RECENT CASES.

CANALS—BRIDGES—DUTY TO REPAIR AND MAINTAIN.—In 1843 the defendant was chartered as a canal corporation by a special Act of Parliament. Section 62 of the Act required the company "at all times during the continuance of the Act to maintain and keep . . . all bridges . . . and retaining walls . . . in good and substantial and serviceable repair and in an efficient state for all purposes thereof and of the traffic on the same respectively." The defendant company had kept the bridge in question in a state suitable for traffic conditions of 1843, but denied any obligation to maintain the bridge in a condition necessary to modern traffic conditions. *Held:* That under section 62 the defendant is not required to do so. *Attorney General v. Lagan Navigation Co.*, [1924] A. C. 877.

Even without any express provisions in their charters, canal companies have a common law duty to construct and keep in repair bridges for the use of all public roads which the canal crosses. *King v. County of Kent*, 13 East 220 (Eng. 1811); *King v. Kerrison*, 3 M. & S. 526 (Eng. 1815); *Re Trenton Water Co.*, 20 N. J. L. 659 (1846); *Franklin County v. White Canal Co.*, 2 Cart. 162 (Ind. 1850); *Burton Township v. Tuttle*, 30 Ohio St. 62 (1876). It has also been held that this duty extended to private roads. *State v. Savannah Canal Co.*, 26 Ga. 665 (1859). But unless expressly required by its charter, the canal company does not have to bridge ways laid out after the canal is constructed. *Delaware Canal Co. v. Mifflin*, 1 Yeates 430 (Pa. 1795); *Morris Canal Co. v. State*, 24 N. J. L. 62 (1853). There are no decisions based on a common law rule that decide the exact question of the instant case. In America the closest case in point is a Pennsylvania decision that where a road becomes a state highway subsequent to the construction of the canal, the company is not obliged to keep up the bridge thereafter, since the expected increase in traffic would impose an unfair burden on it. *Union Canal Co. v. Pinegrove. Township*, 6 Watts & S. 560 (Pa. 1844). A canal company, however, was held not relieved of its obligation to maintain a bridge which a railroad company had been permitted by the state to alter so considerably as to increase immensely the cost of maintenance. *Ammerman v. Wyoming Canal Co.*, 40 Pa. 256 (1861). The distinction seems to lie in the fact that the railroad company would have to reimburse the canal company. And see *Book v. Penna. R. R. Co.*, 207 Pa. 138, 56 Atl. 352 (1903). The underlying principle of the early English cases cited above seems broad enough to support the proposition that the bridge must be kept in condition for present-day traffic. And there is a dictum to this effect by Fletcher Moulton, *L. J.*, in *County Council v. Great Eastern Ry. Co.*, [1909] 2 K. B. 403, 412. In the principal case it was urged, and with some reason, that section 62 is merely a statement of the English common law rule and that therefore it should be interpreted as such. But it seems settled that such provisions, whether or not they are intended to be only statements of the common law duty, must be construed without regard to the common law, whatever that may be. *Sharpness New Docks, etc., Co. v. Attorney General*, [1915] A. C.

654. Even so, the construction of section 62 is doubtful. Much stress is laid upon the words "maintain and keep in repair," which the court says could not mean "rebuild" and "reconstruct," as might be necessary if the bridge was to be suitable for modern traffic conditions. This is construing the statute on very narrow grounds. The court would be equally justified in construing the section by picking out the clause "in an efficient state for all purposes," which standing alone would lead to a result opposite to the one reached. A broader interpretation is found in *State v. Lehigh Valley R. R. Co.*, 89 N. J. L. 48, 97 Atl. 786 (1916), in which a requirement under a chartering act to build and maintain bridges was held not to be limited by the necessities of travel at the time of chartering, but to cover modern traffic conditions. And this would seem to be the better view. When the act or charter does not specifically relieve the canal company, which is the beneficiary of a valuable grant, it should be so construed as to give the most possible protection to the public.

CARRIERS—FAILURE TO FURNISH CARS—AMERICAN RAILWAY ASSOCIATION.—The plaintiff sued the defendant for damages resulting from failure to furnish cars upon proper notice. The defendant offered as a defense, proof that the American Railway Association, employed by it and other interstate carriers to look after the interchange and prompt return to the owner-carrier of freight cars engaged in interstate commerce, had failed to return to it a sufficient number of its cars to supply plaintiff. The defendant did not show, however, that the failure of the Association was due solely to some emergency. *Held:* That the plaintiff may recover. *McCord v. Louisville & Nashville R. R. Co.*, 267 S. W. 766 (Ky. 1924).

