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defendant to be tried for all crimes known to the prosecutor when the defendant is brought to trial, then the problem of complexity mentioned before will be greatly magnified.

These reasons for opposing the adoption of the "same transaction" test for double jeopardy apply, though with considerably less force, to the adoption of collateral estoppel. It must be remembered, though, that collateral estoppel has considerably less effect in curing the abuse of harassment through multiple trials. However, collateral estoppel has a preventive side that the total cure—the "same transaction" test for double jeopardy—does not need. The prosecutor will be forced to try the defendant for all of the crimes involved in a single transaction because he cannot know beforehand what will result during the first trial. If he first brings the defendant to trial for only one crime in an attempt to feel out the defense and test his approach, he may well be estopped from proving a point vital to his prosecution in the subsequent trial for another of the crimes. Where, heretofore, a multiple-crime transaction has given the prosecutor virtually a free try[35] at the defendant in which he could discover the defenses and polish up his case, at least now the prosecutor knows that further trials may be foreclosed by the doctrine of collateral estoppel.

After consideration of the policies involved, the result in *Ashe* appears to have been the best alternative. The application of collateral estoppel should result in better prepared prosecutions and less harassment of defendants without some of the risks of the almost total exclusion of multiple trials required by the adoption of the "same transaction" test for determining double jeopardy.

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Federal Courts—Choice of Controlling Law in Cases Involving Federally Insured Mortgages

In a recent Ninth Circuit Court of Appeals decision, *United States v. Stadium Apartments, Inc.*,[1] the court held that the Federal Housing

[35] Calling this a free try does, however, ignore the fact that the prosecution has lost the opportunity to get additional punishment for the additional crime; but the common practice of concurrent running of the sentences in an *Ashe* situation combined with the small likelihood that a prosecutor, having secured one conviction, would bring prosecutions on the other crimes minimizes this distinction.

[1] 425 F.2d 358 (9th Cir. 1970).

Authority was not subject to a state redemption statute. Stadium Apartments secured an FHA insured loan from the Prudential Insurance Company; the mortgage included a provision waiving any right to redemption "to the extent permitted by law."[2] Stadium Apartments defaulted, and Prudential assigned the mortgage to the Secretary of Housing and Urban Development who paid Prudential the amount due. The United States secured by default judgment a foreclosure decree that, despite the waiver provision, included a one-year redemption period as provided by Idaho statute. The government appealed, arguing that the waiver of redemption clause should have been upheld.

The court of appeals, finding the applicable law to be federal[3] and the state law regarding redemption not to have been adopted as the federal rule,[4] reversed the portion of the lower court decision providing for a period of redemption.[5] The dissent argued that deep-rooted equitable redemptive rights were being cast aside in an unnecessary intrusion into the legitimate local affairs of the states.[6] While accepting "the assumption that federal law is controlling," the dissent felt that effect should be given "to the pertinent and equitable state law by incorporating it into the federal program."[7]

In deciding which law will apply when faced with a situation similar[8]

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[2] *Id.* at 359.

[3] *Id.* at 360, *citing* United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

[4] 425 F.2d at 367. The court felt that the adoption of the state's definition of first mortgage was for commercial convenience and did not constitute an adoption of the state law regarding the remedy. *Id.* at 361. Further the FHA was not viewed as having adopted the state redemption statute by its regulations. *Id.* at 361-62. Finally the court declined to adopt the local law of redemption itself, citing protection of the federal treasury, need for a uniform policy regarding FHA insured loans, and prevention of administrative cost and difficulty as policy reasons against adoption. *Id.* at 362-67.

[5] *Id.* at 367.

[6] *Id.* at 367-68.

[7] *Id.* at 368. The dissent saw neither controlling precedent nor so great a burden on the FHA in destroying uniformity or threatening the treasury that the state redemption rule should not be adopted by the federal courts. *Id.* at 371.

