the circumstances now presented, either to apply or refuse to apply the law of Vermont, in accordance with their own interpretation of New Hampshire policy and law.

UTAH POWER & LIGHT CO. *v.* PFOST, COMMISSIONER OF LAW ENFORCEMENT, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 722. Argued April 13, 1932.—Decided May 16, 1932.

1. The generation of electricity from water-power and the transmission of the electricity over wires from the generator to consumers in another State, are, from the practical standpoint of taxation, distinct processes, the one local, the other interstate, like the making and shipping of goods to order, although the generation and transmission are apparently simultaneous and both respond instantaneously to the turning of a consumer's switch. P. 177.
2. Therefore a state license tax on the electricity produced at a plant within the State is valid under the commerce clause as applied to that which is transmitted therefrom and sold to consumers in another State. P. 181.
3. In deciding whether a part of a statute is separable, the fact that the bill was passed after a bill like it but lacking the part in question had been withdrawn by unanimous consent does not justify the inference that the legislature would not have passed the statute if that part had been omitted. P. 183.
4. A clause in a statute declaring that an adjudication that any of its provisions is unconstitutional shall not affect the validity of the Act as a whole, or any other of its provisions or sections, has the effect of reversing the common law presumption that the legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility. P. 184.
5. This presumption of divisiblity must prevail unless the inseparability of the provisions be evident or there be a clear probability that the legislature would not have been satisfied with the statute without the invalid part. *Id.*
6. The primary object of the Idaho statute here involved (Laws 1931, Ex. Sess., c. 3) is to raise revenue by taxing production of electricity. Section 5, which provides an exemption as to electricity

used for pumping water for irrigating land in Idaho, is secondary in purpose and its validity may be considered apart. P. 185.

7. In the Idaho law taxing electricity produced for sale, the exemption of that used for irrigating lands, inserted for the benefit of those so using it, is consistent with the equal protection clause of the Fourteenth Amendment, because in the arid region the irrigation of even private lands is a matter of public concern. P. 185.
8. The question whether a state taxing statute will operate unconstitutionally to take the money of one person to give to another, will not be decided here when the construction of the statute is involved and has not been determined by the state supreme court, and when it does not appear that the party complaining is presently in danger of such an application of it. P. 186.
9. This Court can not assume in advance that a state court will so construe or apply a state statute as to render it obnoxious to the Federal Constitution. *Id.*
10. To warrant holding a statute invalid under a constitutional requirement that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title," the violation must be substantial and plain. P. 187.
11. The Idaho statute, *supra*, complies in this respect with § 16, Art. III, of the Idaho constitution. *Id.*
12. The statute is to be construed as laying the tax only on the electricity produced for barter, sale or exchange, to be determined by deducting from the production of the generator the amounts disposed of otherwise, including the part used by the producer, or consumed in effecting transmission. P. 188.
13. Neither the validity of the tax nor its certainty is affected because it may be necessary to ascertain, as an element in the computation, the amounts delivered in another jurisdiction. P. 190.
14. In the administration of a revenue act involving complicated measurements and computations, fair and reasonable approximations must suffice where absolute precision is impracticable. *Id.*

54 F. (2d) 803, affirmed.

Appeal from the final decree in a suit to enjoin the enforcement of a law taxing production of electrical power. The decree dissolved an interlocutory injunction and required the petitioner corporation to pay the tax, with interest, but without penalties accrued during the pendency of the suit.

Mr. John F. MacLane, with whom *Mr. Robert H. O'Brien* was on the brief, for appellant.

The tax involved in this case—on the kilowatt hour of electric energy—is not a tax on the manufacture of goods or on the production or extraction of a product of nature but on the transfer or conveyance of energy in nature from its source to its place of use. When this transfer is across state lines it is interstate commerce.

The "generation" of electric energy is a part of the process of transferring energy from a source in nature such as falling water to some point where it may be usefully applied. Energy can not be "generated, manufactured or produced" except as it is transmitted and used. The process through the generator is continuous and simultaneous with the consumer's demand for energy. That part of the process described as generation is the part which is responsible for and causes the movement. The generator is thus an instrumentality of commerce. The entire combined process of generation, transmission and use is integral, continuous and essentially simultaneous.

Energy transferred to the consumer is drawn directly from its source at the water fall and is not stored in the system either at the consumer's place of use or some intermediate point. It is not analogous to a water or gas system with storage facilities either separately furnished or present in the water main or gas pipes.

Transformers interposed in the system for economy in transmission, while they result in interrupting the flow of electric current and in the induction of a different voltage and current on the other side of the transformer, do not interrupt the flow of electric power. This passes directly from its source through the transformers along the transmission line to the place of use. It is this energy, and not current or voltage, measured in terms of kilowatt hours, which is taxed by the Act involved in this case.