While the duty of a railroad to furnish cars, is not absolute; *Peet v. Chic. & N. W. Ry. Co.*, 20 Wis. 594 (1866); *Wallace v. Pecos, etc., R. Co.*, 50 Tex. Civ. App. 296, 110 S. W. 162 (1907); *Mulberry Hill Coal Co. v. Ill. Cent. R. Co.*, 161 Ill. App. 272 (1911); performance will not be excused by showing merely that its cars are unavailable because they are being used elsewhere on other lines. It is the normal situation with an interstate carrier to have a number of its cars on other lines, and to afford a valid excuse it must show that an unusual number are detained through some emergency. *Tex., etc., R. Co. v. Barrow*, 94 S. W. 176 (Tex. Civ. App. 1906); *St. Louis S. W. R. Co. v. Phoenix Cotton Oil Co.*, 88 Ark. 594, 115 S. W. 393 (1909); *Pa. R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120 (1915).

The obligation to furnish cars to the plaintiff, being owed by the Railroad, cannot be shifted to the Association. If the Association is merely the defendant's agent, the defendant is clearly responsible. And, though the Association has an independent status, the defendant should still be liable. A railroad cannot escape liability for damage to freight by showing merely that the injury was caused by defective cars supplied to it under contract by another company. *N. Y., Phila. & Norf. R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444 (1900); *St. Louis Iron Mt. & So. Ry. Co. v. Renfroe*, 82 Ark. 143, 100 S. W. 889 (1907); nor for injury to a passenger caused by a defective berth in a Pullman car supplied by a Pullman Company. *Pa. Co. v. Roy*, 102

U. S. 451 (1880). It has further been held that a railroad cannot escape liability for failure to furnish cars, where, having no cars at all of its own, it was entirely dependent upon another company to furnish them. *Mo. & N. A. R. Co. v. Sneed*, 85 Ark. 293, 107 S. W. 1182 (1908); and in a case very similar to the instant one it was held that it was no excuse to show that an association, of which the defenadnt was a member and whose duty it was to do so, had failed to return the defendant's cars promptly enough to enable the plaintiff to be served. *St. Louis, etc., R. Co. v. State*, 85 Ark. 311, 107 S. W. 1180 (1907).

It is submitted that the view taken by the Kentucky Court, although, upon the facts, quite new, is nevertheless in accord with general principles laid down in the cases.

CEMETERIES—DEDICATION—ABANDONMENT.—The defendant purchased land without knowledge that it was formerly the burial ground of the plaintiff's family. No interments had been made for over twenty years and all signs that it was a cemetery had disappeared. The plaintiff brings trespass against the defendant for excavating on the land. *Held:* That this did not constitute such abandonment as would cause the fee to revert to the grantor. *Frost v. Columbia Clay Co.*, 124 S. E. 767 (S. C. 1924).

Land may be dedicated for burial purposes; *Wormley v. Wormley*, 207 Ill. 411, 69 N. E. 865 (1904); the fee remains in the grantor and the beneficiaries under the dedication acquire only an easement to bury their dead on the land. Therefore, upon abandonment of the cemetery by the public or the beneficiaries the fee reverts, unincumbered, to the grantor. *Hins v. State*, 127 Tenn. 1, 149 S. W. 1058 (1911); *Badeaux v. Ryerson*, 213 Mich. 642, 182 N. W. 22 (1921).

The question then resolves itself into what constitutes an abandonment of a cemetery. The use of a cemetery is two-fold—for the purpose of continuous burials, and for the purpose of preserving the remains and memory of those who have been buried. *Campbell v. City of Kansas*, 102 Mo. 326, 13 S. W. 897 (1890). Thus, the mere fact that interments have been discontinued will not be an abandonment, since the relatives of the dead still have the right to protect the graves from desecration. *Hunter v. The Trustees of Sandy Hill*, 6 Hill 407 (N. Y. 1844); *VanBuskirk v. Standard Oil Co.*, 94 N. J. Eq. 686, 121 Atl. 450 (1923). From this, it would follow that a cemetery does not lose its character as such until those bodies already interred are exhumed and removed; *Kansas City v. Scarritt*, 169 Mo. 484, 69 S. W. 283 (1902); but after disinterment, the cemetery purpose has ceased, and the land is regarded as having lost its sacredness as a resting place for the dead. *Clarke v. Keating*, 170 N. Y. Supp. 187 (1918).