[8] *See, e.g.*, United States v. Merrick Sponsor Corp., 421 F.2d 1076 (2d Cir. 1970), a recent case in which the court applied federal law to uphold the government's interest in an FHA insured loan despite a contrary state statute. After Merrick Sponsor Corporation defaulted and the mortgage was assigned to the Federal Housing Commissioner, the United States secured a foreclosure decree authorizing a deficiency judgment. The deficiency judgment was awarded on motion by the United States 133 days after the delivery of the deed despite a state statute requiring such a motion to be made within ninety days. *Id.* at 1078. The Second Circuit Court of Appeals affirmed the deficiency judgment, holding the question to be one of federal law under which there was no requirement or suggestion that the

to that in *Stadium Apartments*, the court must face two questions.[9] First, is there authority for federal law to apply? If this is answered in the affirmative, then the second question is reached. Should the federal court adopt the state law as the federal rule?[10] These separate questions have been explicitly acknowledged by some courts.[11] Others, however, have expressly declined to treat the questions separately,[12] leaving it "not clear whether the court must apply state law, or whether it merely chooses the state rule as an acceptable statement of federal law."[13]

In answering the question of whether there is authority for federal law to apply, courts generally look to the constitutional mandate to apply federal law[14] and to the policy embodied in the Rules of Decision Act.[15]

The current line of authority to apply federal law in cases sufficiently involving a federal function is bottomed primarily on *Clearfield Trust Co. v. United States*,[16] in which the rights and duties of the United States on the commercial paper it issues were held to be governed by federal rather than local law.[17] The Court reasoned that "[w]hen the United States disburses its funds or pays its debts, it is exercising a constitutional function or power,"[18] and that "[i]n the absence of an applicable Act

state law be applied as the federal rule. *Id.* at 1078-79. The motion 133 days after the delivery of the deed was not considered "untimely as a matter of federal law." *Id.* at 1079.

[9] *See* Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 410 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 802, 805 (1957).

[10] "The question of judicial incorporation can only arise in an area which is sufficiently close to a national operation to establish competence in the federal courts to choose the governing law, and yet not so close as clearly to require the application of a single nationwide rule of substance." Mishkin, *supra* note 9, at 805.

[11] *E.g.*, United States v. Sommerville, 324 F.2d 712, 715 n.8 (3d Cir. 1964).

[12] *E.g.*, "Since the federal and the state law are the same we need not decide between them." United States v. Matthews, 244 F.2d 626, 633 (9th Cir. 1957) (concurring opinion).

[13] Comment, *Rules of Decision in Nondiversity Cases*, 69 YALE L.J. 1428, 1442 (1960). *See also* Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1099 (1964).

[14] U.S. CONST. art. VI, § 2 (supremacy clause).

[15] 28 U.S.C. § 1652 (1964). "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply."

[16] 318 U.S. 363 (1943).

[17] *Id.* at 366. The extent of the holding in *Clearfield*, however, has been drawn into some doubt. *E.g.*, Bank of America Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956). Nevertheless it has been applied in the field of federally insured mortgages. *See* cases cited note 22 *infra*.

[18] 318 U.S. at 366.

of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."[19] The principle set down in *Clearfield* was amplified by *United States v. Allegheny County*[20] to include "every acquisition, holding, or disposition of property by the Federal Government,"[21] and was later refined to hold that the source of the law governing the relations between the United States and the parties to a government-insured mortgage to be federal.[22] Other recent circuit court decisions have held that "federal law applies in an action by the United States to foreclose a mortgage insured by and assigned to the FHA."[23] The court in *Stadium Apartments* answered the first question directly and found the applicable law to be federal.[24] In so doing it took a position in accord with the developed law in the area.

After concluding that federal law should apply, the court then turned to the second question of whether the state law was to be the federal rule. In answering this question the court first looked to whether Congress or the federal agency had adopted the state law to further federal policy. The court concluded that the state redemption statutes had not been adopted by the Congress[25] or by the FHA[26] and thus faced the question whether it should adopt judicially the state law as the federal rule. In decisions to reject the local law as the federal rule, attention frequently has been given to the intent of Congress and the policies underlying the particular federal program.[27] The court, in *Stadium Apartments*, inferred from Congress' lack of express adoption of the state law and from the general policies

[19] *Id.* at 367. One commentator maintains that "[t]he enduring contribution of *Clearfield* is its clear establishment of power in the federal courts to select the governing law in matters related to going operations of the national government." Mishkin, *supra* note 9, at 833.

[20] 322 U.S. 174 (1944).

[21] *Id.* at 182.

[22] United States v. View Crest Garden Apts., Inc., 268 F.2d 380, 382 (9th Cir. 1959); *accord*, Clark Inv. Co. v. United States, 364 F.2d 7 (9th Cir. 1966); United States v. Flower Manor, Inc., 344 F.2d 958 (3d Cir. 1965) (per curiam); United States v. Chester Park Apts., Inc., 332 F.2d 1 (8th Cir.), *cert. denied*, 379 U.S. 901 (1964), *rehearing denied*, 380 U.S. 927 (1965). In the area of Farmers Home Administration security agreements, the third circuit held that federal law applied, noting that "[w]hen there is a genuine federal interest, the Constitution or statutes of the United States can be said to 'require' application of federal law." United States v. Sommerville, 324 F.2d 712, 716 n.13 (3d Cir. 1964).

