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Recent Decisions

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CONSTITUTIONAL LAW—SOVEREIGN'S IMMUNITY FROM SUIT IN THE FEDERAL COURT.—Chicago Stadium Corp. v. Indiana, 123 F. Supp. 783 (S.D. Ind. 1954). The plaintiff in this case sought to enjoin the State of Indiana as well as the representatives of the Indiana State Fair Board in an action of replevin for special lighting fixtures installed at the coliseum building at the Indiana State Fair Grounds. The state holds a fee simple title in the fair grounds and acts as trustee for and on behalf of the people of Indiana. The representatives of the Board, acting in their official capacity, had a misunderstanding as to the ownership of the lighting fixtures, a previous agreement having been effected between the plaintiff and a third party, acting for the Board, concerning the equipment in question. The case was in the federal court because of a diversity of citizenship between the parties. The plaintiff contends that the State of Indiana was not the real party in interest; that the legislature of the state, by the broad powers it had vested in the Indiana State Fair Board, had waived its sovereign immunity in regard to the Board's business transactions for the reason that these transactions were similar to that of private enterprises. The court held that the Board was not a separate corporate entity, but that it was an instrumentality of the state and hence the state had not waived its sovereign immunity.

The issue then, as to whether the parties-defendant are merely nominal or real parties in interest has been the problem generally presented to the courts as regards state immunity under the eleventh amendment to the Constitution. The historic case on this point is Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), wherein the Court decided that the suit was not one against the state unless the state be named as a member to the record. This rule, however, has been repudiated and the only major consideration today is that the court does not stop at the nominal parties in the litigation but looks behind the litigants on the record to see actually who are the real parties in interest. In re Ayers, 123 U.S. 443 (1887); Poindexter v. Greenhow, 114 U.S. 270 (1885). In the Poindexter case, supra, the Court said at 114 U.S., page 287: “... the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties of the record.” The perplexity of the situation is to determine what distinction can be drawn between nominal and real parties.
Oftentimes this must be done in the light of state legislation to determine what power or what autonomy was given to the party in question.

The principle upon which the courts have decided whether or not the state is a real party to the suit is determined by an analysis of the relief sought, for the central point is: does such relief in effect impose liability upon the state. In *Colorado ex rel. Watrous v. District Court*, 207 F.2d 50, 56 (10th Cir. 1953), the court said, "Whether a suit is one against a state is to be determined . . . by the result of the judgment or decree which may be entered." *Larsen v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902). States which incorporate associations do not grant immunity to the corporations in which the states have participated unless so stipulated in the powers given to the corporation; "as a member of a corporation, a government never exercises its sovereignty." *The Bank of the United States v. Planter's Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 908 (1824). Followed in, *Bank of Kentucky v. Wister*, 27 U.S. (2 Pet.) 318 (1829). Therefore it was held in *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 645 (1911), that:

...Neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty.

... general governmental interest is not that which makes the state, as an organized political community, a party in interest in the litigation, for if that were so the state would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the state, either statute or common. The interest must be one in the state as an artificial person.


In the Brief for Appellant, p. 469, In re Ayers, 123 U.S. 443 (1887), was enumerated certain criteria applicable when deciding whether the suit is one against the state or not:

The tests are as follows: (1) Whether a State is named as a party on the record; (2) Whether the action is directly upon the contract; (3) Whether the suit was brought to control the discretion of an executive of the State; (4) Whether the suit was brought for the purpose of administering the funds actually in the public treasury; (5) Whether it is an attempt to compel officers of the State to do acts which constitute a performance of its contract by the State; (6) Where the case is such that the State is a necessary party, that the defendant may by [sic] protected from liability to it.

In the present case, the court used the above test as to whether the source of funds used for the operation of the Board was derived solely from state appropriation. It also interpreted the power granted to the Board by the Indiana legislature as being indicative of the close relationship existing between the Board and the state. The court seemed to favor most the argument that the members of the Board were elected from the state agricultural districts. This certainly would indicate that the Board was acting as an agency of the state for the benefit of the people in such a capacity.

Also in cases where authorization to waive immunity has been provided in a particular state statute, it has been held that a suit should be brought before the state court and not the federal court. O’Neill v. Early, 208 F.2d 286 (4th Cir. 1953).

The general trend has been to a more strict approach to state immunity in the federal courts. The federal courts have felt that this issue is more properly determined in the light of state legislation and is more of an individual problem of the state than that of the federal court. Recent decisions have followed this view unless the state has waived its immunity in the federal courts by statute. Kennecott Copper Corp. v. State Tax Comm’n, 327 U.S. 573 (1946); Ford Co. v. Dep’t of Treasury, 323 U.S. 459 (1945); Great Northern Ins. Co. v. Reed, 322 U.S. 47 (1944).

The federal courts then, have given an equitable approach to
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the problem of state immunity. It has promulgated rules which are not necessarily harsh to the litigant seeking relief and has properly left the question in the majority of cases to the state courts to decide. The eleventh amendment called for such immunity and the federal courts have provided for such as far as the dictates of reason and fair play will allow.

John Rogers

Corporations—Dissolution—Presumption Against Participation by Preferred Stock in Liquidation Priority.—Mohawk Carpet Mills, Inc. v Delaware Rayon Co., . . . Del. Ch. . . ., 110 A.2d 305 (1954). The Delaware Rayon Co., a Delaware corporation, was dissolved in October, 1954. The present action was brought by certain class A stockholders who objected to the terms of the proposed liquidation plan regarding the distribution of surplus assets. The plan provided for repayment of full par value of the Class A stock, and for all remaining assets to be distributed solely among the Class B stockholders. The Class A stockholders maintained that in the absence of a provision in the corporate charter to the contrary, the rights of all stockholders to share in the surplus were equal. The Delaware statute controlling the rights of preferred stockholders provided: "The holders of preferred or special stock of any class . . . shall be entitled to such rights upon dissolution of . . . the corporation as shall be stated and expressed in the certificate of incorporation . . ." Del. Code Ann. tit.8, §151(d) (1953).

In regard to the respective rights of Class A and B stockholders, the charter provided that Class A was to have preference to both dividend payment and to repayment of capital upon dissolution. While Class A was granted the right to share ratably with Class B in surplus dividend distribution after both classes had received their stated dividend, the charter was significantly silent regarding the right of Class A to participate further in the distribution of surplus assets after being repaid at par.