The right to provide for the establishment and discontinuance of cemeteries is within the control of the legislature, which right it may exercise directly or intrust to local municipal action. Whenever there is a public necessity for the discontinuance of a cemetery, the municipality may, with proper care and attention, and at its own expense, remove the remains from the discontinued cemetery to a suitable burial ground. *Page v. Symonds*, 63

N. H. 17 (1883). The only right that lot owners can claim in such case is to have notice and an opportunity to remove the bodies and monuments, and upon their failure to do so, these may be removed by the city. *Kincaid's Appeal*, 66 Pa. 411 (1870). And if the city removes the remains in a decent and orderly fashion to a suitable location from a burial ground which has been lawfully abandoned, a court of equity will not interfere unless some substantial right is invaded. *Sohier v. Trinity Church*, 109 Mass. 1 (1871; *Kincaid's Appeal, supra.*

In the instant case, where all signs that the bodies were in the land had since disappeared and no relative had visited the forgotten graves for many years, it is interesting to note to what length the courts will go in preserving the sanctity of the resting place of the dead.

CONSTITUTIONAL LAW—DUE PROCESS—ASCERTAINABLE STANDARD OF GUILT.—A statute in New York made guilty of a misdemeanor any person who with intent to defraud, sold or exposed for sale any meat or meat preparation and falsely represented the same to be kosher. The appellants challenged the constitutionality of this law as being in contravention of the due process clause of the Fourteenth Amendment of the Constitution of the United States, claiming that the word "kosher" was so indefinite and uncertain as not to provide an ascertainable standard of guilt. *Held:* The statute was constitutional. *Hygrade Provision Co., et al., v. Therman, et al.*, 45 Sup. Ct. Rep. 141 (1925).

It is clear that a criminal statute which is not sufficiently definite on its face to enable a defendant to know what is forbidden violates the due process clause of the Fifth or Fourteenth Amendment. *U. S. v. Cohen Co.*, 255 U. S. 81 (1921) (under Fifth Amendment). *International Harvester Co. v. Kentucky*, 234 U. S. 216 (1914) (under Fourteenth Amendment). The same definiteness is not required in a civil statute. *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 250 (1922); but see *Small Co. v. American Sugar Refining Co.*, Supreme Court of the United States, October Term, 1924, No. 101, decided March 2, 1925.

The statute in the principal case operated only on those who knowingly violated its provisions; hence the contention of the appellants was clearly untenable. Even in the absence of such a requirement, the statute would probably have been held constitutional. The word "kosher" has a meaning well enough defined to enable one to apply it correctly. When applied to meat, it signifies meat from animals slaughtered and cut by an orthodox Hebrew acting under the authorization of a rabbi, in accordance with orthodox Hebrew religious requirements. The animal at the time of killing must be sound and healthy, and without broken ribs. It must be killed by cutting in the throat with a knife with a perfectly sharp edge. Certain blood vessels must be removed, the meat must be washed, and kept separate from non-kosher meat. Failure to comply with a single requirement renders the meat non-kosher. See *People v. Atlas*, 183 App. Div. 595, 170 N. Y. Supp. 834 (1918).

Though the requirements are many, they are ordinarily easily understood and applied. Exceptional cases may sometimes arise where even experts might differ with regard to whether certain meat is kosher; but a statute otherwise clear is not fatally indefinite because in some instances opinions differ in respect of what falls within its terms. See *Nash v. United States*, 229 U. S. 373 (1913); *Miller v. Strahl*, 239 U. S. 426 (1915).

The statute in the present case is another instance of numerous attempts by the state in the exercise of its police powers to prevent deception upon its people.

CONSTITUTIONAL LAW—OLD AGE PENSIONS—VALIDITY OF PENNSYLVANIA OLD AGE ASSISTANCE LAW.—The Old Age Assistance Act of Pennsylvania provided that the income of persons over seventy years of age, who fulfilled certain requirements of eligibility, should be made up to one dollar per day from money appropriated by the state. ACT OF MAY 10, 1923, P. L. 189. The plaintiff sought an injunction to restrain the fiscal officers of the state from paying bills incurred under the law. The injunction was granted and the law declared unconstitutional. *Busser et al. v. Snyder et al.*, Supreme Court of Pennsylvania, Feb. 2, 1925. Not yet reported.