[23] United States v. Walker Park Realty, Inc., 383 F.2d 732, 733 (2d Cir. 1967) (per curiam); *accord*, United States v. Wells, 403 F.2d 596 (5th Cir. 1968).

[24] 425 F.2d at 360.

[25] *Id.* at 361.

[26] *Id.* at 362.

[27] Friendly, *supra* note 9, at 410.

embodied in the national housing program a congressional nonintent to adopt the local law. However, the dissent noted with persuasion that Congress had consistently refused to enact bills that would have achieved the same result as this case.[28]

Another major factor considered by federal courts in formulating a substantive rule rather than adopting the local law is the need for national uniformity in the administration of the program.[29] This test frequently is traced to the concern expressed in *Clearfield* that "application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty."[30] Fearing such uncertainty among the twenty-six states having various post-foreclosure redemption statutes, the court in *Stadium Apartments* argued, "[i]t would be contrary to the teaching of every case we have cited to hold that there is a different federal policy in each state, thus making FHA 'subject to the vagaries of the laws of the several states.' "[31] However, the dissent argued that the decision would render FHA financing less attractive in those states that have redemption statutes and suggested that a lack of uniformity would remain between those states with overriden redemption provisions and those with statutes that protect mortgagors and junior lienors in other ways.[32] Furthermore, the court's position appears weakened by its failure to explain why uniformity of foreclosure proceedings for the FHA by nonallowance of redemption rights is desirable for its own sake. When compared with *Clearfield*, the federal interest in uniformity in *Stadium Apartments* does not appear so great as in the issuance of commercial paper by the government.[33]

Also pertinent in decisions not to adopt the local law is the protection of the federal treasury. The coupling of this concern with that for uni-

[28] 425 F.2d at 372-73.

[29] Note, *Federal Common Law—Married Women's Contracts*, 16 BAYLOR L. REV. 412, 418 (1964).

[30] 318 U.S. at 367. This concern for uniformity is reflected in subsequent decisions which declined to adopt the local law as the federal rule. *E.g.*, United States v. Shimer, 367 U.S. 374, 377 (1961); United States v. Standard Oil Co., 332 U.S. 301, 309 (1947); United States v. Wells, 403 F.2d 596, 597-98 (5th Cir. 1968); United States v. Sommerville, 324 F.2d 712, 714-15 (3d Cir. 1964); United States v. View Crest Garden Apts., Inc., 268 F.2d 380, 382 (9th Cir. 1959).

[31] 425 F.2d at 364.

[32] *Id.* at 369. "Some states provide for a statutory appraisal and prohibit foreclosure for less than a certain percentage of that value, while other states depend on anti-deficiency legislation and upset prices." *Id.* at n.1.

[33] While "a single piece of commercial paper issued by the United States may easily be involved in several transactions in different states," the *Stadium Apartments* situation involves "a single transaction within a single state." *Id.* at 371.

formity generally is traced to *United States v. Standard Oil Co.*,[34] in which the government sued to recover hospital expenses incurred for a soldier who was injured by negligent action of an employee of Standard Oil. The Court held that the relation between persons in the armed services and the government derived from federal sources and declined to adopt the state law[35] that would have denied recovery.[36] In *United States v. View Crest Garden Apartments, Inc.*[37] the court also invoked the principle of protection of the federal treasury to disregard a state law requiring a sufficient showing of cause for the appointment of a receiver in the foreclosure of a mortgage. The court noted that in the government's pursuit of remedies, factors other than commercial convenience come into play.

> Now the federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act—to facilitate the building of homes by the use of federal credit—becomes predominant. Local rules limiting the effectiveness of the remedies available to the United States for breach of a federal duty can not be adopted.[38]

Thus the majority position in *Stadium Apartments* appears strongest in its contention that there is substantial precedent to apply federal law to assure protection of the FHA from loss.[39] However, the dissent saw no reason why the government should not take the risk of redemption since "[t]he very purpose of the entire federal housing program is to provide badly needed housing that could not otherwise exist."[40]

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[34] 332 U.S. 301 (1947).

[35] *Id.* at 305-06.

[36] *Id.* at 304 n.4.

