

FEDERAL COMMON LAW IN GOVERNMENT COMMERCIAL TRANSACTIONS

INTRODUCTION

Regular readers of the United States Reports should not have been surprised when Mr. Justice Brandeis, in *Erie R.R. v. Tompkins*,¹ announced the fall of federal common law. That concept, enshrined in *Swift v. Tyson*² and venerated for the subsequent century, had met increasingly critical scrutiny in Mr. Justice Holmes' dissenting opinions for two decades prior to its demise.³ Whatever the reasons motivating the Court's adoption of the Brandeis view, *Erie R.R. v. Tompkins* revolutionized one part of American law and has provided an endless source of material for the commentators⁴ who are, even now, finding new problems raised by that decision.⁵

That "there is no federal general common law"⁶ still represents the Supreme Court's position. Yet, even Mr. Justice Brandeis, writing on the same day that *Erie* was handed down, acknowledged that there is some form of federal common law.⁷ Later decisions, analyzing the pronouncement, also generally concluded that there is "for want of a better label, an area of 'federal common law,'"⁸ or a residuum of federal common law power⁹ in the federal courts untouched by the *Erie* decision:

The federal courts have no *general* common law. . . . But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.

I do not understand Justice Brandeis' statement in *Erie* . . . to deny that the common law may in proper cases be an aid to, or the basis of, decision of federal questions. In its context it means to me

¹ 304 U.S. 64 (1938).

² 41 U.S. (16 Pet.) 1 (1842).

³ *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532 (1928); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 218 (1917); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370 (1910).

⁴ E.g., Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L.J. 267 (1946); Pofcher, *The Choice of Law, State or Federal, in Cases Involving Government Contracts*, 12 La. L. Rev. 37 (1951); Notes, 50 Nw. U.L. Rev. 72 (1955); 30 Ore. L. Rev. 164 (1951); 105 U. Pa. L. Rev. 266 (1956).

⁵ See Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964); Morgan, *The Future of Federal Common Law*, 17 Ala. L. Rev. 10 (1965); Notes, 5 B.C. Ind. & Com. L. Rev. 783 (1964); 77 Harv. L. Rev. 1084 (1964); 50 Va. L. Rev. 1236 (1964).

⁶ *Erie R.R. v. Tompkins*, supra note 1, at 78.

⁷ "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

⁸ *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947); see also, D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 465 (1942) (Jackson, J., concurring).

⁹ *Wheeldin v. Wheeler*, 373 U.S. 647, 666 (1963) (Brennan, J., dissenting).

only that federal courts may not apply their own notions of the common law at variance with applicable state decisions except "where the constitution, treaties or statutes of the United States [so] require or provide. . . ."

Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.¹⁰

Narrowly construed, *Eric* applies only to diversity cases.¹¹ This view, even today, finds strong support as many courts dismiss considerations of state law if there is no diversity.¹² In most of these recent cases, however, there have been other, more positive, reasons for applying federal law and the general view today is that the jurisdictional basis is of little importance.¹³ Instead, courts now look to the nature of the right being asserted. If an essentially state-created cause of action is involved, then state law is applied, regardless of the jurisdictional basis.¹⁴ If, however, the case involves federally-created rights, then federal law is applied, even if the suit were originally brought on an assertion of diversity jurisdiction.¹⁵ Although the principle is clear, its application is difficult since the problem lies in determining, in each case, which rights are dominantly present.

Applied in many diverse cases, this rapidly developing body of federal common law has yet to be fully charted: "I doubt that we sufficiently realize how far this development has gone—let alone where it is likely to go."¹⁶ This development has already extended to areas of tort, labor, and commercial law.¹⁷ This comment, however, concerns only the effect of this federal common law on some species of government commercial paper. Decisions outside this area enter the discussion only where necessary to keep it within the realities of the overall growth of federal common law.

¹⁰ *D'Oench, Duhme & Co. v. FDIC*, supra note 8, at 469-70 (Jackson, J., concurring).

¹¹ *Id.* at 467.

¹² *E.g.*, *United States v. Chester Park Apts. Inc.*, 332 F.2d 1, 3 (8th Cir. 1964) (dictum).

¹³ *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540 n.1 (2d Cir. 1956) (dictum); 77 Harv. L. Rev. 1084, 1087 (1964).

¹⁴ See, e.g., *United States v. Henke Constr. Co.*, 157 F.2d 13, 24 (8th Cir. 1946); *Blair v. United States*, 147 F.2d 840, 849 (8th Cir. 1945), where the jurisdictional basis was the Miller Act, 49 Stat. 793 (1935), 40 U.S.C. § 270a (1958).

¹⁵ *Francis v. Southern Pac. Co.*, 333 U.S. 445, 450 (1948).

¹⁶ Friendly, supra note 5, at 405.

¹⁷ *E.g.*, *Howard v. Lyons*, 360 U.S. 593 (1959) (tort); *United States v. Standard Oil Co.*, supra note 8 (tort); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) (labor); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (labor); *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949) (government contract); *United States v. Taylor*, 333 F.2d 633 (5th Cir. 1964) (government sub-contract); *Girard Trust Co. v. United States*, 149 F.2d 872 (3d Cir. 1945) (government lease); *Levitt v. Johnson*, 334 F.2d 815 (1st Cir. 1964) (shareholder's derivative action), noted in 6 B.C. Ind. & Com. L. Rev. 614 (1965).

GOVERNMENT CHECKS

After *Erie*, several cases arose involving the issue of the government's right to recover for losses occasioned by the wrongdoing of third parties. In all these cases, a check mailed by a government agency was cashed with a forged endorsement and passed to the defendant bank, which perfunctorily guaranteed all prior endorsements and received payment from the United States. The United States subsequently brought suit to recover, alleging the defendant's express guarantee of prior endorsements as the basis of its action.

These early cases illustrate the impact of *Erie*. In *Security-First Nat'l Bank v. United States*,¹⁸ an imposter received a Veterans' Bureau loan, using the name of a recently deceased veteran. The check was addressed in the name of the dead man, care of General Delivery, Los Angeles, where the imposter intercepted it. The Ninth Circuit applied California law, where the check had been delivered and negotiated. Noting that the United States neither has nor asserts a preferred status, the court stated that the rights of holders of United States checks are the same as those accorded by commercial practice to checks of private individuals. Accordingly, the United States was held estopped from questioning the genuineness of the endorsement. As an alternative ground for the decision under state law, the court held that the case came within the "imposter rule,"¹⁹ which relieved the defendant bank of liability.