The advisability of the court's action from a non-legal standpoint is not here under consideration. Under the Pennsylvania Constitution, Art. III, Sec. 17, which provides: "No appropriation . . . shall be made for charitable, educational, or benevolent purposes, to any person or community," the decision is unassailable. It seems clear that an appropriation to a class of persons is an appropriation "to any person" within the meaning of the Constitution, and that the intervention of state and county boards for distribution does not make the gift less direct. Consequently, it seems that the Pennsylvania Mothers' Assistance Act must also fail on challenge, since it also provides for state appropriation, through state and county boards, to a class. ACT OF JULY 10, 1919, P. L. 893. Pennsylvania must either abandon such legislation or erect a new machinery for distribution which will not require appropriation by the state.

Old Age Pension laws are now in force in Alaska, Montana and Nevada. ALASKA SESSION LAWS 1915; C. 64; 1923 LAWS OF MONTANA 192; 1923 NEVADA STAT. 96. See 10 A. B. A. JOUR. 109. The Constitutions of Montana and Nevada assign to the counties provision for the poor; MONT. CONST., Art. X, Sec. 5; NEV. CONST., Art. 13, Sec. 3; and this has been held to forbid state relief. *Nevada ex rel. Keyser v. Hallock*, 14 Nev. 202 (1879). So a similar question of constitutionality may arise in these jurisdictions. The validity of the Nevada statute may be doubted, since the state shares in the work and expense of administration. But the Montana law is clearly good and might well serve as a model to avoid the difficulty now encountered in Pennsylvania, since the state provides by law only the framework of a system which the counties administer and support from their own poor funds. Under such an act no appropriation would be necessary, and no question under Art. III, Sec. 17 of the Pennsylvania Constitution would be raised.

CRIMINAL LAW—FORMER JEOPARDY—SUBMISSION OF CASE TO COURT ON AGREED STATEMENT OF FACTS.—The defendants and others were indicted for a conspiracy to procure the paving of a certain highway with brick. The prosecution was begun against all, but it was found that the Statute of Limitations had run in favor of the third corporation, and by agreement action was discontinued against the officers of the defendants. The prosecution and the defendants then agreed to submit the case on an agreed statement of facts, some of which the prosecution would have been unable to prove. This was accepted by the trial court, after joinder of the name of the other defendant corporation on the record, and the case submitted to the court, a jury being waived, on plea of not guilty and demurrer to the facts stated. Thereafter, the court announced its determination to set aside this agreed statement of facts, on the ground of an erroneous belief that all the defendants had joined in it. This was done, against the defendants' objection, and a second trial had. *Held:* That jeopardy had attached upon the submission of the case on the agreed facts, so that the new trial put the defendants in double jeopardy. *State v. Pittsburg Paving Brick Co. et al.*, 230 Pac. 1035 (Kan., 1924).

The case would appear to be one of first impression, but the decision is certainly correct. The trial had advanced at least to the stage corresponding to the point in a trial by jury where all the evidence is in and the jury charged with the deliverance of the defendant. Nothing more was to be done by either party to the litigation, the court having the power forthwith to pronounce judgment for the state or the defendants, according to its application of the law to the facts of the agreed case. When that stage has been reached, the defense of double jeopardy can be avoided only by the fact that the defense appeals or asks to have the verdict set aside. Here the defendants expressly and strongly objected to the setting aside of the agreed statement of facts, and whether the situation is taken to be as stated by the court, above, or as analogous rather to the rendition of a special verdict, the decision is equally sound.

EVIDENCE—CONFESSION—DIRECT OR CIRCUMSTANTIAL EVIDENCE.—The prisoner, who had killed two persons, made an oral confession which was written down, signed by him, and attested by four witnesses. Except for the confession the evidence of the killing was circumstantial. Sec. 6665 C. L. 1921 provides that no person "shall suffer the death penalty who shall have been convicted on circumstantial evidence alone." The prisoner was sentenced to be executed, and appealed. The court held, overruling a former decision, that a confession is direct evidence. *Mitchell v. People*, 232 Pac. 685 (Colo. 1925).

