacture being at the situs of the machines in the state, the tax levied on this manufacture would be valid. The Supreme Court adopted this distinction in holding the generation of electrical energy for transportation as subject matter of interstate commerce taxable as a local activity, even though transmission to other states was instantaneous. *Utah Power & Light Co. v. Pfof*, 286 U.S. 165 (1932). Similarly, a tax levied upon gasoline withdrawn from storage tanks at an airport to refuel interstate airplanes has been held valid since its use in interstate commerce had not yet commenced. *Edelman v. Boeing Air Transp. Co.*, 289 U.S. 249 (1933); *American Airways v. Grosjean*, 3 F.Supp. 995 (La. 1933), aff'd without opinion, 290 U.S. 596 (1933). But a tax levied upon gasoline actually used within the state by an instrumentality of interstate commerce has been

held invalid. *Helson v. Kentucky*, 279 U.S. 245 (1929) (tax upon amount of gasoline purchased outside state and consumed by interstate ferry within state); *Bingham v. Golden Eagle Western Lines*, 297 U.S. 626 (1936) (tax upon gasoline consumed in state by interstate busses). The *Utah* case has been criticized on the ground that the electricity taxed did not come into existence until its interstate flow had actually begun. 42 Yale L. J. 96 (1932). As a practical matter, however, so long as generators at the power plant are operating, the plant is in effect manufacturing (converting) energy preparatory to its interstate transfer. Since the tax in the principal case was levied according to the plant's capacity to generate energy, it must be interpreted as a tax on the manufacture rather than on the use of this energy. The court therefore erroneously distinguished the *Utah* case; but its decision may be regarded as a desirable inroad upon the tenuous division of an instantaneous activity into "manufacture" and "transportation."

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Contracts—Quasi-contractual Relief for One Not Substantially Performing a Building Contract—[Wisconsin].—The plaintiff contracted to build a first-class roof upon the defendant's building for \$325. Upon completion, the defendant refused to pay, contending that it was not properly constructed and that it leaked soon after it was put on. A jury found that the cost of repairing the roof to make it conform to the contract would be \$75 and that the defendant had suffered \$75 damage because of leakage. The trial court accordingly awarded the plaintiff \$175. On appeal, *held*, reversed. The plaintiff could not recover on the contract because he had not substantially performed. Since there was no acceptance of the roof by the defendant, the plaintiff could not recover even the reasonable value thereof. To recover on a theory of unjust enrichment there must be such an acceptance as is something besides a keeping and using where there is no opportunity to return what has been received. *Nees v. Weaver*, 269 N.W. 266 (Wis. 1936).

This court's unqualified requirement of "acceptance" for the relief of one who has insubstantially performed his contract is indicative of widespread judicial unwillingness to consider each such case on its particular merits. For a considerable period, strict contract notions militated against the relief of one who had deviated even the slightest from his express obligation. 3 Williston, Contracts § 675 (2d ed. 1936). But the manifest injustice to those who, in good faith, had omitted some slight detail in performing their contracts led courts, especially in cases involving building contracts, to protect a contractor who had substantially performed. *Jacob & Youngs Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921); 3 Williston, Contracts § 805 (2d ed. 1936). Where a contractor has performed a large but not a "substantial" part of his contract, further protection has been necessary to avoid uncompensated enrichment to the other contracting party. *Gale v. Dixon*, 91 Cal. App. 529, 267 Pac. 342 (1928). Thus many courts granted recovery on a *quantum meruit* count if an acceptance of the benefits resulting from the plaintiff's performance could be shown. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N.W. 515 (1903); *Robinson Const. Co. v. Barry*, 135 Md. 275, 108 Atl. 688 (1919); *Everroad v. Schwartzkopf*, 123 Ind. 35, 23 N.E. 969 (1890). The measure of damages in these cases, although termed the reasonable value of materials and services furnished, was ascertained by deducting from the contract price the damages to the defendant resulting from the breach. *White Star Coal Co. v. Pursifull*, 189 Ky. 296, 217 S.W. 1020 (1920); *Ginsberg v. Myers*,