pointment of a receiver he might argue that even if he has not made out a clear case of deprivation of constitutional guaranties, the court might exercise its discretion to deny a receivership when the risk that the latter would constitute a "fishing expedition" outweighs the probability that it will preserve rights which might otherwise be lost.[24]

The objection that a receivership will be employed in order to obtain evidence should seldom lead to denial of the remedy in toto. One intermediate position was recognized by the court in the present case when it suggested that the defendant would be permitted to reacquire papers not directly related to the usurious transactions.[25] Although such a remedy might afford slight protection, the alternative of denying the receiver custody of papers upon a showing by the defendant of their incriminatory character would appear to be practicable.[26] Moreover, a receivership of only the negotiable assets of the defendant could scarcely be said to be sought with the intent of discovering evidence. Although such a receivership could not be justified on the ground that it assisted the state in recovering a share in usurious interest paid to the defendant, it would serve to protect either the interests of makers of usurious notes or the interests of persons who purchase the notes for value without notice of the usury. As a final and perhaps most satisfactory alternative it might be desirable to impound the alleged usurer's paper pending termination of suits establishing the rights of all parties arising from the issuance of such paper. This course would protect the rights of third parties and at the same time protect the defendant from a "fishing expedition." That impounding is a more satisfactory remedy than receivership rests on the assumption that the court can deny access to impounded instruments. It might be desirable that temporary impounding be granted ex parte if such a procedure were necessary to avoid negotiation of notes pending final relief.

Res Judicata—Change in Law as Ground for Vacating Injunction—[Washington]. —The Washington legislature enacted a "compensating tax" law, the tax to be levied upon the use of personal property purchased outside the state but used therein.[1] The trial court, on petition of the Pacific Telephone and Telegraph Company, enjoined the state tax commissioners from collecting the tax on the use of articles purchased by the petitioner "outside this state, when such merchandise is not manufactured, and cannot be purchased, in this state. . . ."[2] The injunction was affirmed by the state supreme court on the ground that the tax statute did not render taxable goods neither manufactured nor purchasable in Washington, and that if it did, it would be unconstitutional as constituting an unreasonable burden on interstate commerce.[3] Subsequently, three developments occurred: (1) the state supreme court reversed itself and on an appeal not involving the interstate commerce question, decided that the tax extended

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court held that the facts did not present an emergency justifying an ex parte order. This error was held to be cured in the O'Neil case by two hearings to show cause.

[24] Cf. FTC v. American Tobacco Co., 264 U.S. 298 (1924); Ellis v. ICC, 237 U.S. 434 (1915).

[25] State ex rel. Goff v. O'Neil, 286 N.W. 316, 321 (Minn. 1939).

[26] Manning v. Mercantile Securities Co., 242 Ill. 584, 70 N.E. 238 (1909).

[1] Wash. L. 1935, c. 180, § 4, pp. 726–8, amended by Wash. L. 1937, c. 191, pp. 943–6.

[2] Quotation taken from opinion of Washington Supreme Court, affirming the injunction, Pacific Tel. & Tel. Co. v. Henneford, 195 Wash. 553, 560, 81 P. (2d) 786, 790 (1938).

[3] Pacific Tel. & Tel. Co. v. Henneford, 195 Wash. 553, 81 P. (2d) 786 (1938).

to the type of property previously held not within the scope of the act;[4] (2) the United States Supreme Court sustained the constitutionality of a statute of another state which imposed a similar tax on such property;[5] (3) the state legislature passed a new "compensating tax" and extended it retroactively as of the date of the original enactment to *all* personal property purchased outside the state for use therein.[6] On the basis of these three developments the tax commissioners, appellants herein, petitioned the Washington Supreme Court for an order allowing them to interpose before the court of first instance a motion to vacate the injunction. *Held*, the supreme court had lost jurisdiction of the case upon sending down its order affirming the injunction; petition denied. *Pacific Telephone & Telegraph Co. v. Henneford et al., Tax Commissioners.*[7]