> The question, therefore, is chiefly one of federal fiscal policy, not of special or peculiar concern to the states or their citizens. And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.

Id. at 311. However the Court felt that the exercise of judicial power to establish a new liability of the employer to the United States would intrude into an area properly in the control of Congress and thus found no liability since Congress had not acted. *Id.* at 316.

[37] 268 F.2d 380 (9th Cir. 1959). The court allowed the appointment of a receiver even though the state standards for appointment had not been met.

[38] *Id.* at 383. Subsequent circuit court decisions have also cited protection of the federal treasury in declining to adopt the local law. *E.g.*, Clark Inv. Co. v. United States, 364 F.2d 7, 9 (9th Cir. 1966); United States v. Sommerville, 324 F.2d 712, 716 (3d Cir. 1964).

[39] 425 F.2d at 362.

[40] *Id.* at 371.

In addition, the financial burden imposed on the FHA by the right of redemption would be no greater than that for any other mortgagee in the state and would not constitute an absolute or permanent frustration of the agency's remedy.

Decisions to adopt local law as the federal rule rest upon other factors, one of which is the traditional role of the states in defining family and property relationships.[41] In *United States v. Yazell*[42] the Supreme Court applied the Texas law of coverture to bar a deficiency judgment for the government on a Small Business Administration loan. The Court asserted that state interests in the field of family and family-property arrangements "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."[43] While this might have been taken to encourage the adoption of the local law in the area of property, the majority in *Stadium Apartments* distinguished *Yazell* on its language.[44]

A second factor that must be considered is the local nature of the activity. In *Bumb v. United States*[45] the circuit court declined to cast aside the requirements of the California Bulk Sales Statute to sustain a chattel mortgage for the SBA because of the local nature of the transaction.[46] In the *Stadium Apartments* situation the FHA engrafted part of the local system of property relations when it defined first mortgage in terms of the state law. After default it proceeded in a foreclosure action on a given transaction in a single state. The context of the relationship thus appears more local than national in its character.

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[41] Note, 27 U. PITT. L. REV. 712, 714 (1966); *e.g.*, Fink v. O'Neil, 106 U.S. 272 (1882).

[42] 382 U.S. 341 (1966).

[43] *Id.* at 352.

[44] The Court in *Yazell* limited its holding in that "material to the resolution of the issue presented" [whether to apply the Texas law of coverture to a loan from the SBA to a husband and wife] was the fact that the loan was "individually negotiated in painfully particularized detail, and . . . with specific reference to Texas law . . . ." *Id.* at 345-46.

The *Stadium Apartments* dissent, however, relied on *Yazell* in framing its test—"whether the state law can be given effect without either conflicting with federal policy or destroying needed uniformity in the pertinent federal law in its operation within the various states." 425 F.2d at 368 (dissenting opinion).

[45] 276 F.2d 729 (9th Cir. 1960).

[46] *Id.* at 738.

> In acquiring security interests, the Small Business Administration is engaging in local activity and in an essentially local transaction. We are unable to conclude that any federal policy in this case requires us to override the sound and well-established policy of the several states which have a vital interest in the protection of local property rights and local creditor citizens.

A final factor is the perceived intent of the Congress. The court in *United States v. Kramel*[47] considered the adoption of state law to be a "matter of inclusion or exclusion governed by the intent (express or implied) of Congress as suited to the situation in the particular case."[48] As already observed, the apparent intent of Congress in not adopting measures to abridge the local right of redemption militates against the abrogation of the local law in the case of *Stadium Apartments*.[49]

While these factors can suggest a tentative answer to the question whether to adopt state law as the federal rule, they do not exhaust the relevant considerations. Decisions to adopt or not adopt state law have significant impact on the operation of the American federalistic system[50] and should be made in the context of the policies that support that system. One partial solution to the problem of balancing federal interests and state policy is suggested by noting that from the Rules of Decision Act through *Erie Railroad Co. v. Tompkins*[51] there is embodied

> the tacit assumption that legal rights and obligations do not attach to a transaction or occurrence unless a competent lawmaking authority creates them. The act regards the states as the sources of the rights and obligations which govern day-to-day relations except where the Constitution, treaties, or statutes of the United States otherwise require or provide.[52]

If the philosophy of the Rules of Decision Act is applied in answering the second question of whether to adopt the local law as the federal rule, a presumption will arise that the state law is adopted.[53] This presumption could be rebutted by a showing of sufficient federal interest for rejection of the local law as the federal rule. Since the federal law is interstitial in nature, building upon the legal relationships established by the states,[54] the state law becomes the primary basis by which men order much of their everyday affairs.[55] To be able to order their affairs effectively they must

[47] 234 F.2d 577 (8th Cir. 1956). *Kramel* involved conversion of livestock that was included in a chattel mortgage held by the Farmers Home Administration.