The question then presented was whether the preference rights to payment of dividends and capital, granted to the Class A stockholders, were exhaustive, and denied to this group the right to share further in the distribution of surplus assets beyond their stated preference. The court held that the rights expressly granted to the Class A stockholders created a presumption that the rights so stated were exhaustive, and that the Class A stockholders had failed to establish that the charter entitled them to further participation.
In positing the burden of proof upon the holders of the preferred shares, the court gave recognition and approval to the rule established in recent English cases. *Scottish Insurance Corp. v. Wilson and Clyde Coal Co.*, [1949] A.C. 462; *In re Isle of Thanet Electric Supply Co.*, [1949] 2 All E.R. 1060 (C.A.) The significance of the decision in the instant case lies in the fact that it represents the first instance of a United States court expressly delineating the participatory rights of preference stockholders in dissolution to their stated priority to repayment, without recourse to implying a limitation from the terms of the charter. In the relatively few instances in which a similar question has arisen in this country, the courts have proceeded on the principle that the rights of classes of stockholders are contractual, and that the articles of incorporation constitute the repository of these rights. By scrutinizing the articles, the courts were able to discover an implied limitation which precluded further participation by the preference shareholders. See *Williams v. Renshaw*, 220 App. Div. 39, 220 N.Y. Supp. 532 (3d Dept. 1927); *Murphy v. Richardson Dry Goods Co.*, 326 Mo. 1, 31 S.W.2d 72 (1930) (based on the *Renshaw* case).

In any question concerning the respective rights of classes of stockholders, the courts in both England and this country have been guided by two underlying principles. The first is that, in the absence of specified rights or limitations, all stockholders are entitled to share equally in liquidated surplus assets. *Birch v. Cooper*, 14 App. Cas. 525 (1889). As stated in *Guaranty Trust Co. v. Galveston City R.R.*, 107 Fed. 311, 318 (5th Cir. 1901):

> When a corporation is dissolved . . . if there are any assets left after paying off the debts they are ordinarily distributed between the stockholders in proportion to the number of shares which each holds. There is no preference of one stockholder over other stockholders, except such preference is expressly contracted for.

Secondly, the courts universally adhere to the rule that rights of respective classes of stockholders are determined by statute and by the terms of the articles of incorporation. *Crocker v. Waltham Watch Co.*, 315 Mass. 397, 53 N.E.2d 230 (1944); *West Duluth Land Co. v. Northwestern Textile Co.*, 176 Minn. 588, 224 N.W. 245 (1929); *Lloyd v. Pennsylvania Electric Vehicle Co.*, 75 N.J. Eq. 263, 72 Atl. 16 (1909). The difficulty ensues when, as in the instant case, a precise application of the foregoing principles is required but the charter is not explicit on its face.

The question of participatory rights in dissolution has been somewhat obscured by the conflict of authority on the related problem of the right of preferred shareholders to participate in additional dividend distribution beyond their stated priority.
Generally, the courts both in England, Will v. United Lankat Plantations Co., 1914 A.C. 11 (1913), and in the United States, Niles v. Ludlow Valve Mfg. Co., 202 Fed. 141 (2d Cir. 1913), cert. denied, 231 U.S. 748 (1913), have denied further participation in this situation. However, in Englander v. Osborne, 261 Pa. 366, 104 Atl. 614 (1918), it was held that after common stock had received a dividend equal to that received by the preferred stock, both classes were entitled to share equally in any excess. While there is authority to the effect that the problems are so analagous that it would be inconsistent not to imply a limitation to further participation in dissolution from a stated preference to repayment, Ballantine, Corporations §217 (2d ed. 1946), the English courts until recently have treated the question as entirely distinct, on the grounds that one theory refers to rights in a going concern while the other refers to rights in liquidation. In re William Metcalfe and Sons Ltd., [1933] 1 Ch. 142 (1932).

In the few instances in which United States courts have determined the extent of participatory rights of preferred stock beyond the stated liquidation priority, the courts have adhered to the principle that, in the absence of an express limitation in the charter, the rights of preferred and common stockholders are equal. However, the courts have then proceeded to construe the charters in question so as to imply a prohibition against further participation. Williams v. Renshaw, supra; Murphy v. Richardson Dry Goods Co., supra. In the former case, the charter provided that in dissolution preferred stockholders were to be "paid in full at par" before any amount was to be paid to common stockholders. This was held to mean that payment at par was to be payment in full and precluded further participation by preferred stockholders. In the Murphy case, supra, a similar question was involved and the court cited with approval the decision in the Williams case, supra, and held that the stated right to be "paid in full" was exhaustive. In line with these decisions, it would not have been unreasonable for the court in the instant case to have held that the right "to receive cash to the amount of the par value of the Class A stock" was similarly indicative of a limitation on further sharing. However, by looking to the English courts for a rule of construction, the court was able to arrive at the same conclusion while avoiding the risks of an arbitrary interpretation.

Although comparatively rare in this country, the question posed in the instant case has been the subject of considerable litigation in the English courts and periodic diverse holdings have resulted. When the charter is silent as to participatory rights in liquidation, the decisions are in accord to the effect that all
stockholders are deemed to have equal rights on the basis of the value of their shares. *Birch v. Cropper*, 14 App. Cas. 525 (1889); *In re Isle of Thanet Electric Supply Co.*, supra. However, when one class of stockholders is granted a preference to repayment of capital, the unanimity of the case holdings disappears.

The decision of the Chancery Division in *In re Espuela Land and Cattle Co.*, [1909] 2 Ch. 187, was indicative of the majority view until very recently. Here the charter granted to preferred stockholders prior rights to dividend payment and to repayment of capital. Expressing approval of *Birch v. Cropper*, supra, the court held that these rights were not exhaustive, and that in the absence of an express limitation, the right of preferred stockholders to share in surplus liquidated assets was equal to the right of the common stockholders. However, a contrary decision was reached in *In re National Telephone Co.*, [1914] 1 Ch. 755 (1913). In the latter case the court held that a preference to repayment of capital was analogous to a preference for dividend payment, and since the latter was considered to be exhaustive, following the rule in *Will v. United Lankat Plantations Co.*, supra, the preferential right to repayment of capital was accordingly held to preclude further claim. In subsequent cases, this holding was confined to its particular facts, and the rule as expressed by *In re Espuela Land and Cattle Co.*, supra, was followed. See *In re Fraser and Chalmers, Ltd.*, [1919] 2 Ch. 114 and *In re John Dry Steam Tugs, Ltd.*, [1932] 1 Ch. 594.

