and is strongly suggested by the more traditional cases involving collateral stipulations[27] as well as by the general rule which permits a mortgagee to refuse, prior to maturity a tender of the entire principal and interest even to the date of maturity.[28] Furthermore, the proposed result would obviate the difficulties to which the application of the rule gives rise.[29] In the first place, the prospective mortgagee must, at the risk of losing the benefits of a long term investment, make the initial determination that the contemplated transaction is not unfair.[30] Secondly, the mortgagee is left under the doctrine of the instant case in an unfavorable position. The mortgagor[31] may redeem at will while the mortgagee could not compel full payment on demand; and not even the possible analogy to the usury cases would warrant such a result.[32]

Taxation—Process—Validity of Constructive Service in Proceeding in Personam —[Illinois].—The Illinois General Assembly enacted a statute whereby the validity of the annual tax levy ordinances of all taxing bodies containing 500,000 or more inhabitants (except the State) shall be conclusively adjudicated before the taxes are extended. Each taxing body affected shall, within sixty days after passage of its annual appropriation ordinance, file a copy of its annual tax levy ordinance with the county clerk who in turn shall, within ten days, file in the proper county court, a petition for the confirmation of such levy, which petition shall contain a return day not less than twenty-five nor more than thirty days therefrom. Within five days after the petition is filed, the county clerk shall publish in a newspaper a notice addressed "to all taxpayers concerned" and to the taxing body, which shall include the docket number of the cause and the return day fixed, and advise all persons who may be affected that they may file objections to the levy. There shall be a hearing on the

[27] See notes 11–18 *supra.*

[28] See cases cited in note 15 *supra.* Perpetual rent charges, perpetual options, and irredeemable mortgage bonds have been upheld. Fleming v. Self, 3 DeGex, M. & G. 996, 1024 (1854); *In re* Crofton, 1 Ir. Eq. 204 (1839); Dewing, Financial Policy of Modern Corporations 94 *et seq.* (1926).

Doubts on the validity of irredeemable debentures on the ground that they violate the rule against clogging the equity appear in a number of English cases. Salt v. Marquess of Northampton, [1892] A.C. 1; Noakes v. Rice, [1902] A.C. 24; Reeve v. Lisle, [1902] A.C. 461; Samuel. v Jarrah Timber Co., [1904] A.C. 323. The doubts were resolved by sec. 14 of the Companies Act of 1907, re-enacted as sec. 74 of the Companies Act of 1929, 19 & 20 Geo. 5, c. 23 (1929).

[29] In this connection, the instant case would seem to point to the conclusion that henceforth, in England at least, when a long term mortgage is placed on a number of properties (and perhaps on land which is likely to be subdivided as well) the mortgage must be so framed that alienation is possible whenever the value of the property exceeds that of fair security for the loan.

[30] The complaint is made that the attorney of the mortgagee is faced with the double task of safeguarding not only the interests of his own client, but the interests of his adversary as well. 185 Law Times 393 (1938).

[31] It might be suggested that the clog doctrine may, in the long run, operate to prevent mortgagors from obtaining as good terms as they can.

[32] Even the usury laws grant the court the power to scale down the interest or revise the bargain in some other appropriate manner. 63 & 64 Vict. c. 51 (1900); 12 Halsbury, Statutes of England 219 (1930).

return day in which proof by the county clerk of the filing of the levy ordinance and of due publication shall constitute the petitioner's prima facie case. After hearing all objections, the court shall enter an order determining the legality or illegality of the levies, which order shall be conclusive in any subsequent proceeding based on such levies.[1]

Six taxing bodies in the state, all overlapping, contain 500,000 or more inhabitants.[2] Inasmuch as each taxing body is given a period of time, up to three months in some cases, in which to adopt its annual appropriation ordinance, after which it has a sixty day period in which to file its levy ordinance with the county clerk, the return date for each taxing body may vary over a period of as high as five months. In a suit to enjoin Cook County from carrying out the provisions of said statute, *held,* (three justices dissenting) injunction should be granted. Inasmuch as the issues adjudicated in the validation proceedings will be binding in all subsequent proceedings whether *in rem* or *in personam,* the publication of one notice where no definite time is fixed for the date of the hearing is a violation of due process. *Griffin v. Cook County et al.; Lloyd v. Same.*[3]

