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CERTIFICATION OF QUESTIONS FROM FEDERAL APPELLATE COURTS TO THE FLORIDA SUPREME COURT AND ITS IMPACT ON THE ABSTENTION DOCTRINE

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I. INTRODUCTION

When a cause of action is tried before the federal judiciary, and the jurisdiction is predicated upon diversity of citizenship, the federal forum is required to apply the substantive law of the state in which it sits.[1] The determination of what the state law is, or should be, in relation to resolving the issues before the court will be made by the federal court itself. This is true no matter how ambiguous or vague the state law may seem to be. The federal court must ascertain what the state law is even though the state courts have never decided the matter.[2]

The United States Supreme Court has developed, and often applied, a doctrine of "abstention," whereby, in certain cases before the federal courts, the actions are suspended while the litigants seek state court determination of the uncertain state law questions involved. But what approach is used by the parties in seeking the answers to these questions, and exactly what type of situation calls for the application of "abstention"? Does not this procedure lead to delay and expense?

In 1945, the Florida Legislature, "with rare foresight,"[3] adopted a procedure whereby the Supreme Court of Florida could answer questions of Florida law through the use of certified questions sent to it by any federal appellate court.[4] This procedure was never used by the federal judiciary until 1960, when it was applied in *Clay v. Sun Ins. Office Ltd.*[5] Is this statute constitutional? And why did the federal courts procrastinate in its use? Does it not seem improper for the federal courts to give up their jurisdiction and thereby deprive the parties of the federal adjudication to which they are entitled under congressional mandate?[6] This writer will discuss these and many other inquiries relating to this general area.

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1. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Sampson v. Channell, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940).
2. Propper v. Clark, 337 U.S. 472 (1949); Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949); Williams v. Green Bay & W.R.R., 326 U.S. 549 (1946); Markham v. Allen, 326 U.S. 490 (1946); Meredith v. Winter Haven, 320 U. S. 228 (1943); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).
3. Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960).
4. See text accompanying note 85 *infra*.
5. 363 U.S. 207 (1960).
6. 28 U.S.C. § 1332 (1958).

II. DIVERSITY JURISDICTION IN THE FEDERAL COURTS

The federal courts are conferred diversity of citizenship jurisdiction by title 28 of the United States Code. Section 1332 sets forth that:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Swift v. Tyson

Section 34 of the Federal Judiciary Act of September 24, 1789 provided that:

> [T]he *laws* of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[7]

In 1842, the United States Supreme Court decided the landmark case of *Swift v. Tyson*,[8] which ruled diversity jurisdiction cases in the federal courts for nearly a century. The Supreme Court, speaking through Mr. Justice Story, held that when the federal courts exercise jurisdiction based upon diversity of citizenship, the courts are not required to apply the unwritten (common) law of the state as declared by its highest court. The federal courts had a free rein in determining what the common law of the state was — or should have been.[9] The Court, in construing the Federal Judiciary Act of 1789, held that section 34 was limited in its application to the positive *statutes* of the state and the interpretations of these statutes by the local tribunals.[10] The true intent of the act was thought not to extend to "general principles and doctrines of commercial jurisprudence."[11]

The application of the doctrine expounded by *Swift v. Tyson* revealed its many defects. Congress conferred diversity of citizenship jurisdiction upon the federal courts to prevent discrimination in state courts against those litigants not citizens of the state and to create uniformity of law

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7. 1 Stat. 92 (1789). (Emphasis added.)
8. 16 Pet. 1 (1842).
9. *Id.* at 18.
10. *Ibid.*
11. *Id.* at 19.

throughout the United States. However, the *Swift* doctrine created the converse, in that it allowed discrimination by non-citizens against parties who were citizens of the state. The rights which accrued to the people under the common law of the state varied according to whether the parties sought enforcement in the state or in the federal court. The non-citizen was conferred with the privilege of selection. Equal protection of the law was, therefore, unattainable under the *Swift* doctrine. The state courts prevented uniformity by their persistence in answering questions of state common law contrary to federal decisions. The federal courts found it impossible to draw a satisfactory line of demarcation between the province of state common law and state decisions interpreting state statutes. The *Swift* doctrine, in attempting to promote greater uniformity of law throughout the courts of the United States, had prevented it.[12]

The Erie Era

The interpretation of the Federal Judiciary Act presented in *Swift v. Tyson,* which had governed for 96 years, was reversed in 1938 by *Erie* R.R. *v. Tompkins.*[13] Mr. Justice Brandeis, making one of his last great contributions to American jurisprudence, stated that "there is no federal general common law."[14] When a case is not governed by the United States Constitution or by congressional enactments, the law applicable in all cases is the law of the state. "[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."[15]

The *Erie* case placed a greater responsibility upon the federal courts, in diversity cases, to determine and apply state law. The problem of ascertaining state law may often be a difficult one. However, that is insufficient grounds for a federal court to decline to exercise its jurisdiction. Chief Justice Marshall, in *Cohens v. Virginia,*[16] stated that:

> It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot . . . avoid a measure, because it approaches the confines of the Constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.[17]

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12. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
13. 304 U.S. 64 (1938).
14. *Id.* at 78.
15. *Ibid.*
16. 19 U.S. (6 Wheat.) 264 (1821).
17. *Id.* at 404.

Thus, cases are legion in which the federal courts, attempting not to thwart the purpose of the jurisdictional act, have decided questions of state law even though the answers were difficult,[18] and the highest court of the state had not previously answered these questions.[19] The United States Supreme Court is hesitant to overrule decisions by lower federal courts when they have determined the law of particular states, unless their conclusions are shown to be unreasonable.[20]

III. THE ABSTENTION DOCTRINE

In the last two decades the United States Supreme Court has developed, and frequently applied, a doctrine of "abstention" from the exercise of its jurisdiction. This enables a state court to resolve some, or all of the issues involved in a particular diversity action.

The Supreme Court created the abstention doctrine in *Railroad Comm'n v. Pullman Co.*,[21] in 1941. There an administrative order based upon a doubtful interpretation of a state statute was challenged as unauthorized by state law and as violative of the due process, equal protection, and commerce clauses of the federal constitution. Speaking through Mr. Justice Frankfurter, the Court unanimously adopted the abstention procedure and remanded the case to the district court with directions to retain jurisdiction pending a determination of the state law questions. The *Pullman* case established the first of two classes of cases in which abstention is required. The first class consists of suits brought for equitable relief against state action in which a state interpretation of *uncertain state law* may avoid a federal constitutional issue as to the validity of the state action. This principle serves the policy of comity inherent in the doctrine of abstention and furthers the Supreme Court's policy of avoiding premature determinations of constitutional questions.[22] *The federal district court does not abdicate federal jurisdiction* in these cases, but only *postpones* its exercise while the state court answers the issues of state law.[23]

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18. The latest decision of the highest court of the state, on the question of law involved in the federal court, must be taken as controlling unless some substantial assurance is given that the highest court will not follow that decision in the future. Meredith v. Winter Haven, 320 U.S. 228 (1943).

19. Propper v. Clark, 337 U.S. 472 (1949); Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949); Williams v. Green Bay & W.R.R., 326 U.S. 549 (1946); Markham v. Allen, 326 U.S. 490 (1946); Meredith v. Winter Haven, 320 U.S. 228 (1943).

20. Propper v. Clark, 337 U.S. 472 (1949); Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949); Helvering v. Stuart, 317 U.S. 154 (1942); MacGregor v. State Mut. Life Assur. Co., 315 U.S. 280 (1942).

21. 312 U.S. 496 (1941).

22. Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909).

23. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959); Louisiana P. & L. 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 Comm. CIO v. Windsor, 353 U.S. 364 (1957); Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957);

As for the interpretation of "uncertainty" in relation to state law, the Supreme Court has held that the federal courts should not adjudicate the constitutionality of state enactments *fairly open to interpretation* until the state courts have been afforded a reasonable opportunity to pass on them.[24] Thus far, a more precise standard as to the degree of uncertainty has not been formulated.

Abstention is required in a second class of cases when a decision by the federal courts would involve a determination of state domestic policy or would be an unnecessary interference with the action of state regulatory activities at the administrative stage.[25] Whether or not substantial constitutional issues or questions of federal law are raised in these cases, and regardless of the settled or unsettled condition of the applicable state law, the abstention doctrine will be applied. The basis for this application is the avoidance of federal-state friction, a problem besetting a system of dual government.

In *Burford v. Sun Oil Co.*,[26] the first of two leading cases involving state administrative action, the federal district court enjoined the enforcement of an order of the Texas Railroad Commission. This order was issued under a state program to regulate oil and gas production through the spacing of oil wells, and by proration of oil production quotas among individual oil fields and wells within the state. The Supreme Court reversed and held that the district court was required to abstain in this situation. The Court did not discuss the avoidance of a constitutional question and placed only a minimal reliance upon the uncertainty of the state law involved. The Court, instead, discussed the effect of federal equitable interference upon the state's regulatory scheme, and the difficulties in evaluating the Commission's order. It was concluded that intervention by the federal judiciary in these circumstances would result in conflicts in the interpretation of state law which would endanger the success of state policies.[27]

In the second leading case, *Alabama Pub. Serv. Comm'n v. Southern Ry.*,[28] the plaintiff railroad petitioned the Commission to authorize the discontinuance of two local passenger trains that were being operated at a loss. The request was denied, and the plaintiff brought an action in the federal district court, alleging that the decision of the Commission was

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Albertson v. Millard, 345 U.S. 242 (1953); AFL v. Watson, 327 U.S. 582 (1946); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942); Williams v. Hot Shoppes, Inc., 293 F.2d 835 (D.C. Cir. 1961).

24. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959).

25. Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

26. 319 U.S. 315 (1943).

27. *Id.* at 334.

28. 341 U.S. 341 (1951).

tantamount to confiscation of the railroad's property and therefore violated the fourteenth amendment of the federal constitution. The district court enjoined the enforcement of the Commission's order. On appeal, the United States Supreme Court reversed and dismissed the complaint. The *Pullman* case was held inapplicable because the *Alabama* case did not involve the interpretation of a state statute.[29] However, the Court stated that when an administrative order, based predominantly upon local factors, is afforded adequate review by a state court, federal intervention is unnecessary to protect federal rights. In order to preserve the rightful independence of state government, the Court denied federal equitable relief.

Despite emphasis to the contrary in *Burford*, that decision can probably be supported under the *Pullman* rule.[30] However, in the *Alabama* case, the Supreme Court made no reference to issues of state law.[31] Since no state law issues were involved, abstention could not resolve the uncertainties in state law, nor avoid a federal constitutional question. Taking cognizance of the rationale and indications in the opinion,[32] it must be considered that, in *Alabama*, abstention was granted solely for the purpose of avoiding federal-state friction.

The principle of comity set forth in *Alabama* left the scope of the abstention doctrine in a confused state.[33] Subsequent cases manifest that the *Alabama* rule is limited to causes of action which challenge state administrative action, typically the action of a regulatory commission.[34]

In this second class of suits in which abstention has been applied, the federal courts have been required to *dismiss* the action without retaining jurisdiction.[35] Congress has acted in this area by amending the Judicial Code to provide that if a "plain, speedy and efficient" remedy is available in a state court, the federal courts are powerless to enjoin the enforcement of any order of a state rate-making body "affecting rates chargeable by a public

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29. *Ibid.*

30. *Burford* contained a federal constitutional question and an issue of uncertain state law. Burford v. Sun Oil Co., 319 U.S. 315, 317, 331 (1943).

31. It must be assumed that no state law issues were involved in the *Alabama* case.

32. "Considering that '[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case." Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 350 (1951).

33. The concurring Justice in *Alabama* thought that the principle applied to any suit in a federal court attacking any action of a state agency. *Id.* at 362.

34. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959); City of Chicago v. Atchison T. & S.F.R.R., 357 U.S. 77 (1958); Albertson v. Millard, 345 U.S. 242 (1953); Wreiole v. Waterfront Comm'n, 132 F. Supp. 166 (S.D.N.Y. 1955).

35. Stefanelli v. Minard, 342 U.S. 117 (1951); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

utility,"[36] and the courts cannot enjoin the "assessment, levy or collection of any tax under state law" by state taxing authorities.[37]

Temporary Arrest of the Abstention Doctrine

The case of *Meredith v. Winter Haven*[38] temporarily halted the erosion of diversity of citizenship jurisdiction in the federal courts. In *Meredith*, non-citizen bondholders sought to enjoin the city's redemption of municipal bonds without providing for the payment of deferred interest coupons. The suit was brought in the federal district court based solely on diversity of citizenship. The district court held for the plaintiffs. The court of appeals set aside the injunction that had been granted below, and held that the cause of action should be dismissed without prejudice.[39] The court of appeals rationalized that a decision of the case on the merits would be based upon Florida constitutional and statutory law, and since state decisions construing these enactments had left the law in a state of uncertainty, the decision should be that of the Florida courts. The Supreme Court of the United States reviewed and synthesized its prior decisions relating to abstention and reversed the decision of the court of appeals, holding that the difficulties of ascertaining state law did not afford sufficient grounds for the denial of federal forum jurisdiction, despite the fact that the remedy sought was an injunction against state action.[40]

Expansion of the Abstention Doctrine

After *Meredith*, no new limitation on the exercise of diversity of citizenship jurisdiction was sanctioned by the Supreme Court until 1959. Until that year, the scope of the abstention doctrine had been limited to the two classes of cases already mentioned. However, in June 1959, the Supreme Court decided four cases[41] which manifested an extension and support of abstention.

In *Martin v. Creasy*[42] the federal district court had *stayed* the action in order to allow the Pennsylvania courts to determine whether Pennsylvania law provided for damages when the state had limited the plaintiff's right of access to a road. The plaintiff contended that the state law was violative of the federal constitution due to the failure by the state to provide just compensation. The district court reopened the case, as the

36. 28 U.S.C. § 1342 (1958).
37. 28 U.S.C. § 1341 (1958).
38. 320 U.S. 228 (1943).
39. Meredith v. City of Winter Haven, 134 F.2d 202 (5th Cir. 1943).
40. Meredith v. Winter Haven, 320 U.S. 228 (1943).
41. Martin v. Creasy, 360 U.S. 219 (1959); County of Allegheny v. Mashuda Co., 360 U.S. 185 (1959); Harrison v. N.A.A.C.P., 360 U.S. 167 (1959); Louisiana P. & I Co. v. City of Thibodaux, 360 U.S. 25 (1959).
42. 360 U.S. 219 (1959).

state courts failed to render a definitive answer, and held that the state statute was unconstitutional.[43] The Supreme Court, in reversing the district court's decision, invoked the abstention doctrine.[44] Mr. Justice Stewart stated that it was desirable to avoid federal-state conflicts, the unnecessary impairment of state functions and premature constitutional questions.[45] Mr. Justice Brennan, with whom Chief Justice Warren joined, concurred.[46] Mr. Justice Douglas dissented, remarking that an adjudication by the federal forum in this case would not be intermeddling in state affairs and would not create needless friction.[47]

In *County of Allegheny v. Mashuda Co.*,[48] the county had allegedly condemned land, but not for a public purpose. Due to the fact that this cause of action was already being litigated in the state courts, the federal district court held that the case could be resolved in the state proceedings, and the case was dismissed.[49] This decision was reversed by the court of appeals,[50] and the Supreme Court affirmed.[51] Mr. Justice Brennan stated that there was no federal constitutional problem involved, the state law in issue was clear and well settled, and the case turned on the purely factual question of whether or not the taking was for private rather than public use.[52]

The appellees in *Harrison v. N.A.A.C.P.*[53] brought suit in the federal district court praying for a declaratory judgment that five Virginia statutes, never before interpreted by the state courts, were violative of the federal constitution. The district court *stayed* the action until the state courts had an opportunity to construe two of the statutes which were held to be ambiguous. The remaining three statutes were held unconstitutional, and their enforcement was enjoined.[54]

Mr. Justice Harlan, speaking for the majority of the Supreme Court, said that *all* the Virginia statutes required state court construction before

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43. Creasy v. Stephens, 160 F. Supp. 404 (W.D. Pa. 1958).
44. Martin v. Creasy, 360 U.S. 219 (1959).
45. *Id.* at 224.
46. These Justices relied especially on the desirability of avoiding constitutional questions and interference with the state highway program at its inception. *Id.* at 225-26.
47. Mr. Justice Douglas believed that the question of whether or not access rights constitute "property" in the constitutional sense did not concern local law, but concerned solely the Bill of Rights. "It is an authoritative pronouncement at the beginning of a controversy which saves countless days in the slow, painful, and costly litigation of separate individual lawsuits in state viewers proceedings." *Id.* at 229.
48. 360 U.S. 185 (1959).
49. The district court held that it "should not interfere with the administration of the affairs of a political subdivision acting under color of State law in a condemnation proceeding." Frank Mashuda Co. v. County of Allegheny, 154 F. Supp. 628, 629 (W.D. Pa. 1957).
50. Frank Mashuda Co. v. County of Allegheny, 256 F.2d 241 (3d Cir. 1958).
51. County of Allegheny v. Mashuda Co., 360 U.S. 185 (1959).
52. *Id.* at 196. Justices Clark, Black, Frankfurter and Harlan dissented.
53. 360 U.S. 167 (1959).
54. N.A.A.C.P. v. Patty, 159 F. Supp. 503 (E.D. Va. 1958).