So-called losses in the electric system on account of which more energy leaves the generator than is delivered to the consumer do not alter the fundamental nature of the process. The system itself is a consuming device to the extent that it requires the transfer of certain energy from the source to enable the system to function and to keep it electrically alive. These so-called losses are used in the system and impress a demand upon the generator of exactly the same nature as the demand exerted by the devices of the consumers.

The kilowatt hour is a mathematical product of the power relation in the electric circuit between the generator and the receiving device measured in kilowatts and hours. It is a measure of the relationship expressed in terms of power demand (kilowatts) and the duration in time that that demand is exerted (hours). It is therefore a measure of the use of the vehicle of commerce which we call the electric system. Energy conceived of as leaving a generator in one State in response to the demand of a consumer in another State, and measured in terms of kilowatt hours, is in transit, and in fact actually crossing the state line and used by the consumer in the second State simultaneously with its measurement.

That part of appellant's system which consists of generating stations in Idaho, and transmission lines across the Utah-Idaho line to the terminal substation in Utah where it is connected with transmission lines for local distribution systems to consumers' devices, operates in interstate commerce. Whether such commerce extends beyond the terminal substation is not involved in this case. *Public Utilities Comm.* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83; *Idaho Power Co.* v. *Thompson*, 19 F. (2d) 547.

The tax imposed by the Act under review is a license tax exacted of appellant as a condition of continuing its business. As applied to interstate business, it is similar to a tax on a ton of freight, considered in the *State Freight*

Tax Cases, 15 Wall. 233, or upon passengers carried, as in the *Passenger Cases,* 7 How. 283, or on the tonnage of vessels, as in the *Tonnage Cases,* 12 Wall. 204, or upon telegraph messages as in the *Telegraph Cases,* 105 U. S. 460. Being levied at a unit rate on energy in interstate commerce, it can not be sustained as a license tax for the privilege of conducting an intrastate business.

While the Act describes the tax as levied upon the kilowatt hour generated, manufactured or produced, yet the process of generation is simultaneous and interdependent with the transmission and use. The Act burdens transmission and use equally with generation. The generator is an instrumentality of commerce. It is this inseparability of process which makes the whole interstate commerce. *Foster Packing Co.* v. *Haydel,* 278 U. S. 1; *Station WBT* v. *Poulnot,* 46 F. (2d) 671; and other cases cited. In this respect, it is also within the rule of *New Jersey Bell Tel. Co.* v. *State Board,* 280 U. S. 338; *Sprout* v. *South Bend,* 277 U. S. 163.

Since the tax falls and has its incidence on energy already in commerce, and is measured by the amount of the commerce in energy, it is likewise void under the rule announced in *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; *Coe* v. *Errol,* 116 U. S. 517; *Champlain Realty Co.,* v. *Brattleboro,* 260 U. S. 366; and other cases cited.

The Act in burdening interstate commerce is void in its entirety because it appears that the intent is to tax the whole business and no provision is made for the separate determination of interstate and intrastate business. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642.

Decisions in *Hope Natural Gas Co.* v. *Hall,* 102 W. Va. 272; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, reviewed and distinguished.

Section 5 of the Tax Act uses the power of taxation for the purpose of granting a subsidy to users of electric energy for irrigation pumping by requiring a credit upon their bills of an amount equal to the tax otherwise payable on such energy.

This is a use of the power of taxation for private, as distinguished from public purpose, and is void under the Fourteenth Amendment, and other constitutional provisions cited. *Jones* v. *Portland,* 245 U. S. 217; *Loan Assn.* v. *Topeka,* 20 Wall. 655.

If this section is unconstitutional for the reasons above stated, the Act must fall in its entirety. The history of its passage shows that this so-called exemption, or subsidy, was inserted to secure its passage, and it would not have been passed without it. Exemption features of statutes inserted to favor certain individuals, or industries, in order to secure their passage can not be excluded by judicial interpretation; and their invalidity carries with it the entire Act of which they are a part. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Howard* v. *Illinois Central R. Co.,* 207 U. S. 463.

This view is not affected by that section of the Act which provides that if any part be adjudged unconstitutional, such adjudication shall not affect the validity of the Act as a whole or other parts. *Dorchy* v. *Kansas,* 264 U. S. 286; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Williams* v. *Standard Oil Co.,* 278 U. S. 235.

The levy of a license tax on electric energy generated in a State; and a subsidy in favor of irrigation pumping users is void under the Idaho Constitution. Art. III, § 16. *State* v. *Banks,* 37 Idaho 27; *Hailey* v. *Huston,* 25 Idaho 165.

The subject of the Act is not expressed in the title. The Act is void for that reason. *Utah Mortgage Loan Corp.* v. *Gillis,* 49 Idaho 676; *Jackson* v. *Gallet,* 39 Idaho 382.

