

June 1928

A Royal Prerogative in the United States

Judson A. Crane
University of Pittsburgh

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Bankruptcy Law Commons](#), [European History Commons](#), and the [Legal History Commons](#)

Recommended Citation

Judson A. Crane, *A Royal Prerogative in the United States*, 34 W. Va. L. Rev. (1928).
Available at: <https://researchrepository.wvu.edu/wvlr/vol34/iss4/2>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

WEST VIRGINIA LAW QUARTERLY

and THE BAR

VOLUME XXXIV

JUNE, 1928

NUMBER 4

A ROYAL PREROGATIVE IN THE UNITED STATES

JUDSON A. CRANE*

Blackstone divides the King's Prerogatives into two classes, the direct and incidental.¹ The incidental are said to be only "exception in favor of the Crown of those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the King; that the King can never be a joint tenant; that his debt shall be preferred before a debt to any of his subjects." These incidental prerogatives were elaborated during the medieval period when the King was the head and representative of the State, the fountain of justice, but as a superior feudal lord with special privileges.² It is proposed to examine the last of these prerogatives, expressed by Lord Coke in the form of a maxim, "*Quando jus domini Regis et subditi insimul concurrunt jus Regis praeferri debet.*"³ It is difficult to find any critical account of it in the earlier books, perhaps because as Blackstone tells us such a matter until a late period was protected from discussion by a taboo. "It was ranked among the *arcana imperii*: and like the mysteries of the *bona dea* was not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the

* Professor of Law, University of Pittsburgh, Pittsburgh, Pa.

¹ 1 BL. COM. 240.

² 3 HOLDSWORTH, HIST. OF ENG. LAW 351.

³ Quick's Case, 9 Rep. 129a (1575).

other would not bear the inspection of a rational and sober enquiry."⁴

While modern justification for this prerogative of priority may be found in the maxim "*Thesaurus Regis est vinculum pacis et bellorum nervus*,"⁵ its historic origin was not based on any such social utilitarian consideration. Historically it seems to be an incident to the facts that under the early feudal system the King was in theory the source of all land titles, as well as the fountain of justice, and through his fiscal officers and courts he collected the services due him as charges on the property held under him in feudal tenure.

After the Norman Conquest it was the accepted legal theory in England, as on the continent, that lands were held of the King as ultimate feudal lord.⁶ An exception to the continental system of considerable importance in the development of a strong centralized government was that military services were owing not to the mesne lord but directly to the King.⁷ As the remedy of the feudal lord generally was by means of distress and ultimate forfeiture of land and chattels thereon when the tenant was in default of his obligations,⁸ so the Crown as overlord could seize the *res* on non performance of the obligations that attended its possession. The Exchequer was originally a part of the Curia Regia,⁹ and as the lord could distrain his tenant in his own court,¹⁰ so could the King in his.¹¹

Rights of action and remedies in personal actions for debts between subjects were slow and gradual in their growth¹² as compared with the Crown remedies. Magna Charta VIII provided, "We or our bailiffs shall not seize any land or rent for any debt, as long as the present goods or chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor * * * the pledges

⁴ 1 BL. COM. 237.

⁵ GODD. 293.

⁶ 2 BL. COM. 50; DIGBY, HIST. OF LAW OF REAL PROP. 34; 1 REEVES, ENG. LAW 86; ALLEN, THE ROYAL PREROGATIVE 125; 1 P. & M. HIST. OF ENG. LAW 232.

⁷ DIGBY 36.

⁸ 2 P. & M. 352; 3 HOLDSWORTH 12.

⁹ 1 HOLDSWORTH 29, 100.

¹⁰ 2 P. & M. 353. Limitations to the exercise of distraint, which had evidently been abused, are set forth in Magna Charta X; STAT. WEST. I, XVI; STAT. MARLBIDGE, 52 Hen. 3.