Almost two years later, state law was again applied without discussion in *United States v. Citizens Union Nat'l Bank*,²⁰ and again the defense of estoppel was upheld against the government because its failure to record the loss of a veteran's adjusted service certificate had made the subsequent forgery possible.

These cases typify the phase which the federal courts went through when their discretionary powers lay dormant and they interpreted their task as the mechanical application of state law in all cases save those where the federal Constitution or statutes clearly compelled the use of federal law.²¹ The problem stemmed from the confusion generated by the Supreme Court's failure to prescribe the boundaries of the *Erie* doctrine:

In the absence of an authoritative decision by the Supreme Court of the United States to the effect that *Erie R. Co. v. Tompkins* applies only in cases of diversity of citizenship, a subordinate federal

¹⁸ 103 F.2d 188 (9th Cir. 1939).

¹⁹ "[W]here the drawer delivers a check, draft, or bill of exchange to an imposter as payee, supposing that he is the person he has falsely represented himself to be, the imposter's endorsement in the name by which the payee is described is regarded as a genuine endorsement as to subsequent holders in good faith." *Id.* at 190.

²⁰ 40 F. Supp. 609 (W.D. Ky. 1941).

²¹ See also *United States v. National City Bank*, 28 F.Supp. 144 (S.D.N.Y. 1939); Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 Colum. L. Rev. 787, 789 (1963); A.L.C., *The Common Law of the United States*, 47 Yale L.J. 1351, 1352 (1938).

tribunal would be exhibiting uncalled for temerity in offering such generalizations.²²

With the Supreme Court defining the effect of *Erie* in other areas,²³ however, the Third Circuit cautiously examined the nature of the action in *United States v. Clearfield Trust Co.*²⁴ and concluded that *Erie* was not applicable. The district court, following the trend of the times, had applied Pennsylvania law and held that the government's unreasonable delay in giving notice of the forgery to the defendant barred recovery. Pointing to the absence of diversity jurisdiction, the act of Congress under which the check had been issued,²⁵ and the statute making forgery a federal offense,²⁶ the Third Circuit concluded that these factors sufficiently distinguished the case from *Erie* to warrant the application of federal law. In reaching its conclusion that the defendant was liable, the court drew upon an early Supreme Court case²⁷ in which the United States had been permitted to recover where there was no showing that the defendant had been harmed by the delay in receiving notice.

While certiorari in *Clearfield* was pending because of the conflict with *Security-First Nat'l Bank*, the Tenth Circuit, in *United States v. First Nat'l Bank*²⁸ also recognized the problem as to the propriety of subjecting the government's rights and liabilities on its own commercial paper to local law. But, the absence of either state or federal law in this area rendered the question moot, for the court reasoned that under either set of laws the rule would be drawn from the law merchant, since it considered this to be the uniform law governing commercial transactions. Drawing upon the law merchant, the court applied the imposter rule and denied recovery to the government. The court justified its use of this rule on the grounds that, although the rights and liabilities of the United States cannot depend upon local law except insofar as it has consented to be bound, the United States was deemed to have impliedly consented to be bound by the same rules governing private persons under the same circumstances when it becomes a party to commercial paper.

This latter statement is subject to at least two interpretations. First, it can mean that the government impliedly consents to be bound by the state laws which would govern in a suit between two private parties in the same circumstances.²⁹ Taken this way, the language nullifies the court's attempt earlier in its opinion to render the choice of law question moot. For this in-

²² *United States v. Clearfield Trust Co.*, 130 F.2d 93, 95 (3d Cir. 1942), *aff'd*, 318 U.S. 363 (1943).

²³ *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *Deitrick v. Greaney*, 309 U.S. 190 (1940); *Board of County Comm'rs v. United States*, 308 U.S. 343 (1939).

²⁴ *Supra* note 22.

²⁵ Federal Emergency Relief Act of 1933, 48 Stat. 55.

²⁶ 18 U.S.C. § 262 (1940), as amended, 18 U.S.C. § 471 (1958).

²⁷ *United States v. National Exch. Bank*, 214 U.S. 302 (1909).

²⁸ 131 F.2d 985 (10th Cir. 1942).

²⁹ See, e.g., *United States v. National Rockland Bank*, 35 F. Supp. 912 (D. Mass. 1940); *United States v. National City Bank*, *supra* note 21.

terpretation, read in the light of the rest of the opinion is, in effect, a conclusion that even if federal law were applicable, the government's implied consent would necessitate adopting state law as the source of any federal rule which might be applied. Another possible interpretation is that both parties will be governed by the same rules, but those rules will be federal, not state.³⁰ So construed, the United States is hardly consenting to anything. Since it generally assumes the role of plaintiff in this type of case, it is unlikely that any rules so formulated to favor the government's position would ever work against it.³¹

The Supreme Court tacitly approved this second view when it shortly thereafter endorsed the use of federal law in *Clearfield*³² and thus changed the course of litigation in this area. Reiterating the factors relied upon by the Third Circuit, and adding others, the Court explained how these factual differences took *Clearfield* out of the *Erie* rule. First, since authority to issue the check originates in the Constitution and statutes, and in no way depends upon Pennsylvania law, these, then, are the sources of both the duties imposed upon the United States and the rights acquired by it. The thrust of this argument is that when a sovereign government operates in an area where it can legitimately function, the validity of its acts should not be decided by another sovereignty.³³ That the check had been issued for services rendered under a congressional act reinforced this position.

The desirability of uniformity in this area, however, primarily influenced the Court's decision to apply federal law. Since the United States issues commercial paper on a vast scale and transactions will commonly occur in several states, the Court reasoned that there should be some method to prevent the fluctuation of the government's rights and duties among the states.

The determination that federal law controlled precluded state law as a possible source for the federal rule of decision because the variety of state rules would cause diverse results under identical circumstances, thus defeating the uniformity required for the stable operation of the federal government. In determining the federal rule the Court drew upon the federal law merchant which had developed under *Swift v. Tyson*.³⁴ In so doing, however, it made an important distinction. While, under *Swift*, the whole law merchant was considered a part of federal common law, only the rule itself was incorporated into the new federal common law by the *Clearfield* decision. This distinction exemplifies Mr. Justice Holmes' statement that "the common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . ."³⁵

The primary cause of the loss in the cases just discussed had been the fraud perpetrated by an unknown third party. The courts now turned to cases where the fraud had been committed by the government's own em-

³⁰ See, e.g., *United States v. Union Trust Co.*, 139 F. Supp. 819 (D. Md. 1956).