In England, the right of a class of stockholders to participate in the distribution of surplus liquidated assets beyond their stated preference was considered to have been settled by the decision in *In re William Metcalfe and Sons Ltd.*, supra. The court stated, [1933] 1 Ch. at 148:

... preference shareholders ... must be treated as having all the rights of shareholders except so far as they renounced those rights on their admission to the company. It is for the ordinary shareholder here to establish that the preference shareholders renounced their rights to participate in the surplus assets now distributable. (Emphasis added.)

This view prevailed until 1949, when the *Scottish Insurance Corp.* case, [1949] A.C. 462, was decided. A colliery, being faced with inevitable liquidation because of the *Coal Industry Nationalization Act*, 1946, 9 & 10 Geo. 6, c. 59, attempted to extinguish the preferred stock by returning paid-in capital prior to the liquidation. The holders of preferred stock objected on the grounds that they would lose their right to share in the distribution of any surplus assets. It was held by a majority of
the House of Lords that the plan was not discriminatory since the preferred stockholders were entitled only to their stated preference rights which included priority to repayment of capital. In this decision, the court rejected the rule established by the Metcalfe case, supra, and indicated that the latter had been wrongly decided. Until the subsequent decision in the Thanet Electric case, supra, it was uncertain whether the holding in the Scottish Insurance Corp. case, supra, would be confined to the unusual factual situation which prevailed there, or whether it would be accepted as establishing a new precedent.

The issue in the Thanet Electric case, [1949] 2 All E.R. 1060, was raised on an appeal from a decision based on the earlier rule, in the Metcalf case, supra, i.e., that the burden of proving that a class of stockholders was not entitled to share beyond its stated preference to repayment of capital upon dissolution, was upon the ordinary stockholders who were challenging this right. The rights conferred upon the preferred class by the charter in this case were essentially the same as in the instant case. The court of appeals, by a subtle analysis of the decision in the Scottish Insurance Corp. case, supra, held that the latter case had initiated a broad principle of construction. The court stated, [1949] 2 All E.R. at 1063, that:

In my view . . . Lord Normand [in the Scottish Insurance Corp. case, supra,] took the view that the same principle applies to the construction of rights in a winding-up as applies to the construction of dividend rights. . . . It, therefore, seems to me plain that he takes the view that the onus in such a case as this lies on the holders of preference shares. (Emphasis added.)

Accordingly, the court held that in any question of the extent of participatory rights, either as to dividends or surplus assets upon dissolution, where the rights of a class are set out, they are prima facie exhaustive. Since the preferred shareholders failed to overcome this presumption, the decision of the lower court was reversed, and the assets remaining after repayment of the preferred stock were ruled to be the sole property of the ordinary shareholders.

To the court in the instant case, the rule of law expressed in the Thanet Electric case, supra, furnished an equitable solution to an unusual and somewhat perplexing problem. If followed, this decision will have the effect of greatly facilitating the solution of any question involving the determination of the extent of participatory rights. Relatively arbitrary interpretation will be replaced by a binding presumption of law. It is submitted that the instant decision represents a correct definition of participatory rights. The holders of prior rights to repayment of capital
receive the benefits which normally would be anticipated and bargained for, and they lose only an uncertain claim to windfall profits. In any event, should a further participatory right be considered necessary, a provision to that effect in the articles of incorporation would be sufficient to defeat the presumption against such participation.

Thomas S. Calder

Courts — Application of State Law Under Diversity of Citizenship — Weight Accorded to Lower Court Decisions.—Eckman v. Baker, 126 F. Supp. 656 (W.D. Pa. 1954). An agent, driving his wife's car in Pennsylvania, in the course of his work for the defendant, collided with an automobile driven by the plaintiff. The latter had process served on the defendant employer through the Secretary of the Commonwealth, pursuant to the Pennsylvania Non-resident Motorist Service Statute, Pa. Stat. Ann. tit. 75 §1201 (1953), which provides that such service can be had on non-resident "operators" and "owners" of motor vehicles that are operated in Pennsylvania by or on behalf of said "operators" and "owners." The defendant, a citizen of Massachusetts, appeared specially to challenge jurisdiction based on this service, claiming that he could not properly be served under the statute because he was neither the "owner" nor the "operator" of the car, even though he did defray gas and oil expenses incurred in its operation. It was found that the appellate courts of Pennsylvania had never been called upon to construe this statute. However, four common pleas decisions ranging over the last twenty years had consistently construed the statute to apply only to operators of motor vehicles in Pennsylvania, and to owners having the same operated within the state. The statute was amended in 1949 in the light of these interpretations, and the specific section in question was left intact.

The question presented to the court for decision was whether a federal judge in a diversity case is bound to follow lower state court decisions where there is no appellate authority in point. The court concluded that although it was not bound by the lower court holdings, they should be accorded great weight in the absence of convincing evidence that they would be overruled on appeal to the supreme court of the state.

The Federal Judiciary Act of 1789, §34, has laid down the requirement that all federal courts must follow the laws of the several states in trials at common law, so long as they do not conflict with the Constitution, treaties, or statutes of the United
States. 1 Stat. 92 (1789), 28 U.S.C. §1652 (1952). The Supreme Court, in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), construed "the laws" to mean local statutory laws only, and this holding went unchallenged for almost a century until in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), the Court, reversing its earlier position, denied the right of federal courts sitting in diversity cases to apply "the general law" of "federal common law" rather than the body of common law in force in the state as declared by its highest court. Erie Railroad Co. v. Tompkins, supra, has supplied the basic premise, and the soundness of that decision is beyond the scope of this discussion.

When there has been no authoritative declaration of state law by the particular state courts, the federal courts have either attempted to arrive at the same result which, in their opinion, would be reached by the highest state court, American Employers' Ins. Co. v. Maryland Casualty Co., 218 F.2d 335, 339 (4th Cir. 1954) (dictum); or they have applied their independent judgment and assumed that the state courts would reach the same reasonable conclusion. Daily v. Parker, 152 F.2d 174, 177 (7th Cir. 1945) (dictum). In attempting to determine the applicable state law, the federal courts have consulted the applicable statutes, the intent of the legislature, the opinions and reports of committees, the opinions of the state courts, their considered dicta, the methods pursued by state courts in reaching their decisions (e.g., policies followed in construing contracts, textbooks, laws of other states, historical studies, etc.) and the reports and opinions of the state bar association. See Harnett and Thornton, Precedent in the Erie-Tompkins Manner: A Decade in Retrospect, 24 N.Y.U.L.Q. Rev. 770 (1949).