The Act is void for uncertainty and ambiguity because it can not be determined whether a tax is levied on all kilowatt hours generated, or only on those produced for

barter, sale or exchange. If the latter is the true construction, and the court below so construed the Act in order to sustain it against the objection that the title did not express the subject, then the Act affords no guide or means for the determination of what electric energy is generated for barter, sale or exchange, and does not confer upon the Commissioner of Law Enforcement any power to prescribe a formula for such determination, but attempts, on its face, to fix a place and method of measurement, which, of necessity, excludes any possibility of determining the energy generated for barter, sale or exchange.

A similar ambiguity and uncertainty is involved in § 5. This section provides for the so-called exemption and credit on irrigation power bills of the full tax which would have been due on such energy. Since the only measurement of the tax is at the point of generation, and the only means of determining the irrigation pumping use is at the users' pumps, there is no possible means of determining the amount of energy generated for irrigation pumping.

The Act, being highly penal in its nature, must be capable of definite construction and enforcement according to its terms, and, failing in this, violates the due process clause of the Constitution. *Connally* v. *General Construction Co.,* 269 U. S. 385; *United States* v. *Capital Traction Co.,* 34 App. D. C. 592; *International Harvester Co.* v. *Kentucky,* 234 U. S. 216; *United States* v. *Shreveport G. & E. Co.,* 46 F. (2d) 354; *Western Union* v. *Texas,* 62 Tex. 630.

Mr. Sidman I. Barber, Assistant Attorney General of Idaho, with whom Messrs. *Fred J. Babcock,* Attorney General, and *Maurice H. Greene,* Assistant Attorney General, were on the brief, for appellees.

The generator does not function to produce electrical energy for barter, sale or exchange, except as its output

is called for by appellant's consumers. The response is accomplished through the use of auxiliary controlling or regulating devices adapted to that purpose. The demand of a consumer's appliance is not related to the production of any specific generator or generating station, but is impressed upon the system as a whole, and appellant supplies the aggregate demand by generation at such station or stations and in such varying quantities between stations as it may determine.

The components of electrical energy are voltage and current. With the voltage and current at which the energy flows from the generator, it may not be transmitted to distant points. The transformer is therefore interposed to change the current and voltage. This change is similar to the packing of goods for shipment. The output of the generator can not be said to have entered upon its final journey until it leaves the transformer.

The losses or so-called uses in the system effectually distinguish generation from use, in that the percentage of electrical energy generated by stations which is delivered to consumers is dependent upon the character of construction of the transmission line and distribution system and their efficiency of maintenance, and not by any character of machinery or manner of operation at the generating plant.

The kilowatt hour is a unit of measurement of an amount of electrical energy that will accomplish a definite amount of mechanical work. It is not a measurement of any period of service. It may be generated or sold, delivered and used in the fraction of a second or over the period of hours. It is an article of commerce and bought and sold as such.

No tax is attempted to be imposed upon the kilowatt hour itself. The tax is measured by the amount of electrical energy generated without respect to its subsequent

transmission, at the first practical point of measurement, and prior to its packing for shipment by the transformer.

The operation of appellant's system as a whole does not destroy the distinction between the several and separate steps of generation, transmission and distribution, in industrial and legal contemplation. These separate steps may be undertaken by separate entities. Transmission is subsequent to generation, and similar to the transportation of goods after manufacture. The control of the routing of the electrical energy is in the transmission network and not in the hands of the man in control of the generator. Only the transmission phase is in interstate commerce.

The tax is an excise with respect to an activity for which a license is required, and imposed solely because of the act of generating for barter, sale and exchange, without regard to transmission. Where generation is accomplished by others from whom appellant purchases electrical energy, appellant pays no tax with respect to its transmission of such energy.

The telephone and radio cases discussed by appellant are to be distinguished in that they deal only with transportation. The transmission of thoughts, intelligence, and entertainment is not an act of production or manufacture.

The mode of measurement is upheld by the rule of *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459.

The tax being imposed solely because of the intrastate activity of generation and without respect to whether the output of the generator is thereafter transmitted in interstate commerce, it is not invalidated by any intent to transport across state lines. The amount of electrical energy generated for intrastate sales is capable of determination in the practical operation of appellant's system and with reasonable certainty.

With respect to the Constitution of Idaho the language of § 5 is held to create an exemption and not a subsidy. It does not lend the aid or credit of the State. *Williams* v. *Baldridge,* 48 Idaho 618.

As a public utility, appellant is entitled to only a just and reasonable return. Its rate structure is not involved in this suit, and the effect of § 5 with respect thereto is beyond the purview of this inquiry and without the evidence. Unless it imposes a rate that is non-compensatory the Tax Act is not wanting in due process because of § 5.

The exemption made by § 5 is a permissible classification. It affects alike all who are similarly situate, and therefore does not deny equal protection. Appellant is not the proper party to claim a discrimination against irrigation uses in Utah.