³¹ *United States v. Matthews*, 139 F. Supp. 683 (N.D. Cal. 1956).

³² *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

³³ See *United States v. McCabe Co.*, 261 F.2d 539 (8th Cir. 1958).

³⁴ *Supra* note 2.

³⁵ *Southern Pac. Co. v. Jensen*, *supra* note 3, at 222 (dissent).

ployee. In *Washington Loan & Trust Co. v. United States*,³⁶ a government employee had established a fictitious conservation camp, caused checks to be issued to non-existent campers, and cashed them at the defendant bank. The government failed to uncover the fraud until several years after it began. The United States, rather than relying on *Clearfield*, conceded that its rights were the same as any other individual or corporation in the same position. It contended, however, that the proffered defense of equitable estoppel was not appropriate because the government had made no representation concerning the endorsements and it was therefore the defendant's duty to determine their genuineness. The court, without reference to *Clearfield*, applied the District of Columbia Negotiable Instruments Law³⁷ and directed a verdict for the United States.

The reasons justifying use of federal law in *Clearfield* were also present here, however. The government was a party to the action and the decision directly affected its rights and duties on its commercial paper. There was, in addition, the element that the conduct of a government employee directly affected the question. In light of *Clearfield*, it is difficult to rationalize the use of state law in *Washington Loan*. One would think that the government would have been anxious to press its newly acquired *Clearfield* rights and attempt to persuade the court to adopt a favorable federal rule which would have the advantage of serving as precedent in other litigation. The government's hesitancy to assert and the court's reluctance to apply federal law probably stemmed from the lack of a readily available and easily ascertainable federal rule. Although *Clearfield* would seem to have required this case to be decided by federal law, it left unanswered many questions, as, for example, what sources could be employed in formulating the federal rule.³⁸ Since state law produced a result favorable to the government, the court might have reasoned that the defendant would fare no better under federal law. But *Clearfield* did not require that the federal rule adopted give the government a preferred status as creditor.³⁹ It chiefly intended, as the Court stated, merely to produce uniformity of decision among the states. Therefore, the *Washington Loan* court could have formulated a federal decisional rule relieving the bank of liability in these circumstances.⁴⁰

By exculpating the government from its negligence, however, *Washington Loan* encouraged the Supreme Court in *National Metropolitan Bank v. United States*⁴¹ to entrench this rule, which excused what might be termed "federal negligence," in the new federal common law. A civilian clerk in the Marine Corps had checks drawn in payment of fictitious travel claims, forged the endorsements, added his own name as endorser, and cashed them. The Supreme Court, relying on *Clearfield*, first held that federal com-

³⁶ 134 F.2d 59 (D.C. Cir. 1943).

³⁷ D.C. Code Ann. § 28-101 (1961).

³⁸ "In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Clearfield Trust Co. v. United States*, supra note 32, at 367.

³⁹ Id. at 369.

⁴⁰ See *United States v. First Nat'l Bank*, 138 F.2d 681 (7th Cir. 1943).

⁴¹ 323 U.S. 454 (1945).

mon law controlled. This, in effect, amounted to tacit disapproval of *Washington Loan's* use of state law; in discussing the federal rule to be applied, however, the Court proceeded to employ that case as support for the rule it adopted. Concluding that the general law merchant should again serve as the source for its rule, the Court noted that this law, which rejects the government's negligence as a defense, had been applied in an earlier, pre-*Erie* Supreme Court decision⁴² and, as evidenced by *Washington Loan*, had been almost unanimously accepted. Since "no persuasive reasons have been suggested . . . why it should not be accepted as the general federal rule,"⁴³ the Court adopted it.

As in *Clearfield*, a two-step process occurred here. First, the federal rights and duties involved were held to warrant application of a federal rule. Then, the rule, more than merely insuring uniformity, was shaped to meet the needs of the sovereign government. The Court accomplished this by restricting operation of the rule to the government in its sovereign capacity rather than in its capacity as drawer of a check. The emphasis was placed upon protection of federal rights, with little consideration of any equities which the defendant bank might have.⁴⁴

Metropolitan Bank firmly established the rule that federal law determined the government's rights in its own commercial paper when the United States was itself a party to the action.⁴⁵ While state law had been applied without comment in earlier cases,⁴⁶ the pendulum had now swung, and courts commonly applied the new federal common law without extended discussion.⁴⁷ Along with establishing federal common law, the Supreme Court had, by its own actions, indicated two permissible sources from which federal rules could be drawn: the law merchant and the pre-*Erie* Supreme Court decisions dealing with the subject. Approval of this latter source was required because *Erie*, holding that the Supreme Court's "course of dealing" in this area had been unconstitutional, rendered all of its relevant prior decisions potentially worthless as precedent.⁴⁸ Using these sources, along with the discretion which the Supreme Court had intimated could be used in formulating federal rules of decision,⁴⁹ the lower courts now turned to developing a body of federal law for this area.

Although the Supreme Court had rejected the defenses of estoppel⁵⁰ and negligence,⁵¹ it did not deny the existence of some valid defenses. In *Metropolitan Bank*, the Court declared:

⁴² *United States v. National Exch. Bank*, supra note 27.

⁴³ *National Metropolitan Bank v. United States*, supra note 41, at 457.

⁴⁴ *Id.* at 458.

⁴⁵ See also *United States v. Mercantile Nat'l Bank*, 67 F. Supp. 759 (W.D. La. 1946).

⁴⁶ E.g., *Security-First Nat'l Bank v. United States*, supra note 18.

⁴⁷ See, e.g., *Continental-American Bank & Trust Co. v. United States*, 161 F.2d 935 (1947).

⁴⁸ See *Erie R.R. v. Tompkins*, supra note 1, at 77-78. Comment, 47 Yale L.J. 1336, 1337 (1938).

⁴⁹ *Clearfield Trust Co. v. United States*, supra note 32.

⁵⁰ *Id.* at 369.

⁵¹ *National Metropolitan Bank v. United States*, supra note 41.