Where the state law is unsettled, a federal court cannot delay its decision until a state tribunal of last resort has expressed its position in the form of an authoritative opinion. The controversy must be settled, and it is the duty of the federal courts to do so. Meredith v. Winter Haven, 320 U.S. 228 (1943). On the other hand, state supreme court silence does not give a federal court freedom to apply the rule it considers best if the question has been answered by the state intermediate appellate court, unless there is convincing evidence that the highest state court would reach a different result. West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940). In the West case, the state supreme court had refused to review the lower court's decision. In Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940), where the only state decisions in point were two holdings of the Chancery Court of New Jersey, the federal court was nevertheless held bound. This would appear to represent an extension of the doctrine of
the West case, supra, in that the state supreme court had never considered the case, and because the chancery court, although it had state-wide authority in equity proceedings comparable to the intermediate appellate court on the law side, was still a court of original jurisdiction.

In Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940), one of the state's three appellate courts had twice decided the same issue between the parties, and the state supreme court had declined review. The United State Supreme Court held that the failure of the federal court to follow the two state court decisions was reversible error.

It is immaterial that the federal court may think that the state appellate court's ruling is wrong. That a federal court must follow the law declared by a state intermediate appellate court, even though it believes the state supreme court will overrule the lower decision, or that another state appellate court might reach a contrary conclusion was decided in McLouth Steel Corp. v. Mesta Machine Co., 214 F.2d 608 (3d Cir. 1954).

The holding in Fidelity Union Trust Co. v. Field, supra, gave rise to a certain amount of confusion in its application by the federal courts. One federal district court, while stating that it doubted that it was bound by two state common pleas decisions, nevertheless followed them because it believed that the state superior court would uphold the lower decisions on the basis of a prior decision by that court. The federal circuit court reversed the district court's decision on the ground that the superior court decision relied upon was not in point. The court then went on to give its own interpretation of the statute involved in the case. In re Berlin, 147 F.2d 491 (3d Cir. 1945). Where a state supreme court dismissed an appeal from an unreported decision of a county court, the federal court of appeals held that it was bound by that decision, even though the court was of the opinion that the county court had departed from precedent, since there was no convincing evidence that this decision did not represent the law of the state. Gustin v. Sun Life Assur. Co., 152 F.2d 447 (6th Cir. 1945), cert. denied, 328 U.S. 866 (1946).

Later, the Supreme Court, in King v. Order of United Commercial Travelers of America, 333 U.S. 153 (1948), limited its holding in the Fidelity case, supra, by deciding that federal courts need not follow the decisions of a lone state trial court whose unpublished decisions are not binding in any subsequent cases in that court or in any other state court. The two cases are clearly distinguishable on the extent of the jurisdiction of the state courts involved. The Fidelity case concerned a state chancery court whose published decisions were binding in later
cases and could be reversed only by the highest court of the state. In the King case, supra, the Court carefully confined its holding to the particular facts involved, expressly pointing out, 333 U.S. at 162, that its decision was not:

... to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. As indicated by the Fidelity Union Trust Co. case, other situations in other states may well call for a different result.

Following the reasoning of the King case, supra, the federal circuit court, in Doggrell v. Great Southern Box Co., 206 F.2d 671 (6th Cir. 1953), rev'd on other grounds, 208 F.2d 310 (6th Cir. 1953), held that the decisions of a state chancery court which are not published, even though the court is a court of record, need not be followed. The decisions of a single common pleas court were held not to be binding on the federal courts in Sunbeam Corp. v. Civil Service Employees' Cooperative Ass'n., 187 F.2d 768 (3d Cir. 1951), rev'd on other grounds, 192 F.2d 572 (3d Cir. 1951), cert. denied, 342 U.S. 909 (1952), even though the decisions were reported, solely on the ground that the court's jurisdiction was very limited and its decisions had no binding effect on other state courts. The court added, by way of dictum, that where decisions of lower courts form a "... sufficient body of nisi prius opinion to form a consensus of legal thought on a given subject," a federal court should join in such a consensus. 187 F.2d at 772.

Other decisions which have followed the general language of the King case, supra, are: Berkshire Land Co. v. Federal Security Co., 199 F.2d 438 (3d Cir. 1952); Lattavo Bros., Inc. v. Hudock, 119 F. Supp. 587 (W.D. Pa. 1953); Stinson v. Edgemoor Iron Works, Inc., 55 F. Supp. 861 (D. Del. 1944). In Neff v. Hindman, 77 F. Supp. 4 (W.D. Pa. 1948), a case involving the same statute as the principal case, it was held that a federal court need not accept as binding the decision of a single common pleas court which was opposed to a prior state supreme court ruling and to the report of the legislative committee which drafted the rule of procedure involved. The fact that there was no indication of a contrary holding by the supreme court was held sufficient to bind the federal court to follow a superior court decision in Stinson v. Edgemoor Iron Works, Inc., supra. Further weight was given to the lone court decision by the fact that it was in line with the weight of authority and also due to the capacity of superior court judges in Delaware to sit as supreme court justices. In Lattavo Bros., Inc. v. Hudock, supra, the district court held itself bound by the decision of a common pleas court because it was convinced that the state supreme court would agree with
the decision of the lower state court. This is perhaps the furthest point to which federal courts have gone in finding themselves bound by lower state court decisions.

Where a state supreme court has reached a conclusion opposed to two orphans' court decisions which were widely separated in time and place, the federal court has disregarded them in its attempt to discover the applicable state law. *Berkshire Land Co. v. Federal Security Co.*, supra. Since these decisions were not binding on other state courts, and not even on other orphans' courts in that very same state, the court reasoned that they should not be binding in a federal tribunal.