If the section were unconstitutional it is severable from the remainder of the Act.

The Act embraces but one subject and matters properly connected therewith, which subject is expressed in the title.

The tax is not so uncertain as to require arbitrary administrative action. The Act provides that the tax shall be measured only by kilowatt hours generated or produced for barter, sale or exchange in the operation of appellant's system. The amount of electrical energy generated for this purpose is ascertainable, and the basic measurement must be made at the place of production.

An act is sufficiently definite where for reasons found to result either from the text of the statutes involved or the subjects with which they deal, a reasonable standard is afforded. *Mahler* v. *Eby,* 264 U. S. 32; *United States* v. *Brewer,* 139 U. S. 278; *Miller* v. *Strahl,* 239 U. S. 426; *Nash* v. *United States,* 229 U. S. 373; *Omaechevarria* v. *Idaho,* 246 U. S. 343.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Utah Power & Light Company is a Maine corporation doing business in the states of Idaho, Utah and Wyoming, under the laws of those states. The corporation is a public utility engaged in generating, transmitting and distributing electric power and energy for barter, sale and exchange to consumers in each of these three states and in interstate commerce among them. The present suit was brought to enjoin the enforcement of an act of the Idaho legislature, levying a license tax on the manufacture, generation or production, within the state, for barter, sale or exchange, of electricity and electrical energy. Laws of Idaho, 1931 (Extraordinary Session), c. 3.

Section 1 of the act provides that any individual, corporation, etc., engaged in the generation, manufacture or production of electricity and electrical energy, by any means, for barter, sale or exchange, shall, at a specified time, render a statement to the Commissioner of Law Enforcement of all electricity and electrical energy generated, manufactured or produced by him or it in the state during the preceding month, and pay thereon a license tax of one-half mill per kilowatt hour, " measured at the place of production." Sections 2, 3 and 4 provide for the time and method of payment of the tax and the furnishing of appropriate information. Section 4 further requires the producer to maintain, at the point or points of production, suitable instruments for measuring the electricity or electrical energy produced. Section 5, which is the subject of a distinct attack, provides:

"All electricity and electrical energy used for pumping water for irrigation purposes to be used on lands in the State of Idaho is exempt from the provisions of this Act, except in cases where the water so pumped is sold or rented

to such irrigated lands. Provided, the exemption here given shall accrue to the benefit of the consumer of such electricity or electrical energy. Provided further that the full amount of such license tax which would have been due from such producers of electricity and electrical energy, if such exemptions had not been made, shall be credited annually for the year in which the exemptions are made on the power bill to the consumer by the producer of such electricity and electrical energy, furnishing such power, and such producer shall include a statement of the amount of electricity and electrical energy exempted by this section, furnished by it for the purpose of pumping water for irrigation purposes on lands in the State of Idaho, to the Commissioner of Law Enforcement of the State of Idaho as a part of the statement required by Section 1 of this Act, together with a statement of the credits made on the power bills to the consumers of such electricity and electrical energy for the pumping of water for irrigation to be used on lands in the State of Idaho."

Section 8 imposes a penalty for any violation of the act, or failure to pay the license tax provided for therein when due, in the sum of three times the amount of the unpaid or delinquent tax, to be recovered by civil action. Section 11 provides that if any section or provision of the act be adjudged unconstitutional or invalid, such adjudication shall not affect the validity of the act as a whole or of any section or provision thereof not specifically so adjudged unconstitutional or invalid.

After the filing of the complaint an interlocutory injunction was granted, 52 F. (2d) 226; and, thereafter, appellees answered. Upon the evidence reported by a master, to whom the case had been referred, the court below (composed of three judges as required by law) made findings of fact and conclusions of law and entered a final decree dissolving the interlocutory injunction and

requiring appellant to pay the tax in question with interest, but without any penalties which might have accrued during the pendency of the suit. 54 F. (2d) 803. This appeal followed.

The validity of the act under the federal and state constitutions is assailed upon four grounds: (1) that it imposes a direct burden on interstate commerce in violation of clause 3, § 8, Art. I of the Federal Constitution; (2) that it denies appellant the equal protection of the laws and deprives it of property without due process of law in violation of the Fourteenth Amendment and of a corresponding provision of the state Constitution, in that § 5 of the act compels the appropriation and payment of money by appellant for the benefit of private individuals, and that, § 5 being unconstitutional, the act as a whole must fall; (3) that the act violates § 16, Art. 3 of the state Constitution, which provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; (4) that the act is so uncertain and ambiguous in specified particulars that its enforcement is left to arbitrary administrative action without a legislative standard, and thus violates the due process of law clause of the Fourteenth Amendment.