We do not say that there may not be some circumstances, not now before us, under which the government might be precluded from recovery because of conduct of a drawer prior to a guarantee of endorsement.⁵²

The lower courts, showing a willingness to sustain defenses, soon adopted as part of the federal law the "imposter rule" which had been applied in earlier cases decided under state law and which had its basis in the law merchant.⁵³ Now a generally accepted defense,⁵⁴ this rule has yet to be tested in the Supreme Court.⁵⁵ In adopting it, the courts have found it necessary to distinguish both *Clearfield* and *Metropolitan Bank*,⁵⁶ the latter on rather tenuous grounds.⁵⁷

There have been attempts to distinguish *Clearfield* on other grounds also. Judge Rives, dissenting in *Fulton Nat'l Bank v. United States*,⁵⁸ suggested that *Clearfield* applies only where the government's delay in giving notice of the fraud does not harm the defendant's rights against prior endorers. In *Fulton*, the state statute of limitations had tolled prior to the bank's receipt of notice of the fraud, thus cutting off the defendant's right to bring an action against prior endorers. This argument has not been generally advanced, and, when made, has met with small success.⁵⁹

Other than merely recognizing defenses, the lower courts have also shifted the emphasis from federal rights, as in *Clearfield* and *Metropolitan Bank*, and have considered the defendant's equities⁶⁰ and policy considerations.⁶¹ One of the equitable considerations is that the bank has not been benefited by accepting the government checks but, rather, accepts them as a free service. The policy issue arises from the fear that holding banks liable on government checks would restrict their free alienability. Although this argument had been successfully advanced in 1942⁶² where state law was applied, it lay dormant until 1947,⁶³ and since then has received little use.⁶⁴

⁵² Id. at 459.

⁵³ *Continental-American Bank & Trust Co. v. United States*, supra note 47.

⁵⁴ See, e.g., *United States v. Bank of America Nat'l Trust & Sav. Ass'n*, 274 F.2d 366 (9th Cir. 1959); *United States v. Union Trust Co.*, supra note 30; *Continental-American Bank & Trust Co. v. United States*, supra note 47.

⁵⁵ *United States v. Bank of America Nat'l Trust & Sav. Ass'n*, supra note 54, at 368-69.

⁵⁶ The cases are discussed in *Atlantic Nat'l Bank v. United States*, 250 F.2d 114 (5th Cir. 1957).

⁵⁷ See *United States v. Bank of America Nat'l Trust & Sav. Ass'n*, supra note 54, at 368.

⁵⁸ 197 F.2d 763, 765 (5th Cir. 1952).

⁵⁹ But see *United States v. First Nat'l Bank*, supra note 40.

⁶⁰ Id. at 686.

⁶¹ *Atlantic Nat'l Bank v. United States*, supra note 56; *Continental-American Bank & Trust Co. v. United States*, supra note 47.

⁶² *United States v. First Nat'l Bank*, supra note 28, at 989.

⁶³ *Continental-American Bank & Trust Co. v. United States*, supra note 47.

⁶⁴ "The necessity for unfettered circulation of the Government's negotiable paper not only does not require—it actually forbids—that such loss should be visited on the collecting banks." *Atlantic Nat'l Bank v. United States*, supra note 56, at 118.

The future growth of the law seems to lie in these areas. It is now too clear for argument that federal law should apply in government check cases. These checks, normally issued by central offices, may be processed through several states. The banks know they are dealing with federal checks, but the government cannot, in practice, determine the states through which its checks will pass. Therefore, it is easier for the banks to comply with one body of federal law than for the national government to comply with diverse state laws. Since most government check cases are brought in federal courts, it is easier for these courts to develop their own body of law than to decide the cases under state decisional law which may be sparse or non-existent in this area.⁶⁵

Although it is no burden upon the banks to have federal law applied, it does become onerous when the government receives the status of a preferred creditor. The *Clearfield* and *Metropolitan Bank* decisions effected this result, but the lower courts have since shown a tendency to ameliorate its harshness.⁶⁶ That banks often handle government checks as a gratuitous service strongly suggests why the government should make some concessions, for the burden of handling such a large volume of checks is impliedly recognized in federal regulations which do not require federal reserve banks to honor government checks presented by the general public.⁶⁷

GOVERNMENT BONDS

When the course of federal law had been set by the *Clearfield* and *Metropolitan Bank* decisions, the Supreme Court moved to contain its development within proper bounds. The Court, having pronounced that the government's commercial rights and duties are to be determined by federal common law, had yet to indicate the effect of these decisions on suits between private parties.

Bank of America Nat'l Trust & Sav. Ass'n v. Parnell,⁶⁸ involving bonds of the Federal Deposit Insurance Corporation, first demonstrated the extent to which the rules developed in the government check cases would be applied when the government itself was not a party. The plaintiff's bonds had disappeared while being readied for collection and were later cashed by the defendant. Suit was brought in federal court, alleging diversity jurisdiction. The district court's application of state law was held erroneous by the court of appeals, citing *Clearfield*. Judge Goodrich, dissenting, interpreted *Clearfield* to mean that federal law determines the nature of the contract and the rights and duties of the United States as a party, but does not control the rights and duties of private transferees among themselves. On appeal,⁶⁹ the Supreme Court distinguished *Clearfield* and adopted Judge Goodrich's position. This action was explained on the grounds that "securities issued by the Government generate immediate interests of the Government. . . . But

⁶⁵ Note, 59 Harv. L. Rev. 966, 970 (1946).

⁶⁶ See, e.g., *United States v. Union Trust Co.*, supra note 30; *Atlantic Nat'l Bank v. United States*, supra note 56.

⁶⁷ 31 C.F.R. § 202.25(b) (1959).

⁶⁸ 226 F.2d 297 (3d Cir. 1955).

⁶⁹ 352 U.S. 29 (1956).

they also radiate interests in transactions between private parties."⁷⁰ The *Parnell* action was purely between private parties and did not touch the rights and duties of the United States, but involved merely the transfer of government paper between private persons. The government's only possible interest was that the floating of securities might be adversely affected by the application of a local rule governing the liability of a converter. Such a speculative and remote federal interest did not, in the Court's view, justify applying federal law to a transaction essentially local.

Mr. Justice Douglas, who wrote the *Clearfield* decision, dissented. He urged that the federal law merchant should be applied to all transactions involving government commercial paper, on the ground that the majority holding would dichotomize disputes, making federal law control some parts while state law governed others, to the harm of potential litigants who deserve some certainty on the course litigation might take. He concluded that if the *Clearfield* rule be abandoned with respect to some parties, it should be abandoned altogether. This liberal view no doubt prompted the Court to limit *Clearfield* before the law circled back to *Swift v. Tyson*.