¹¹ See P. & M. 311 as to reliefs in cases of death of tenant in chief of the King. The King had a remedy against his debtor's debtor. This was taken advantage of by a sort of subrogation by the Crown debtor to the Crown's right of garnishment, under the writ of Quo Minus. See 3 BL. COM. APP. 3, §4; 1 HOLDSWORTH 105. This developed into the Extent in Aid, commented on in Atty. Genl. v. Poultney, Hardie 40a. Extents in Aid were abolished in 1817, 57 Geo. 3, c. 117.

¹² 2 P. & M. 121.

shall answer for the debt; and if they will, they shall have the lands and rents of the debtor, until they be satisfied of that which they have paid for him * * * *.”¹³ This is in terms a limitation of powers, and presupposes the right of the Crown as creditor to seize real or personal property of the Crown debtor. It concedes that personal property will be taken rather than lands if sufficient. Further, sureties are subrogated just as in the most recent cases in our own courts¹⁴ to the extraordinary remedies of the Crown.

A priority of the Crown in distribution of decedents' estates is affirmed in Magna Charta XVIII. “If any that holdeth of us law fee do die and our sheriff do shew our letters patent of our debt which the dead man did owe to us, it shall be lawful to our sheriff or bailiff to attach and enroll all the goods and chattels of the dead being found in said fee, to the value of the same debt, * * * so that nothing thereof shall be taken away until we shall be clearly paid off the debt; and the residue shall remain to the executors, to perform the testament of the dead: * * * * saving to his wife and children their reasonable part.” This is the first statutory statement of a Crown priority, and a concession that wills may be executed, saving a family allowance.

The early remedy of the subject as against his debtor's property was by distress, and limitations on its exercise by feudal lords are referred to in note 10, *supra*. Bracton set forth an elaborate “restatement” of the law of civil procedure, including distress.¹⁵ This was originally, like modern attachment, a means of securing appearance of the defendant at court.¹⁶ It is suggested by Reeves¹⁷ that the judgment was collected out of the goods distrained, and this finds some support in early cases.¹⁸ So long as personal actions for breach of contracts were rare inadequate remedies were not a great hardship. But with the beginnings of trade better remedies were demanded.

Under Edward I legislation began to provide remedies

¹³ See 1 REEVES, HIST. OF ENG. LAW 243; 3 BL. COM. 419.

¹⁴ *Bramwell v. U. S. Fid. & G. Co.*, 269 U. S. 483, 70 L. ed. 368, 46 S. Ct. 176 (1925); *Re Carnegie Trust Co.*, 206 N. Y. 390, 99 N. E. 1096 (1912); *Woodward v. Sayre*, 90 W. Va. 295, 110 S. E. 689 (1922); see also n. 4, *supra*.

¹⁵ BRACTON 439 ff.; 1 REEVES 480 ff.

¹⁶ 1 REEVES 480 ff.

¹⁷ 2 REEVES 187 n. (c).

¹⁸ SELD. SOC. SEL. CIV. PLEAS, Vol. 1, 102, 184.

for the enforcement of consensual personal obligations. By the Statute of Merchants¹⁹ a merchant creditor could secure a recognizance before the Mayor of London or the chief warden of some other city, and if the debt was not paid sell the land in the burrage, and if that was not enough all the chattels and lands of the debtor were turned over to the creditor until the debt was paid. Similar provisions were made for debts acknowledged in the Staple Court.²⁰ As to creditors generally a provision was made in the Statute of Westminster II²¹ whereby on debts recovered or acknowledged in the King's Court the creditor could in his election have fieri facias of lands and goods, or have delivered to him all the chattels of the debtor saving his oxen and beasts of the plough, and one half of his land at a reasonable price or extent. This was the origin of the Elegit.²² It is to be noted that it was limited to half the land, the other half being saved to secure performance of feudal services.²³ This is the first statutory mention of fieri facias, and in the opinion of Reeves²⁴ its origin.