The Colorado court had held that an extrajudicial confession, given orally, was circumstantial evidence, so that after a conviction based on such confession unaccompanied by direct evidence the death sentence could not be imposed. *Damas v. People*, 62 Colo. 418, 163 Pac. 289 (1917). In the instant case the court expressly overruled *Damas v. People*. They declared that a confession, once established, is direct evidence and that the difficulty is "with

the facts establishing the confession and not with the facts established by the confession." If the confession is once established it is the evidence of one who took cognizance of the facts in issue, not of one who took cognizance of facts from which those in issue must be deduced.

Authorities are agreed that a confession, once established, is the best possible evidence but that there are many serious difficulties in the way of sufficiently establishing an oral extrajudicial confession. 1 GREENLEAF, EVIDENCE (15th ed.), 215; 1 WIGMORE, EVIDENCE, 866. It is generally held that a confession is direct evidence of guilt, but this rule is usually pronounced by way of dictum rather than by direct decision. *Hart v. State*, 14 Ga. App. 714, 82 S. E. 164 (1914); *Wilganowski v. State*, 76 Tex. Crim. Rep. 328, 180 S. W. 694 (1915); *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805 (1900).

The reasoning of the *Damas* case seems to show a confusion between hearsay evidence and circumstantial evidence. Hearsay evidence once brought within one of the exceptions to the rule for its exclusion may be just as direct as that given on the stand by an eyewitness if the person who made the hearsay statement had equal opportunity for observing the facts. Therefore the ruling in the instant case is the one consistent with logic and reason.

INSURANCE—CONSTRUCTION—BURGLARY BY FOUR ARMED MEN HELD A RIOT.—The appellant insured the respondent against loss by burglary. The policy contained a proviso that the insurance did not cover loss caused directly or indirectly by riot. Four armed men entered the respondent's premises on a summer evening while it was still daylight, held up the employees, and took a sum of money. This was done so quietly that there was no disturbance in the neighborhood. The respondents sued on the policy and recovered below. The House of Lords reversed the judgment on the ground that the loss was caused by a riot. *London & Lancashire Fire Insurance Co. v. Bolands, Ltd.*, [1924] A. C. 836.

While this decision may strike the reader as surprising, it follows logically from two earlier decisions of the House of Lords. In the first of these, an automobile, insured under a policy excepting losses caused by riot or civil commotion, was stolen under circumstances which justified a finding that it had been taken by insurrectionists in pursuance of their activities. The exception was held to prevent recovery for the loss. *Cooper v. General Accident Fire & Life Assurance Corp.*, [1922] 2 I. R. 214. In the second case a car similarly insured was taken from its driver on a highway by three or four armed men. There was reason to suspect insurrectionists, but insufficient proof. It was held that there was strictly no civil commotion, but that there was a riot within the legally accepted definition of the word. *Motor Union Insurance Co. v. Boggan*, [1923] 2 I. R. 136.

All the elements necessary to convict of the crime of riot are present in the instant case. 9 HALSBURY'S LAWS OF ENGLAND 929; 34 CYC. 1772. The courts commonly say that there is no distinction in the ordinary use of the word and its legal use; but in most of the cases there has been a large body of persons joining in the act and partially paralyzing the governmental functions; *Spring Garden Insurance Co. v. Imperial Tobacco Co.*, 132 Ky. 7;

116 S. W. 234 (1909); *Kirschenbaum Co. v. Insurance Co.*, 107 Neb. 368, 186 N. W. 325 (1922); or else there have been less than three persons involved and so no riot. *Phoenix Insurance Co. of Brooklyn v. Jones*, 16 Ga. App. 261, 85 S. E. 206 (1915). In the *Spring Garden* case there is a dictum which indicates that if the court had been presented with circumstances similar to those of the instant case, it would have reached a different result.

Ordinarily if the language employed in a policy is that of the insurer and is susceptible of two meanings, the one most favorable to the insured is adopted. 14 R. C. L. 931; *Insurance Companies v. Wright*, 68 U. S. 456 (1863). It would seem that the intent of the parties would have been better served if the court had recognized that the business conception of a riot is a disturbance of the peace which, for no matter how brief a period, actually paralyzes the forces of government, and had interpreted the policy accordingly.

INSURANCE—CONSTRUCTION—INCONTESTABILITY CLAUSE.—An insurance policy issued by the defendant on the life of the plaintiff's husband, contained the following clause: "This policy shall be incontestable after one year except for nonpayment of premiums." Within the year the insured died and the defendant refused to pay the claim, on the ground that the policy had been obtained by false statements as to the health of the insured. In a suit on the policy, brought by the beneficiary after the stipulated period had run, the defense of fraud was set up. *Held:* That such a defense was barred because there had been no contest within the year. *Repala v. J. Hancock Life Insurance Company*, 201 N. W. 465 (Mich. 1924).

