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.

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**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).

need for maintaining the status quo,[5] whereas permanent injunction proceedings determine rights to the relief prayed.[6] The respective issues overlap only insofar as establishing the right to final injunctive relief includes the making of a credible showing of the right to such relief; no question of preserving status quo is involved in the permanent injunction. Furthermore, it cannot be said that since the permanent injunction implies that the restrained party has been or is about to infringe upon the rights of another, prevention of such infringement during litigation could not have been wrong. Inasmuch as the final decree only established the right of the successful party to *injunctive* relief as of the time of the decree, no determination is made of his prior right to an injunction. He may previously have been entitled only to money damages.

The dismissal of the preliminary injunction and the grant of the permanent injunction may involve the same issue, and this was true in the present case.[7] Whenever the reason for dissolving a temporary injunction is on record and a higher court in the same action disagrees with that reason in granting a permanent injunction, the later decree might well establish the appropriateness of the temporary injunction. True, the dissolution might have been justified on some ground other than that given by the lower court, but this possibility is remote. Since the supreme court in effect overruled the appellate court, it seems illogical to hold that the permanent injunction did not impliedly establish the appellate court's action as error. This is especially true where, as in the present case, no review can be had of the appellate court's decision because rendered on an interlocutory appeal.[8]

The majority common law view ignored the possibility that a plaintiff succeeding on the merits may have had no right to injunctive relief in advance of the final decree, and that consequently even an unsuccessful defendant might have a damage action for a wrongful temporary injunction. The defendant was entitled to collect damages on a temporary injunction bond only if he had won on the merits.[9] The bond was con-

[5] As stated by the court in the present case: "On application for a temporary injunction .... it is only necessary that the party in whose favor the restraining order is sought .... raises a fair question as to the existence of his rights .... and satisfactorily show[s] to the court the matter out of which his asserted rights arises should be preserved and held in status quo until the cause can be disposed of on its merits, Nestor Johnson v. Goldblatt, 371 Ill. 570, 21 N.E. (2d) 723 (1939)." To the same effect are Shrewsbury & Chester v. Shrewsbury & B. R., 1 Sim. N.S. 410, 426 (Ch. 1851); Kerr, Injunctions 2 (6th ed. 1927).

[6] "The perpetual injunction is in effect a decree and concludes a right," Kerr, op. cit. supra note 5.

[7] The appellate court concluded: "We are of the opinion that the action of the board was not in violation .... of the constitution, and in the absence of fraud or a showing the expenditure was illegal, the court will not question the discretion of the board in entering into the contract. .... Therefore, the judgment of the Superior court is reversed and the cause is remanded with directions that the motion to dissolve the preliminary injunction be allowed." Ill. App. Ct. Feb. 10, 1938. The supreme court in granting the permanent injunction concluded: "No power existed in the .... school board to make [the] contract .... and the superior court erred in dismissing the bill of complaint," Schuler v. Board of Education, 370 Ill. 107, 110, 18 N.E. (2d) 174, 175 (1938).

[8] Ill. Rev. Stat. (1937) c. 110, § 202.

[9] Brown v. Galena Mining & Smelting Co., 32 Kan. 528, 4 Pac. 1013 (1884); Gray v. Veirs, 33 Md. 159 (1870); Penny v. Holberg, 53 Miss. 567 (1876); Bemis v. Gannett, 8 Neb. 236 (1879);

strued as assuring the successful defendant compensation for being temporarily denied a right later established on the merits. There seems to be some doubt, however, as to the Illinois common law rule. In *People v. Eisenberg*[10] the court, citing no cases, said the rule always has been that "damages may be assessed upon the dissolution of a temporary injunction without disposing of the merits of the bill," and *Shackleford v. Bennett*[11] implies, somewhat questionably, that *Hibbard v. McKindley*[12] upholds this view. The Illinois Injunction Act subsequently provided that "where an injunction is dissolved by any court of chancery . . . . , the court . . . . before finally disposing of the suit, [is empowered to] assess such damages as the nature of the case may require."[13] Although in *Terry v. Hamilton*[14] it was held improper where injunctive relief alone was sought to assess damages until final disposition of the case, *People v. Eisenberg*[15] later ruled that a cause of action accrued immediately upon dissolution of a temporary injunction; the latter is now the accepted view.[16]

This interpretation does not mean, however, that damages under the Injunction Act are necessarily conclusive as to rights arising out of a preliminary injunction; to hold otherwise imputes to the legislature an intent to divorce such rights from adjudication on the merits in every case. Had the legislature intended this result, would it not have expressed its purpose in more explicit terms? Perhaps the legislature intended merely to confer a temporal advantage on one relieved from a preliminary restraining order; damages on the bond are given to aid him to continue the litigation, but if he later loses on the merits, he might be required to repay the damage judgment. But it is arguable that if this were the case, the legislature would have provided some procedural mechanism for recovering payment. Nevertheless, would it not have been preferable to adopt the suggested view, at least where the temporary injunction is dissolved for reasons later disapproved by a higher court?