First. Appellant contends that the tax is not one on manufacture or production or on the extraction of a product of nature, but on the transfer or conveyance of energy in nature from its source to its place of use; that in part appellant's system consists of generating stations in Idaho and transmission lines across the boundary into Utah, and thence to various consumers, the combined action of which constitutes an operation in interstate commerce; that the energy is brought to the consumers in Utah directly from its source in the water fall; that thus the generator is an instrumentality of interstate commerce; that the process of generation is simultaneous and interdependent with

that of transmission and use, and because of their inseparability the whole is interstate commerce; that since the intent of the act is to tax the whole business, and no provision is made for the separate determination of interstate and intrastate business, the act, in burdening interstate commerce, is void in its entirety.

On the other hand, appellees say that the tax is laid upon the generation of electrical energy as a distinct act of production, and without regard to its subsequent transmission; that the process of generation is one of converting mechanical energy into electrical form; that the resulting change is substantial and is a change in the physical characteristics of the energy in respect of voltage, current, and character as alternating or direct current, according to the design of the mechanical generating devices; that the process of conversion is completed before the pulses of energy leave the generator in their flow to the transformer; that the tax is measured by the amount of electrical energy generated, without regard to its subsequent transmission; that such transmission is subsequent to, and separable from, generation, and, in effect, corresponds to the transportation of goods after their manufacture; that the generation of the electrical energy is local, and only its transmission is in interstate commerce; that since the tax is imposed in respect of generation, it is not invalidated by reason of any intent on the part of the producer to transport across state lines.

In the light of what follows, we find it unnecessary to state or consider the claims of the parties as to the effect of the interposition of the transformer between the generator and the places of consumption.

From the foregoing greatly abbreviated but, for present purposes, we think sufficient statement of the views of the respective parties, it is apparent that in the last analysis the question we are called upon to solve is this: Upon the facts of the present case is the generation of electrical energy, like manufacture or production gener-

ally, a process essentially local in character and complete in itself; or is it so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce? From the strictly scientific point of view the subject is highly technical, but in considering the case, we must not lose sight of the fact that taxation is a practical matter and that what constitutes commerce, manufacture or production is to be determined upon practical considerations.

Electrical energy has characteristics clearly differentiating it from the various other forms of energy, such as chemical energy, heat energy, and the energy of falling water. Appellant here, by means of what are called generators, converts the mechanical energy of falling water into electrical energy. Thus, by the application of human skill, a distinct product is brought into being and transmitted to the places of use. The result is not merely transmission; nor is it transmission of the mechanical energy of falling water to the places of consumption; but it is, first, conversion of that form of energy into something else, and, second, the transmission of that something else to the consumers. While conversion and transmission are substantially instantaneous, they are, we are convinced, essentially separable and distinct operations. The fact that to ordinary observation there is no appreciable lapse of time between the generation of the product and its transmission does not forbid the conclusion that they are, nevertheless, successive and not simultaneous acts.

The point is stressed that in appellant's system electricity is not stored in advance but produced as called for. The consumer in Utah, it is said, by merely turning a switch, draws directly from the water fall in Idaho, through the generating devices, electrical energy which appears instantaneously at the place of consumption. But this is not precisely what happens. The effect of turning the switch in Utah is not to draw electrical energy directly

from the water fall, where it does not exist except as a potentiality, but to set in operation the generating appliances in Idaho, which thereupon receive power from the falling water and transform it into electrical energy. In response to what in effect is an order, there is production as well as transmission of a definite supply of an article of trade. The manufacture to order of goods and their immediate shipment to the purchaser furnishes a helpful analogy, notwithstanding the fact that there the successive steps from order to delivery are open to physical observation, while here the succession of events is chiefly a matter of inference—although inference which seems unavoidable. The process by which the mechanical energy of falling water is converted into electrical energy, despite its hidden character, is no less real than the conversion of wheat into flour at the mill.

The apparent difficulty in perceiving the analogy arises principally from the fact that electrical energy is not a substance—at least in common meaning. It cannot be bought and sold as so many ounces or pounds, or so many quarts or gallons. It has neither length, breadth nor thickness. But that it has actual content of some kind is clear, since it is susceptible of mechanical measurement with the necessary certainty to permit quantitative units to be fixed for purposes of barter, sale and exchange. However lacking it may be in body or substance, electrical energy, nevertheless, possesses many of the ordinary tokens of materiality. It is subject to known laws; manifests definite and predictable characteristics; may be transmitted from the place of production to the point of use and there made to serve many of the practical needs of life.

We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so

far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce. Appellant's chief engineer, although testifying that generation is a part of the process of transferring energy, said on cross-examination that in the process of generation there is a "conversion of the mechanical energy in the turbine shaft into a different form of energy, that is electrical energy. It must be converted into electrical energy before it can be transmitted . . . . This process of transformation is complete at the generator, and you have a greater amount of energy there, capable of doing a greater amount of mechanical work, at the generator than you do after transmitting it into Utah." The evidence amply sustains the conclusion that this transformation must take place as a prerequisite to the use of the electrical product, and that the process of transferring, as distinguished from that of producing, the electrical energy, begins not at the water fall, but definitely at the generator, at which point measuring appliances can be placed and the quantum of electrical energy ascertained with practical accuracy.