The incontestability clause is now a feature of almost every life insurance policy and its interpretation is, therefore, a matter of paramount importance. It is well settled that such a clause is valid, and that it precludes the defense of even fraudulent misstatements as to the health of the insured. *Wright v. Mutual Bene. Assoc.*, 118 N. Y. 237, 23 N. E. 186 (1890); *Clement v. N. Y. Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561 (1898); *Life Assoc. v. Austin*, 142 Fed. 398 (C. C. A. 1905). But, as to its application, the courts have differed. It has been held that in the case where the insured has died within the stipulated period, such an incontestability clause is inoperative. Courts so holding rest their decisions on the ground that the rights and liabilities of the parties become fixed by the death, and, since at that time the defense of fraud is valid, it remains valid *ad infinitum*. As a result, the insurer can, in such a case, interpose the defense of fraud in any subsequent suit on the policy regardless of the incontestability clause. *Jefferson Stand. L. Ins. Co. v. McIntyre*, 285 Fed. 570 (D. C. 1922), *semble; Mutual L. Ins. Co. of N. Y. v. Stevens*, 195 N. W. 913 (Minn. 1923); *Markovitz v. Metro. Ins. Co.*, 122 Misc. 675, 203 N. Y. Supp. 534 (1924). It is submitted that this is not a reasonable interpretation of the clause. The policy clearly states that after one year it shall be incontestable, and says nothing about a condition precedent, namely, that the insured should survive the period. It would, therefore, seem that reading such a condition into the clause is mate-

rially changing the terms of that clause. The weight of authority is contrary to such a distinction and in accord with the principal case. *Monahan v. Metro. L. Ins. Co.*, 283 Ill. 136, 119 N. E. 68 (1918); *Mutual L. Ins. Co. of N. Y. v. Hurni Packing Co.*, 263 U. S. 167 (1923); *Feierman v. Eureka Ins. Co.*, 279 Pa. 507, 124 Atl. 171 (1924). These cases hold that the incontestability clause is of the nature of, and has the same effect as, a short statute of limitations against the insurer and therefore inures to the benefit of the beneficiary as well as to the insured.

As a result, in most jurisdictions, the insurer must, in every case, contest the policy within the stipulated period or lose the defense. It is generally held, in accord with the principal case, that mere notice is not equivalent to a contest on the ground that the word "contest" in its legal sense always imports litigation. It is, therefore, necessary for the insurer either to bring a bill in equity for the cancellation of the contract, or plead it as a defense to an action on the policy, within the stipulated period. *Amer. Tr. Co. v. Life Ins. Co. of Va.*, 173 N. C. 558, 92 S. E. 706 (1917); *Mo. St. L. Ins. Co. v. Cranford*, 161 Ark. 602, 257 S. W. 66 (1923); *Powell v. Mut. L. Ins. Co.*, 144 N. E. 825 (Ill. 1924). A few cases hold that mere notice of repudiation with the reasons therefor is a sufficient "contest" within the clause. *Feierman v. Eureka L. Ins. Co., supra; Jefferson Stand. L. Ins. Co. v. McIntyre, supra; Mut. L. Ins. Co. of N. Y. v. Hurni P. Co., supra, semble.* But a mere notification *per se* raises only a question of fact which, without an agreement with the insured or his beneficiary, cannot be settled except before a legal body competent to find the fact of whether there was fraud or not. It would, then, seem only fair that the insurer should take some steps to bring the matter to a definite conclusion. To force the insurer either to take an affirmative step in equity to have the policy cancelled, or to plead the misrepresentation as a defense in an action on the policy, within the stipulated period, seems logically sound and in accord with public policy.

SALES—UNIFORM SALES ACT—SECTION 4 UNCONSTITUTIONAL.—Article III, Section 3, of the Pennsylvania State Constitution provides that "No Bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." The Uniform Sales Act of May 19, 1915, P. L. 543, is entitled "An Act relating to the sale of goods." Section 4 of that act provides that "A contract to sell or a sale of any goods or choses in action of the value of $500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods . . . or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged . . ." The plaintiff brought suit for breach of an oral contract to buy certain shares of corporate stock. The defense was that the statement of claim did not set forth any of the circumstances neccessary under the above section. *Held:* For the plaintiff, since section 4 violates Article III, section 3, in so far as it relates to choses in action. *Guppy v. Moltrup*, 281 Pa. 343 (1924).