If damage payments may be recovered, the appropriate procedure would be either to include the request to vacate the damage judgment in an appeal on the merits, or to petition the lower court after plaintiff had prevailed on the merits. Since, on the above analysis the damage decree is contingent upon final judgment, no question of

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Thompson v. McNair, 64 N.C. 448 (1870); Lockwood's Dollar Cleaners v. Lockwood, 137 N.Y. Misc. 446, 244 N.Y. Supp. 281 (1930); New York Security and Trust Co. v. Lipman, 83 Hun (N.Y.) 569, 32 N.Y. Supp. 65 (1895), wherein it is stated, "The rule that the final outcome of the suit, and not the order vacating the temporary injunction, determines the right to damages under the undertaking, is well settled." Contra: Sizer v. Anthony, 22 Ark. 465 (1861); Jesse French Piano & Organ Co. v. Porter, 134 Ala. 302, 32 So. 678 (1902).

[10] 288 Ill. 304, 123 N.E. 532 (1919).

[11] 237 Ill. 523, 86 N.E. 1073 (1908).

[12] 28 Ill. 240 (1862).

[13] Ill. L. 1861, § 12, p. 133. In 1874 a proviso was added that "a failure so to assess damages shall not operate as a bar to an action upon the injunction bond," Ill. L. 1874, § 12, p. 579. These two enactments are in force today, Ill. Rev. Stat. (1937) c. 69, § 12.

[14] 72 Ill. 476 (1874), followed in Bolander v. Childs, 163 Ill. App. 57 (1911).

[15] 288 Ill. 304, 123 N.E. 532 (1919). In the Eisenberg case, relief other than an injunction was prayed, but the court indicated that the prayer for additional relief was immaterial, by pointing out that in Shackleford v. Bennett, 237 Ill. 523, 86 N.E. 1073 (1908), "the only relief sought by the bill was a perpetual injunction."

[16] Abel v. Flesher, 296 Ill. 604, 130 N.E. 353 (1921).

jurisdiction should arise. The appellate court could consider the damage order as accessory to the main cause, and the lower court could assume it retained jurisdiction over the damage judgment until a final decision on the merits.[17]

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**Taxation—Reduction of Indebtedness as Taxable Income—[Federal].**—The plaintiff sued for a refund of $330 paid as income tax for 1925. He had bought a farm for $20,000 subject to a $10,000 mortgage. In 1935 the mortgagee reduced the indebtedness and accepted $6,500 as full payment when the plaintiff was unable to pay the mortgage debt and an appraisal indicated that the property value had declined to less than $6,000. The plaintiff tried to set off against the $3,500 income realized in the cancellation of indebtedness his $3,500 loss through "depreciation." On the plaintiff's suit for a refund the court *held* that the transaction constituted a refinancing of the farm and involved a "determined loss" to the taxpayer equal to the gain realized through the satisfaction of his obligation at less than face value. Judgment for the plaintiff. *Hextell v. Huston.*[1]

The usual rule is that cancellation of indebtedness is taxable as income,[2] and decline in property value is not deductible unless there is a sale or relinquishment of title.[3] But in cases where a debtor has obtained a reduction of a debt incurred to purchase property and shows that the property has declined in value, the court may exempt the debtor-owner from tax liability. Cases of this type are decided by determining whether there is a loss on the whole transaction or whether assets are freed from offsetting obligations.

Under the whole transaction theory, the court, in determining whether a debt reduction gives rise to taxable income, will consider the losses sustained in any later transaction involving the money obtained by incurring the debt. For example, where a debt is created to obtain funds which are subsequently dissipated without any profit to the debtor or are invested in property that has declined in value, the court will deduct these losses from any gain through debt reduction and will assess an income tax only on the remainder. This principle was first enunciated in *Bowers v. Kerbaugh-Empire Co.*,[4] although in that case the court stated as a second ground for its decision that

[17] "A judgment which is founded upon another judgment that has subsequently been reversed or set aside may be vacated on this ground," 1 Freeman, Judgments 510 (5th ed. 1925).

[1] 28 F. Supp. 521 (Iowa 1939).

[2] United States v. Kirby Lumber Co., 284 U.S. 1 (1931). "Cancellation of Indebtedness—*In general*—the cancellation of indebtedness, in whole or in part, may result in the realization of income . . . . ," Treas. Reg. 101, art. 22(a)-14 (1938), reprinted in 391 C.C.H. Fed. Tax Serv. ¶ 77 (1939).

[3] Appeal of Schwarzler, 3 B.T.A. 535 (1926); cf. Lucas v. American Code Co., 280 U.S. 445, 449 (1930). "The term 'long term capital loss' means loss from sale or exchange of a capital asset . . . . ," 52 Stat. 501, 26 U.S.C.A. § 101 (a) (5) (1938); ". . . . losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions . . . . ," U.S. Treas. Reg. 101, Art. 23 (e)-1 (1938). Paul, Federal Income Tax Problems of Mortgagors and Mortgagees, 48 Yale L. J. 1315, 1318 (1939); Brown, The Time for Taking Deductions for Losses and Bad Debts for Income Tax Purposes, 84 U. Pa. L. Rev. 41, 49 (1935). But see Rhodes v. Com'r, 100 F. (2d) 966 (C.C.A. 6th 1939); Brumback v. Denman, 48 F. (2d) 255 (D.C. Ohio 1930).

[4] 271 U.S. 170 (1926). See also lower court opinion 300 Fed. 938 (D.C. N.Y. 1924).