The subject had thus been vested with part of the remedies available to the Crown from before Magna Charta. The continuing superiority of the Crown remedy and its greater antiquity would seem to imply as a natural incident its priority, especially as there developed the notion expressed in the maxim "*Nullus tempus occurrit Regi.*" Where the Crown and the subject could both have seized property of a debtor the tardiness of the Crown in getting

¹⁹ 13 Edw. 1, 3. 3 HOLDSWORTH 113; Jenks Edw. I; 1 SEL. ESSAYS 142. The right to take over half the lands of the debtor as tenant in Elegit under the STAT. WESTMINSTER II, and the rights created by the Statutes of Merchants and Statutes Staple, seem to be of adaptations to the use of merchants and other creditors of the special rights in the nature of a gage or mortgage recognized in the Jewish Exchequer, as the practice of the early mercantile class, the English Jews. See SELD. SOC. SEL. PLEAS OF THE JEWISH EXCHEQUER, xiii, 100; 1 P. & M. 475; HAZELTINE, GAGE OF LAND, 3 SEL. ESSAYS 46, 17 HARV. L. REV. 549, 18 *ibid.* 36.

²⁰ 27 Edw. III, St. 2, c. 9. By 33 Hen. VIII c. 29, obligations to the King became of the same force and effect as a Statute Staple. Extent by this time was the common remedy for the collection of Crown debts. The Statute of Henry VIII has been said to be merely declaratory of the remedies of the Crown. 3 COKE 12b; 3 COM. DIG. 393; 2 COKE INST. 19. The power to sell land taken on Extent by the Crown, and not merely hold it, was granted in 1785 by the Crown Debtor's Act, 25 Geo. III c. 85. See also Crown Suits Act 1865, 28 and 29 Vic. c. 104, §50.

²¹ 13 Edw. I, XVIII.

²² DIGBY, HIST. OF LAW OF REAL PROP. 282; 2 BL. COM. 161; COKE LIT. 289b.

²³ 3 BL. COM. 419. Power to reach the whole, instead of the half by Elegit was granted by the Judgments Act 1838, 1 & 2 Vic. c. 110, §12. Power to sell the land was granted the judgment creditor in 1864, Judgments Act 27 & 28 Vic. c. 112, 4. In the American Colonies the whole of the debtor's land could be taken and sold under an act applicable to the Colonies, 5 Geo. II, c. 7 (1712). See Jones v. Jones, 1 Bland. Ch. Md. 443, 217 Am. Dec. 327 (1827). As to extent in the United States see FREEMAN, EXECUTIONS, 370, 372 ff.

²⁴ 2 REEVES 187 n. (c). But see Jenks, Edward I, 1 SEL. ESSAYS 142.

into action does not operate to its prejudice.²⁵

The priority of the Crown was a well settled rule of the common law before the Revolution.²⁶ The majority of our states have accepted it as a common law attribute of state sovereignty.²⁷ In a few states it has been rejected.²⁸ Nowhere is it denied that the prerogative existed as part of English common law. Its adoption here has been approved or disapproved in the light of its supposed underlying reasons or justification as a modern institution and its conformity to a republican form of government. Justice Story in *United States v. State Bank*,²⁹ justified it in language often quoted, "It is founded not so much upon any personal advantage to the sovereign as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts." Bourquin, Dis. J. in *American Bonding Company v. Reynolds*,³⁰ adopting Blackstone's classification of direct and incidental prerogatives said, "The crown's priority over subjects in payment of debts is to secure and conserve the revenues—the life blood of the state, that the latter may be maintained in peace and war and its obligations discharged. It is of the incidental prerogatives and belongs to the King, not as an individual, but *parens patriae*, or as a universal trustee for the people. It is

²⁵ 7 COM. DIG. 90; HARDIE 35; Buchanan, "Some Aspects of the Royal Prerogative," 35 JURID. REV. 49. The King was supposed to be so engrossed in the affairs of state as to be able to take care of every private matter relating to his revenues. GLE. HISTORY OF THE EXCHEQUER 110; *In re Henley & Co.*, 9 Ch. Div. 469, 48 L. J. Ch. N. S. 147. The priorities of the Crown were set forth in statutory form in 33 Henry VIII, 39.