The majority opinion argues that after remittitur, a supreme court has jurisdiction over a cause only to compel obedience by the court to which the cause is remanded or to entertain an application for vacation of judgment. The procedure for vacation of judgment is statutory in Washington, and the grounds required by the legislature do not include those urged by the appellant.[8] Even if the court were to have in addition the common law power to vacate judgments after term time, it could not grant the petition. True, a writ of error coram nobis lay at common law to correct certain decisions wrong in the light of subsequent disclosures. That writ, however, served only to recall causes adjudicated at a time when some fact existed, which neither was nor reasonably could have been known to the court at trial time, but which if known, would have prevented the court from rendering its decision.[9] Therefore, concludes the majority, there is no way in which the supreme court can obtain jurisdiction.

The minority, adopting an entirely different line of reasoning, avoids directly joining issue with the majority. There is no such thing, the dissent maintains, as a "vested right" in an injunction. Permanent retention of the power to modify or vacate an injunction is necessary to assure that decrees may be altered to conform to changed circumstances. To grant immunity to the appellee from taxation under the original act while all others are subject to its burden is unjust.

The majority opinion constitutes a restatement of the traditional view of res judicata—of finality in legal proceedings.[10] Convenience of judiciary and litigants, as well as certainty for the latter, requires the limitation of litigation arising out of a single cause of action. Once a controversy has been judicially determined and both term time and the time for appeal have elapsed, subsequent decisions or statutes altering the rights of litigants similarly situated have no bearing on the decided case.[11] This

[4] Spokane v. Washington, 89 P. (2d) 826 (Wash. 1939).

[5] Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939); Pacific Tel. & Tel. Co. v. Gallagher, 306 U.S. 182 (1939).

[6] Wash. Rev. Stat. Ann. (Remington, Supp. 1939) § 8370–31.

[7] 92 P. (2d) 214 (Wash. 1939).

[8] Wash. Rev. Stat. Ann. (Remington, 1932) § 464.

[9] See 6 Miss. L. J. 133 (1933) for a discussion of the scope of the writ of error coram nobis.

[10] "It was the rule of the common law, and is still adhered to with more or less consistency in most states, that after the expiration of the term the court loses control of its judgments rendered during that term; they become final, and the court has no longer the power to vacate or modify them, or to set them aside," 1 Black, Judgments 466 (2d ed. 1902). There are certain well settled exceptions, but none relating to events subsequent to the trial and appeal.

[11] A concise statement of the general principles is found in Woods Bros. Const. Co. v. Yankton County, 54 F. (2d) 304 (C.C.A. 8th 1931), in which case a federal court refused to vacate a

rigorous and often harsh doctrine is a practical necessity. It was devised and adhered to, however, by courts of law; equity followed another course. Law adjudged the rights of parties as of a certain time; the finality of judgment doctrine was in the nature of things an easily explainable development.[12] Equity, on the other hand, decreed that a person do or refrain from doing something in the future;[13] since conditions might change, equity retained the power to modify decrees.[14] On this historical distinction rests the chief difference between the minority and majority opinions; all cases cited by the majority in support of its main argument are apparently actions which would have lain at law, whereas those cited by the minority would have been in equity.[15] Furthermore, the minority view is strengthened by a Washington statute which provides that "motions to dissolve or modify injunctions may be made in open court, or before a judge of the superior court at any time after reasonable notice."[16] The majority takes cognizance of this provision, but concludes that events subsequent to the injunction "do not bring before us . . . . such a new or different condition as justifies this court in granting appellants' motion."[17] Apparently the majority recognizes that the power of Washington courts to modify or vacate injunctions exists independently of their power to vacate any type of judgment on the enumerated statutory grounds; but this recognition is lost sight of in the remainder of the opinion.

Assuming that a Washington court decreeing an injunction retains forever the power to vacate it, what arguments may be advanced as to whether this power should be exercised in the principal case? On the one hand, as the minority emphasizes, it

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judgment after term time even though the statute upon which the decision rested was subsequently declared a violation of the state constitution by the state supreme court.