From these various decisions, several basic conclusions may be drawn in regard to the factors which will be considered by the federal courts in determining the weight to be accorded to lower state court decisions. Although no one case has turned on all of these factors, the following considerations have been consistently deemed relevant: whether the decision runs contrary to the letter or policy of higher court decisions; the rank of the court in the state judicial structure; the extent to which its decisions are binding on other state courts of lower and co-ordinate jurisdiction; the number of other trial courts that have arrived at a similar conclusion; the court's jurisdictional limits; the length of time these decisions have been in effect without being reversed or appealed; whether or not the statute construed by the court has been amended without affecting the construction placed upon it; whether or not the court is a court of record and its decisions are so reported and published as to be readily available; whether the lower court decisions are widely separated in time and place; and whether the lower court's decision has followed the weight of authority.

In the instant case, the court discussed the absence of contrary decisions and dicta from higher court, the failure of the legislature to amend the section of the statute construed by the lower courts, the number of lower court decisions to the same effect, their longevity, and their soundness. On the basis of these considerations, the court held that it was bound only to give great weight to the lower court decisions. Due to the fact that these common pleas decisions undoubtedly represented the state law on the particular point in question, it is submitted that the court would have been more accurate by admitting that it was bound by such decisions.

*Edward S. Mraz*
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COURTS—IMPROPER CONDUCT ON THE PART OF THE TRIAL JUDGE—INTERFERENCE WITH TESTIMONY OF WITNESSES CONSTITUTING A DEPRIVATION OF FUNDAMENTAL RIGHTS.—Ohio v. Lawrence, 162 Ohio St. 412, 123 N.E.2d 271 (1954). The defendant was arrested and charged with manslaughter in the second degree. Waiving trial by jury, his defense was presented to the court, supported by the testimony of three witnesses. The record of the trial court revealed that the judge had constantly interrupted defense counsel during direct examination of his witnesses; that the defense witnesses were directly or indirectly accused of falsification or inaccuracy when their answers were not in accordance with testimony given by the prosecution; that each witness was threatened with imprisonment for perjury when their answers appeared undetailed and conflicted with previous witnesses, or incapable of being heard. It appeared that all of the witnesses were attempting to be accurate and cooperative. The defendant was convicted and an appeal was directed to the Supreme Court of Ohio, after the court of appeals had affirmed, on the ground that the trial court had, by its manner and conduct with the witnesses, deprived the defendant of his right to a fair and impartial trial. The supreme court, after reviewing the record, reversed the conviction and remanded the case for retrial in conformity with the fundamental rights of every person charged with a crime. The court determined that the atmosphere of this trial fell “far short of the plain requirements of the law.”

It is manifest that a defendant in a criminal trial has the right to demand a fair and an impartial court. Determining when a particular defendant may object to the conduct of the trial judge has long been a perplexing problem for the courts. Historically, the position of the judge in the United States has differed greatly from that of the Continental courts. The judge in English practice was never dominated by the tendency of the common law to relegate the judge to the position of an umpire. The English judge is said to perform an active part as director of the proceedings and is considered the administrator of justice. See generally, 3 WIGMORE, EVIDENCE § 784 (3d ed. 1940). A comparable rule has been formulated in federal practice where the Supreme Court has determined the status of the judge to be not that of a mere moderator, but the “governor” of the trial. Quercia v. United States, 289 U.S. 466, 469 (1933). Canada has apparently followed the tradition of the common law although in Boran v. Wenger [1942] 2 D.L.R. 528 (Ont. Ct. App.), it was held that there was no serious error when the trial judge in a non-jury case took over examination of witnesses but had allowed counsel opportunity to add anything afterward. The court said the rule was,
however, that a judge has no right to take the case into his own hands from counsel except to see that any ambiguities were cleared up.

In the United States the traditional concept of the common law relegating the judge to the position of a moderator has never been abandoned. Wornam v. Hampton Normal & Agricultural Institute, 144 Va. 533, 132 S.E. 344 (1926). Perhaps no exact term or status fits the judge except by way of describing what his position is not. For example, it has been held that a judge is not merely a “moderator at a town meeting” and neither should he attempt to become an advocate, Fritts v. United States, 80 F.2d 644 (10th Cir. 1935), and that the trial judge should endeavor not to show any “favor or disfavor” toward the parties and witnesses, People v. Shiffman, 350 Ill. 243, 182 N.E. 760 (1932). It is not deemed improper to interrogate a witness, but the concept of due process has placed the judge in a position which requires that he be impartial and completely fair. Thus, it is very possible that expressions of impatience by the judge will tend to place counsel at a disadvantage with the jury or tend to disparage counsel’s case by implying disbelief of the witness’ veracity. Western Coal & Mining Co. v. Kranc, 193 Ark. 426, 100 S.W.2d 676 (1937). While the practice of asking questions in order to elicit the truth is well-established, the court must exercise careful discretion in the matter. In State v. Gleason, 86 Utah 26, 40 P.2d 222, 228 (1935), it was stated:

The practice of questioning by a judge is not to be recommended or encouraged because even with the best of intentions a judge in all sincerity may carry his examination too far and unwittingly prejudice a defendant before the jury.

In Simpson v. Burton, 328 Mich. 557, 44 N.W.2d 178 (1950), the court held, inter alia, that the interrogation of the witnesses and the defendant by the trial judge was improper. The basis for the court’s decision was that the series of questions during an intensive examination by the judge may have aroused suspicion in the mind of the jury as to the credibility of the defendant. The court said that the particular questions directed for clarity’s sake would normally be proper but the trial judge should not persist so as to express his opinion to the jury. However, in Aero Enterprises Inc. v. Walker, 123 Colo. 113, 228 P.2d 811 (1950), the court held questions proper if the trial judge has exercised sound discretion in his examination. Further, the court limited the extent of the questions by stating that interrogation should only be used in exceptional instances where the purpose is to elicit the truth or clarify a situation. Interruptions and examination in a hostile manner are not fair to the defendant,

While it is generally recognized that it is the right of the trial judge to take part in the examination of witnesses whenever he deems it necessary to clearly understand the testimony, the judge is limited to preserving a judicial attitude and refraining from disclosing his views. State v. Davis, 83 N.H. 435, 144 Atl. 124 (1928). In People v. Rongetti, 331 Ill. 581, 163 N.E. 373, 379 (1928), the court points out the danger in exercising this power:

... it is generally within the province of the court to propound pertinent and properly framed questions to a witness to clear up the record when it appears that such questions will not be asked by counsel. The exercise of that power... is not only embarrassing to counsel if leading, suggestive, and improper questions are asked, but is always likely to arouse a serious apprehension in the minds of the jury as to what the court thinks on the issue of guilt. To question a witness is a task of great delicacy when done by the court, and even the tone or inflection of the voice of the judge may tend to indicate to the jury what the court thinks...