The various specific objections to the findings made below, and the failure to adopt others suggested by appellant, become immaterial in view of our conclusions. We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture. *Cornell* v. *Coyne,* 192 U. S. 418, 428–429. "Commerce succeeds to manufacture, and is not a part of it." *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 12.

Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities, not in one only. So far as it produces electrical energy in Idaho, its business is purely intrastate, subject to state taxation and control. In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce, and state legislation in respect thereof is subject to the paramount authority of the commerce clause of the federal Constitution. The situation does not differ in principle from that considered by this court in *Oliver Iron Co.*, v. *Lord,* 262 U. S. 172. There the State of Minnesota had imposed an occupation tax on the business of mining ores. The tax was assailed as being in conflict with the commerce clause. It appeared that substantially all the ores there in question were mined for delivery to consumers outside the state; and that the ores passed practically at once after extraction into the channels of interstate commerce. The greater part of the ores came from open pit mines, to which empty cars were run and there loaded, the ores being severed from their natural bed by means of steam shovels and lifted directly into the cars. When loaded these cars were promptly returned to the railroad yards from which they came and were there put into trains and continued their interstate journey. The several steps followed in such succession that there was practical continuity of movement from the severance of the ores to the end of their journey in another state. Upon these facts the court held that the commerce clause was not infringed.

" The ore does not enter interstate commerce," it was said, p. 179, " until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce,

just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

In *Hope Gas Co.* v. *Hall,* 274 U. S. 284, this court considered an act of the State of West Virginia imposing a tax upon the production, among other things, of natural gas. The chief business of the Hope Gas Company was the production and purchase of natural gas in West Virginia and the continuous and uninterrupted transportation of it through pipe lines into adjoining states, where it was sold, delivered and consumed. Most of it passed into interstate commerce by continuous movement from the wells where it originated. Interpreting and following the decision of the state court, it was held that the tax was to be computed upon the value of the gas at the well, and that if, thereafter, executive officers should fix values upon an improper basis appropriate relief would be afforded by the courts. The tax was sustained as not involving an infringement of the commerce clause of the Constitution.

In the light of what we have said in respect of the character of the product here involved, the manner of its production, and the relation of such production to its interstate transmission, these cases in principle clearly control the present case and render further discussion or citation of authorities unnecessary.

Second. The attack upon § 5 of the act, which is copied on a preceding page, is based upon the contention that it does not grant an exemption but has the effect of laying a tax for the benefit of favored consumers, that is to say, of selected private persons; and that the enforcement of the section in respect of allowances of credits by the producer to the favored consumers will result in taking the money of the former and giving it to the latter. A further contention is that § 5 is an inseparable part of the act, and being unconstitutional, the entire act must fall

with it. In support of the latter point, the grounds stated are that the legislative history discloses as a matter of fact that the act would not have been passed had § 5 not been included; and that it is apparent on the face of the act itself that the provisions of the section are essential and inseparable parts of the act as an entirety. It will shorten our consideration of the first point if we begin by disposing of the second point as to the question of separability.

The claim that the legislative history discloses that the act would not have passed without § 5 seems to rest entirely upon the fact that a bill for a similar act, but which did not contain the challenged section, failed of passage; but that, upon § 5 being included, the act thereafter was passed. The bill first introduced did not come to a vote, but was withdrawn from consideration by unanimous consent. That it would have been rejected if put to a vote rests upon mere supposition. There is no real ground for an opinion one way or the other. Courts are not justified in resting judgment upon a basis so lacking in substance.

Nor do we think the inseparability of the section from the rest of the act appears from the face of the legislation. The act itself (§ 11) provides that an adjudication that any provision of the act is unconstitutional shall not affect the validity of the act as a whole, or of any other provision or section thereof. While this declaration is but an aid to interpretation and not an inexorable command (*Dorchy* v. *Kansas,* 264 U. S. 286, 290), it has the effect of reversing the common law presumption, that the legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility; and this presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that the legislature would not have been satisfied with the statute unless it

had included the invalid part. *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 241–242.

It fairly may be assumed that the Idaho Legislature, in making this declaration, had in mind every provision of the act, including § 5. The primary object of the statute, under review, plainly, is to raise revenue. The exemption made by § 5 and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity. *Field* v. *Clark,* 143 U. S. 649, 696–697; *People ex rel. Alpha P. C. Co.* v. *Knapp,* 230 N. Y. 48, 60–63; 129 N. E. 202.