[48] *Id.* at 580. "[I]t would require a very clearly expressed intent so to invade a field of control [title to real and personal property] which has always been regarded as peculiarly belonging to the States exclusively." *Id.* at 582-83.

[49] 425 F.2d at 372-73 (dissenting opinion).

[50] Friendly, *supra* note 9, at 422.

[51] 304 U.S. 64 (1938).

[52] Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1085 (1964).

[53] Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1517 (1969).

[54] H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953) (hereinafter cited as HART & WECHSLER).

[55] *Id.* at 634.

have some degree of certainty in advance about the rules by which they are to conduct their daily business.[56]

In *Stadium Apartments* the court by rejecting the local law of redemption changed a basic premise under which the parties entered into the mortgage agreement. The parties hardly could have been expected to anticipate such a decision since the FHA previously had consented to decrees including provision for redemption rights under the state law.[57] Arguably all parties to future mortgage agreements are now on notice to expect different treatment of the right of redemption in an FHA insured mortgage. However, there remains the burden not only of recognizing two laws of redemption for mortgages executed in the state but also of anticipating in what other areas of mortgage law the previously accepted state law may be cast aside in favor of formulating a federal rule.

Thus the import of this decision is to diminish the certainty of the primary law that constitutes the basic framework of daily life.[58] The implications of this erosion of certainty have been viewed with concern by scholars such as Henry Hart, who observed that "[p]eople repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown."[59] While the decision in *Stadium Apartments* will not in itself precipitate a national nervous breakdown, the extent to which it contradicts the expectation of a party involved renders the law less certain and less able to serve as a guide to conduct.[60]

A final consideration is the impact that decisions not to adopt the state law and to formulate a federal rule may have on the already overloaded docket of the federal courts, and consequently on the courts' efficiency and clarity of decision. Each decision to reject state law and to formulate a federal rule brings another issue into the federal courts, which may require further explanation by the lower courts or consideration by the Supreme Court if the desired uniformity of federal rule is to be achieved among all the circuit courts. Yet Judge Friendly has noted that the nation's judicial business has grown "far beyond the capacity of any single court

[56] Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954). *See also* HART & WECHSLER 634.

[57] United States v. Stadium Apts., Inc., 425 F.2d 358, 360 (9th Cir. 1970).

[58] Hart, *supra* note 56, at 491.

[59] *Id.* at 489.

[60] Comment, *Rules of Decision in Nondiversity Cases*, 69 YALE L.J. 1428, 1445 (1960).

to preserve uniformity by the force of example."[61] Thus a decision to reject the state law as the federal rule induces confusion regarding the primary rules of conduct in two ways: first, by posing two laws on the same subject and raising doubts about the viability of other state rules; and second, by injecting imprecision through hurried opinions and conflicting decisions among the circuits.

When, as in *Stadium Apartments*, a court chooses to reject the state law as the federal rule, it should face squarely the impact of that decision on the certainty and clarity of its guides to future conduct, especially in an area such as the law of property where the state law is widely presumed to apply and in fact is applied to govern the relations of the parties. The local rule should be rejected only when a sufficient federal interest warrants intrusion into the traditional ambit of the local guides to conduct and the resulting confusion for those who rely on them to plan their future transactions is justified. In *Stadium Apartments* the consequences to the federal system were not confronted directly nor was there an adequate showing of the requisite federal interest to warrant the result obtained.

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Federal Jurisdiction—Derivative Jurisdiction Upon Removal

"[P]rompt, economical, and sound administration of justice depends upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts . . . ."[1] One such principle is derivative jurisdiction in the removal area; title 28, United States Code, section 1441[2] allows removal at de-

[61] Friendly, *supra* note 9, at 405. *See also* Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158 (1953).

[1] American Fire and Cas. Co. v. Finn, 341 U.S. 6, 8 (1951). Defendant, who had removed on grounds of diversity, lost on the merits in federal court. On appeal he asked that the case be remanded because of jurisdictional shortcomings, and the Court in an opinion written by Justice Reed granted his request, feeling that the ends of justice would be better served through strict enforcement of jurisdictional requirements.

[2] The text of 28 U.S.C. § 1441 (1964) concerns actions removable generally:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws