

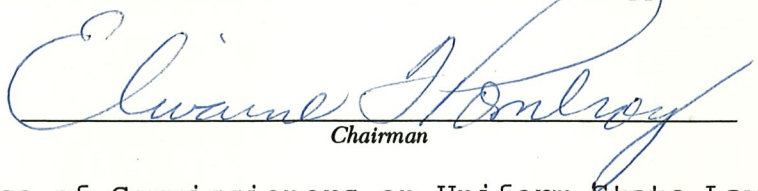
MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 10:00 a. ~~m.~~^{p.m.}, on February 7, 19 79.

All members were present except:

The next meeting of the Committee will be held at 10:00 a. m./~~p.m.~~ on February 8, 19 79.

~~These minutes of the meeting held on xxxxxxxxxxxxxxxxxxxxxxxx, 19xx were considered, corrected and approved~~


Chairman

The conferees appearing before the Committee were:

- John M. McCabe - Nat'l Conference of Commissioners on Uniform State Laws
- Herbert A. Marshall
- Ronald Williams - Kansas Association of Defense Counsel
- Representative Michael Glover

Staff present:

- Jerry Stephens - Legislative Research Department
- Wayne Morris - Legislative Research Department

Senator Parrish discussed with the committee the introduction of a committee bill dealing with the issue of blind bidding in the motion picture industry. Senator Parrish moved that such a bill be introduced; Senator Berman seconded the motion, and the motion carried.

Senator Parrish discussed with the committee the introduction of a committee bill amending the statute which prohibits the use of garnishment in any collection matter where the account had never been referred to a collection agency. He stated the proposal is different from the legislation considered by the committee last year. Senator Parrish moved to introduce the bill; Senator Mulich seconded the motion, and the motion carried.

Senator Hess discussed with the committee the introduction of a committee bill to change the date of expiration of terms of members of the State Board of Regents; the bill would be referred to the appropriate committee. Senator Parrish moved that such a bill be introduced; Senator Hess seconded the motion, and the motion carried.

Senate Bill No. 90 - Enacting the uniform certification of questions of law act. The chairman explained the bill, and stated that he had introduced it at the request of the Federal District Court Judges in Kansas. A copy of a letter from those judges endorsing the bill is attached hereto.

continued -

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

Minutes of the Senate Committee on Judiciary February 7, 1979.

John McCabe, of the Chicago ^{office} of the National Conference of Commissioners on Uniform State Laws, testified in support of the bill. He stated that Glee Smith, who is a Kansas member of the conference, requested him to appear. Copies of the material he distributed to the committee are attached hereto. He stated that courts, particularly federal courts, are often confronted with uncertainty as to what the law of a particular state is when the law of that state would be determinative of the outcome of a case. This act would authorize a state or federal court faced with this problem to submit the issue in question to the supreme court of the state whose rules should be applied. The act thus permits the precedent establishing responsibility for each jurisdiction to be exercised by its own supreme court, rather than by another court. He stated 12 states have adopted the act: Colorado, Florida, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, Rhode Island, West Virginia, North Dakota, Washington, and Oklahoma. Committee discussion with him followed. In answer to a question, he stated that he does not believe that there has been a noticeable increase in the caseload of the supreme courts in states which have adopted the act.

Herbert Marshall testified in support of the bill, and stated he had been requested to appear by the federal judges. He testified that this type of decision process would be of immense help and benefit to the federal trial court judges in Kansas. It would give them a useful tool in cases pending in federal courts in which they must apply state substantive law and the Kansas Supreme Court or Court of Appeals has not yet decided that issue. Committee discussion with him followed.

Ronald Williams, of the Kansas Association of Defense Counsel, testified in support of the bill. He stated the bill would be of great help to the federal judges and also to the litigants involved in such cases. Committee discussion with him followed.

Representative Glover appeared before the committee to ask it to introduce a committee bill dealing with lessening the penalty for possession of marijuana. Following committee discussion, Senator Simpson moved to introduce the bill; Senator Hess seconded the motion. On a voice vote, the chairman announced that the motion failed. A division was requested; on a show of hands, the motion carried on a vote of seven to three.