The majority decision expressed ideas implicit in the former Supreme Court holdings, i.e., that the primary factor controlling the application of federal law was not the mere presence of government commercial paper in the litigation but rather that the government's rights and obligations were directly affected by the outcome. In *Parnell*, the majority concluded that the "federal interest" present in the case was too nebulous to warrant judicial protection. That the court of appeals had reasoned to the opposite conclusion shows how fine the lines are drawn in determining the nature of federal interest.

That the dissent in *Parnell* was prophetic appeared as the uncertainties predicted by Mr. Justice Douglas came to light in two subsequent actions involving federal savings bonds. Both cases presented a conflict between federal regulations⁷¹ permitting joint ownership of the bonds with right of survivorship and state community property laws prohibiting survivorship arrangements. In the first case, *Bland v. Free*,⁷² a husband had purchased the bonds with community funds and registered them in co-ownership with his wife. Upon her death, he claimed complete ownership of the bonds but his son claimed a one-half interest under the Texas community property laws. The Texas court, per curiam, held the husband's attempted arrangement void, and allowed the son to take. This same result had been reached in other jurisdictions interpreting the federal survivorship regulation as designed solely to facilitate payment on the bonds for the administrative convenience of the government.⁷³ On appeal,⁷⁴ federal law was applied to *Free* because

⁷⁰ Id. at 33.

⁷¹ 31 C.F.R. § 315.61 (1959).

⁷² 162 Tex. 72, 344 S.W.2d 435 (1961), rev'd, 369 U.S. 663 (1962). The Texas decision was based upon *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961) where the court, relying on *Parnell*, stated: "It is clear that the Federal regulations do not override our local laws in matters of purely private ownership where the interests of the United States are not involved." Id. at 577, 342 S.W.2d, at 570.

⁷³ *Slater v. Culpepper*, 222 La. 962, 64 So. 2d 234 (1953).

the case involved the construction and application of a federal regulation having the force of law. Unlike *Parnell*, the Supreme Court minimized the essentially private nature of the dispute, emphasizing instead that the discharge of the national debt depends in part upon the successful sale of bonds and one of the inducements to purchasers was the survivorship provision. Insofar as state law interfered with this legitimate exercise of federal power, it had to retreat before the Supremacy Clause. The Court, however, specified that its decision was limited to the facts and "the doctrine of fraud applicable under federal law in such a case must be determined on another day. . . ."⁷⁵

That day came with *Yiatchos v. Yiatchos*,⁷⁶ where testator had registered the bonds in co-ownership form with his brother. When the brother later brought suit against the testator's executrix claiming full ownership, testator's wife claimed a one-half interest. Again, the Supreme Court held that federal law applied because the construction of a federal statute was at issue. Federal law was also held to control the issue of fraud. But, in applying the federal standard on this latter issue, the Court stated it would be guided by state law insofar as the property interests of the wife created by state law were concerned. Bonds, the Court intimated, cannot be used as a device to deprive the wife of state property rights which would not be transferable but for the bonds' survivorship provisions. Remanding the case, the Court left open the possibility that the plaintiff-brother would be entitled to only one-half of the proceeds of the bonds if, under state law, the wife was entitled to a one-half interest in each individual asset of the estate and if she had not consented to having plaintiff's name registered as co-owner of the bonds. The wife had not alleged fraud, but since the facts were stipulated prior to the decision in *Free v. Bland*, the Court remanded the case to permit her to do so.

Problems of fraud aside, the conflict with the federal regulation is just as evident in *Yiatchos* as in *Free* and, following the reasoning used there, the Supremacy Clause should have been applied with equal force. The Court, however, apparently decided that, although the Treasury Regulation was intended to prevail over conflicting state laws, it was not intended to permit bond purchasers to work a fraud under state laws.

Deciding cases in this area upon a balancing of state and federal interests seems particularly inappropriate as the results reached by the Supreme Court in the cases discussed confirm the futility of attempting to do so. In three cases, the Court reached three different conclusions. In *Parnell*, state law was applied of its own force. In *Free*, federal law was applied. Finally, in *Yiatchos*, the Court again chose state law, but as incorporated into federal law and not of its own force. The uncertainties thus created may well have the same adverse effect upon the sale of government bonds which the Court has been attempting to prevent.

⁷⁴ *Free v. Bland*, 369 U.S. 663 (1962).

⁷⁵ *Id.* at 670-71.

⁷⁶ 376 U.S. 306 (1964).

FEDERAL COMMON LAW

GOVERNMENT SECURED TRANSACTIONS

Increased participation of the federal government in local affairs has been matched by a corresponding rise in litigation. While the Supreme Court's authoritative decisions lent some order to the development of law in the government check and bond cases, there has been a conspicuous lack of Supreme Court direction in the area of government secured transactions, leaving the lower federal courts dependent upon decisions in other jurisdictions and upon analogous Supreme Court rulings in other areas. Thus, chronological treatment of the cases is impractical and the cases can best be classified in terms of the similarity of issues presented.

In *United States v. View Crest Garden Apts. Inc.*,⁷⁷ the lower court, using state law, had denied the government's application for appointment of a receiver. On appeal, the defendant sought to sustain the application of state law because the National Housing Act,⁷⁸ under which the loan had been granted, defines the terms "mortgage" and "mortgage lien" by reference to state law, showing Congress' intent to apply state law to all phases of the transaction. Further, the FHA, in practice, uses different mortgage forms in each state and these forms incorporate many of the state filing provisions. The Ninth Circuit, holding that federal law applied, separated the secured transaction into two phases. In the "planning and working" phase, the state recording provisions and laws defining terms do not interfere with any federal policy and are adopted by the federal agencies as a matter of commercial convenience. Once this phase has terminated, however, different considerations arise. Where, as in *View Crest*, a mortgagor defaults, the commercial convenience afforded by state laws is no longer significant and the remedies for breach of a federal duty cannot be limited by local rules. But this does not mean that the defendant loses all the protection originally afforded by the state recording laws since a court can weigh the federal and state interests and, where justice requires, adopt the latter as the federal rule.

The following year, the Ninth Circuit clarified its reasoning in *Bumb v. United States*.⁷⁹ The defendant trustee in bankruptcy had challenged the validity of the government's mortgage on grounds it had not been properly filed under state law. The government contended that the validity of its mortgage should be resolved by federal law since Small Business Administration loans were made on a nationwide basis and use of local laws would both prove inconvenient and lead to diverse results.