One purpose behind such an act is to prevent collection of illegal taxes. This would prove especially beneficial to the small taxpayer whose bill is not large enough to warrant litigation over illegal taxes.[4] Moreover, those who seek to recover illegal taxes paid may be denied relief if payment was voluntary[5] or the proper formalities not complied with.[6] This procedure is further desirable in that it may serve to reduce the great amount of tax litigation said to be clogging the courts of Illinois[7] and if, as contended, the courts in Cook County are especially crowded with this type of litigation, the basis for the classification chosen may be found reasonable.[8] It is not unfair to bind the taxpayer by an adjudication in which no one has objected or where those who did object may not have presented a fair case if he was given adequate notice—such notice and opportunity to be heard as is required by due process. If all taxpayers are duly served, they become parties to the action though not specifically named,[9] and if one does not appear to protect his interests, a binding judgment by default may be rendered against him.[10] The court in the instant case felt that the statute did not provide for fair notice.

[1] Ill. L. 1937, p. 1019.

[2] County of Cook, City of Chicago, Board of Education of the City of Chicago, Chicago Park District, Sanitary District of Chicago, and Forest Preserve District of Cook County.

[3] 369 Ill. 380, 16 N.E. (2d) 906 (1938).

[4] Condit v. Widmayer, 196 Ill. 623, 63 N.E. 1078 (1902) (injunctive relief); Yates v. Royal Insurance Co., 200 Ill. 202, 65 N.E. 726 (1903) (suit to recover illegal taxes paid); see also Ill. Rev. Stat. 1937, c. 120, §§ 150, 150a.

[5] Yates v. Royal Insurance Co., 200 Ill. 202, 65 N.E. 726 (1902); Carey and Schuyler, The Illinois Taxpayer's Day in Court, 31 Ill. L. Rev. 993 (1937).

[6] Ill. Rev. Stat. 1937, c. 120, §§ 150, 150a.

[7] Carey and Schuyler, *op. cit. supra* note 5, at 993.

[8] The dissenting opinion in the instant case adequately covers this subject. Griffin v. Cook County, 369 Ill. 380, 401, 16 N.E. (2d) 906, 916 (1938).

[9] North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925).

[10] People v. Miller, 339 Ill. 573, 171 N.E. 672 (1930).

Statutes providing for proceedings to adjudicate the validity of bonds prior to their issuance have been upheld where service upon the real property owners of the issuing district was by publication. These proceedings were considered to be *in rem.*[11] In *Fidelity National Bank v. Swope,*[12] the court held an action by a city against owners of real property to validate an *ordinance* specially assessing all property abutting a boulevard for grading work done thereon to be *res judicata,* where suit was brought prior to the apportionment of costs. Service was by publication. While the proceedings in the *Swope* case are very similar to those provided for by the instant statute, they differ in that the issues adjudicated in those proceedings would be binding only in proceedings *in rem,* whereas by the instant statute the adjudication would be binding in all subsequent proceedings, whether *in rem* or *in personam.*

In proceedings *in personam,* each state can, within the bounds of due process, determine for itself the method in which process may be served upon its residents[13] who are within its boundaries,[14] and the better view is that substituted service can be authorized against a resident physically outside of the state.[15] But such substituted service may be provided for only where the necessities of the case demand it,[16] and courts state that it must be of such nature that it is reasonably probable that notice will be received.[17] But even if the service has a reasonable tendency to notify, it may not be used if a clearly more efficient method is available in that situation.[18] Since under the instant facts, it would be an administrative impossibility for individual notice to be given each taxpayer resort to general constructive notice was necessary. As to whether notice to residents within the state by publication and nothing more is a reasonable substitute for personal service, the Illinois *dicta* are to the effect that something more than publication alone is necessary[19] but no case seems to have held publication invalid except where a better method was available,[20] and there is authority holding it within the bounds of reasonableness.[21] As to residents outside of the boundaries of the state, the *dictum* of *McDonald v. Mabee*[22] is that service by publication is not reasonable.[23] But inasmuch as the circumstances and nature of the case must

[11] Crall v. Poso Irrigation District, 87 Cal. 140, 26 Pac. 797 (1890).

[12] 274 U.S. 123 (1926).

[13] "Resident" is herein used to denote a person *domiciled* within the state.