In the light of these conclusions, § 5, in respect of the constitutional question, stands apart from the remainder of the act and is to be considered accordingly. The court below followed the decision of the state supreme court (*Williams* v. *Baldridge,* 48 Idaho 618; 284 Pac. 203), in holding that § 5 granted an exemption ultimately for the benefit of the consumers of electrical power for irrigation purposes on lands within the state. It seems to us plain that the purpose of the act was to relieve the producer from liability for the tax *pro tanto,* and to pass on to the irrigation consumers the benefit thereof to the extent—and only to the extent—of the savings effected through the exemption. There is nothing to suggest that the legislature intended to cast any additional burden upon the producer or require him to yield to the irrigation consumers anything beyond the equivalent of the exemption. The irrigation of even private lands in the arid region is a matter of public concern (*Clark* v. *Nash,* 198 U. S. 361),

and we are of opinion that an exemption of the character here involved is not precluded by the equal protection clause of the Fourteenth Amendment. Compare *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 40.

The provisions in respect of the allowance of credits to the consumers by the producer present a question of more difficulty. If these provisions embody nothing more than a method of accounting to make sure that the irrigation consumers shall not bear, in whole or in part, the burden of the tax from which the producer is exempt, they would seem to be without fault. If by construction or in application they result in taking from the producer more than the sum of the exemption, a different question would arise. The supreme court of Idaho thus far has not construed § 5 in respect of the provisions now under consideration. The point was presented but reserved in *Williams* v. *Baldridge, supra,* p. 631. It does not appear that appellant is presently in any such danger of an unconstitutional application of these provisions of the statute as to entitle it to invoke a decision here upon the question, and the rule is well settled that "a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage." *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289; *Oliver Iron Co.* v. *Lord, supra,* pp. 180–181; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Gorieb* v. *Fox,* 274 U. S. 603, 606. Primarily, the construction of these provisions of the statute is for the state supreme court, and we cannot assume in advance that such a construction will be adopted, or such an application made of the provisions, as to render them obnoxious to the federal Constitution. In *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544–545, 546, Mr. Justice Pitney pointed out that

". . . in cases other than such as arise under the contract clause of the Constitution, it is the appropriate

function of the court of last resort of a State to determine the meaning of the local statutes. And in exercising the jurisdiction conferred by § 237, Judicial Code, it is proper for this court rather to wait until the state court has adopted a construction of the statute under attack than to assume in advance that a construction will be adopted such as to render the law obnoxious to the Federal Constitution." This was said in a case brought for review from the supreme court of a state, but the same doctrine was recognized in *Arizona Employers' Liability Cases,* 250 U. S. 400, 430, which came here on error to a federal district court.

Third. Section 16, Art. III, of the Idaho Constitution provides—" Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." Appellant contends that the act now under review contains two subjects, (a) the levy of a license tax on electrical energy generated in the state; and (b) a subsidy (§ 5) in favor of irrigation pumping users. The purpose of the constitutional provision, as this court said in *Posados* v. *Warner, B. & Co.,* 279 U. S. 340, 344, " is to prevent the inclusion of incongruous and unrelated matters in the same measure and to guard against inadvertence, stealth and fraud in legislation. . . . the courts disregard mere verbal inaccuracies, resolve doubts in favor of validity, and hold that, in order to warrant the setting aside of enactments for failure to comply with the rule, the violation must be substantial and plain." We cannot agree with the claim that the violation here is substantial and plain. The statute levies a license tax and creates an exemption therefrom in specified cases. This exemption, although it inures to the benefit of third persons, and whether it be constitutional or not, is obviously a matter properly connected with the subject matter of the act. It is nothing more than a limitation upon the generality of the tax. The supreme court of

Idaho has laid down the proper rule in *Pioneer Irrigation Dist.* v. *Bradley,* 8 Idaho 310; 68 Pac. 295, to the effect that the purpose of the constitutional provision is to prevent the inclusion in title and act of two or more subjects diverse in their nature and having no necessary connection; but that if the provisions relate directly or indirectly to the same subject, have a natural connection therewith, and are not foreign to the subject expressed in the title, they may be united. Following this rule, we are of opinion that the objection is untenable.

It is further said that the subject of the act is not expressed in the title, since the title purports to levy a license tax on electricity and electrical energy generated, etc., for barter, sale or exchange, while the act requires payment of a tax upon such electricity and electrical energy generated, etc., in the state of Idaho for any purpose and measured at the place of production. The point made is that a tax on energy generated specifically for barter, sale or exchange, and a tax on all energy generated or produced in the state are entirely different things. The force of the contention depends upon the construction of the act. We are of opinion, as will appear more fully under the next heading, that the act, in harmony with the title, imposes a tax only upon the energy which is generated for barter, sale or exchange.