The purpose of the Constitutional provision is to prevent fraud and deception by giving to parties interested information as to the subject of the bill through its title. *Provident L. & T. Co. v. Hammond*, 230 Pa. 407, 79 Atl. 628 (1911). Having already decided that shares of stock were choses in action, *Peoples Bank v. Kurtz*, 99 Pa. 344 (1882), the court argues that, as a practical matter, the numerous stock brokers and others buying and selling corporate stock cannot be expected to find these transactions governed by an "Act relating to the sale of goods." Secondly, the statute itself discloses the ambiguity. Section 76 specifies that "In this Act, unless the context or subject matter otherwise requires . . . 'goods' include all chattels personal other than things in action and money." And section 4 relates to "a sale of any goods or choses in action." It is beyond argument, therefore, that the one subject of the act is not clearly expressed in the title. In fact, there is an intimation that the whole may be unconstitutional as containing two subjects, but this point is left undecided.

Since this is one of the "uniform" acts, it is interesting to note that the constitutions of no less than thirty-one other states require that the one subject of a bill be expressed in its title. Only eight of these other constitutional provisions use the word "clearly," and the decision in the principal case may be a precedent for these latter states only. See *Provident L. & T. Co. v. Hammond*, 230 Pa. 407, 413, 79 Atl. 628 (1911).

TRIAL—VOIR DIRE EXAMINATION—RIGHT TO QUESTION AS TO SOCIAL AFFILIATIONS.—Indictment of a woman for the illicit sale of liquor. The trial court would not permit counsel for the defendant to ask talesmen in their *voir dire* examination if they belonged to the Ku Klux Klan, there having been no direct showing of any Klan action in the matter. *Held:* No error. *People v. Kroll* 145 N. E. 814 (Ill. 1924).

Most jurisdictions allow the examination of prospective jurors to go beyond those points which would justify a challenge for cause and allow further inquiry in order to bring out information upon which the defendant may base his peremptory challenges. While these questions are not allowed to refer to matters not pertinent to the case, they are, within the discretion of the trial judge, allowed to vary greatly, and to go to any point which might create a prejudice in the mind of a juror. *People v. Reyes*, 5 Cal. 347 (1855); *Lavin v. People*, 69 Ill. 303 (1873); *Hale v. State*, 72 Miss. 140, 16 So. 387 (1894). *Cf.* 109 A. S. R. 563 note.

A prospective juror may be asked the general question whether he belong to any organization the obligations of which would affect his impartial verdict in the case involved. *Lavin v. People, supra; State v. Mann*, 83 Mo. 589 (1884). But it is a matter of some doubt whether, if he answer in the negative, he may then be asked the specific question, whether he belongs to a particular organization. If that organization is a party to the case, or if one of the parties or a prominent witness is a member of it, the question is permissible. *State v. Tighe*, 27 Mont. 327, 71 Pac. 3 (1907); *State v. Miller*, 207 S. W. 797 (Mo. 1918). It has also been permitted where counsel offered evidence that the organization was taking an active interest in

the case. *Reich v. State*, 94 Tex. Cr. R. 449, 251 S. W. 1072 (1923); *Bethel v. State*, 162 Ark. 76, 257 S. W. 740 (1924).

Where there is no direct showing of any interest on the part of the organization the cases are not in accord. In Texas, the rule has developed from a series of cases in which active interest was shown, that the direct question, "Do you belong to the Ku Klux Klan?" may always be asked. *Belcher v. State*, 96 Tex. Cr. R. 561, 257 S. W. 1097 (1924); *Bennett v. State*, 97 Tex. Cr. R. 459, 261 S. W. 1036 (1924); *Moore v. State*, 265 S. W. 385 (Tex. Cr. App. 1924). Arkansas permitted this question where the active interest of the Klan was shown, *Bethel v. State, supra*, and also where a union, the strike of which was the basis of the case, was shown to have expressed by resolution its opposition to the Klan, *Clark v. State*, 154 Ark. 592, 243 S. W. 868 (1922). But in *Snyder v. State*, 160 Ark. 93, 254 S. W. 381 (1923), where a woman was on trial for manslaughter, the court did not think membership in the Klan could be material, and would not hold as error the refusal to permit this question. *Cf.* 31 A. L. R. 411, note.