²⁶ Quick's Case, 9 Coke 129b; Coke's Case, GODB. 289; *R. v. Curtis*, 1 Ves. Sr. 483; Stringfellow's Case, 3 East 6; Giles v. Grover, 1 Cl. & F. 72, 9 Bing. 128; 1 COKE LIT. 131b; BACON'S ABR. 91; GLE. EXCH. 91; 3 COM. DIG. 397; 7 *ibid.* 90; 2 TMD'S PRAC. 1052.

²⁷ *American Bonding Co. v. Reynolds*, 203 Fed. 356 (1913); *Marshall v. N. Y.*, 254 U. S. 380, 65 L. ed. 315, 41 S. Ct. 447 (1920); *U. S. Fid. & Guar. Co. v. McFarson*, 78 Col. 338, 241 Pac. 728 (1925); *Robinson v. Bank of Darien*, 18 Ga. 65 (1855); *Booth v. State*, 131 Ga. 750, 63 S. E. 502 (1908); *Dennis v. Maynard*, 15 Ill. 477 (1854); *Re Marathof Sav. Bank*, 191 Ia. 696, 196 N. W. 729, 200 N. W. 199 (1924); *State v. Rogers*, 2 Harr. & McH. 198 (1786); *Jones v. Jones*, 1 Bland. Ch. 18 Am. Dec. 327 (1827); *Aetna Accident & Liab. Co. v. Miller*, 54 Mont. 377, 170 Pac. 760 (1918); *Re Holland Baking Co.*, 313 Mo. 307, 281 S. W. 702 (1926); *Re Carnegie Trust Co.*, 206 N. Y. 390, 99 N. E. 1096 (1912); *U. S. Fid. & Guar. Co. v. Bramwell*, 108 Ore. 261, 217 Pac. 332 (1923); *Com. v. Lewis*, 6 Binn 266 (1814); *Booth & Finn Ltd. v. Miller*, 237 Pa. 297, 85 Atl. 467 (1912); *Natl. Surety Co. v. Fixton*, 60 Utah 289, 208 Pac. 878 (1922); *Md. Casualty Co. v. McConnell*, 148 Tenn. 656, 257 S. W. 410 (1924); *Woodward v. Sayre*, 90 W. Va. 295, 110 S. E. 639 (1922). In these cases the English rule is recognized and its existence as part of the common law of the states is assumed. In some of them special reasons were found to exist which prevented its application.

²⁸ *Md. Casualty Co. v. Rainwater*, 173 Ark. 103, 291 S. W. 1003 (1927); *Com. of Banking v. Chelsea Sav. Bank*, 161 Mich. 691, 125 N. W. 424 (1910); *Potter v. Fidelity & D. Co.*, 101 Miss. 823, 51 So. 713 (1911); *Board of Freeholders of Middlesex Co. v. State Bank of New Brunswick*, 29 N. J. Eq. 268, 30 N. J. Eq. 311 (1828); *No. Car. Corp. Com. v. Citizens Bank T. Co.*, 193 N. C. 513, 137 S. E. 587 (1927); *State v. Harris*, 2 Bal. L. (S. C.) 598 (1832). In many of these cases reasons existed for not applying the rule even had it been accepted. In many of the states where the rule does not exist at common law the state is given certain priorities by legislation.

²⁹ 6 Pet. 29, 8 L. ed. 308 (1832).

³⁰ *Supra*, n. 27.