Fourth. Appellant contends that the act is so uncertain and ambiguous as to require arbitrary administrative action without a legislative standard, and thus take appellant's property without due process of law. The uncertainties said to exist are (1) that it can not be determined whether the tax is levied on all electrical energy generated or produced, or only on such as is generated or produced for barter, sale or exchange; and (2) that if the latter be the true construction, the act affords no guide for the determination of what electrical energy in fact is generated for barter, sale or exchange; but by fixing the

place and method of measurement it excludes the possibility of a determination of that matter. The same uncertainties are said to exist in respect of § 5.

We think the act is reasonably open to the construction that the tax is to be measured by the kilowatt hours generated or produced for barter, sale or exchange. The purpose, as manifested by the title, is to levy a tax "on electricity and electrical energy generated, manufactured or produced in the State of Idaho for barter, sale or exchange." The act itself in terms applies to those engaged in the production of electricity and electrical energy in the State of Idaho "for barter, sale or exchange." The producer is required to render a statement and pay a license "on all such electricity and electrical energy so generated, manufactured or produced, measured at the place of production." Considering these provisions and, in connection therewith, the title and the general scope and purpose of the act, the intent to impose the tax only in respect of energy generated for barter, sale or exchange is sufficiently clear.

The limitation of the tax to electrical energy generated only for barter, sale or exchange obviously requires that in determining the amount so generated there be excluded from the computation all electrical energy generated for other purposes. In other words, the intent of the act being to levy a tax only in respect of electrical energy generated for the purposes named, it becomes necessary, in order to effectuate the intention, to deduct from the amount produced and measured at the generator such amounts as are generated for appellant's own use, or otherwise than for the specified purposes. We think this view is not precluded by the provision in § 1 of the act that the tax is levied in respect of the electrical energy generated, "measured at the place of production"; nor by the further provision in § 4 that the producer shall maintain at the point of production suitable appliances

for measuring the electrical energy produced. Since the tax applies not to all electrical energy generated, and, therefore, not to all measured at the point of production, but only to such as is produced for barter, sale or exchange, it necessarily follows that other factors than the basic measurement at the generator must be taken into consideration. That is, to put the matter concretely, the amount of the initial production must first be ascertained by measurement at the place of production, and from that there must be taken amounts used by the producer or consumed in effecting transmission (including so-called line or system losses), or disposed of otherwise than by barter, sale or exchange—the remainder only being subject to the tax. The record shows that the ascertainment of these necessary factors is practicable, testimony being to the effect that the flow of energy passing any point in the transmission system, as well as the amount delivered at any point on the system, can be measured with fair accuracy if proper instruments be attached. Neither the validity of the tax nor its certainty is affected because it may be necessary to ascertain, as an element in the computation, the amounts delivered in another jurisdiction. See *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, 463; *Hope Gas Co.* v. *Hall, supra.*

It is said that the commissioner, who administers the act, has not provided for these deductions or the means for determining them. But the commissioner must administer the act as it is construed, and it is not to be supposed that he will not now properly do so. Undoubtedly, the administration of an act like this one is attended with some difficulty. Measurements and calculations are more or less complicated. Absolute precision in either probably cannot be attained; but that is so to a greater or less degree in respect of most taxing laws. If, for example, absolute exactness of determination in respect of net income, deductions, valuation, losses, obsolescence,

depreciation, etc., were required in cases arising under the federal income tax law, it is safe to say that the revenue from that source would be much curtailed. The law, which is said not to require impossibilities, must be satisfied, in many of its applications, with fair and reasonable approximations. Compare *Smith* v. *Illinois Bell Tel. Co.*, 282 U. S. 133, 150; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563–566; *Commonwealth* v. *People's Five Cents Savings Bank*, 87 Mass. 428, 436.

Decree affirmed.

REED ET AL. *v.* ALLEN.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 600. Argued April 18, 1932.—Decided May 16, 1932.

1. The title to real estate and the right to rents collected from it depended alike upon one and the same construction of a will. In an interpleader over the rents, A got the decree. B appealed, without supersedeas, and secured a reversal; but before his appeal was decided, A had sued him in ejectment, invoking the decree, and recovered a judgment for the real estate. B did not appeal from this judgment, but after the reversal of the decree he sued A in ejectment for the land, relying upon the reversal. *Held:*

   (1) That the judgment in the first action of ejectment was a bar to the second. P. 197.

   (2) B's remedy was to appeal the first ejectment as well as the interpleader and advise the appellate court of their relation. *Butler* v. *Eaton*, 141 U. S. 240. P. 198.

2. A suit by interpleader to determine the right to funds collected as rents from a piece of land, and an action in ejectment to determine title to the land itself, are on distinct causes of action concerning different subject-matters, even though both depend upon the same facts and law, and a decree of reversal in the interpleader suit can not be made to operate as a reversal of a judgment for the other party, in the ejectment case; the rule of restitution upon reversal is irrelevant. P. 197.

3. Jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment. P. 198.