In Connecticut, more latitude is given to the right of the trial judge to comment, the appellate court looking to the purpose rather than the effect on the parties and jury. See State v. Cianflone, 98 Conn. 454, 120 Atl. 347 (1923). In the federal district court, openly expressed opinion, otherwise prejudicial, is held to be cured by instructions to the jury to disregard the opinion, even when such instructions come at the end of the trial. United States v. Aaron, 190 F.2d 144 (2d Cir. 1951), cert. denied sub. nom., Freidus v. United States, 242 U.S. 827 (1951).

The problem presented to the appellate court is whether or not the trial judge has abused his discretion and thereby deprived the defendant of a fair trial. The courts, reluctant to establish any specific test because of the nature of the subject, prefer a case by case approach. However, a general test was set out in Garrett v. State, 187 Miss. 441, 193 So. 452, 455 (1940), where the court said:

... an impartial trial is one of the constitutional rights of every person accused of crime. In any case, a judge is not supposed to be partial, biased or prejudiced, and by virtue of his training and experience in dealing with trials, matters of law and evidence, he can distinguish the niceties of the situation and accord to every party his full legal right. Should a case arise in which it was obvious that a judge had been partial, biased or prejudiced, and that his attitude and conduct had brought about an unfair trial, the Court would reverse...
Understandably different considerations could reasonably apply where a trial by jury is waived and the judge is relied upon as the arbiter of the law and fact. The weight accorded to the judgment of the trial court on appeal may be substantially in his favor for the reason that the record does not reveal the actual atmosphere of the trial. See United States v. Warren, 120 F.2d 211 (2d Cir. 1941), and Risley v. Lenwell, 277 P.2d 897, 909 (Cal. App. 1954). It has been held, however, that the same considerations apply to the conduct of the court whether or not a jury is present. People v. Giacomino, 347 Ill. 523, 180 N.E. 437 (1932).

In the latter case, very similar to the instant case, it was contended that the conduct of the judge was improper in that he asked too many questions concerning the defendant's alibi as well as subjecting the witnesses to severe cross-examination. Although recognizing that the trial court was properly exercising its judicial power of inquiry, it was held that the judge should not discomfort or confuse a witness by his questions or attitude while searching for the truth. The court of appeals said that the principles of proper conduct are no different whether or not the cause is before a jury and the judge should refrain from siding with the prosecution or defense.

The restrictive mandate that the judge preside with utmost impartiality and restrain himself from taking too active a part in the progress of the trial has been deemed applicable to both civil and criminal trials. Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936). In Rosenfield v. Vosper, 45 Cal. App. 2d 365, 114 P.2d 29 (1941) (trial was before the judge sitting without a jury), where judgment for damages was reversed because of the trial court's admonition to the defendant to settle out of court, it was held that the judge had pre-judged the issues before the whole case was submitted; that giving such advice compelled the conclusion that he had closed his mind to the merits of the case. Where the trial judge gratuitously interrupted counsel and aided him in a lengthy questioning of an adverse medical witness, the court held that such acts furnished an adequate explanation for the jury's verdict. Whitehead v. Mutual Life Ins. Co., 264 App. Div. 647, 37 N.Y.S.2d 261 (3d Dep't 1942) (alternative holding). Annot., 84 A.L.R. 1172 (1933).

As previously noted, the federal courts have taken a more liberal view of the attitude which a trial judge may take toward witnesses and the parties. United States v. Aaron, supra. After examination of the record, the court in United States v. Warren, 120 F.2d 211 (2d Cir. 1941), held that, although the trial judge was extremely curt in his conduct, such action was not so prejudicial as to deny the complainant a fair trial. Further,
the court explained that every word of the record should not be jealously scrutinized, but rather the trial had to be taken in its entirety to see if the end result was in accord with the evidence presented. Some area of appellate control is expressed in Adler v. United States, supra, where the court held that a judge may not give the jury any impression that he has a fixed opinion of the defendant's guilt or innocence. The court said, 182 Fed. at 472:

The trial judge, under the federal system, is not only permitted, but it is his duty, to participate directly in the trial, and to facilitate its orderly progress and clear the path of petty obstructions . . . . But the conduct of the judge, in the performance of all his duties, should appear to be impartial.

This impartiality is for the benefit of the jury, and if opinions are stated, the jury must be instructed to the effect that they should disregard them. Texarkana Bus Co. v. Balcer, 142 F.2d 451 (5th Cir. 1944). See also Quercia v. United States, supra. Further, it has been held improper for a trial judge, during a criminal trial, to interrupt the witness who is answering a question if the effect is to put words in the witness' mouth. Williams v. United States, 93 F.2d 685 (9th Cir. 1937).

The cases presented set out the principles from which a guide may be formulated for determining when questioning of witnesses or a party to an action by a trial judge is proper or improper. A case by case determination may be aided by the following "rule of thumb" approach: A judge has not acted improperly if his questions have been asked in all sincerity and fairness and in a calm and friendly manner, being motivated by a desire for truth and justice. He must not create an impression of passion or prejudice toward one side or the other. Whatever variances might be found from this broad test have invariably depended upon the distinctions in the cases themselves. The court in the instant case has followed the general view of the common law in this country.

Cornelius Jerome Smith

Evidence—Admissibility—Blood Grouping Tests to Prove Paternity.—People v. Nichols, . . . Mich. . . . 67 N.W.2d 230 (1954). Defendant, the putative father of the complaining witness' illegitimate child, appealed from an adverse decision in the lower court. Defendant alleged error on the part of the trial judge for admitting blood grouping evidence, given by an expert witness, which tended to show the defendant was the possible father of the complaining witness' illegitimate child. Defendant alleged further error in the court's instruction to the effect that
the jury could give the evidence whatever weight it deemed proper. The supreme court held that the admission of the testimony constituted reversible error. The court ruled that since the error was prejudicial the resulting verdict should be reversed and a new trial granted. One justice dissented on the grounds that such testimony on blood grouping is “expert testimony” and as such should be admissible for whatever weight the jury believes it properly deserves.