The court distinguished its former holding in *View Crest* on grounds that there the issue was what remedies were available to the government after default, while now the court was merely dealing with the manner of acquiring a security interest. The objects sought to be achieved in *View Crest* were not deemed present. Where there has been a default, protection of the Treasury takes precedence over commercial convenience resulting from use of local forms and procedures. But, before default, these local require-

⁷⁷ 268 F.2d 380 (9th Cir. 1959).

⁷⁸ 48 Stat. 1247 (1934), as amended, 12 U.S.C. § 1707 (Supp. V, 1964).

⁷⁹ 276 F.2d 729 (9th Cir. 1960).

ments do not interfere with the Small Business Act⁸⁰ because the SBA is under no compulsion to make the loan, and the purpose sought to be achieved by the California State Bulk Sales Act⁸¹ is especially applicable to the SBA because this agency lends to persons whose creditors most need the protection afforded by this state act. Since application of federal law would also have the undesirable effect of overriding a well-established state policy, state law was applied.

The theory, however, that the secured transaction consists of two phases, was ignored in *Hendry v. United States*,⁸² a subsequent decision by the Ninth Circuit. There, after the defendant had signed as surety on a note and mortgage given to secure an FHA loan, the agency determined that administrative regulations had not been followed and requested the mortgagor to execute a new note. Before any payments were received on either note, the mortgagor defaulted. When the United States brought suit, the surety claimed that his failure to sign the second note relieved him of liability under state law. The Ninth Circuit rejected this defense, however, and held that federal law controlled because there was no diversity and the action had been brought under a federal statute. For the federal rule, the court looked to the Uniform Negotiable Instruments Act, as generally construed by the courts. Since the Negotiable Instruments Law had been enacted in Idaho in its entirety,⁸³ the only practical effect of applying federal rather than state law was to expand the inquiry to include decisions of other jurisdictions. The choice of this uniform act comports with modern thought that federal decisional rules should freely draw from uniform acts.⁸⁴

Following the "two phase" theory, state law should have been applied since the efficacy of the surety's signature arises at the "planning and working" phase. Since the same result would be reached under either federal or state law, it is unlikely that the court was retracting its theory as unworkable but, instead, was merely confining its operation to cases involving conflicts with state recording laws and not personal defenses.

Federal law has also prevailed in other jurisdictions. After the trial court, in *United States v. Sylacauga Properties, Inc.*,⁸⁵ granted a sixth continuance in a foreclosure action under an FHA loan, the Fifth Circuit held that federal law controlled and, under that law, the continuance could not be granted. That the loan affected the government's money and credit was reason enough for applying federal law. The basis for striking down the continuance was found in a provision of the National Housing Act requiring that foreclosure proceedings be instituted within one year.⁸⁶ This, the court surmised, shows an intent to protect government security from deterioration

⁸⁰ 72 Stat. 384 (1958), 15 U.S.C. § 631 (1958).

⁸¹ Cal. Civ. Code § 3440.1.

⁸² 305 F.2d 515 (9th Cir. 1962).

⁸³ Idaho Code § 27-801 (1948).

⁸⁴ See *Reeves Soundcraft Corp.*, ASBCA Nos. 9030 & 9130 (1964) (mimeographed), 33 U.S.L. Week 2024 (June 30, 1964), noted 6 B.C. Ind. & Com. L. Rev. 122 (1964), and *Friendly, In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 419 (1964).

⁸⁵ 323 F.2d 487 (5th Cir. 1963).

⁸⁶ 48 Stat. 1252 (1934), as amended, 12 U.S.C. § 1713 (Supp. V, 1964).

and to expedite the availability of loans to others, and both purposes would be frustrated by permitting continuances. As an independent ground for the decision, the court stated that the creditor's reliance on the mortgage provision giving him the right to immediate foreclosure could not be abrogated by courts.

The Eighth Circuit reasoned differently but reached similar conclusions in *United States v. Chester Park Apts. Inc.*,⁸⁷ where the United States was again seeking appointment of a receiver. The defendant contended that a mortgage provision waiving all his defenses to such an action was void under state law and it would be necessary to find actual insolvency as a fact before a receiver could be appointed. Dismissing *Erie* because of the absence of diversity, the court stated that, initially, federal law must be looked to for determining the controlling source of law. Noting that appointment of a receiver affects neither title to the property nor the validity of the mortgage lien, the court found it unnecessary to determine what law would be applicable in those circumstances. The absence of such factors here, however, entitled plaintiff to appointment of a receiver. This language suggests that in a later suit for foreclosure, a different result might be reached as to the applicable law. The qualification was undoubtedly prompted by earlier decisions involving innocent converters of property subject to a government security interest.⁸⁸

Two recent cases involving the defense of coverture show best the extremes in reasoning employed and have injected some uncertainty as to the law governing these secured transactions. In both, a husband and wife had executed chattel mortgages to secure loans granted by the Small Business Administration. Upon default, the government brought suit against the wife to recover a deficiency judgment. In the first action, *United States v. Helz*,⁸⁹ federal law was applied. The choice resulted from the absence of diversity, the presence of a federal statute, and particularly the effect the decision would have on the government's money and credit. Without discussion, the court fashioned its own rule that coverture was not a valid defense. Since the property levied upon, however, was held by husband and wife as tenants by the entirety, and since the federal and state rules conflicted, the court added that it expressed no opinion on whether the property would be free from execution under state law.

*United States v. Yazell*⁹⁰ reached the other extreme, the Fifth Circuit concluding that state law applied. Specifically rejecting *Helz*, the majority distinguished this action from cases involving commercial paper issued as an obligation of the United States and viewed it as a simple contract action. It reasoned that if the wife were held liable, then it would be just as reasonable to hold insane persons and minors liable on contracts solely because the government was a party to the contract. There is, of course, no basis for thus comparing coverture, insanity, and minority, for these de-

⁸⁷ 332 F.2d 1 (8th Cir. 1964).

⁸⁸ See *infra*, p. 913.

⁸⁹ 314 F.2d 301 (6th Cir. 1963).

⁹⁰ 334 F.2d 454 (5th Cir. 1964), cert. granted, 33 U. S. L. Week 3245 (U.S. Jan. 19, 1965) (No. 575).

fenses are easily distinguished. While coverture rests upon the fictional incapacity of a wife to contract,⁹¹ the defenses of insanity and infancy grow from defects inherent in the individuals themselves. Thus, federal courts may draw a rule from the many states which have abolished coverture as a defense.⁹² Locating similar sources from which to formulate federal rules abrogating the defenses of insanity and infancy would prove difficult.

The dissenting opinion in *Yazell* concentrated upon the practicalities of applying a federal rule. Judge Prettyman pointed out that if local rules were allowed to govern here, then they should also govern all other aspects of contractual capacity. Further, the holding in this case would be equally applicable to other loan programs with the possible result of nullifying many of them. Judge Prettyman further suggested that "if a person has capacity to get money from the Federal Government, he has the capacity to give it back . . . [and] the federal rule ought to be that you must repay what you borrow."⁹³ He also felt that uniformity was necessary to effectuate the policy of the act requiring reasonable assurance of repayment.

Where the litigation has placed the government in the position of a creditor competing with other creditors of the mortgagor for priority, the decisions applying federal law have often rested upon a federal statute. In *United States v. Latrobe Constr. Co.*,⁹⁴ a foreclosure action, the United States claimed a superior lien under the terms of the mortgage creating the lien, while the defendant, another creditor, claimed that state law gave him priority for sums advanced subsequent to the government's mortgage used to make improvements upon the property. The court, first holding that the question was to be resolved by federal law, concluded that the federal lien was superior. This conclusion rested upon an interpretation of the Defense Production Act of 1950⁹⁵ under which the loan was granted. Put in syllogistic form, the argument runs that the Constitution gives Congress the power to provide for defense and makes federal statutes supreme. The Defense Act, giving the Government authority to prescribe the conditions of the loan, is a statute exercising this power. Therefore, the conditions so prescribed preempt conflicting state statutes.

Similarly, in *W. T. Jones & Co. v. Foodco Realty, Inc.*,⁹⁶ the Fourth Circuit affirmed a judgment giving the government's lien priority over the defendant's mechanic's lien on the rarely used ground that the federal insolvency statute⁹⁷ applies and, under the Supremacy Clause, takes precedence over conflicting state law. In the same year, the Tenth Circuit also invoked the Supremacy Clause in *Southwest Engine Co. v. United States*,⁹⁸ and applied the federal rule, borrowed from the law merchant, that "the first in time [is the] first in right."⁹⁹ Here again, the government was competing

⁹¹ 26 Am. Jur. Husband & Wife § 19 (1940).

⁹² Id. at § 20.

⁹³ *United States v. Yazell*, supra note 90, at 456.

⁹⁴ 246 F.2d 357 (8th Cir. 1957).

⁹⁵ 64 Stat. 798, 50 U.S.C. App. § 2061 (1958).

⁹⁶ 318 F.2d 881 (4th Cir. 1963).

⁹⁷ R.S. § 3466, 31 U.S.C. § 191 (1958).

⁹⁸ 275 F.2d 106 (10th Cir. 1960).

⁹⁹ Id. at 107.

against the defendant's mechanic's lien, but the case differs from *Latrobe* and *Foodco Realty* in that the conflict was between a state statute and a federal decisional rule rather than between a state statute and a federal statute.

These decisions demonstrate that courts have distinguished the cases upon a combination of factors, including (a) the parties involved, (b) the type of relief sought, (c) the point in time at which the issue arises, and (d) the type of defense sought to be employed.

Since the nationwide government loan programs are in large measure locally administered, the underlying question in many cases is the extent to which these agencies should be required to know local law and the extent to which they should be held to have impliedly consented to be bound by local rules. Although there is little imposition in requiring these agencies to know and comply with local filing provisions which are, in part, incorporated into their mortgage forms, this principle does not extend to every obscure state law. The same reasons for holding banks to a knowledge of federal law seem equally forceful here. This does not work any imposition on creditors since the federal rule that the "first in time is the first in right" protects creditors who have taken action without knowledge of the federal interest in the property and relying upon the priority afforded them by state recording laws.

INNOCENT CONVERTERS

The cases in this area generally arose under the now repealed Bankhead-Jones Farm Tenant Act¹⁰⁰ and followed a similar fact pattern. An FHA loan was secured by a filed chattel mortgage on livestock. The mortgagor, breaching the mortgage provisions, gave the livestock to the defendant, a commission agent, who sold them in the ordinary course of business, deducted his commission, and remitted the proceeds to the mortgagor. The United States, upon discovering the conversion, brought suit against the defendant to collect the full value of the livestock.

In *United States v. Matthews*,¹⁰¹ the district court rejected California law under which the defendant would have been liable for the entire purchase price of the livestock. It instead held that federal law applied, and that the governing law was "the common law prevailing in the federal courts."¹⁰² Relying upon one federal case,¹⁰³ the defendant was held liable only for his commission. This result was recognized as being contrary to the usual case since the United States, as plaintiff, generally profits by the denial of a defense under local law.¹⁰⁴ On appeal,¹⁰⁵ the Ninth Circuit agreed that federal law controlled, but held that the weight of federal authority made the defendant liable for the full value of the livestock.

¹⁰⁰ 50 Stat. 527 (1937).

¹⁰¹ 139 F. Supp. 683 (N.D. Cal. 1956).

¹⁰² *Id.* at 688.

¹⁰³ *Drovers' Cattle Loan & Inv. Co. v. Rice*, 10 F.2d 510 (N.D. Iowa 1926).

¹⁰⁴ But Murphy, J., had no qualms about the result: "What is sauce for the Federal plaintiff as gander ought to be sauce for it when it is the goose." *United States v. Matthews*, *supra* note 101, at 690.

¹⁰⁵ *United States v. Matthews*, 244 F.2d 626 (9th Cir. 1957).

This case loses much of its precedential value since both parties had agreed upon appeal that federal law should apply. The concurring opinion also saps much of the strength from the decision, pointing out that the result would be the same under both state and federal law.

No stipulation as to the governing law was made in *United States v. Kramel*,¹⁰⁶ however, and the choice of law there determined the outcome. The government contended that federal law should be applied for two reasons. First, the FHA program is nationwide and requires uniform administration. Secondly, the federal statute creating a remedy against criminal converters¹⁰⁷ shows a congressional intent to protect against innocent conversions as well. The defendant, conversely, contended that the state law applied. The court, holding that federal law controlled because *Erie* is limited to cases of diversity, then proceeded to apply state law without clarifying whether this law was incorporated as part of the federal law or whether it applied of its own force. Its selection was based first on the fact that the Bankhead-Jones Act neither explicitly nor impliedly displaced state law, showing that Congress did not deem uniformity necessary. Secondly, the action was essentially one in tort; thirdly, it affected local property interests. Since these last two matters normally fall under state law, the court felt the need for compelling reasons before displacing it. No such reasons were offered. On similar grounds, the federal statute was held not to extend to innocent conversions.

