No other section of the Bankruptcy Act seems available to the trustee. If the transfer has been effected prior to bankruptcy, he has no lien under Sec. 47 (a) 2; and his derivative powers under Sec. 70 (e), 11 U.S.C.A. 107 (e), to exercise the rights of creditors under state law would be applicable only to transfers made prior to four months of bankruptcy and voidable under state law.

HOWARD W. NEFFNER.
JUSTIN H. FOLKERTH.

PRIORITY OF MUNICIPAL CORPORATIONS IN BANKRUPTCY

The City of Lincoln, Nebraska, a municipal corporation, sought priority in its claim of $45,000 with interest against the Lincoln Trust Company, bankrupt. The City based its contention on Sec. 64b(7) of the Bankruptcy Act and also claimed that the bankrupt had custody of the fund as a trust fund. The district court and the circuit court decided that the city was not within Sec. 64b(7) and the circuit court held that there was no trust fund. *Held:* that a city as a municipal corporation is entitled to priority under Sec. 64b(7) if as a matter of local law the municipality was accorded priority. The case was remanded to try the issue of local law. *City of Lincoln, Neb. et al.* v. *L. A. Ricketts, Trustee, etc.*, 56 S. Ct. 507 (U.S. Law Wk. Mar. 3, 1936, Index 607).

For an adequate understanding of this problem, the history of state and federal priority in bankruptcy is necessary. The United States is accorded priority in insolvent debtor's estates by R.S. Sec. 3466-67 (31 U.S.C.A. 191-192) and sureties are subrogated to this priority by R.S. Sec. 3468 (31 U.S.C.A. 193). This statute is the same in substance as that passed as early as 1797. It has been held that the United States has no sovereign prerogative of priority but its priority is derived solely from Congressional enactment. *United States* v. *The State Bank of North Carolina*, 6 Pet. 29, 8 L. Ed. 308 (1832). The Supreme Court has held that R.S. Sec. 3466-68 is in *pari materia* with the Bankruptcy Act and that the Bankruptcy Act of 1898 relegates the priority of R.S. Sec. 3466-68, if recognized at all in bankruptcy (which point the court did not have to decide under the circumstances), to fifth place in payment of claims under Sec. 64b(5) of the Bankruptcy Act of 1898 (Now 64b(7). *Guarantee Title and Trust Co.* v. *Title Guarantee and Surety Co.*, 224 U.S. 152 (1912).

Contrary to the view of some writers and lower courts, but support-

ing a dissenting dictum in *Matter of Eastern Shore Ship Building Corp.*, 258 U.S. 549, 42 S. Ct. 386 (1922) the Supreme Court held in *Davis* v. *Pringle*, 268 U. S. 315, 45 S. Ct. 549, 69 L. Ed. 794 (1925) that the United States was not a "person" under Sec. 64b(5) of the Bankruptcy Act of 1898 and hence that the priority accorded it under R.S. 3466-68 had no effect in bankruptcy (tax claims being especially provided for in Sec. 64a).

A year later (1926) Congress, showing its preference for governmental priority, overcame the rule of *Davis* v. *Pringle, supra,* by enacting an amendment to Sec. 64b of the Bankruptcy Act. It created seven classes of priority instead of the previous act's five. It stated, "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of the bankrupt estate, and the order of payment shall be . . . . (7) debts owing to any person who by the laws of the States or the United States is entitled to priority. Provided, That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States." See McLaughlin, "Amendments of Bankruptcy Act," 40 Harv. L.R. 341, 345. Recent federal cases now hold that for a debt other than taxes, the United States priority under R.S. Sec. 3466-68 is recognized under Sec. 64b(7). *United States* v. *Kaplan*, 74F (2d) 664 (1935). See *In re Brannon, et al.* 62 F. (2d) 959 (1933); *In re Hauger Co.* 54 F. (2d) 117 (1931).

The expansion of this judicial interpretation of Sec. 64b(7) in the principal case to include municipal corporations seems entirely justifiable. It would seem that it could have been justified even before the amendment of 1926 which specifically includes corporations in the definition of "person" in the proviso of Sec. 64b (7), since prior to that amendment "person" as used in Sec. 64b (5) included corporations by virtue of the definition of "person" in Sec. 1 (19). That a municipal corporation is a "corporation" under the Bankruptcy Act might at first be doubted from the definition of a corporation under Sec. 1 (6). At first glance, this definition seems limited to private as distinguished from public business. But since this definition of Sec. 1 (6) in its broader aspect includes almost all forms of aggregate business other than partnerships, and since, strictly speaking, the definition of Sec. 1(6) (" 'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, ... ,") includes municipal corporations, the conclusion of the court that a municipal corporation is a "corporation" under the Bankruptcy Act and therefore a person under Sec. 64b(7) seems correct.