The question in this case is whether the courts should admit blood grouping evidence to prove paternity. The scope of this discussion will be limited to the admissibility of blood grouping evidence in actions concerning illegitimate children.

The admissibility of blood grouping evidence, when introduced to show nonpaternity, is no longer questioned in the United States. Many states have statutes expressly allowing blood grouping tests when the admissibility of such evidence tends to exclude the putative father. IND. ANN. STAT. § 3-658 (Burns 1953); ME. REV. STAT. c. 166, § 34 (1954); MD. ANN. CODE GEN. LAWS art. 12, § 17 (1951); N.Y. DOM. REL. LAW § 126-c; STAT. OF NEV. c. 159 p. 234 (1951); N.C. GEN. STAT. § 8-50.1 (1953); OHIO GEN. CODE ANN. § 8006-16 (1952); PA. STAT. ANN. tit. 28, § 306 (1954); WIS. STAT. § 325.23 (1953). Most of these statutes have been interpreted by the courts of these jurisdictions to expressly preclude admission of blood grouping evidence to prove paternity. The position taken by these courts is that by the very terms of such statutes blood grouping evidence cannot be admitted unless it will prove non-paternity. Miller v. Domanski, 26 N.J. Super. 316, 97 A.2d 641 (App. Div. 1953) (if evidence does not show exclusion of defendant the terms of the statute make such evidence inadmissible); State ex rel. Freeman v. Morris, 156 Ohio St. 333, 102 N.E.2d 450 (1951) (results of blood tests where mere possibility of paternity is disclosed is not competent, and its admission is prejudicial); State ex rel. Wollock v. Brigham, 72 S.D. 278, 33 N.W.2d 285 (1948) (blood grouping evidence can never establish paternity; order by trial judge for defendant to submit to blood grouping test was set aside).

There is a judicial trend starting with Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949), toward allowing blood grouping evidence to be conclusive proof of nonpaternity. While the Maine statute uses the same general terminology of the statutes enumerated above in regard to admission of blood grouping evidence, the court has recognized in the Jordan case that scientific advances have reached the stage where blood grouping tests can prove conclusively that a defendant was not the father of the child. Accord, C. v C., 200 Misc. 631, 109 N.Y.S.2d 276 (Sup. Ct. 1951).

Effects of Test Results. If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence. If the experts conclude that the blood tests show the possibility of the alleged father’s paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type.

The Michigan and California acts do not include that portion of the recommended statute which makes blood grouping evidence admissible, in the discretion of the trial judge, to prove paternity. The Oregon and New Hampshire acts have followed the recommendations of the Commissioners in this respect and, at this time, are the only states which have statutes which allow admission of blood grouping evidence to prove paternity. These statutes leave the decision in the discretion of the trial judge as to the admission of such evidence, and therefore it is not absolutely admissible in all cases, as is permitted in nonpaternity cases.

There are a few isolated cases where blood grouping evidence has been admitted to show a possibility of paternity without statutory approval. Appeal of Ketcham, 254 App. Div. 776, 4 N.Y.S.2d 786 (2d Dep’t 1938), held that admission of blood grouping evidence to show possibility of paternity over the objection by defendant was error, but was harmless due to the abundance of supporting evidence. A new trial was refused. In Livermore v. Livermore, 223 Iowa 1155, 11 N.W.2d 389 (1943), evidence was introduced on blood grouping to show a possibility of paternity. The trial judge gave an instruction allowing the jury to give this evidence whatever weight they deemed proper. Defendant took exception to the charge along with other alleged errors and on appeal the supreme court, without stating any reason, held that there was no merit to the exception. The decision was primarily founded on the fact that there was considerable additional evidence supporting the conclusion reached by the jury.

The courts have used many types of evidence which could prove only a possibility of paternity. This evidence would not appear to be any less prejudicial to the defendant than blood
grouping. In *Berry v. Chaplin*, 74 Cal. App. 2d 652, 169 P.2d 442 (1946), a child was shown to the jury in the arms of the putative father and the closeness of resemblance left for the jury to determine. In this same case the court refused to overrule a verdict against the defendant even though expert testimony on blood grouping definitely ruled out the defendant as the possible father. In *Reams v. State ex rel. Favors*, 53 Ohio App. 19, 4 N.E.2d 151, 153 (1936), a baby was exhibited to the jury so that it might determine if there was any real or fancied resemblance to its putative father. The Ohio court of appeals said it could not know how much weight was given to the evidence but it did not consider it reversible error. Also in *Lawhead v. State*, 99 Okla. 197, 226 Pac. 376-77 (1924), a child was shown to the jury and attention called to the tips of the child's ears for comparison to the ears of the putative father. The appellate court said that this was not reversible error. Accord, *People v. Wing*, 115 Mich. 690, 74 N.W. 179 (1898) (court refused to reverse case on grounds that jury was allowed to consider alleged resemblances between defendant and the child).

The admission of evidence which could only prove a possibility, such as exhibiting children before the jury to compare them with the putative father, or blood grouping evidence which tends to show that defendant could have been the father, can be related to a judicial statement in an analogous case, *Shanks v. State*, 185 Md. 437, 45 A.2d 85 (1945). Therein the court was of the opinion that, 45 A.2d at 89: "To exclude evidence merely because it tends to establish a possibility, rather than a probability, would produce curious results not heretofore thought of. . . ."

The Michigan court has decided the instant case in conformity with the weight of authority, and it closely parallels that state's recently passed blood grouping statute. Mich. Stat. Ann. § 25.474 (Supp. 1954). It is submitted that the admission of such evidence should be permitted in the discretion of the trial court and should not be reversible error in all cases. Since there are two blood types, B and AB, which represent only small percentages of the population [See McCormick, Evidence § 177 (1954)] it may be a wiser policy to allow the trial judge to use his discretion as to admission. If proper instructions are given to the jury, such evidence could be useful in determining the issues of the case. It would at least be as useful, it is further submitted, as some of the other modes of proof which the courts have allowed, such as the exhibition of the child for comparison to the putative father. While this whole question may be a matter of legislative action, the judges who try the cases are in the best position to determine whether the testimony will cause undue prejudice.