the Court could resolve the issue of their constitutionality. In invoking abstention, he stated that the abstention procedure is essential to suppress federal-state friction.[55] "This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention, and it spares the federal courts of unnecessary constitutional adjudication."[56]

Mr. Justice Douglas, with whom Chief Justice Warren and Mr. Justice Brennan concurred, dissented. Speaking about the abstention doctrine, he stated:

> [T]he *Pullman* case has been greatly expanded. It has indeed been extended so far as to make the presence in federal court litigation of a state law question a convenient excuse for requiring the federal court to hold its hand while a second litigation is undertaken in the state court. This is a delaying tactic that may involve years of time and that inevitably doubles the cost of litigation. When used widespread, it dilutes the stature of the Federal District Courts, making them secondary tribunals in the administration of justice under the Federal Constitution. . . . From the time when Congress first implemented the Fourteenth Amendment by the . . . Civil Rights Act of 1871 the thought has prevailed that the federal courts are the unique tribunals which are to be utilized to preserve the civil rights of the people. . . . Where state laws make such an assault as these do on our decisions and a State has spoken defiantly against the constitutional rights of citizens, reasons for showing deference to local institutions vanish.[57]

The most revolutionary of the cases was *Louisiana P. & L. Co. v. City of Thibodaux*.[58] There the utility company removed to the federal district court an expropriation proceeding filed against it by the city in the Louisiana courts. The statute, which purportedly authorized the seizure, had been interpreted in an opinion by the Attorney General of Louisiana, wherein he advised that the city's action was unauthorized. The district court *stayed* the proceedings until the Louisiana Supreme Court had been afforded an opportunity to construe the ambiguous statute.[59] The Court of Appeals for the Fifth Circuit reversed.[60] The Supreme Court reversed the decision of the court of appeals and held that the district court had properly exercised its power in granting abstention.[61]

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55. Harrison v. N.A.A.C.P., 360 U.S. 167, 176 (1959).
56. *Id.* at 177. This writer believes that this statement relates only to cases involving federal constitutional questions. In the second class of cases a dismissal is required.
57. *Id.* at 180, 182.
58. 360 U.S. 25 (1959).
59. City of Thibodaux v. Louisiana P. & L. Co., 153 F. Supp. 515 (E.D. La. 1957).
60. The court of appeals held that abstention was not available in an eminent domain proceeding, and no exceptional circumstances were present to justify abstention even if it was available. City of Thibodaux v. Louisiana P. & L. Co., 255 F.2d 774 (5th Cir. 1958).
61. Mr. Justice Frankfurter distinguished *Meredith v. Winter Haven*, contending that

Mr. Justice Frankfurter, speaking for the majority, stated that eminent domain is intimately involved with *sovereign prerogative.*[62] "And when, as here, a city's *power* to condemn is challenged, a further aspect of sovereignty is introduced."[63] Determining the extent of the delegation of eminent domain powers deals with the apportionment of governmental powers between city and state. This issue turns on the variation of local legislation interpreted in local settings.[64] The rationale behind the rule of abstention is similarly appropriate in a state eminent domain proceeding brought before the federal judiciary.[65]

> There is only postponement of decision for its best fruition. Eventually the District Court will award compensation if the taking is sustained. If for some reason a declaratory judgment is not promptly sought from the state courts and obtained within a reasonable time, the District Court, having *retained* complete control of the litigation, will doubtless assert it to decide also the *question of the meaning of the state statute.*[66]

Mr. Justice Stewart concurred, stating that although both the *Thibodaux* and *Mashuda* cases dealt with eminent domain proceedings, the former case is totally unlike the latter. In *Mashuda,* the Supreme Court denied the *dismissal* of the complaint, holding that since the state law was clear and only factual issues needed to be resolved, prompt adjudication was called for in the federal forum.[67]

Mr. Justice Brennan, with whom Chief Justice Warren and Mr. Justice Douglas joined, vigorously dissented, contending that the abstention doctrine is an extraordinary and narrow exception to the duty of the federal courts to render prompt justice in cases properly before them on the grounds of diversity jurisdiction.[68] The Justices argued that this case did not come

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the issue in *Meredith* was whether jurisdiction *must* be surrendered to the state court. "Here the issue is whether an experienced district judge, especially conversant with Louisiana law, who, when troubled with the construction which Louisiana courts may give to a Louisiana statute, himself initiates the taking of appropriate measures for securing construction of this doubtful and unsettled statute . . . , should be jurisdictionally disabled from seeking the controlling light of the Louisiana Supreme Court." Louisiana P. & L. Co. v. City of Thibodaux, 360 U.S. 25, 27 n.2 (1959).

62. He relied on a quotation by Mr. Justice Holmes in Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 257 (1905), wherein Mr. Justice Holmes stated: "The fundamental fact is that eminent domain is a prerogative of the State, which . . . may be exercised in any way that the State thinks fit, and . . . may not be exercised except by an authority which the State confers." Louisiana P. & L. Co. v. City of Thibodaux, 360 U.S. 25, 26 (1959).

63. Louisiana P. & L. Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959). (Emphasis added.)

64. See Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942), wherein the issue touched upon was the relationship of city to state. The proceeding was stayed.

65. Louisiana P. & L. Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959).

66. *Id.* at 29. (Emphasis added.)

67. *Id.* at 31.

