right to keep all rents collected before that date. *Rider v. Bagley*, 84 N.Y. 461 (1881); 80 U. of Pa. L. Rev. 269 (1931). But since the mortgagee, in title jurisdictions, may obtain possession upon default by taking some action to enforce this right, it is clear that the mortgagor's rights after default can be made subordinate to those of the mortgagee. See 4 A.L.R. 1400, 1410 (1919); 55 A.L.R. 1020, 1022 (1928). In some older cases, a demand for possession followed by a bill in equity to enforce this demand has been held to entitle the mortgagee to rents and profits from the time of the original demand. *Dow v. Memphis Ry. Co.*, 124 U.S. 652 (1888); see *Sacramento Ry. v. Super Ct.*, 55 Cal. 453 (1880); *Shaw v. Norfolk Ry.*, 71 Mass. 162 (1855). A mortgagee has also been allowed to enjoin the mortgagor from further collection of rents, the injunction being issued "coincident with" the institution of foreclosure proceedings. *Howell v. Ripley*, 10 Paige (N.Y.) 43, 44 (1843); *Post v. Dorr*, 4 Edw. (N.Y.) 412 (1844). A mere suit for foreclosure, however, is not enough to deprive the mortgagor of his right to collect rents. *Gilman v. Ill. & Miss. Tel. Co.*, 91 U.S. 603 (1875); *cf. Johnston v. Riddle*, 70 Ala. 219, 225 (1881); see 4 A.L.R. 1400, 1414. Thus although the pending foreclosure in the instant case may have been insufficient action by the mortgagee, the application for a receiver may well be considered a sort of *lis pendens* operating to preclude the mortgagor from further dealing with the property. See *In re Banner*, 149 Fed. 936 (D.C. N.Y. 1907) (receiver allowed to collect rents from the date of the *application*). Thus the court correctly extended the protection of the mortgagee in disallowing the mortgagor's agreement with the tenant.

It has been pointed out that the purpose of most protections to the mortgagee flowing from receivership was to assure him a reasonable rental from the mortgaged premises. In the instant case there was a clear showing that the new agreement provided for an approximately reasonable rental. 4 N.E. (2d) 504, 505. Thus it might be argued that the court should not place new restrictions on the mortgagor's rights in order to give the mortgagee an exorbitant rental against the mortgagor's wishes. But if this agreement had been made after the appointment of a receiver, it would not have been binding as against the receiver. Therefore, the court in the principal case would more adequately have disposed of the case had it clearly held the mortgagor's rights terminated by application for appointment of a receiver where appointment actually follows, especially since the mortgagor had notice of the pending receivership.

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**Taxation—Constitutionality of State Tax Covering Costs of Railroad Inspection—Burden of Proving Constitutionality—[United States].**—The state of Washington imposed a fee of one tenth of one percent of the gross revenue from intrastate operations on all public utility corporations subject to regulation by its department of public works, for the purpose of providing funds for the inspection and supervision of such companies under the public service commission law. 11 Remington's Rev. Wash. Stats. 1933, §§ 10417, 10418. This department supervised many kinds of public utilities. Some of its activities in connection with railroads were unrelated to the inspection and supervision thereof. The funds collected from the railroads, together with those collected from other utilities under the department's supervision, were paid into the department's general fund, and all expenses of the department were paid indiscriminately out of that fund, there being no appropriation from the state's general revenues for any of the department's activities. The state showed that disbursements charged to rail-

roads exceeded receipts therefrom during the period in question by $37,833. The plaintiff introduced evidence, however, tending to show that some disbursements were not properly allocable to the functions of inspection and supervision. In an action to recover fees paid under protest, *held*, upon the authority of *Foote v. Maryland* (232 U.S. 494 (1914)), the state had the burden of showing that sums exacted from the railroads did not substantially exceed the amounts expended for regulation and supervision. Four justices dissented on the ground that intermingling of the funds did not shift from the complainant the burden of showing that it was injured by operation of the common fund. *Great Northern Ry. Co. v. Washington*, 57 Sup.Ct. 397 (1937).

In holding that the intermingling of funds raised a presumption of invalidity of the tax, the Court departed from the usual rule which places upon the one attacking a statute the burden of proving both that it is unconstitutional and that the unconstitutional feature injures him. *Norfolk & Western Ry. Co. v. North Carolina*, 297 U.S. 682, 688 (1936); *Atl. & Pac. Tel. Co. v. Philadelphia*, 190 U.S. 160, 165 (1903); *Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226, 227 (1936); *Heald v. District of Columbia*, 259 U.S. 114, 123 (1922). Despite the Court's emphasis upon the controlling influence of the *Foote* case, the situations in the two cases were not substantially alike. In the *Foote* case, it was established by stipulation of the parties that under a previous statute substantially the same as the one in litigation, the fees collected were more than double the cost of inspection. Even if the traditional presumption of constitutionality had been applied, this evidence might well have been considered sufficient to overcome it and to satisfy the complainant's burden of proof, thus passing to the state the burden of coming forward with additional evidence. See 5 Wigmore, Evidence §§ 2487, 2489 (2d ed. 1923). It is true that there was language in the opinion in the *Foote* case to the effect that a "presumption of invalidity" was raised by the statutory provision for intermingling of funds; but the Court unnecessarily extended this holding in the instant case by declaring a statute unconstitutional where there was no proof that the tax receipts exceeded inspection costs.

The effect of applying this presumption to the principal case was to place upon the state the burden of proving that the amounts collected under this statute did not substantially exceed the amounts necessary for inspection and supervision. But the mere fact of intermingling seems an insufficient justification for a failure to apply the traditional presumptions of constitutionality. There seems no material distinction between those taxing statutes levied to pay inspection expenses which provide for intermingling of funds and those which provide that the receipts be kept separate. It is well settled that one attacking the latter type of statute must show that the tax receipts substantially exceeded inspection expenses. *Pure Oil Co. v. Minnesota*, 248 U.S. 158, 160, 164 (1918); *McLean v. Denver & Rio Grande Ry. Co.*, 203 U.S. 38, 52 (1906). In neither type can it be ascertained from the face of the statute whether the amounts collected will or will not be more than permissible; nor does the intermingling type of statute indicate on its face that the operation of the common fund will be to the disadvantage of the complainant. See 57 Sup.Ct. 397, 404. If the presumption were raised only when it was shown that the state had exclusive access to the necessary information, a more plausible exception would be presented. See *Selma, Rome & D. Ry. Co. v. United States*, 139 U.S. 560, 567 (1891); *cf.* 5 Wigmore, Evidence § 2486 (2d ed. 1923). In the instant case, however, the Court passed the burden of proof to the state without requiring the plaintiff to show that it had made a reasonable attempt to secure such information. See the dissenting opinion of Cardozo, J., 57 Sup. Ct. 397, 405–06.