This conclusion is emphasized by Sec. 4a which in naming persons who may be voluntary bankrupts states, "Any person except a municipal, ... corporation . . . . "; and by Sec. 4b which in naming those who may be adjudged involuntary bankrupts states, ". . . . corporation except a municipal, ... corporation." This exception of municipal corporations to the term "person" in Sec. 4a and to the term "corporation" in Sec. 4b would seem to indicate a legislative intent that both "person" and "corporation" otherwise include municipal corporations. *City of Lincoln, Neb.* v. *Ricketts, supra,* at p. 508, 509.

Whether other political subdivisions such as counties and special districts would be entitled to priority under Sec. 64b(7) admits of greater doubt. Although they are often distinguished as municipal *quasi* corporations, still the generic term municipal corporation is broad enough to include them. McQuillan, "Municipal Corporations," Sec. 135; Dillon, "Municipal Corporations," Sec. 32. Congressional favoring of governmental priority as evidenced in the aforementioned legislative overruling of *Davis* v. *Pringle, supra,* might aid in construing the term "corporations" to include these political subdivisions. On the other hand the omission of the words, "county, district, or municipality" included in the tax priority of Sec. 64a from Sec. 64b(7) might be construed as a legislative intention to exclude counties and districts from priority other than taxes under the Bankruptcy Act. See McLaughlin "Amendments to the Bankruptcy Act," 40 Harv. Law Rev. 341, 345. In the principal case, the latter argument was rejected (p. 509) in view of the express inclusion of "corporations" in Sec. 64b(7). Similarly if counties and special districts are construed as "corporations" as indicated above, the argument of their omission from Sec. 64b(7) would not be controlling.

Although, by the holding of the principal case, municipal corporations are entitled to priority in bankruptcy, if by local law they are accorded a priority, it is doubtful whether they have the latter in absence of state statute specifically according them such a priority. This is because many states do not recognize common law sovereign prerogative in insolvency proceedings. See Crane, "A Royal Prerogative," 34 W. Va. L.Q. 317 (1928). Ohio denies its existence in bank failure cases in which either state or municipal funds are involved. *The Fidelity & Casualty Co. of New York* v. *The Union Savings Bank Co. et al.,* 119 Ohio St. 124 (1928). *Village of Warrensville Heights* v. *Fulton, Supt. of Banks,* 128 Oh. St. 192 (1934). And of those states which recognize such a common law sovereign prerogative, the vast majority hold that it cannot be delegated to a political subdivision. It cannot be

delegated to a drainage district: *William R. Compton Co.* v. *Farmer's Trust Co.*, 279 S.W. 746 (Mo. App., 1925); nor to a county: *Glynn County* v. *Brunswick Terminal Co.*, 101 Ga. 244, 28 S.E. 604 (1897); *Aetna Casualty & Surety Co.* v. *Brumell, State Supt. of Banks*, 12F(2d) 307 (1926); *Phillips* v. *Yates Center National Bank* (*Phillips* v. *Gillis*) 98 Kan. 383, 158 Pac. 23, L.R.A. 1917A, 680 (1916); nor to a municipal corporation: *People* v. *Home State Bank of Grant Park*, 338 Ill. 179, 170 N.E. 205 (1930); *In re Northern Bank*, 85 Misc. 594, 148 N.Y.S. 70 (1914) aff'd. 163 App. Div. 974, 148 N.Y.S. 70 (1914) further aff'd. 212 N.Y. 608, 106 N.E. 749 (1914); *United States Fidelity & Guaranty Co.* v. *Rainey*, 120 Tenn. 357, 113 S.W. 397 (1907); contra *Denver* v. *Stenger*, 295 Fed. 809 (1924). A political subdivision has been distinguished from an agency of the state, such as a university, the latter being entitled to exercise the state's common law sovereign prerogative. *University of Tennessee* v. *Peoples Bank, et al.*, 157 Tenn. 87, 6 S.W. (2d) 328.

JUSTIN H. FOLKERTH.

WHAT CONSTITUTES A FARMER UNDER THE BANKRUPTCY ACT?

On May 15, 1935, section 4b of the bankruptcy act was amended to provide, "Any natural person, except a wage earner or a farmer, ... may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this title."[1] At the same time section 75r was amended to provide, "For the purposes of this section, section 4b, and section 74, the term 'farmer' includes[2] not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the

[1] Bankruptcy Act, sec. 4b, 49 Stat. 246, 11 U.S.C.A. sec. 22b. (1935); formerly "Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil . . . . may be adjudged an involuntary bankrupt." Bankruptcy Act of 1898, sec. 4b, 30 Stat. 547, 11 U.S.C.A., sec. 22b.

[2] The United States Supreme Court recently held that the word "include" was not a term of exclusion, as used in section 1 (9), defining a creditor. *American Surety Co. of New York* v. *Mariotta*, 287 U.S. 513, 77 L.Ed. 466, 53 S. Ct. 238.