Inter-Sovereign Certification as an Answer to the Abstention Problem

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dicated that in this situation by virtue of comparative negligence there can be no recovery. Another indicated under similar circumstances that the seaman’s recovery should be reduced fifty per cent. Such determinations point to a problem inherent in all comparative negligence decisions, i.e., what percentage reduction should be assigned to any particular degree or magnitude of fault.

CONCLUSION

Under the modern doctrine of unseaworthiness seamen are given a more advantageous action for indemnity for injury than is afforded passengers and shoreside workers. This cause of action has become firmly entrenched in the law. But like any other form of judge-made law, it has had to evolve and develop decision by decision. The resolution of old problems has created new ones. It is hoped that this Comment will focus attention on some of these problems and furnish an analytical process for reaching logical and consistent solutions.

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Inter-Sovereign Certification as an Answer to the Abstention Problem

Under the rule of Erie Railroad v. Tompkins, when jurisdiction is predicated upon diversity of citizenship, federal courts are required to apply state law. In general, the necessary determination of applicable state law will be made by the federal court itself, with recourse to such sources as are available. However, in a significant area of cases, the doctrine of “equitable abstention” has been applied, whereby a federal action will be

131. For this reason the Supreme Court has been severely criticized in some circles. See Boner, One If By Land, Two If By Sea: A Comparative Study of Remedies Available to Injured Seamen and Land Workers, 30 Texas L. Rev. 489 (1952); The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale L.J. 243 (1947); Lovitt, Things Are Seldom What They Seem: The Jolly Little Wards of the Admiralty, 46 A.B.A.J. 171 (1960).
1. 304 U.S. 64 (1938).
2. The case generally cited as establishing the abstention doctrine is Railroad Commission v. Pullman Co., 312 U.S. 496 (1941).
stayed or dismissed pending recourse by the parties to state court in order to secure determination of questions of state law. Traditionally two sets of policy considerations have supported employment of abstention—the inadvisability of deciding a federal constitutional question underpinned by an unresolved question of state law, and general considerations of federal-state comity. When requested, a district court in a case appropriate for application of the abstention doctrine is required to stay decision of the case pending recourse by the parties to state court, or to dismiss the federal action. In either instance, the parties to the controversy then repair to state court, where initial determinations of fact and of state law necessary to potential federal adjudication are made. A recent case, *Clay v. Sun Insurance Office Limited*, has suggested that another approach to the same problem, another type of abstention, may be for the federal courts of appeals to certify pertinent questions of state law to the state supreme courts. This Comment will attempt to discuss some of the problems raised by this suggestion.

3. There appears to be no great clarity of delineation between the cases where retention of jurisdiction pending state determination will be employed and those where the federal action will be dismissed. There is some support for the theory that dismissal will ordinarily be employed in cases coming into the federal system on the ground of diversity of citizenship and which involve no federal question, while retention of jurisdiction and postponement of decision will be used in federal question cases. The logic of such a distinction would be that in the diversity cases there is no federal question over which to retain jurisdiction. Upon reflection, the author has concluded that the distinction attempted in his prior Note, 20 *Louisiana Law Review* 614, 616 (1960) is erroneous.

For cases where stay of proceedings and retention have been employed see *Harrison v. NAACP*, 360 U.S. 167 (1959); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959); *Government & Civic Employees Organizing Committee, CIO v. Windsor*, 353 U.S. 364 (1957); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957).

Dismissal cases include *Stefanelli v. Minard*, 342 U.S. 117 (1951); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

4. The undesirability of deciding constitutional issues underpinned by unresolved questions of state law is supported by the fact that the state questions may prove dispositive, so that constitutional adjudication will be unnecessary, and by the possibility that later state adjudication may shift the state law upon which the constitutional determination was based.

5. In at least one case it is indicated that the trial court correctly abstained on its own motion. See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

6. Since the federal court will ordinarily abstain at the outset of the litigation, before any findings of fact have been made, the state court presumably is called upon to make its own findings.

7. Apparently it has never been entirely clear whether the state court is also to decide the federal questions in the case, or only the state law questions. The Supreme Court's statement in *Propper v. Clark*, 337 U.S. 472, 491 (1949), to the effect that abstaining in that case would raise the problem of "control of the receiver . . . to keep him from raising in such proceedings federal issues" would indicate contemplation that the state courts are to decide only state questions. However, state court compliance with this contemplation is quite another matter.

In the Clay case, suit was brought in federal district court in Florida to recover on an insurance policy issued to plaintiff while in Illinois. A provision in this policy, probably valid under Illinois law but clearly not so under the laws of Florida, would have prohibited recovery. The court gave judgment for the plaintiff, on the theory that Florida law invalidated the policy provision in question. The Fifth Circuit Court of Appeals reversed; the questions of Florida law on which the district court had predicated its disposition of the case were discussed but pretermitted, the court simply holding that to apply the Florida statute to this Illinois contract would do violence to the due process clause of the fourteenth amendment. The Supreme Court, on certiorari, stated that the court of appeals had erred in reaching the constitutional question, since the state law questions involved in the case may have proven dispositive. The case was remanded to the court of appeals, with the suggestion that a Florida statute providing for certification of unsettled questions of state law from the federal courts of appeals to the Florida Supreme Court be utilized.

Perhaps the first question presented is whether the type of "inter-sovereign" certification suggested in the Clay case is a new type of abstention, exercisable by the district courts as well as by courts of appeals, or rather is a rarer type of procedural device available only to the appellate courts. Pertinent to this inquiry is the fact that under the latest developments in the abstention area presumably the usual type of abstention would

10. FLA. STAT. § 25.031 (1957). This provision has apparently never been implemented by rules of court, nor had it received any application prior to the instant case. See Stern, Conflict of Laws, 12 U. MIAMI L. REV. 383, 395 (1958). Since the statute reads: "The supreme court of this state may, by rule of court, provide" for this type of certification, the fact that the court has never done so gives rise to some question as to the effectiveness of reliance upon the statute.
11. The certification suggested in the Clay case was pursuant to FLA STAT. § 25.031 (1957), which provides only for such certification from federal courts of appeals. There may be some question as to whether state statutory authorization is necessary. As it is difficult to envision the authority under which a state may make provision for federal disposition of cases, the presence or absence of a state statute would seem to be significant only from the standpoint of whether or not in the absence of state accession to such a procedure the federal courts can compel the state courts to accept certified questions. Probably this question should be answered in the negative, but it would seem to be an open point at present.
12. Prior to the case of Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), the abstention doctrine was generally considered to obtain only in equity, where federal injunctive relief against state action or proposed action was sought. However, the Louisiana Power & Light Co. case was an action at law involving an expropriation problem, and the district court's employment of abstention on its own motion was sustained. This departure from the use of abstention as an equity device was borne heavily upon by Justice Brennan, with Chief Justice Warren and Justice Douglas, in dissent.
have been appropriate on the part of the district court had it been requested in *Clay*. If the trial court should have abstained in the *Clay* case upon request, perhaps that court should also be empowered to certify questions to state supreme courts. From the standpoint of logic, it would seem that the appropriateness of exercising either type of abstention — the usual abstention, or inter-sovereign certification — would be determinable at the outset of the federal litigation. It is believed that, whether or not the usual abstention would have been available here, there are cogent reasons why certification by trial courts would prove undesirable. In the first place, it would seem that this sort of enlistment of state court assistance by the numerous federal district courts would not be in accord with the general scheme of federal-state judicial relations. Clearly the intendment of the system is that the district courts perform all facets of the task of litigation in cases properly in the federal system, and function in diversity cases substantially as another court of the state. If certification were to be allowed from the federal district courts to the highest court of the state, it would seem that the increase in docket load in the state courts might well prove prohibitive. Probably certification would run only to the state supreme court, since only that court could furnish a definitive determination of state law. Another objection to certification by district courts might be the problem of which tribunal is to find the facts necessary to furnish a background for determination of the certified question. If, as would be assumed, the necessary questions of state law were certified at the beginning of the case, before any findings of fact had been made in the federal court, then either the questions would have to be answered by the state court in the absence of any factual setting, which would give rise to possible objections as to the academic or abstract quality of the answer, or the state court system would be required to make findings of fact, which would do violence to the theory of certification as a speedy and inexpensive method of determining the answer to isolated questions of law. Neither of the above objections is presented to the same degree by the usual type of abstention, where the parties repair initially to the lower state courts, and where the state court makes essential findings of fact.

13. An analogous question is whether, given a case where the trial court should have but failed to abstain, the court of appeals should remand to the district court with instructions to abstain, or rather should exercise its own certification power.

14. It would seem unlikely that certification by the district court during the course of the trial would be considered appropriate, particularly in cases tried before a jury.
If inter-sovereign certification is to be exercised only by the courts of appeals, some of the objections disappear. Ordinarily, the court of appeals will have at its disposal findings of fact sufficient to constitute a background for the certified question, so that the problem of either requiring the state court to make findings of fact or eliciting an answer to a naked question of law is eliminated. Further, the fact that the courts of appeals handle fewer cases than the district courts lessens the possibility of overloading the dockets of state high courts. However, other potential difficulties remain. Perhaps most serious is the chance that the supreme court of a state will be certified a question of law which, had the entire case come before that court, it would have been able to avoid answering. In many instances, flexibility inherent in techniques of deciding cases and writing opinions permits disposal of cases without reaching questions which, for various legitimate reasons of judicial policy, a court would prefer pretermitting. Another potential objection is that often it may be said that a question may be framed in such a way as to shade the answer, or perhaps even to pre-determine the answer. Clearly any reasons in support of certification of questions of law militate equally strongly against any participation in the answer to the question by the certifying court.

Although the problem of furnishing an appropriate factual setting for a certified question is presented with more cogency if district courts may certify questions, it also exists to an extent with respect to court of appeals certification. While the appellate court will have sufficient factual matter at its disposal with which to furnish a background for the certified question, decisions as to the proper degree and kind of setting remains. In some states which provide for certification from trial or intermediate appellate tribunals to the supreme court, part of the record in the case is submitted to the reviewing court. In others, and in the federal system, the reviewing court is furnished with certain findings of ultimate fact. In both situations, the questions of the proper degree of factual background — how much factual matter is to be presented — arises. If a somewhat complete factual setting is furnished, the advantages of certification as a procedurally inexpensive technique for securing the answer

15. A state supreme court might wish to avoid or defer decision on certain points of law for such legitimate reasons as the desirability of letting the law settle or ferment in the lower courts, or to avoid potential influence on pending legislative or executive action.
to a question of law tend to be submerged. On the other hand, if too little factual background is submitted to the reviewing court, the possibility of securing an academic or hypothetical determination is intensified.

The undesirability of securing an academic or abstract answer to a naked question of law is a consideration which has permeated the field of certification. A fundamental notion of judicial function is embodied in the "case" or "controversy" requirement contained in the Federal Constitution. Succinctly stated, the theory underlying this requirement is that the proper function of courts is adjudication, not rule-making. The fact that judicial determinations acquire a certain stature as precedent results in an unavoidable minimum of judicial infringement upon a function strictly legislative. Any further infringement is sought to be alleviated by insistence on the part of the courts upon an actual justiciable controversy before judicial determination will be undertaken. The problem of potential violation of the case or controversy requirement is a particularly intense one in the field of certification, because ordinarily only a minimum of factual background will be presented to the court to which the question is certified, with the resultant possibility that the court's answer to the question certified may tend to take on an academic flavor, or may assume the quality of judicial rule-making, rather than adjudication in the true sense of the term. A feeling on the part of the federal courts that certification presents a danger of contravention of their traditional approach to

16. Most jurisdictions providing for certification require that the device not be employed to secure a determination of the entire case. This requirement as to federal certification was expressed in Chicago, B. & Q. Ry. v. Williams, 205 U.S. 444, 453-54 (1907), as follows: "The present certificate brings to us a question of mixed law and fact, and, substantially, all the circumstances connected with the issue to be determined. It does not present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of all the evidence out of which the question arises. The question certified is rather a condensed, argumentative narrative of the facts upon which . . . depends the validity of the live-stock contract in suit. Thus, practically, the whole case is brought here by the certified question and we are, in effect, asked to indicate what, under all the facts stated, should be the final judgment."


18. In Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41 (1937), the Court stated: "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." (Citations omitted.)
the case or controversy philosophy is evidenced by a palpable reluctance to make use of the device.¹⁹

If the advantages of inter-sovereign certification should be determined by the federal judiciary to outweigh the disadvantages, further use of the device to implement, or to an extent to supplant, the usual type of abstention may perhaps be expected. It is to be hoped that cognizance of some of the possibilities noted here will be taken before widespread use is undertaken.

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1958 Amendment to the United States Judicial Code Relative to the Denial of Costs to a Plaintiff

Since the Judiciary Act of 1789, there has been a jurisdictional amount requirement for suits brought in federal courts where jurisdiction is predicated on diversity of citizenship between the parties.¹ In 1958, in an effort to reduce the number of cases brought in the federal courts,² Congress raised the jurisdictional amount, exclusive of interest and costs, from $3,000 to $10,000.³ Included in this statute is a provision allow-

¹. Although the United States Supreme Court's jurisdiction over questions certified from the courts of appeal is theoretically mandatory, the cases where certificates have been dismissed, as improperly framed or as containing questions improper for certification, are practically legion. E.g., Busby v. Electrical Utilities Employees Union, 323 U.S. 72 (1944); NLRB v. White Swan Co., 313 U.S. 23 (1941); Atlas Life Insurance Co. v. Southern, Inc., 306 U.S. 563 (1939); Lowden v. Northwestern National Bank & Trust Co., 298 U.S. 160 (1936); State-Planters Bank and Trust Co. v. Parker, 283 U.S. 332 (1931). The Lowden case contains an illuminating exposition by Justice Cardozo of the Supreme Court's policy as to certified questions of law, including discussion of the case or controversy requirement. See also Moore & Vestal, Present and Potential Role of Certification in Federal Appellate Procedure, 35 Va. L. Rev. 1 (1949).

². See H.R. Rep. No. 1706, 85th Cong., 2d Sess. 2-3 (1958), in which it is stated: "In adopting this legislation the committee feels that it will bring the minimum amount in controversy up to a reasonable level by contemporary standards and that it will ease the workload of our Federal courts by reducing the number of cases involving corporations which come into Federal district courts on the fictional premises that a diversity of citizenship exists."

³. 72 Stat. 415 (1958), amending 28 U.S.C. §§ 1331, 1332 (1952). In addition to the provision increasing the jurisdictional amount and providing that costs may be denied the plaintiff in certain instances, the statute also provides that a corporation shall be deemed a citizen of the state where it has its principal place of business and that civil actions in any state court arising under the workmen's compensation laws of that state may not be removed to federal district