68. *Id.* at 32.

within the realm of the two recognized situations in which abstention is justified.[69] Not even the "slightest hazard of friction"[70] in federal-state relations was presented in this case. The party seeking an interpretation of authority was the city itself. "This case does not involve the potential friction that results when a federal court applies paramount federal law to strike down state action."[71]

> The Court ignores cases in which this Court has refused to refer state law questions to state courts even though that course required a federal constitutional decision which resulted in affirmative prohibitions against the State from carrying out sovereign activities. Surely, eminent domain is no more mystically involved with "sovereign prerogative" than a city's power to license motor vehicles, . . . a state's power to regulate fishing in its waters, . . . its power to regulate intrastate trucking rates . . . .[72]

Mr. Justice Brennan, in trying to rationalize the majority holding, raised an interesting point as a possible explanation for it.[73] He stated that this decision "reflects a distaste for diversity jurisdiction."[74] However, the federal judiciary has only one choice, and that is to adjudicate cases involving diversity jurisdiction until Congress removes its mandate.[75]

Prior to *Thibodaux*, all cases involving the application of the abstention doctrine were suits in *equity*. Mr. Justice Frankfurter, in overcoming that contention, stated that in those cases the federal courts "did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism."[76]

The Court apparently is willing to grant a "stay" in a diversity case when the circumstances involve *any* aspect of the sovereign prerogative[77] if the applicable state law is uncertain.[78] To this extent, a third area of exceptional circumstances in which the federal courts will allow the application of the doctrine is established. However, since the degree of uncertainty needed to bring about abstention is unclear, that result would greatly

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69. *Id.* at 33.
70. *Ibid.*
71. *Id.* at 35.
72. *Id.* at 37.
73. Mr. Justice Brennan contended that the Court should frankly state that *Meredith* is overruled as that case is in point and the Court makes no adequate distinction between the cases. *Id.* at 38.
74. *Id.* at 41.
75. *Ibid.*
76. *Id.* at 28.
77. Any suit in which state action is challenged seems to involve a matter close to the political interest of a state and it may be difficult to avoid the holding of *Thibodaux*.
78. The *Thibodaux* majority might approve remission in all diversity cases, even those between private parties, if the relevant issue of state law is open to interpretation. See Louisiana P. & L. Co. v. City of Thibodaux, 360 U.S. 25, 27 n.2 (1959); Sutton v. Leib, 342 U.S. 402, 412 (1952) (Mr. Justice Frankfurter concurring).

aggravate federal-state friction, which the abstention doctrine seeks to avoid. The federal court will be the one which will decide whether to "stay" the proceeding or adjudicate the matter itself. This creates a great deal of confusion and uncertainty.

Problems of Abstention

While Mr. Justice Frankfurter is the greatest advocate of the abstention doctrine, Mr. Justice Douglas is the most vehement opponent of its use.[79] The opposition reasons that the federal judiciary has no authority to limit the right of adjudication in a federal court when Congress has set forth that privilege. By opposing all abstention, there would be some degree of consistency. Even though there is a possibility of different results in subsequent causes of action before the state courts, at least the federal courts would handle all diversity cases themselves.

One of the great problems of the doctrine is its "want of definition." The federal district court, in deciding whether or not to apply abstention, has difficulty in determining what view the Supreme Court will take on appeal. It is highly desirable that Congress amend the Judicial Code and set forth a standard for the federal district courts to follow. This action would also erase the main objection to the doctrine, *i.e.*, the lack of congressional authorization.

The greatest burden created by the abstention doctrine is the matter of delay.[80] In cases in which the circumstances possibly call for the application of the doctrine, whether or not abstention is applied by the federal district court, the parties may have the right to appeal the determination of the abstention issue to the court of appeals and possibly to the Supreme Court. This is the first point of delay.

Even if no appeal is taken and a stay or dismissal is granted, the burden is now upon the litigants to bring the cause of action before the state courts. If the suit is dismissed, the parties must start in a state court having original jurisdiction.

If the suit is stayed, the parties must obtain a decision on the substantive issues from the highest state court. Some states provide a method of review by means of a declaratory judgment proceeding,[81] while others have no *direct* method available to secure an adjudication from the highest court of

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79. Chief Justice Warren and Mr. Justice Brennan are strong supporters of Mr. Justice Douglas.

80. For a good example of delay due to application of the abstention doctrine, see Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944).

81. Some states provide for a *direct* petition to the highest court of the state for a declaratory judgment, while in others the parties must go to a lower trial court to obtain a declaratory judgment.

the state. In the latter situation, the parties must bring their action in a state court having original jurisdiction and work their way up to the highest court.

Innumerable problems under this form of abstention can be foreseen. For instance, should the plaintiff seek the answers to the state law questions only, or should he also seek a determination of the federal law issues? May the federal judiciary prohibit the determination of federal law issues by the state courts, or does the state have a constitutional obligation to answer the federal questions? Suppose the plaintiff fails to raise federal issues, but the state court answers these questions. Can the plaintiff relitigate the federal questions upon returning to the federal court system? What of the doctrine of res judicata in relation to state court determination of federal issues? All of these questions are beyond the scope of this article and have already been discussed adequately.[82]

The delay and expense for litigants may deter taking advantage of the choice of forums which Congress has provided.[83] Also, a financially strong party may be able to control the choice of forum. He deliberately may choose a federal adjudication in a case reasonably certain to be sent back to the state court. In this way, he may force his adversary to settle or decline to bring suit.

IV. The Awakening

Probably the best way to avoid unreasonable delay and expense is through a procedure set forth by the Florida Legislature, whereby the Supreme Court of Florida is authorized to receive and answer certified questions of uncertain state law from federal appellate courts. This authorization was originally granted by the legislature in 1945,[84] and later became section 25.031 of the Florida Statutes. This section provides:

> The supreme court of this state *may, by rule of court,* provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, *and there are no clear controlling precedents in the decisions of the supreme court of this state,* such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, *may* answer.[85]

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82. Comment, *Consequences of Abstention by a Federal Court,* 73 Harv. L. Rev. 1358 (1960).
83. 28 U.S.C. § 1332 (1958).
84. Fla. Laws 1945, ch. 23098, § 1, at 1291.
85. Fla. Stat. § 25.031 (1961). (Emphasis added.)

The Constitutionality of Section 25.031

Since section 25.031 is the first statute of its kind in the United States, it must be determined whether the statute is a valid and constitutional enactment.

"State constitutions are in no manner grants of power, as is the federal constitution, but are limitations upon the powers of the state legislature."[86] Any power which is not limited by a state constitution will inhere in the people of that state.[87] This being the case, unless it can be shown that the Florida constitution expressly or impliedly prohibits the enactment of section 25.031, the legislative provision will be valid.[88]

The Florida constitution does not specifically prohibit the Florida Legislature from granting the supreme court the power to render advice to federal appellate courts on questions of "uncertain" Florida law, when the answers are needed to resolve a case before the federal judiciary. Since there is no *express* prohibition against the enactment of section 25.031, a constitutional *implication* prohibiting the authorization of the statute must be found, in order to invalidate it.

Section 4 of article V of the Florida constitution delineates the appellate jurisdiction of the Florida Supreme Court. It also sets forth certain named writs which the court may issue. Should section 4 be construed as restricting the Florida Legislature from expressly enlarging the judicial powers of the Supreme Court of Florida? This question has been answered in the negative.[89]

Each department of government has "the inherent right to accomplish all objects naturally within the orbit of that department," if it is not expressly granted to another department or expressly limited by the constitution.[90]

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86. Sun Ins. Office, Ltd. v. Clay, 133 So.2d 735, 741 (Fla. 1961); *accord*, *In re* Board of Pub. Instruction, 76 So.2d 863, 864 (Fla. 1955); Thomas v. State, 58 So.2d 173, 177 (Fla. 1952); Miami Beach v. Crandon, 160 Fla. 439, 444, 35 So.2d 285, 287 (1948); Shad v. De Witt, 158 Fla. 27, 29, 27 So.2d 517, 519 (1946); Fowler v. Turner, 157 Fla. 529, 534, 26 So.2d 792, 799 (1946); Taylor v. Dorsey, 155 Fla. 305, 314, 19 So.2d 876, 881 (1944); State v. Pearson, 153 Fla. 314, 318, 14 So.2d 565, 567 (1943); 11 AM. JUR. *Constitutional Law* § 18 (1937); 6 FLA. JUR. *Constitutional Law* § 37 (1956).

87. Sun Ins. Office, Ltd. v. Clay, *supra* note 86, at 741.

88. Miami Beach v. Crandon, 160 Fla. 439, 35 So.2d 285 (1948); State v. Pearson, 153 Fla. 314, 14 So.2d 565 (1943); South Atl. S.S. Co. v. Tutson, 139 Fla. 405, 190 So. 675 (1939); Savage v. Board of Pub. Instruction, 101 Fla. 1362, 133 So. 341 (1931); Harry E. Prettyman, Inc. v. Florida Real Estate Comm'n, 92 Fla. 515, 109 So. 442 (1926); Chapman v. Reddick, 41 Fla. 120, 25 So. 673 (1899).

89. Sun Ins. Office, Ltd. v. Clay, 133 So.2d 735, 740-43 (Fla. 1961).

90. *Id.* at 742; *accord*, Petition of Florida State Bar Ass'n, 40 So.2d 902 (Fla. 1949); *In re* Richards, 333 Mo. 907, 63 S.W.2d 672 (1933); *In re* Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 275 N.W. 265 (1937).

The Supreme Court of Florida has consistently held that, although the Florida Legislature cannot in any way reduce the jurisdiction of the supreme court when that power has been conferred by the Florida constitution, the constitutional jurisdiction can be enlarged by the legislature if this expansion does not diminish the constitutional jurisdiction of another court and the constitution does not prohibit the expansion.[91]

Since there is no constitutional provision which either expresses or implies that the jurisdiction of the Supreme Court of Florida is limited to express grants of power conferred upon it by the constitution; and taking into consideration the lack of an express constitutional provision conferring the jurisdictional power, which is the subject matter of section 25.031, upon another court; and reiterating the rule that all sovereign power not limited by a state constitution inheres in the people of that state, it must be concluded that section 25.031 is a valid exercise of legislative authority.[92]

V. Clay v. Sun Insurance

For nearly fifteen years after the advent of section 25.031, the federal appellate courts ignored it. Then, in 1960, the United States Supreme Court, in *Clay v. Sun Ins. Office, Ltd.*,[93] for the first time implied that the court of appeals should take advantage of the convenient procedure set forth by section 25.031.

In *Clay* the petitioner, while a citizen and resident of Illinois, purchased from respondent insurance company a "Personal Property Floater Policy (World Wide)," which provided for world wide coverage against "all risks" of loss or damage to the chattels covered. The policy required that suit must be brought within twelve months after the discovery of any loss. After moving to Florida, the petitioner sustained losses in 1955. The respondent denied liability, and in 1957 the petitioner brought suit in the United States District Court for the Southern District of Florida.[94]

The two main contentions of the respondent were: (1) that the suit was barred by the Illinois statute of limitations; and (2) that the "all risk" coverage was not applicable to losses resulting from the appropriation of the property by the insured's wife. The district court decided in favor of the petitioner, holding that the interference by the spouse did not preclude coverage and that, based upon section 95.03[95] of the Florida Statutes, the

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91. Sun Ins. Office, Ltd. v. Clay, 133 So.2d 735, 742 (Fla. 1961); *accord*, Pournelle v. Baxter, 142 Fla. 517, 195 So. 163 (1940); South Atl. S.S. Co. v. Tutson, 139 Fla. 405, 190 So. 675 (1939); Chapman v. Reddick, 41 Fla. 120, 25 So. 673 (1899).

92. Sun Ins. Office, Ltd. v. Clay, *supra* note 91, at 742-43.

93. 363 U.S. 207 (1960).

94. The jurisdiction was based upon diversity of citizenship.

95. Fla. Stat. § 95.03 (1961). "All provisions and stipulations contained in any contract whatever . . . fixing the period of time in which suits may be instituted under any

"suit clause" was invalid. The Court of Appeals for the Fifth Circuit reversed, holding that section 95.03 did not apply to the Illinois-made contract, as the application would be violative of due process.[96] However, the court did not consider the state law question — whether section 95.03 in fact applies to the type of contract involved in this case. The only question decided was the constitutional one, which would be ripe only if the statute actually did apply.

The United States Supreme Court, speaking through Mr. Justice Frankfurter, held that the court of appeals should have preliminarily answered the two nonconstitutional questions, namely, the effect of the interference by the spouse and whether section 95.03 applied to this contract, before deciding the constitutional issue. "The Court of Appeals was . . . not called upon . . . to reach this constitutional question; nor is this Court."[97] Since these answers might avoid a constitutional question, the Court vacated the judgment and remanded the cause to the court of appeals, implying that section 25.031 of the Florida Statutes be made use of in order to receive a clear interpretation of the uncertain state law involved. Mr. Justice Frankfurter stated that:

> The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision.[98]

However, it was indicated that even without this revolutionary advent of the Florida Legislature, the questions would have to be resolved by the Supreme Court of Florida since it is the policy of the United States Supreme Court to render federal constitutional questions moot.[99]

Mr. Justice Black, with whom Chief Justice Warren and Mr. Justice Douglas joined, dissented vigorously. He remarked that the state law questions in this instance were not ambiguous or vague,[100] nor was the answer to the constitutional question unclear.[101] He proceeded to answer all three questions. The first question related to the loss of property caused by the intervention of the wife. Since the policy insured against "all risks,"

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such contract . . . at a period of time less than that provided by the statute of limitations of this state, are hereby declared . . . to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." FLA. STAT. § 95.11(3) (1961) provides a five-year limitation for actions on written contracts not under seal.

96. Sun Ins. Office Ltd. v. Clay, 265 F.2d 522 (5th Cir. 1959).
97. Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 211 (1960).
98. *Id.* at 212.
99. *Ibid.*
100. *Id.* at 213.
101. *Id.* at 214.

and the instrument did not intimate any exception relating to the interference of a spouse, it was considered unlikely that the contention that the policy did not cover the loss would be sustained anywhere.[102] As to the issue of the "suit clause," "the only way to get ambiguity into this section is to import it."[103] Similar statutes exist in thirty-two other jurisdictions,[104] and state courts have consistently applied those statutes to make use of the underlying legislative intent.[105] He further stated that added support is shown by the fact that the Attorney General of the State of Florida had filed briefs and orally argued in support of the petitioner. The statute should have been given its plain meaning and the Court should have settled the constitutional question before it.[106]

The dissenters, after remarking that this situation called for the answer of the constitutional question,[107] proceeded to uphold the constitutionality of the Florida law, rationalizing that Florida, the forum state, had sufficient contact with the parties and was not compelled to apply the law of the state where the contract was made.[108]

Mr. Justice Black set forth the proposition that the practice of avoiding the decision of constitutional questions is not a rigid rule, but is discretionary with the Court. To make it rigid would be "bad for the litigants, bad for the courts, and bad for the country."[109] He further stated that:

> Litigants have a right to have their lawsuits decided without unreasonable and unnecessary delay or expense.[110] There come times . . . when a constitutional question is so ripe for decision, when its resolution is so much needed, that it would be proper to decide the constitutional question even though there might be a possibility or even a probability that by sending a case back some nonconstitutional question might be decided in a way that would remove the constitutional controversy from that particular case.[111]

Turning to the problem of the use of certified questions to obtain a decision from the Supreme Court of Florida, Mr. Justice Black stated that

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102. *Ibid.*
103. *Id.* at 215.
104. See CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS § 25(h), at 121 n.83, and § 137 (1958).
105. Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 1000 (1959).
106. Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 216 (1960).
107. The rationale behind this view was that the answer would have an important effect on the laws of many states. *Id.* at 225.
108. *Id.* at 221-22.
109. *Id.* at 224.
110. "This case was begun in 1957. The damage was sustained in late 1954 and early 1955. It has taken over a year to have this Court rule on the decision of the Circuit Court below. Remand, some form of transfer of part or all of the case to the state courts, proceedings there and either appeal to this Court again or return to the federal system and eventually return here, might possibly even take 10 years or more." *Id.* at 224 n.20.
111. *Id.* at 224.

"Florida does have such a law on paper, but evidently does not have one in fact."[112] He argued that the Supreme Court of Florida had never promulgated any rules of court under section 25.031 and had never accepted any certified questions.[113]

Upon remand of the *Clay* case, the court of appeals utilized section 25.031 for the first time by sending the two nonconstitutional questions to the Supreme Court of Florida by the method of certification.

The Supreme Court of Florida, although never having provided the rules of court for this procedure, accepted the certified questions and in October 1961, rendered a decision answering them.[114]

Only recently has the Supreme Court of Florida supplied the procedural rules needed by the federal appellate courts in order to insure the proper use of section 25.031. These rules are set forth in section 4.61 of the Florida Appellate Rules.[115]

VI. PROBLEMS OF CERTIFICATION

There are many problems raised by inter-sovereign certification. First it seems odd that the Florida Legislature restricted certification to the federal appellate courts. Is it not true that the federal district court is given the first opportunity to determine whether the case before it is ripe for application of the abstention doctrine? If a district court determines that a case before it requires the application of abstention, how does it go about seeking the advice of the Supreme Court of Florida? It seems illogical to say that when a district court applies abstention, the parties must first seek

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112. *Id.* at 226.

113. *Ibid.* Mr. Justice Black felt that this was probably due to the fact that state courts do not like to decide cases on a piecemeal basis.

114. Sun Ins. Office, Ltd. v. Clay, 133 So.2d 735 (Fla. 1961). In answering both questions, the court favored the insured.

115. FLA. APP. R. 4.61. Certified Questions From Federal Courts.

"a. When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decision of the Supreme Court of this State, such federal appellate court may certify such questions or propositions of law of this State to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

"b. Jurisdiction. Questions or propositions of law referred to in sub-paragraph a. hereof shall be certified for answer to the Supreme Court of this State.

"c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph a. hereof upon its own motion or upon the suggestion or motion of any interested party when approved by such federal courts.

"d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of the facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

"e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original

an interpretation of the pertinent state law involved from a lower Florida court,[116] while this same determination can be made through the use of certified questions sent *directly* to the Supreme Court of Florida, when the case is before a federal appellate court. In order to avoid delay, the district court would have to fail to apply abstention when the case called for its application, and leave it up to the federal appellate court to make use of section 25.031. The appellate court would first reverse the district court's decision and then certify the pertinent questions to the Supreme Court of Florida.

If Congress has a high regard for the use of section 25.031, and if it realizes the dilemma of the federal district court, it might authorize a procedure whereby the federal district court would be allowed to certify pertinent questions of state law to the court of appeals. The appellate court, in turn, could certify those questions to the Supreme Court of Florida. The best solution, however, would be for the Florida Legislature to give the privilege of certification not only to the federal appellate courts, but also to the federal district courts.

The method of certification itself can be criticized. It has been contended that in framing a question of such an abstract quality, there is a great propensity toward shading the answer.[117] An even greater objection is raised to the abstract or academic answer to a question which is void of any factual surroundings. These and many other objections to the use of certification have been shown through the hostile attitude of the United States Supreme Court toward answering this type of question.[118]

Another question to be answered is whether the objection to the abstention doctrine relating to the unauthorized relinquishment of federal jurisdiction is a valid one. It seems that, in those cases which are *dismissed* by the federal courts, there is an unauthorized relinquishment of federal

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or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said cause.

"f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this court.

"g. Briefs and Argument. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within thirty days after the filing of said certificate in the appellate court of this State having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within twenty days after receipt of appellant's or moving party's brief and a reply brief shall be filed within ten days thereafter.

"h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits."

116. In this situation the parties must work their way up to the Supreme Court of Florida.

117. Comment, *Inter-Sovereign Certification as an Answer to the Abstention Problem*, 21 LA. L. REV. 777, 781 (1961).

118. Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1 (1949).

jurisdiction. When a case is *stayed*, the federal forum retains jurisdiction, and there is only a postponement of decision.[119] The use of abstention in the "stay" situation does not defeat diversity jurisdiction. In dealing with section 25.031, the federal forum parts with no jurisdiction. The Supreme Court of Florida does not acquire jurisdiction ultimately to decide a controversy before the federal courts, but renders only an *advisory opinion* to the federal judiciary.

Section 25.031 — Permissive or Mandatory

Undoubtedly, the next time the federal judiciary is confronted with an interpretation of uncertain Florida law, and the application of abstention is proper, it will make use of section 25.031. Is there a mandatory obligation upon the Supreme Court of Florida to answer these certificates? This writer thinks not. The pertinent language of section 25.031 relating to this problem states that the federal appellate courts may certify questions of uncertain state law to the supreme court, "which certificate the supreme court of this state . . . *may* answer." The word "may" seems to be of a permissive nature.[120] This conclusion is substantiated by the recent Florida case of *Stein v. Darby*,[121] wherein the Supreme Court of Florida refused to answer a certified question which was sent to it by a Florida district court of appeal.[122]

Section 4(2) of article V of the Florida constitution states that the Supreme Court of Florida

> may review by certiorari any decision of a district court of appeal that . . . passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law . . . .

The Supreme Court of Florida, in *Darby*, held that the word "may" should not be construed as "shall," and that the court is *not compelled to decide certified questions.*

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119. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959); Louisiana P. & L. 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 Comm., CIO v. Windsor, 353 U.S. 364 (1957); Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957); AFL v. Watson, 327 U.S. 582 (1946); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942); Williams v. Hot Shoppes, Inc., 293 F.2d 835 (D.C. Cir. 1961).

120. The word "may" has been held to mean "shall" and "shall" has been held to mean "may." However, there is a presumption that the word "may" is of a permissive nature. See, *e.g.*, Stein v. Darby, 134 So.2d 232 (Fla. 1961).

121. 134 So.2d 232 (Fla. 1961).

122. See also, Zirin v. Charles Pfizer & Co., 128 So.2d 594, 596 (Fla. 1961); Susco Car Rental Sys. v. Leonard, 112 So.2d 832 (Fla. 1959).

The purposes of section 25.031 and article V, section 4(2) are different. However, there is no legitimate reason to construe the two sections differently as to their permissive nature.

VII. Conclusion

It seems unlikely that Congress will revoke diversity jurisdiction or restrict the application of the abstention doctrine in the near future. Therefore, it is highly desirable that Congress amend the Judicial Code and set forth a standard procedure for the federal courts to follow in determining exactly what type of cases require the application of abstention. This action would eliminate the confusion surrounding the applicability of abstention which prevails in the minds of the litigants, their attorneys, and the federal judges themselves. It also would alleviate the main objection to abstention, *i.e.*, the lack of congressional authorization.

The Florida Legislature had rare foresight in enacting a statute which authorized inter-sovereign certification. This procedure is used to facilitate the application of abstention by affording a swift procedure whereby the federal appellate courts can receive immediate answers to uncertain questions of state law through the use of certified questions sent to the Supreme Court of Florida. However, it must be remembered that this procedure can be used only in those cases which require the operation of abstention and *not in all cases involving issues of uncertain state law.* To insure the maximum efficiency of section 25.031, the Florida Legislature should expand the privilege of certification to the federal district courts. It is also suggested that the legislators in the other forty-nine states take cognizance of section 25.031 of the Florida Statutes.[123]

It is admitted that inter-sovereign certification presents its own perplexities, but they are greatly outweighed by its elimination of some of the primary disadvantages of the abstention doctrine.

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123. The British Commonwealth, by statute (British Law Ascertainment Act, 1859, 22 & 23 Vict. c. 63), provides a procedure similar to that of section 25.031. Certified questions may be sent by any Commonwealth court to any other Commonwealth court when the former court is faced with a question of uncertain law of the latter jurisdiction. The answer to these questions is mandatory. Dicey, Conflict of Laws 115 (7th ed. 1958).