[12] The "law of the case doctrine" is an application of the finality of judgment principle. The majority rule still is that a holding of law by an appellate court must be adhered to on a subsequent appeal to the same tribunal, even though in the meantime that court has reversed its position on the law, 1 A.L.R. 1267 (1919), supplemented by 67 A.L.R. 1390 (1930). But there is some tendency to depart from this rule, McGovern v. Eckhart, 200 Wis. 64, 227 N.W. 300 (1929).

[13] 1 Story, Equity Jurisprudence § 93 n. 1 (14th ed. 1918).

[14] Ladner v. Siegel, 298 Pa. 487, 148 Atl.. 699 (1930); Emergency Hospital v. Stevens, 146 Md. 159, 126 Atl. 101 (1924); Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N.W. 936 (1924); Vulcan Detinning Co. v. St. Clair, 315 Ill. 40, 145 N.E. 657 (1924); Misch v. Lehman, 178 Mich. 225, 144 N.W. 556 (1913). As stated in Larson v. Minnesota North-Western R., 136 Minn. 423, 162 N.W. 523 (1917): "A judgment ordering a perpetual injunction is not above the power of the court to ever alter or amend. Facts may arise after the judgment is rendered, of such a nature that the judgment ought not to be executed, and, in such event, modification of the judgment may be a matter of right."

[15] The majority cites in its main argument In re Jones' Estate, 116 Wash. 424, 199 Pac. 734 (1921), an action of probate; Dickson v. Matheson, 12 Wash. 196, 40 Pac. 725 (1895), action on a note; Ward v. Springfield Fire and Marine Ins. Co., 12 Wash. 631, 42 Pac. 119 (1895), action on an insurance policy; Wolferman v. Bell, 8 Wash. 140, 35 Pac. 603 (1894), a foreclosure action. The minority in its primary argument cites Kelley v. Earle, 325 Pa. 337, 190 Atl. 140 (1937); Ladner v. Siegel, 298 Pa. 487, 148 Atl. 699 (1930); Hodges v. Snyder, 45 S.D. 149, 186 N.W. 867 (1922); Williams v. Shoudy, 12 Wash. 362, 41 Pac. 169 (1895); Sawyer v. Davis, 136 Mass. 239 (1884); Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. (U.S.) 421 (1855), all of which actions involved an injunction.

[16] Wash. Rev. Stat. Ann. (Remington, 1932) § 735.

[17] 92 P. (2d) 214, 217 (Wash. 1939).

can be said that the factual situation out of which the injunction arose has so changed that it is inequitable to continue the immunity of the appellee from proceedings under the original tax act. The cases support the view that a modification in legislation might constitute ground for revising an injunction.[18] But cases holding a changed interpretation of a statute to constitute such grounds could not be found. Yet it can be argued that for present purposes, an altered judicial interpretation of a statute presents the same type of changed circumstances as does revised legislation, and the two, therefore, should have the same effect. On the other hand, the result reached by the above reasoning is not entirely satisfactory. Washington is a code state in which there is only one "civil" action for the adjudication of private rights.[19] Had the initial proceeding in the present controversy been a suit by the commissioners (appellants) to collect taxes from the utility company, and had the supreme court decided that the act did not extend to the property in question, the controverted issue would have been closed forever.[20] Why should the result be different merely because the utility company happened to institute proceedings first? Certainly different results are not in accord with the spirit of the code. Moreover, it can be argued that the present injunction must be distinguished from those which courts have been willing to modify. The usual injunction should reasonably be construed to mean that a particular act is prohibited under existing conditions; the parties should contemplate that conditions might change and that the decree, therefore, will be subject to modification.[21] The instant injunction would reasonably be interpreted to mean that appellants cannot collect taxes for the use of certain property under the particular "compensating tax" act. The parties cannot reasonably be expected to contemplate that an altered judicial decision will so modify conditions as to render the particular legislation enforceable. Furthermore, in the usual suit to vacate an injunction the petitioning party asks the court to recognize that external circumstances have so changed that the prohibition should be terminated; in this action appellants ask the court to admit not that the legislation upon which the injunction is based has changed but that the court erred in its initial interpretation. Such a request approximates asking a court to change its mind about the rights of litigants under an unchanged set of facts. To the extent that this is true, the injunction in the instant case resembles a judgment of law more than it conforms to the usual type of equity decree.

