regarded equally exists." *Duncomb* v. *Railroad Co.*, *supra*. Let a decree be entered foreclosing the deed of trust for the amount due on the debt therein mentioned, and dismissing the cross bill of Sallie Leverett for want of equity.

MATTHEWS *v.* FIDELITY TITLE & TRUST CO. *et al.*

(*Circuit Court, W. D. Pennsylvania.* August 4, 1892.)

No. 27.

1. SUBROGATION—ASSIGNMENT FOR BENEFIT OF CREDITORS.
M., the owner of a mortgage, loaned it to a bank for temporary use, to sustain its credit when in a financial strait. The bank pledged the mortgage with a creditor as collateral security, and subsequently pledged with the same creditor commercial paper, owned by it, as collateral security for the same debt. Afterwards the bank made a general assignment for the benefit of creditors. The mortgagor then voluntarily paid the amount of the mortgage to the pledgee, who applied the money towards the debt of the bank. The pledgee collected the commercial paper, and, after full satisfaction, there remained a balance therefrom in the pledgee's hands. *Held*, that by right of subrogation M. was entitled to this balance as against the voluntary assignee.
2. SAME—ESTOPPEL.
M. had proved as a general creditor against the assigned estate, and received a *pro rata* dividend on the full amount of his claim. *Held*, that he was not thereby estopped from asserting his right by subrogation to the whole of the special fund remaining in the hands of the pledgee, as that fund and his dividend together did not satisfy his claim in full.

In Equity. Bill by John Matthews against the Fidelity Title & Trust Company and others to enforce an alleged right of subrogation. Decree for complainant.

On October 31, 1889, and prior to that time, the complainant, John Matthews, was the owner of a mortgage for $50,000, made by the Moorhead-McCleane Company, and dated February 1, 1887, payable 10 years after date. On the date first above mentioned the Lawrence Bank was financially embarrassed, and its condition was known both to Matthews and to its president, Young, and on that day Matthews assigned the mortgage to Young for the use of the bank, and received in return a certificate of deposit, bearing interest, for the sum of $50,000. Subsequently the mortgage was assigned by Young to the president of the Union National Bank to secure overdrafts made and to be made upon it by the Lawrence Bank. The overdrafts having at length somewhat exceeded the amount of the mortgage, the Lawrence Bank, as additional security, pledged with the Union Bank a large amount of commercial paper. Shortly afterwards, on November 25, 1889, the Lawrence Bank made a voluntary assignment for the benefit of creditors to the defendant the Fidelity Title & Trust Company. On December 2d following, the Moorhead-McCleane Company paid the amount of the mortgage and accumulated interest to the Union Bank, which applied the same to the extinguishment of the overdrafts. Subsequently it collected large amounts

of the commercial paper held in pledge, and, after satisfying its whole claim against the Lawrence Bank, had left a surplus of $21,000. The complainant, Matthews, claims this fund by right of subrogation, on the theory that he had only assigned his mortgage for use in sustaining the credit of the bank, and was to receive it back when this purpose was accomplished. It appeared, however, that Matthews had filed his certificate of deposit with the assignee of the Lawrence Bank, and had received his *pro rata* share of a dividend paid to the creditors thereof.

Lyon, McKee & Sanderson, for complainant.