in fact a reservation or exception to the general course of law in favor of the public and for its good." Sanner, J., in *Aetna Company v. Miller*,³¹ said that at the time of the organization of the Territory of Montana "there existed a vast number of decided cases from almost all the states, holding that divers and sundry prerogatives ascribed to the King at common law had passed to the states; those only being denied which attached to the King in his personal character rather than as *parens patriae*, or personification of the sovereign," and then shows that by the great weight of authority this prerogative of priority had been adopted. Haight, J., in *in re Carnegie Trust Company*,³² referring to the New York constitution adopting the common law saving the King's prerogatives repugnant to the constitution, said that "his sovereignty, powers, functions and duties, in so far as they pertain to civil government, now devolve upon the people of the state, and consequently are not in conflict with any of the provisions of the constitution * * * such preference became a part of the common law of our state, and is so continued under our present constitution." Buchanan, C. J. in *State v. Bank of Maryland*,³³ answered the objectors as follows, "This asserted priority has been denounced as an odious prerogative, springing up in the barbarous and tyrannical ages of the British government and inconsistent with the genius of our people and the spirit of our institutions * * * . The government of the state is established for the good of the whole, and can only be supported by means of its revenue; which revenue the good of the whole requires to be protected. And as it can only act by its agents, who, no matter how vigilant, cannot always be present to protect its rights, a priority in the payment of its debts (which must always be of a public nature) is necessary to enable it to accomplish the ends of its institution."

Courts which have denied the prerogative have relied on the fact that the Federal Government has no such right at common law,³⁴ that its non-existence is to be presumed from failure to claim it during long periods of state exist-

³¹ *Ibid.*

³² *Ibid.*

³³ 6 Gill & J. 205, 26 Am. Dec. 561 (1834).

³⁴ *Middlesex Co. v. State Bank*, *supra*, n. 28; *State v. Harris*, *ibid.* See also *Brown v. Am. Bonding Co.*, 210 Fed. 844 (1914).

ence,³⁵ and in a few cases it is discussed on its merits and condemned as being of such a monarchial nature as to be inconsistent with our institutions.³⁶

It has been assumed that the Federal Government has no common law prerogative of priority.³⁷ One explanation given is that there is no Federal Common Law.³⁸ The United States certainly has one common law prerogative of sovereignty, that of immunity from suit, save by its consent.³⁹ The need of a common law priority has not been seriously felt because of the ground having been substantially covered by several statutes adopted between 1789 and 1799.⁴⁰ The principal statute has continued in about the same form from the beginning and provides for a priority for the United States debts as against insolvent decedents' estates and in cases of voluntary assignments and of attachment by legal process of estates of absconding or absent debtors. In asserting a priority in cases of voluntary assignments the statute goes beyond the common law prerogative as will be shown later. The constitutionality of the Federal legislation might seem doubtful if no common law prerogative exist, and in the absence of express powers in the Constitution. It might be conceded as necessary and proper in its application to taxes and obligations of government officials. But the statutes have recently been applied to ordinary contract claims, as for the price of munitions sold in the market.⁴¹ The legislation was sustained at a time when the judiciary was of the Federalist turn of mind, in one case on the general welfare clause,⁴² and in another, the opinion being by Marshall, on the necessary and proper clause.⁴³

The priority provided in voluntary assignments has been claimed in cases of receiverships where the defendant corporations have consented to the proceedings. The Supreme Court has recently held this to be in effect a voluntary as-

³⁵ *Middlesex Co. v. State Bank*, *supra*, n. 28; *Maryland Casualty Co. v. Rainwater*, *ibid*; *No. Car. Corp. Com. v. Citizens B. & T. Co.*, *ibid*.

³⁶ *State v. Harris*, *supra*, n. 28; *Com'r. of Banking v. Chelsea Sav. Bank*, *ibid*.

³⁷ See *U. S. v. State Bank of No. Car.*, 6 Pet. 29, 8 L. ed. 308 (1832); *Price v. U. S.*, 269 U. S. 492, 70 L. ed. 373 (1926).

³⁸ *Equitable Trust Co. v. Connecticut Brass & Mfg. Corp.*, 290 Fed. 712 (1923).

³⁹ *U. S. v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 S. Ct. 240 (1882); *U. S. v. Clarke*, 8 Pet. 436, 8 L. ed. 1001 (1834).

⁴⁰ See discussion of these statutes in the cases cited in n. 37, *supra*.

⁴¹ *Equitable Trust Co. v. Conn. Brass & Mfg. Co.*, *supra*, n. 38; and advances of money under War Credits Board to aid in manufacture of munitions, *U. S. v. Butterworth Judson Corp.*, 269 U. S. 504, 70 L. ed. 380 (1925).