Allan C. Schmid
Insurance — Delivery in Good Health Clause — Apparent Good Health.—Brubaker v. Beneficial Standard Life Ins. Co., . . . Cal. App. . . . , 278 P.2d 966 (1955). Plaintiff’s husband made application for two life insurance policies. The application was completed on the 25th of March, 1952. A doctor, acting as medical examiner for the defendant insurance company, found the applicant to be “quite healthy.” On April 11, 1952, the policies were delivered to the insured. Two weeks after receiving the policies the insured was found to be suffering with cancer; until this time he had no knowledge of his affliction. On November 4, 1952, the insured died. The defendant tendered to the plaintiff, beneficiary of the policy, the money which amounted to the premiums paid on the policies, but the tender was not accepted. Plaintiff brought this action to collect $7,000 on the policies, and the superior court gave judgment for her. On appeal the judgment was affirmed, the court holding that where insured had been examined by insurer’s physician and found in good health, but actually had cancer, which caused his death, “delivery in good health clause” in the policies did not render the policies void.

The issue presented is whether, in the absence of fraud, a life insurance policy is void if it is delivered to an insured not in actual good health but apparently so, when the policy contains a delivery in good health clause.

In the last few years a large number of courts have been loathe to enforce these clauses against an innocent insured, preferring to discover various means of depriving the insurers of the legal effect of such clauses. The approaches to the problem vary from holding the clauses to be effective only between the time the policy is applied for and issued or delivered, National Life and Accident Ins. Co. v. Jones, 230 Ky. 222, 18 S.W.2d 982 (1929), to the few cases holding, as does the instant case, that these clauses are not construed to be conditions precedent, but rather mere stipulations which do not affect the validity of the insurance contract. Schmidt v. Prudential Ins. Co. of America, 190 Minn. 239, 251 N.W. 683 (1933) (decided under statute providing applicant’s statement controlling unless fraud shown), Minn. Stat. Annotations § 61.24 (1945).

The general rule of contract law, as well as early insurance law was that innocent misrepresentations avoid the policy. See Note, 32 Colum. L. Rev. 522, 524 (1932). In compliance with this general principle, the Massachusetts Supreme Court held, in effect, if the insured at the time of delivery was not in sound health, the defendant is not liable on the policy, and this fact can be shown by any competent evidence. Gallant v. Metropolitan Life Ins. Co.,
The facts in Murphy v. Metropolitan Life Ins. Co., supra, are very similar to those of the instant case. A young boy applied for life insurance and was found to be in good health by the insurance medical examiner. The policy was issued and delivered. When the delivery was made the boy was afflicted with cancer, which fact was discovered when the boy died shortly after the delivery. The court held that a delivery in sound health clause was a condition precedent, which was not met, thus making the insurance contract unenforceable. If the contract is unenforceable the only liability of the insurance company is to return the money paid in premiums on the policy. See Popowicz v. Metropolitan Life Ins. Co., supra.

Of the courts which follow the apparent rather than the actual good health requirement, a large number of them reach their decisions by holding the delivery in good health clause applies only to changes in the condition of the insured occurring after the making or acceptance of the application for the policy and before the issuance or delivery of the policy. James v. National Life and Accident Ins. Co., 265 Ill. App. 436 (1932). The Supreme Court of Pennsylvania held in Prudential Ins. Co. of America v. Kudoba, 323 Pa. 30, 186 Atl. 793 (1936), that the sound health clause must be restricted to mean only that the applicant did not contract any new disease impairing his health nor suffer any material change in his physical condition between the time when the medical examination was made and the date of the policy. Accord, Stramaglia v. Conservative Life Ins. Co., 319 Ill. App. 20, 48 N.E.2d 719, 722 (1943); Mid-Continent Life Ins. Co. v. House, 156 Okla. 285, 10 P.2d 718, 723 (1932); New York Life Ins. Co. v. Smith, 129 Miss. 544, 91 So. 456 (1922).

The decision in Fidelity Mutual Life Ins. Co. v. Elmore, 111 Miss. 137, 71 So. 305 (1916) is in line with the instant case. However, it presents a different approach to the problem. The facts in this case were quite similar to those in the present case. The insured died of tuberculosis shortly after the policy was delivered to her. She had been examined by the company doctor at the time she applied for the policy and was found to be in good
health. In deciding a delivery in good health clause did not void the policy, the court said such a clause has no effect after the policy has been delivered to the insured, unless fraud could be shown. This same line of reasoning was followed by the North Carolina Supreme Court in *National Life Ins. Co. v. Grady*, 185 N.C. 348, 117 S.E. 289 (1923). The court held the insurance company under a delivery in good health clause was authorized to withhold the policy in case the insured shall be taken ill before delivery, but where the policy was delivered to the insured the company was concluded on this and other stipulations of like kind except in case of fraud.

In many jurisdictions the decision of the issue presented in the instant case has been greatly affected by legislation. A great majority of the states enacted statutes which were intended to save policies of insurance from forfeiture for false statements contained therein, unless such statements were found to be material to the risk. See generally, Note, 32 Colum. L. Rev. 522 (1932). The statutes vary greatly but the general intent is to transform warranties into common-law representations. VANCE, INSURANCE, § 74 (3ed., 1951). The California statute, CAL. INS. CODE § 10113 (1935), reads in part as follows:

> Every policy of life . . . insurance issued or delivered within this State . . . shall contain and be deemed to constitute the entire contract between the parties . . .; and all statements purporting to be made by the insured shall, in the absence of fraud, be representations and not warranties . . .

All but four states, Colorado, Florida, Iowa, and Maine, now have statutes of a like nature. 8 Wash. & Lee L. Rev. 94, 99 (1951). (An Iowa statute is discussed infra.)

The court in *Salts v. Prudential Ins. Co.*, 140 Mo. App. 142, 120 S.W. 714, 718 (1909), construed the Missouri “representation” statute so as to include within its provisions a delivery in good health clause. The court said in substance that the legislature intended to prevent insurance companies from avoiding liability on their contracts because of immaterial errors in representations and warranties, therefore, the statute must apply to prevent defenses based on warranties being introduced into the policy as conditions precedent. However, the Missouri statute further stated in effect that if the unsound health of the insured at the time of delivery caused or contributed to his death, the policy is not enforceable. The Alabama statute contained no such restricting clause and was given a very conclusive interpretation by that state’s supreme court in *Mutual Life Ins. Co. v. Mandelbaum*, 207 Ala. 234, 92 So. 440 (1922). This court held that regardless of whether the language used in the application was technically a