Wm. M. McGill and *David Q. Ewing*, for Fidelity Title & Trust Company—

Contended that subrogation "will not be decreed in favor of a mere volunteer, who, without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of a party, who, on some sort of compulsion, discharges the payment against a common debtor;" citing *Cottrell's Appeal*, 23 Pa. St. 294; *Webster & Goldsmith's Appeal*, 86 Pa. St. 409; *Hoover* v. *Epler*, 52 Pa. St. 522; *Mosier's Appeal*, 56 Pa. St. 80; *Wallace's Estate*, 59 Pa. St. 401; *Bleakley's Appeal*, 66 Pa. St. 187; *Wandell's Estate*, 13 Wkly. Notes Cas. 143; Sheld. Subr. § 1; *Shinn* v. *Budd*, 14 N. J. Eq. 234; *Bank* v. *Winston's Ex'rs*, 2 Brock. 254; *Gadsden* v. *Brown*, 1 Speer, Eq. 41; *Sandford* v. *McLean*, 3 Paige, 122.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. Taking the proofs as a whole, the transaction of October 31, 1889, between the plaintiff, Matthews, and the Lawrence Bank, cannot fairly be regarded as a purchase by the bank from the plaintiff of the Moorhead-McCleane Company mortgage. Neither of the parties understood or intended the transfer of the mortgage to be a sale thereof. As well the officers of the bank as the plaintiff himself believed that the financial embarrassment of the bank would be overcome, and we think it was in the contemplation of them all that the mortgage would be returned to the plaintiff after its temporary use to sustain the credit of the bank. Certainly it was the plaintiff's expectation—well warranted by what the officers of the bank told him—that the mortgage would be retransferred to him shortly. It is, indeed, true that a certificate of deposit for the sum of $50,000, the principal (without the accrued interest) of the mortgage, was issued by the bank and delivered to the plaintiff; but it is quite clear from the evidence that this certificate was intended as a mere security to the plaintiff. As already intimated, the substantial nature of the transaction was a loan of the mortgage to aid temporarily the bank in its financial strait.

Turning now to the dealings between the Lawrence Bank and the Union National Bank, we find from the evidence that the latter was the clearing-house agent of the former bank, and that, for the purpose of securing any existing or future overdrafts by the Lawrence Bank of its clearing-house account with the Union Bank, the Lawrence Bank, by its president, on November 4, 1889, assigned the mortgage to the president of the Union Bank, in trust for that institution. While this assignment, upon its face, was unconditional, it is indisputable under the proofs

that the transfer by the Lawrence Bank to the Union Bank was not a sale or absolute assignment of the mortgage, but a mere pledge, for the purpose just stated. At the time of this transfer the Lawrence Bank had overdrawn its clearing-house account to the amount of $14,915.39, and on November 8, 1889, its overdrafts in all amounted to $57,108.38. On the last-mentioned date the Lawrence Bank assigned and delivered commercial paper owned by it, amounting to $25,769.49, to the Union Bank, as security for all its liabilities incurred or to be incurred to the Union Bank. Such was the condition of affairs when the Lawrence Bank, on November 25, 1889, made its deed of voluntary assignment for the benefit of its creditors. Then, on December 2, 1889, before the maturity of the mortgage, the Moorhead-McCleane Company, the mortgagor, voluntarily paid the principal thereof, with accrued interest, amounting to $52,350, to the Union Bank, and this money was credited by the Union Bank to the Lawrence Bank. Afterwards the Union Bank collected the commercial paper pledged with it by the Lawrence Bank, and, after applying so much of the proceeds as fully discharged all the remaining indebtedness of the Lawrence Bank, there was left in its hands a balance from these securities, amounting to about $21,000. This balance is claimed by the plaintiff, Matthews, by right of subrogation, and to enforce such right is the purpose of this bill.