⁴² *U. S. v. Clason*, 2 Brev. 118 (1806).

⁴³ *U. S. v. Fisher*, 2 Cranch 358, 2 L. ed. 304 (1804). See 3 BEVERIDGE, LIFE OF MARSHALL 163.

signment within the act establishing a priority for the United States.⁴⁴ Should a corporation or other debtor go into bankruptcy priorities are governed by the Bankruptcy Act. Section 64 of the Act of 1898 has been interpreted as allowing no priority to the United States except for taxes, these being the only claims expressly enumerated.⁴⁵ By a recent amendment to this section the United States has been defined as a person, so as to be within the clause allowing priority to "debts owing to any person who by the laws of the states or of the United States is entitled to priority."⁴⁶ This probably incorporates into the Bankruptcy Act the old statutes under which the United States may claim priority for all debts.

Where the common law right to priority exists it is subject to certain limitations, the principal of which is that it is lost once the property against which it is claimed ceases to belong to the debtor.⁴⁷ A voluntary assignment passes the title from the debtor to a third person, and thereafter, the common law priority of the state is gone.⁴⁸ But a receivership which does not pass the debtor's title does not affect the priority.⁴⁹

A frequent occasion for assertion of priority in recent years has been the failure of a bank in which public funds are deposited. The deposit is usually protected by a surety bond. The surety having paid the state, it seeks to be subrogated to the alleged priority of the depositor, and has in

⁴⁴ Price v. U. S., *supra*, n. 37; U. S. v. Butterworth Judson Corp., *supra*, n. 40. See Blair, "Priority of the United States in Receiverships," 39 HARV. L. REV. 1.

⁴⁵ Davis v. Pringle, 268 U. S. 315, 69 L. ed. 974, 45 S. Ct. 549 (1925). This was based on Guar. Title & Trust Co. v. Title Guar. & S. Co., 224 U. S. 156, 32 S. Ct. 457, 56 L. ed. 706 (1911); Sloan Shipyards Corp. v. U. S. Shipping Bd. Emer. Fleet Corp., 258 U. S. 549, 66 L. ed. 762, 42 S. Ct. 386 (1921). Taxes are entitled to priority in receivership proceedings, being debts. Price v. U. S., *supra*, n. 37. Rogers, J., had attempted to sustain priority for taxes under a common law prerogative, the existence of which he had denied in Equitable Trust Co. v. Conn. Brass & Mfg. Co., *supra*, n. 38. His decision was affirmed in Stripe v. U. S., 269 U. S. 503, 70 L. ed. 379, 46 S. Ct. 182 (1926), on the ground that a tax is a debt. The opinion below is to be found in Liberty Mut. Ins. Co. v. Johnson Shipyards Corp., 6 F. (2d) 762 (1925).

⁴⁶ May 26, 1926, c. 406, 15, 44 STATS. 666.

⁴⁷ Giles v. Grover, 1 Clark & Fennell 72 (1832); 2 TIDD PRAC. 1053; 3 PRICE 6.

⁴⁸ State v. Bank of Md., 6 Gill. & J. 205, 26 Am. Dec. 561 (1834); State v. Williams, 101 Md. 529, 61 Atl. 297 (1905); State v. Foster, 5 Wyo. 199, 38 Pac. 926 (1895). But see Aetna Accident & Liability Co. v. Miller, *supra*, n. 27. Also it has been held that the priority is lost when a bank is being liquidated under statutory process by a state officer. Natl. Surety Co. v. Pixton, 60 Utah 289, 208 Pac. 878 (1922); Aetna Casualty & S. Co. v. Moore, 107 Wash. 99, 181 Pac. 40 (1919); No. Car. Corp. Com. v. Cit. B. & T. Co., 193 N. C. 513, 137 S. E. 587 (1927); Comr. of Banking v. Chelsea Sav. Bank, 161 Mich. 691, 125 N. W. 424 (1910). See also Middlesex Co. v. State Bank, *supra*, n. 28. Cf. U. S. Fid. & Guar. Co. v. Bramwell, *supra*, n. 27; Md. County Co. v. McConnell, *supra*, n. 27. As to waiver by implication under statutory rules of distribution see Comm. v. Comr. of Banks, 240 Mass. 244, 133 N. E. 625 (1921). As to paramount rights of United States, see Bramwell v. U. S. Fid. & Guar. Co., 269 U. S. 488, 70 L. ed. 368 (1926).