[14] Nelson v. C. B. & Q. R.R. Co., 225 Ill. 197, 80 N.E. 109 (1907).

[15] Sturgis v. Fay, 16 Ind. 429 (1861); 24 Ky. L.J. 345 (1936); but see Raher v. Raher, 150 Iowa 511, 129 N.W. 494 (1890).

[16] Bardwell v. Collins, 44 Minn. 97, 46 N.W. 315 (1890).

[17] Bickerdike v. Allen, 157 Ill. 95, 41 N.E. 740 (1895).

[18] McDonald v. Mabee, 243 U.S. 90 (1917).

[19] Nelson v. C. B. & Q. R.R. Co., 225 Ill. 197, 80 N.E. 109 (1907); Bickerdike v. Allen, 157 Ill. 95, 41 N.E. 740 (1895). But these cases are often cited for the proposition that publication alone is reasonable.

[20] Bardwell v. Collins, 44 Minn. 97, 46 N.W. 315 (1890).

[21] Roberts v. Roberts, 135 Minn. 397, 161 N.W. 148 (1917); Martin v. Burns, Walker & Co., 80 Tex. 676, 16 S.W. 1072 (1891).

[22] 243 U.S. 90 (1917).

[23] The case of De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345 (1896) did not hold such publication unreasonable but held that personal jurisdiction does not extend beyond the limits of the state, a minority view.

be considered,[24] including the fact that special diligence is said to be required of taxpayers,[25] publication as to absent residents should be held to be reasonably calculated to give notice. But though necessary and reasonable, the court in the instant case seemed to feel that one notice where no definite time was set for the hearing was a failure to provide the best available method of notifying the taxpayer.[26] This position seems sound because the legislature could have set a specific date for the return day or at least have limited it to a more definite time, instead of requiring a taxpayer to watch for one notice over a period of as high as five months, a task especially burdensome to those whose residence is within all six taxing districts and who would thus be obliged to watch for six notices. While it is not clear whether the court would uphold the statute were it redrafted in line with the foregoing analysis or whether it had further objections (lack of justiciability and reasonable classification) which the concurring opinion raised, it would seem that a redrafted statute should be upheld as to residents.

Trade Regulation—Invalidity of Unfair Practices Act for Uncertainty—[Nebraska]. —An injunction was issued against a grocer who had advertised and sold coffee at a price below the "cost price" to him within thirty days prior to the sale to restrain further violation of the Nebraska Unfair Practices Act, section 3[1] of which provides that it is unlawful "to sell, offer for sale or advertise for sale" below cost "where the effect of such sale below cost . . . may lessen, injure, destroy, hinder or suppress the competition of competitors." "Cost" for a retailer is the invoice cost within thirty days of the sale or replacement cost, whichever is lower, plus a markup not less than the "minimum cost of distribution by the most efficient retailer," prima facie evidence of which is a six per cent markup.[2] The defendant pleaded that the statute was void for uncertainty and that it violated the due process clauses of the federal and state constitutions. *Held*, judgment reversed and proceedings dismissed without determination of the constitutionality of the statute. Since the statute contained no definition of criminal intent or guilty knowledge, the ordinary person would not know beforehand what course it was lawful to pursue. The statute is not sufficiently clear to sustain either criminal prosecution or civil proceedings. *State ex rel. English v. Ruback*.[3]

Statutory provisions against sales below cost, similar to the statute construed in

[24] Town of Hinckley v. Kettle River R. Co., 70 Minn. 105, 110, 72 N.W. 835, 836 (1897); Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

[25] North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925).

[26] "If the statute fixed the first day of a definite term of court, or if the levies were required to be on file with the clerk by a fixed date, the taxpayer would have some definite information from which the date of hearing could be ascertained." Griffin v. Cook County, 369 Ill. 380, 392, 16 N.E. (2d) 906, 912 (1938).

[1] Neb. L. 1937, c. 137, § 3.

[2] Actual cost of doing business is defined as the percentage which overhead expenses were to total volume of sales for the year immediately preceding the violation. It must include "without limitation the following items of expense: Labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, buildings and fixtures, transportation and delivery cost, light, heat, power and water, credit losses, all types of licenses, taxes, insurance and advertising." *Ibid.*

[3] 281 N.W. 607 (Neb. 1938).