Now, it is well settled that subrogation is not founded on contract, nor does it depend on strict suretyship, but it results from the natural justice of placing the burden where it ought to rest. It is a mode which equity adopts to compel the ultimate discharge of a debt by him who, in good conscience, ought to pay it, and relieve him whom none but the creditor could ask to pay. 2 White & T. Lead. Cas. 282; *McCormick* v. *Irwin*, 35 Pa. St. 111. The facts above narrated, we think, clearly bring this case within the operation of the rule, for, as between the Lawrence Bank and the plaintiff, the former was bound to pay the indebtedness to the Union Bank, and, as the plaintiff's mortgage, pledged by the Lawrence Bank for its debt, has been applied to the discharge thereof, the plaintiff has, as against the Lawrence Bank, an equitable right to the surplus in the hands of the creditor arising from the other securities owned and pledged by the Lawrence Bank for the same debt. Nor can the Fidelity Title & Trust Company, the trustee under the deed of voluntary assignment for the benefit of creditors, successfully contest the plaintiff's claim, for that company is clothed merely with the rights of the Lawrence Bank. *Morris' Appeal*, 88 Pa. St. 368. The cases cited by the defendant's counsel to show that one who, without compulsion, obligation, or duty pays the debt of another, is not entitled to subrogation, have no application here, for the plaintiff was not a volunteer in the sense of those authorities. He was no more a volunteer than is any surety who, of his own free will, binds himself for the acts or debt of another.

But it is contended that, if the plaintiff ever had a right to subrogation, he lost it by claiming and receiving out of the general assets of the Lawrence Bank in the hands of the trustee a dividend amount-

ing to $8,737.15, upon his certificate of deposit. But we cannot adopt that view. True, the plaintiff, on January 9, 1891, appeared as a claimant before the auditor appointed to distribute among the creditors of the Lawrence Bank the balance in the hands of the trustee under the deed of assignment upon its first and partial account, and as the foundation of his claim presented the certificate of deposit for $50,000, heretofore referred to. But at the same time he submitted to the auditor evidence similar to that now before us, explanatory of the whole transaction. All the facts were disclosed, and the allowance to him by the auditor of the dividend awarded was an adjudication of his right thereto upon all the evidence. Herein we perceive no ground of estoppel against Matthews. It is clear to us that he was at liberty to prove as a general creditor against the assigned estate in the hands of the trustee without prejudicing his rights in the specific fund in the hands of the Union Bank. He had a valid claim against the Lawrence Bank for $50,000 and upwards, which originated prior to the voluntary assignment. His proof before the auditor was by no means an abandonment of his right to subrogation. The case did not involve an election, for the two claims were not inconsistent. If it appeared that the plaintiff had received a larger dividend than he was entitled to, we could so mold our decree as to do equity; but we do not see that he was allowed more than his proper share. He had, we think, a right to a *pro rata* dividend upon the full face of his claim, upon the principle that a creditor may so use his collaterals as to secure his whole debt. 1 Story, Eq. Jur. (12th Ed.) § 564*b*; *Kittera's Estate*, 17 Pa. St. 416. Let a decree be drawn in favor of the plaintiff in accordance with the views expressed in this opinion.

BUFFINGTON, District Judge, concurs.

PATAPSCO GUANO CO. *v.* BOARD OF AGRICULTURE OF NORTH CAROLINA.

(*Circuit Court, E. D. North Carolina.* September 24, 1892.)

1. CONSTITUTIONAL LAW—STATE INSPECTION LAWS.
   In the absence of any constitutional prohibition, a state has the right, under the general powers reserved from the grant of other powers to the federal government, and in the regulation of its internal commerce, and to protect its citizens from fraud, to say that certain articles shall not be sold within its limits without inspection, and also to charge the cost of such inspection upon those offering such articles for sale.
2. SAME—INSPECTION TAX—POWERS OF FEDERAL COURTS.
   A state tonnage tax upon fertilizers to defray inspection expenses will not be declared unconstitutional, simply upon the ground of alleged excess, when such excess does not manifest a purpose to evade constitutional inhibitions; and a federal court will not go into the examination of the question, except for the purpose of deciding whether the tax is only colorably or ostensibly an inspection charge, or a charge of a kindred nature.
3. SAME—EXCESSIVE TAX.
   The tax of 25 cents per ton imposed upon fertilizers by Pub. Laws N. C. 1891, c. 9, (amending Code, § 2190,) to defray the expenses of inspection, is not in itself so unreasonable or excessive as to show a purpose to evade the inhibition of the federal constitution against the taxation of imports by the states.