⁴⁹ Marshall v. N. Y., *supra*, n. 27.

several instances been accorded this privilege.⁵⁰ In some states it is denied on the ground that the state can waive its common law right of priority, and has impliedly done so by the requirements in the depositary laws for adequate surety protection of deposits.⁵¹ In other states it is held that contracting for additional protection of public deposits, even under statutory requirements, does not by implication waive or repeal a common law right of the state, which right passes to the surety by subrogation under general principles of suretyship.⁵² The prerogative of priority is so far an attribute of sovereignty that it cannot be divided nor delegated to a county or other inferior municipal corporation.⁵³ It has been urged that it should not enure to the benefit of a surety, particularly a paid surety company, when not needed in the interest of the public treasury.⁵⁴

The priority of the state seems to be in accord with the public interest and should be preserved so far as necessary for the public interest. There is considerable diversity among the states as to its standing at the present time in the light of statutes, such as the depositary acts, and as to the rights of sureties. The question is so far a matter of general commercial interest, particularly to the surety companies doing a nation wide business, as to be a suitable subject for an attempt to formulate a Uniform State Law.

⁵⁰ So. Phila. St. Bank v. Natl. Surety Co., 8 D. C. 93 (1926, *semble*) reviewed on other grounds and priority not mentioned. 288 Pa. 300, 135 Atl. 748 (1927); Woodward v. Sayre, *supra*, n. 27; Re Carnegie Trust Co., *ibid.*; Aetna Accident & Liability Co. v. Miller, *ibid.* As to subrogation to statutory priority of United States, see Shaeffer's Est., 281 Pa. 138, 126 Atl. 205 (1924).

⁵¹ Re Central Bank, 23 Ariz. 574, 205 Pac. 915 (1922); U. S. Fid. & Guar. Co. v. McFerson, 78 Col. 338, 241 Pac. 728 (1925); *In re* Holland Banking Co., 313 Mo. 307, 281 S. W. 702 (1926); Nat. Surety Co. v. Morris, 34 Wyo. 134, 241 Pac. 1063 (1925); Natl. Surety Co. v. Pixton, *supra*, n. 27.

⁵² Booth v. State, 131 Ga. 750, 53 So. 502 (1908); Amer. Surety Co. v. Pearson, 146 Minn. 342, 178 N. W. 817 (1920); Lenoir v. Winn, 4 S. C. Eq. 65, 6 Am. Dec. 597 (1809); Fid. & Dept. Co. of Md. v. State Bank of Portland, 117 Ore. 1, 242 Pac. 823 (1926); Md. Casualty Co. v. McConnell, 146 Tenn. 656, 257 S. W. 410 (1924); Woodward v. Sayre, *supra*, n. 27.

⁵³ Aetna Casualty & Surety Co. v. Bramwell, 12 F. (2d) 307 (1926); Glynn Co. v. Brunswick Terminal Co., 101 Ga. 244, 28 S. E. 604 (1897); Bignell v. Cummins, 69 Mont. 294, 222 Pac. 797 (1923); Re Northern Bank, 212 N. Y. 607, 106 N. E. 749 (1914); U. S. Fid. & Guar. Co. v. Rainer, 120 Tenn. 357, 113 S. W. 397 (1907); Calhoun County v. Connell, 99 W. Va. 483, 129 S. E. 399 (1925). But see Denver v. Stenger, 295 Fed. 809 (1924).

⁵⁴ U. S. Fid. & Guar. Co. v. McFerson, 78 Col. 328, 241 Pac. 728 (1925). See also Natl. Surety Co. v. Morris, 34 Wyo. 134, 241 Pac. 1063 (1925).