The meeting adjourned.

These minutes were read and approved
by the committee on 2-23-79.

2-7-79

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Marvin C. Shuford Jr	Lourens	KCUK
James J. Smith	Humboldt	
John M. McCabe	645 N. Michigan	NCCUSL
Ken Williams	Chicago IL 60611	
Ken Williams	Topeka	KADC
Harold D. Hamm	Topeka	SRS
Herbert A. Marshall	Topeka	

United States District Court
District of Kansas

Chambers of
Frank G. Theis
Chief Judge

February 1, 1979

P. O. Box 2396
United States Courthouse
Wichita, Kansas 67201

Governor John W. Carlin
State House
Topeka, Kansas

Mr. Ross O. Doyen
President, Kansas State Senate
State House
Topeka, Kansas

Mr. Wendell Lady
Speaker, House of Representatives
State House
Topeka, Kansas

Mr. Elwaine F. Pomeroy
Chairman, Senate Judiciary Committee
State House
Topeka, Kansas

Mr. Joseph J. Hoagland
Chairman, House Judiciary Committee
State House
Topeka, Kansas

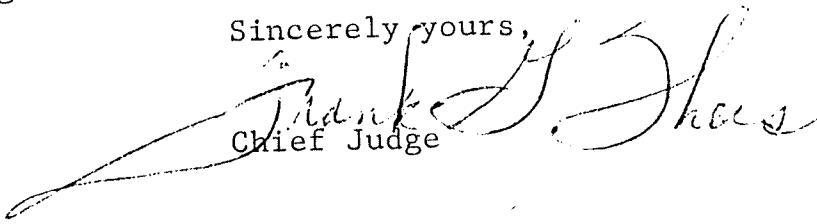
Re: Senate Bill No. 90

Gentlemen:

The Judges of this Court unanimously favor the enactment of legislation enabling this Court to certify the determination of questions of state law to the Kansas Supreme Court. Senate Bill No. 90 accordingly has the full endorsement of the Judges of this Court for favorable enactment by the legislature of Kansas.

The Honorable Richard D. Rogers, of this Court, having had a distinguished career in both houses of the State Legislature, is designated as our liaison to provide whatever assistance is appropriate in the consideration of the proposed legislation.

Sincerely yours,


Chief Judge

CERTIFICATION OF QUESTIONS OF LAW - 1967 (10)

Substance

Courts are often confronted with uncertainty in the law of the state whose rule (because of choice of law principles or because of Erie R.R. v Tompkins) should be applied to a decisive issue in a case. This act authorizes a state or federal court faced with this problem to submit the issue in question to the supreme court of the state whose rule should be applied. The act thus permits the precedent establishing responsibility for each jurisdiction to be exercised by its own supreme court, rather than by another court.

The answer to a certified question is binding on the parties, so the act does not authorize advisory opinions.

The act also authorizes the supreme court of the enacting state to answer a question of law certified from a court of another state or from a federal court.

UNIFORM CERTIFICATION OF QUESTIONS
OF LAW [ACT] [RULE]

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS SEVENTY-SIXTH YEAR
IN HONOLULU, HAWAII
JULY 31 — AUGUST 5, 1967



WITH
PREFATORY NOTE AND COMMENTS

APPROVED BY THE AMERICAN BAR ASSOCIATION AT ITS MEETING AT
HONOLULU, HAWAII, AUGUST 9, 1967

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Certification of Questions of Law [Act][Rule] was as follows:

ALLAN D. VESTAL, Law Building, Room 222, Iowa City, Iowa, 52241, *Chairman*.
CHARLES S. HANSON, Capitol Building, Pierre, S. Dak., 57501.
M. KING HILL, JR., 1700 One Charles Center, Baltimore, Md., 21201.
CHARLES W. JOINER, University of Michigan Law School, Ann Arbor, Mich., 48104.
STERRY R. WATERMAN, United States Circuit Judge, P.O. Box 368, St. Johnsbury, Vt. 05819.
DON J. McCLENAHAN, 312 Simplot Building, Boise, Idaho, 83702, *Chairman*,
Section D.

Copies of Uniform and Model Acts and other printed matter issued by the Conference may be obtained from

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
1155 East Sixtieth Street
Chicago, Illinois
60637

UNIFORM CERTIFICATION OF QUESTIONS OF LAW [ACT][RULE]

PREFATORY NOTE

Reasons for Proposed Uniform Act

Since the announcement in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) that federal courts in non-federal matters would be required to follow state law rather than some general common law, the federal courts have been faced with a very difficult problem. This is the ascertainment of state law when the state judiciary has not spoken definitively on the matter. The federal courts have been forced to guess what the state law is. To avoid this awkward situation the federal courts have developed an abstention doctrine under which the federal court refrains from acting while the litigants turn to the state court to get the definitive statement of the local law. This device has proved to be quite unsatisfactory. See 1A *Moore's Federal Practice* ¶ 0.203.

In the search for a suitable technique to assist the federal courts in ascertaining the law of the state, the certified question is now being used.¹ The certifying federal court sends to the state's highest court the question to be answered. The question is considered and the answer given. This is a more rapid method than the use of the abstention doctrine and seems to be a much more orderly way of handling the problem. Within recent years, a group of states have provided for the certification of questions of state law from federal courts to the highest court of the state. The first to provide for such certification was Florida, Florida Stat. Ann Sec. 25.031.² The device

¹ The certified question of law has a long history in the United States and the English-speaking world. The British Law Ascertainment Act of 1859 provided for certification of questions of law within the British Empire, while the Foreign Law Ascertainment Act of 1861 made provision for certification of questions to foreign states. 9 *Halsbury's Statutes of England* (2d ed.) 58206. Within the federal court system, the certified question has been available from the Courts of Appeals and the Court of Claims to the United States Supreme Court, 28 U.S.C. Sec. 1254-1255, see Moore and Vestal, Present and Potential Role of Certification in Federal Appellate, 35 Va. L. Rev. 1 (1949), while a great number of states have provided for certified questions within their court systems. See Vestal, the Certified Question of Law, 36 Iowa L. Rev. 629, 632 (1951).

² The Uniform Act Rule is patterned in large measure on Florida Appellate Rule 4.61.

has been used with some frequency since its adoption. See for example, *Sun Insurance v. Clay*, 133 S.2d 735 (5th Cir. 1961) (answering questions), *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962), certified question answered 154 So.2d 169, conformed to in 325 F.2d 673 (1963), cert. den. 377 U.S. 943 (1964), *Hopkins v. Lockheed Aircraft Corp.*, 358 F.2d 347 (5th Cir. 1966), and *Life Insurance Company of Virginia v. Shifflet*, 370 F.2d 555 (5th Cir. 1967). Although the Court of Appeals for the Fifth Circuit may decide that a question of Florida law is not subject to doubt, it apparently considers the possibility of certification to the Supreme Court of Florida as part of its normal approach to problems of Florida law. See *Motor Vehicle Casualty Co. v. Atlantic National Insurance Company*, 374 F.2d 601 (5th Cir. 1967) and *Greer v. Associated Indemnity Corporation*, 371 F.2d 29 (5th Cir. 1967).

The Florida provision has also been used by the Supreme Court of the United States, *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963) question answered 164 So.2d 208 (1964), and *Aldrich v. Aldrich*, 375 U.S. 75, 249 (1963), questions answered 163 So.2d 276 (1964).

Maine has provided for the certified question from federal courts to the Supreme Judicial Court of Maine, and the federal district court in Maine has availed itself of the process. See *In Matter of Richards*, 253 F. Supp. 913 (D.Me. 1966), question answered in *In Matter of Richards*, 223 A.2d 827 (Me. 1966). See also *Norton v. Benjamin*, 220 A.2d 248 (Me. 1966).

The other two jurisdictions which have adopted the certified question from federal courts to the court of the state are Washington and Hawaii. See Chapter 2.60 of the Revised Code of Washington Ann. and Chapter 214 of the Revised Laws of Hawaii as amended.

Although there may be some question about the propriety of state courts answering certified questions from federal courts, two opinions by the highest courts in Florida and Maine have concluded that such power is properly exercised by state courts. See *Sun Insurance v. Clay*, 133 S.2d 735 (Fla. 1961) and *In Matter of Richards*, 223 A.2d 827 (Me. 1966) in which the Supreme Judicial Court of Maine stated,

We conclude as did the Florida court that our participation in the certification procedure will constitute a valid exercise of 'judicial power' . . . We are satisfied that more will be involved than the mere rendering of a purely advisory opinion. This certification by the federal court becomes by the force of our statute the jurisdictional vehicle for placing the matter before the court for its action. . . .

In reaching this decision we are heartened by the knowledge that the certification process has been repeatedly hailed as a step forward

in resolving some of the problems attendant upon federal abstention. . . .

The United States Supreme Court in *Clay v. Sun Insurance Office*, 363 U.S. 207, 212 (1960) seemingly urged the use of the certified question by the Court of Appeals for the Fifth Circuit. See also the favorable comments in *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963).

The Uniform Act/Rule goes beyond the *Erie* problem in the bracketed material in section 1, lines 4 and 5 and in section 8. These provide for inter-jurisdictional certification of questions between states. This means that a state court, having determined under its conflict of law rule that the law of another state controls a controversy, would be able to certify a question of law to the highest court of the controlling state. Although this has not been done between states in the United States, the British Law Ascertainment Act of 1859 and The Foreign Law Ascertainment Act of 1861, 9 *Halsbury's Statutes of England* (2d ed.) 582-6, are examples of this in England.

Finally, a combined *Erie* and conflicts problem can also be handled under the Act/Rule. For example, a federal court sitting in State A might decide that the *Erie* doctrine applies so it should look to the state law of A on a problem. The federal court might then decide that the state court in A, under its conflicts of law rules, would look to the law of B for the solution of the legal problem. Under the Act/Rule the federal court in A can ask the court of State B what its law is on the point.

Need for Uniformity

Since the certification of a question of law in either the *Erie* or the conflicts situation involves more than one jurisdiction, provisions for certification affect not just the attorneys and bench of the enacting state. Certification involves rather the relationship between states. Therefore, it would seem to be eminently desirable that uniformity be achieved in this area. Uniformity would make probable the greater use of certification. If attorneys and judges are faced not with an unfamiliar act, but rather with a carbon of the act of their own states, they will be more willing to use the device.

Adopted by Legislature or Court

The Conference has promulgated the Uniform Act/Rule for certified questions in a form which can be enacted by a legislature or adopted by a court as a rule. In some jurisdictions, action by the highest court will suffice with no legislative action required.

UNIFORM CERTIFICATION OF QUESTIONS
OF LAW [ACT] [RULE]

1 SECTION 1. [*Power to Answer.*] The [Supreme Court] may
2 answer questions of law certified to it by the Supreme Court of
3 the United States, a Court of Appeals of the United States, a
4 United States District Court [or the highest appellate court or
5 the intermediate appellate court of any other state], when re-
6 quested by the certifying court if there are involved in any pro-
7 ceeding before it questions of law of this state which may be
8 determinative of the cause then pending in the certifying court
9 and as to which it appears to the certifying court there is no
10 controlling precedent in the decisions of the [Supreme Court] [and
11 the intermediate appellate courts] of this state.

COMMENT

This section provides that the highest court of the state has the right to answer questions certified to it; it is not mandatory. Under some circumstances it is possible that the court might decide not to answer a certified question. See, for example, *Atlas Life Insurance Co. v. W. I. Southern, Inc.*, 306 U.S. 563 (1939) and *National Labor Relations Board v. White Swan*, 313 U.S. 23 (1941) (in both cases the Supreme Court of the United States refused to answer certified questions).

The courts listed as the court which may certify questions are the Supreme Court of the United States, the federal Courts of Appeals and the federal District Courts, which would include three-judge District Courts under 28 U.S.C. 2281 and 2284. Also included, in brackets, are "the highest appellate court or the intermediate appellate court" of other states. This provision allows certification of questions in conflicts cases.

1 SECTION 2. [*Method of Invoking.*] This [Act] [Rule] may be
2 invoked by an order of any of the courts referred to in section
3 1 upon the court's own motion or upon the motion of any party
4 to the cause.

1 SECTION 3. [*Contents of Certification Order.*] A certification
2 order shall set forth
3 (1) the questions of law to be answered; and
4 (2) a statement of all facts relevant to the questions certified
5 and showing fully the nature of the controversy in which the
6 questions arose.

COMMENT

The certification order in the statement of facts should present all of the relevant facts. The purpose is to give the answering court a complete picture of the controversy so that the answer will not be given in a vacuum. The certifying court could include exhibits, excerpts from the record, summary of the facts found by the court, and any other document which will be of assistance to the answering court.

1 SECTION 4. [*Preparation of Certification Order.*] The certifica-
2 tion order shall be prepared by the certifying court, signed by
3 the judge presiding at the hearing, and forwarded to the [Supreme
4 Court] by the clerk of the certifying court under its official seal.
5 The [Supreme Court] may require the original or copies of all
6 or of any portion of the record before the certifying court to
7 be filed with the certification order, if, in the opinion of the
8 [Supreme Court], the record or portion thereof may be necessary
9 in answering the questions.

1 SECTION 5. [*Costs of Certification.*] Fees and costs shall be
2 the same as in [civil appeals] docketed before the [Supreme
3 Court] and shall be equally divided between the parties unless
4 otherwise ordered by the certifying court in its order of certifi-
5 cation.

1 SECTION 6. [*Briefs and Argument.*] Proceedings in the [Supreme
2 Court] shall be those provided in [local rules or statutes govern-
3 ing briefs and arguments].

COMMENT

This section provides for incorporation by reference of the local rules or statutes governing briefs and arguments.

1 SECTION 7. [*Opinion.*] The written opinion of the [Supreme
2 Court] stating the law governing the questions certified shall be
3 sent by the clerk under the seal of the Supreme Court to the
4 certifying court and to the parties.

1 [SECTION 8. [*Power to Certify.*] The [Supreme Court] [or the
2 intermediate appellate courts] of this state, on [its] [their] own
3 motion or the motion of any party, may order certification of
4 questions of law to the highest court of any state when it appears
5 to the certifying court that there are involved in any proceeding
6 before the court questions of law of the receiving state which may
7 be determinative of the cause then pending in the certifying court
8 and it appears to the certifying court that there are no controlling

9 precedents in the decisions of the highest court or intermediate
10 appellate courts of the receiving state.]

COMMENT

Sections 8 and 9 allow a state to provide for certifications from the courts of that state to the highest court of another state. This could prove to be very useful in the case of conflicts of laws where State A's court wishes to apply the law of B. If B's law is unclear on the point, a question could be certified. This is the reciprocal provision to the bracketed provision of section 1.

1 [SECTION 9. [*Procedure on Certifying.*] The procedures for
2 certification from this state to the receiving state shall be those
3 provided in the laws of the receiving state.]

1 SECTION 10. [*Severability.*] If any provision of this [Act]
2 [Rule] or the application thereof to any person, court, or cir-
3 cumstance is held invalid, the invalidity does not affect other
4 provisions or applications of the [Act] [Rule] which can be
5 given effect without the invalid provision or application, and to
6 this end the provisions of this [Act] [Rule] are severable.

1 SECTION 11. [*Construction.*] This [Act] [Rule] shall be so
2 construed as to effectuate its general purpose to make uniform
3 the law of those states which enact it.

1 SECTION 12. [*Short Title.*] This [Act] [Rule] may be cited as
2 the Uniform Certification of Questions of Law [Act] [Rule].

1 SECTION 13. [*Time of Taking Effect.*] This [Act] [Rule] shall
2 take effect . . .