What considerations should determine which of these arguments should prevail? Granted that the distinction between law and equity is not recognized in Washington and granted that the judgment could not be reopened had the tax commissioners instituted the initial proceedings, is finality of judgment nevertheless undesirable in the present situation? The court's interest in the res judicata doctrine is based on the practical necessity of preventing the revival of already litigated controversies. But no great inconvenience to the court would result from vacating the instant injunction, since the rights of no other litigants would be affected.[22] By its decision, the majority

[18] Hodges v. Snyder, 45 S.D. 149, 186 N.W. 867 (1922); Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. (U.S.) 421 (1855).

[19] Wash. Rev. Stat. Ann. (Remington, 1932) § 153.

[20] The cases cited by the majority would then clearly be controlling.

[21] The best example of this is an injunction prohibiting a certain type of activity as constituting a nuisance. See Sawyer v. Davis, 136 Mass. 239 (1884).

[22] Cases of this nature are so rare that the court would not be greatly inconvenienced by any precedent arising from an opposite decision in the instant case.

may have enhanced the union of law and equity in the state of Washington, but possibly at the expense of an undesirable result in the particular case. Conceivably the new act expressly extending the "compensating tax" to goods neither manufactured nor purchasable within Washington may be held unconstitutional on the ground that the retroactive provision is a violation of due process of law. The tax commissioners would nevertheless be able to collect the tax on goods of this type purchased before passage of the new act under the *original* "compensating tax" enactment, which by virtue of the decisions of the United States and Washington Supreme Courts now extends to such goods. The appellee alone would escape the burden of the tax. Furthermore, were the state legislature to attempt passing a remedial or windfall tax, the Washington Supreme Court might feel not only that the tax was special and retroactive,[23] but also that it was intended to circumvent and nullify the effect of a judicial decision.

Res Judicata—Permanent Injunction as Conclusive Determination of Appropriateness of Prior Temporary Injunction—Recovery of Damages on Temporary Injunction Bond after Issuance of Permanent Injunction—[Illinois].—The plaintiff taxpayer sought temporary and permanent injunctions restraining the defendant board of education from further performing an allegedly unconstitutional contract. A temporary injunction was decreed and the plaintiff filed a bond to pay "all .... costs and damages as shall be awarded .... in case the said injunction shall be dissolved...." On interlocutory appeal the appellate court dissolved the temporary injunction,[1] and thereafter the trial court assessed damages against the plaintiff for having caused th temporary injunction to issue. Upon dismissal of the complaint by the trial court for failure to state a cause of action, the plaintiff appealed directly to the Illinois Supreme Court and secured a permanent injunction.[2] Having already paid the damage judgment, the plaintiff petitioned the trial court to vacate its damage decree on the ground that the Supreme Court decision impliedly approved the temporary injunction. On dismissal of the petition, the petitioner procured a writ of error to the Illinois Supreme Court. *Held*, that the supreme court lacked jurisdiction; the writ of error was dismissed. *Schuler v. Wolf* (*The Board of Education of the Oak Park and River Forest Township High School District No. 200.*)[3]

A permanent injunction does not necessarily determine the appropriateness of a preliminary injunction.[4] Applications for preliminary restraining orders raise questions as to the credibility of the applicant's asserted right to injunctive relief and the

[23] A retroactive tax is not necessarily unconstitutional, Milliken v. United States, 283 U.S. 15 (1931). As stated by Mr. Justice Stone in Welch v. Henry, 305 U.S. 134, 147 (1938): "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." The act in the present case extends retroactively over a period of four years.

[1] Schuler v. Board of Education, 293 Ill. App. 635 (1938).

[2] Schuler v. Board of Education, 370 Ill. 107, 18 N.E. (2d) 174 (1938). A constitutional issue permits direct appeal to the Illinois Supreme Court. People v. Chicago, 238 Ill. 146, 87 N.E. 307 (1909).

[3] Ill. S. Ct., Oct. 10, 1939.

[4] Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570, 21 N.E. (2d) 723 (1939).