*United States v. Union Livestock Sales Corp.*¹⁰⁸ produced reasoning similar to that in *Kramel*, but there the court made no pretense of applying federal law. After the chattel mortgage had been recorded in Ohio, the mortgagor removed his cattle to West Virginia where the defendant sold them on a commission basis in the ordinary course of business. The court emphasized that the transfer was of private property by private owners and controlled by state law. It dismissed the need for uniformity on grounds that the interests of both the government and the borrower are protected and preserved if local law, with which both are familiar, were applied. In support of this, the court gave Bankhead-Jones a novel interpretation, stating that its general purpose—to aid the farming community—would be fostered if the loans were made in accordance with local practice. This purpose was found not in the act itself, but in all the surrounding circumstances:

Whether or not this inference may justifiably be drawn from the statute itself, we think the circumstances justify the court in choosing the state law as the appropriate federal rule to be applied to the loan transaction.¹⁰⁹

Even though state law was applied, however, the defendant was held liable, as he would undoubtedly have been under federal law.¹¹⁰

The same type of mortgage had been filed under Pennsylvania law in

¹⁰⁶ 234 F.2d 577 (8th Cir. 1956).

¹⁰⁷ 18 U.S.C. § 658 (Supp. V, 1964).

¹⁰⁸ 298 F.2d 755 (4th Cir. 1962).

¹⁰⁹ *Id.* at 759.

¹¹⁰ See *United States v. Matthews*, *supra* note 105.

United States v. Somerville,¹¹¹ containing a provision expressly giving the United States the right to proceed under the Pennsylvania Uniform Commercial Code.¹¹² The majority found the requisite federal interest present based upon the statutes, regulations, and executive orders in the field. This argument, that federal law "blankets the field," was first expressed in *Clearfield*. Other factors relied upon in concluding to the existence of a sufficient federal interest were the Bankhead-Jones Act under which creation of the security interest was authorized and the power of the United States to protect its purse. This power was deemed to be "paramount here and . . . paramountly federal."¹¹³ The court did make one concession toward state law, however. In dictum, it stated that Pennsylvania law would be used to decide whether or not the government's security interest had been perfected. But, once perfected, federal law determines the consequences. As guidelines for determining these consequences, the court stated that the genesis of the rights and duties of the parties is to be found in the act, "and absent express congressional declaration of intent that state law shall be applicable, we are reluctant to subject federal rights and duties to the exceptional uncertainty and heterogeneity which may ensue in many cases."¹¹⁴ Examining the general law and finding that the weight of authority favored imposing liability here, the court proceeded to do likewise.

The concurring opinion thought the result unobjectionable because the outcome would be the same under state law, but doubted the propriety of applying federal law. Admitting that, in a broad sense, the act did produce the rights, nevertheless, the immediate rights stem from Pennsylvania law to which the parties to the mortgage had bound themselves. Since this, then, is the source of the government's possessory rights, it is only natural that this law should also determine the consequences. In short, the concurring opinion felt that the practical necessities of uniformity and protection of federal law were outweighed by the lien's intrusion upon property relationships which are traditionally governed by state laws.

These decisions are difficult to harmonize, but the results reached can often be explained by looking at the manner in which each court has classified the action. Where viewed as essentially contractual, federal law has been applied; when regarded as essentially a property tort action, local law has controlled.

A fact that has gone unnoticed in both *Matthews* and *Somerville* is that they were the first instances in which the new federal common law was applied to defendants who entered a commercial transaction without actual notice of the government's interest. This extension of federal common law had previously been made in tort cases,¹¹⁵ but such cases lack the element of reliance present in commercial transactions. Not only were the defendant commission agents unaware of any federal interest, but their ability to ascertain true ownership of the livestock was hindered in part by

¹¹¹ 324 F.2d 712 (3d Cir. 1963).

¹¹² Pa. Stat. Ann. tit. 12A(1954).

¹¹³ *United States v. Somerville*, supra note 111, at 716.

¹¹⁴ *Id.* at 717.

¹¹⁵ *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

a federal statute requiring them to offer non-discriminatory services "upon reasonable request."¹¹⁶ It therefore seems anomalous to have adopted a federal rule compelling them to pay a governmental agency for this livestock. The government's remedy should have been, instead, in discouraging the mortgagor from selling by strengthening the penalties attached to the federal statute making such conversions a criminal offense.¹¹⁷

CONCLUSION

Application of federal common law to government commercial paper was briefly interrupted by the confusion generated by *Erie*, but since then has been applied with renewed force. By recognizing the government's need for uniformity because of the presence of a strong federal interest, the courts have accorded to the federal government the same advantages which *Erie* made available to private litigants. In this respect, the *Clearfield* doctrine is not an exception to *Erie* but rather a compatible corollary. While *Erie* accomplished the desirable aim of preventing forum shopping in the trial of state issues, *Clearfield* and subsequent government commercial paper cases have accomplished this same result in trials of federal issues. Where state interests are concerned, the need is for uniformity within the states, while the presence of federal interests creates the need for uniformity among the states. This latter has been accomplished without defeating the purpose of *Erie* since federal decisional law applies in state courts with equal force in government commercial paper cases.

Future development lies in two areas. First, in more clearly defining what constitutes a "sufficient federal interest" requiring application of federal common law; secondly, in building up a body of federal decisional rules. At present, the federal interest is determined primarily by the presence of federal statutes and acts, the congressional intent drawn from these, and the government's persistence in a need for uniformity. Where the government must know the law before taking or refraining from action, this argument for uniformity is justified. But the government has sapped some of the strength from the argument by advancing it in cases where there is no real need for uniformity and its chief aim was to achieve the position of a preferred creditor.

As for rules likely to be developed, again the congressional intent culled from the federal statutes and acts will prevail by virtue of the Supremacy Clause; but where the statutes and acts are silent, all the surrounding circumstances will be taken into consideration in forming such rules including the defendant's equities, policy considerations, and the effect the rule will have upon strong state interests. In so doing, uniform acts should receive more attention and application.

JOSEPH F. RYAN

¹¹⁶ 42 Stat. 164 (1921), as amended, 7 U.S.C. § 205 (1958).

¹¹⁷ 18 U.S.C. § 658 (Supp. V, 1964).