actual intent. However, in view of the long line of analogous cases which interpret self-destruction clauses as requiring specific intent, the decision appears to be sound.

O. R. A.

SUBROGATION—PRIORITY OF CREDITORS—TAXATION—UNJUST PREFERENCE. —[Federal].—Plaintiff tendered certified checks drawn on defendant bank to the United States Collector of Internal Revenue in payment of taxes. The defendant bank failed and the certified checks were dishonored. The statute which authorized the collector of internal revenue to accept certified checks tendered in payment of taxes also gave him power to exact payment from the original tax debtor in case of failure of the certifying bank.[1] The collector exercised this option of collecting from the plaintiff and was duly paid. The taxpayer then received an assignment of the government's statutory lien and priority[2] along with the return of the certified checks. The plaintiff now claims the right to be subrogated to the government's lien and priority on the basis of the general rule that a guarantor who pays his principal's debt is, at least as far as the principal is concerned, entitled to be subrogated to all the rights of the creditor whom he has paid.[3] *Held;* in an action against the reorganized bank, plaintiff taxpayer is subrogated to the government's statutory lien and priority.[4]

The principle that a surety for a debtor of the government, on payment of the debt is entitled to the government's priority was enunciated in England as early as 1888.[5] It is also firmly entrenched in the United States.[6]

N. E. 631 (1926). However, in Trembly v. Fidelity, 243 S. W. 201 (Mo. 1922) the court held that the law presumes that a self-inflicted death was accidental and not suicidal, in the absence of any evidence to rebut the presumption.

1. 36 Stat. 965, 26 U. S. C. A. sec. 1546 (1934); 26 U. S. C. A. sec. 109 (1925). This statute codifies the Law of Merchants that a holder of a certified check may seek payment from the drawer of the check who has had it certified himself. Bigelow, *Bills Notes and Checks* (Lile's ed. 1928) sec. 206; Randolph National Bank v. Hornblower, 160 Mass. 401, 35 N. E. 850 (1894). Even though certification was procured by drawer upon request of payee.

2. Supra, note 1.

3. 2 Williston, *Contracts* (1927) sec. 1267; Phelps v. Scott, 325 Mo. 711, 30 S. W. (2d) 71, 71 A. L. R. 290 (1930).

4. American Tobacco Co. v. South Carolina National Bank, 15 F. Supp. 215 (D. C. E. D. S. C., 1936).

5. In Re Lord Churchill, Manistry v. Churchill, 39 Ch. Div. 174 (1888).

6. See cases enumerated 60 C. J. 762; Comment, 26 Col. L. Rev. 492, (1926); For a strongly contra opinion see In Re So. Phila. State Bank's Insolvency, 295 Pa. 433, 145 Atl. 521 (1929); Comment, 78 U. of Pa. L. R. 120, a case which held this rule of law to be based on an erroneous conception of early English decisions. The court declared that the common law precedents show that such subrogation was not due to the application of laws of equity but as a matter of sovereign grace, granted only after the king had given his consent. Since the court could find no true equity, it refused to

When holding that there is such a right of subrogation the court should be careful to determine whether or not the one who has paid, has actually paid the debt of another, and is entitled to the favored role of surety. From the statute itself, it is not at all clear that the taxpayer who tendered payment of his debt in certified checks, was released from his primary liability and became a mere surety.[7]

Assuming, however, that under the statute a depositor who paid his tax in certified checks did become a surety, there is serious doubt whether the general rule of the right of subrogation to the sovereign's lien and priority ought to be applied. The equities justifying the application of this rule to an ordinary suretyship in which an individual undertakes to guaarntee payment or performance of an obligation due the government, are lacking in the instant case. In the former situation the right to succeed to the sovereign's priority may have been an important inducement to the creation of the relationship. This consideration is lacking in the instant case. The principal-surety relationship was created merely as a result of a particular device or technique resorted to by the plaintiff in order to pay his taxes.

Since subrogation is based on equities existing in favor of the one to whom such remedy is accorded,[8] and since such equities are absent in the instant case, there is lacking a persuasive reason why the failure of the government to pursue its claim against the bank should inure to the benefit of the taxpayer rather than to general creditors.[9] It is therefore difficult to justify a departure from the general policy favoring a pro rata distribution among creditors of the assets of an insolvent estate.

Two prior state court decisions decided under essentially the same facts are, however, in accord with this decision.[10]

M. B.

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prefer a guarantor of the bank who had paid the government. The effect of this decision was greatly weakened by the later Pennsylvania case of In Re Harr, 319 Pa. 193, 179 Atl. 725 (1935) which held that this decision was limited to its facts and applied only to subrogation to the government's *inherent* priority and not to a *statutory* right. It is submitted that this distinction has no logical basis. The same reasons would seem to apply to the granting or not granting of the right in both cases, particularly when there is a mere enactment into statute of a right which the government already possesses; see also 1 Stat. 676, 31 U. S. C. A. sec. 193 (1799), which holds that a surety on a civil bond who is forced to pay his principal's debt to the United States is entitled to the government's priority in reimbursing himself from the principal debtor in default.

7. Supra, note 1; for relationships ordinarily incident to certification see Morse, *Banks and Banking* (6th ed. 1928) sec. 415; Mutual National Bank v. Rotge, 28 La. Ann. 933 (1876); N. I. L. sec. 187; R. S. Mo. 1929, sec. 2815.

8. Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 2349.

9. The court argued that since the fund in dispute would have had to be paid without question to the tax collector, had he so desired, there is no reason why other creditors and depositors of the bank should be enriched as a result of his election to seek payment from the plaintiff. The court used with approval the same rationale as was employed in the case of In Re McBride, Fed. Cas. No. 8,662 (D. C. E. D. Mich., 1878).

10. Cuesta Rey and Co. v. Newsom, 102 Fla. 853, 136 So. 551 (1931); In Re Harr, 319 Pa. 193, 179 Atl. 725 (1935).