The courts of Oklahoma have come to a conclusion directly opposite to the holding of the principal case. There a negro was on trial for the theft of livestock and the Criminal Court of Appeals took judicial notice of the Klan's opposition to negroes and its pressure for law enforcement, and held as error the trial court's refusal to permit this question. *Johnson v. State*, 230 Pac. 525 (Okla. 1924). This seems to be a valid extension of the cases holding that judicial notice may be taken of the fundamental beliefs of the leading churches; *State v. District Board*, 76 Wis. 177, 44 N. W. 967 (1890); *Hilton v. Roylance*, 25 Utah 129, 69 Pac. 660 (1902); and of prejudices against certain races and faiths. *Luft v. Lingane*, 17 R. I. 420, 22 Atl. 942 (1891); *Wätcher v. Jones*, 43 N. Y. S. R. 151, 17 N. Y. Supp. 491 (1892); *Axton-Fisher Co. v. Post*, 169 Ky. 64, 183 S. W. 269 (1916). But *cf. Hoxie v. Pfaelzer*, 167 Ill. App. 79 (1912), where the court refused to notice that counsel could so work upon an anti-Hebrew prejudice as to obtain an unjust verdict.

If peremptory challenges are to be of any value to a defendant, he ought to be allowed any reasonable question to enable him to know enough about his talesmen to decide whom he should challenge. And if recent reports are any indication of Klan activities on liquor enforcement, the information might be very important in such a case. It is submitted that the decision in the Oklahoma case is entirely correct and that, assuming the Klan's enforcement movement is general throughout Illinois, that court might have done well to notice the condition and to permit the question.

TRUSTS—CHARITABLE TRUSTS—UNCERTAIN BENEFICIARIES.—The testator's will provided that the residue of his estate should be distributed among such religious and charitable purposes, objects and institutions as his executors should appoint, "and as in their judgment are in accord with my wishes and preferences." One executor renounced and the other died without having selected the charities which should benefit. The testator's heirs sue for the estate. *Held:* That the objects of the trust were capable of ascertainment and

that the court could appoint a trustee who was capable of designating the beneficiaries. *Thompson's Estate*, 282 Pa. 30 (1925).

It is a maxim of equity never to allow a certain and valid trust to fail for want of a trustee. *Treat's Appeal*, 30 Conn. 113 (1861), and if a gift was intended to be upon a trust which another can execute, the courts will usually appoint a competent trustee. *Klumpert v. Vricland*, 142 Iowa 434, 121 N. W. 34 (1909). In such cases, the courts say that there is no ground to suppose that the discretion of any particular trustee is material to the essence of the gift. But if it is the evident intention of the testator that the power given to the trustee is a personal trust and confidence, the court should not appoint other trustees to exercise that power contrary to the intention of the testator. PERRY, TRUSTS (6th ed. 1911), sec. 731. However, as is evidenced in the instant case, there is a strong tendency on the part of the courts to act upon liberal principles of construction in order to uphold the trust. See 72 U. OF PA. L. REV. 457.

The question, then, is whether uncertainty of the objects to be benefited will render a charitable trust ineffective. There is much conflict of authority as to what is sufficient definiteness as to beneficiaries and the rule varies throughout the country between the rule for private trusts, which require a definite beneficiary, *Trinity M. E. Church v. Baker*, 91 Md. 539, 46 Atl. 1020 (1900), and the rule established in England that courts of equity have inherent jurisdiction to provide for the proper execution of charitable trusts in all cases where the intent of the donor to devote the property to some form of charity is clear. *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345 (1900); *Kasey v. Fidelity Trust Co.*, 131 Ky. 609, 115 S. W. 739 (1909). Some jurisdictions require a certain and definite class of persons from which the beneficiaries must be selected, *Strong's Appeal*, 68 Conn. 527, 37 Atl. 395 (1897), but the tendency of the majority is to uphold the trust even when the donor has not specified the particular charitable use, but has merely limited it to such objects of charity as the trustee may select. *Kemmerer v. Kemmerer*, 233 Ill. 327, 84 N. E. 256 (1908). Massachusetts apparently has gone beyond the limits set by other American jurisdictions. Where it is clear that the testator intended to make a gift for charitable purposes, the court will supply a trustee and a scheme by which the beneficiaries may be selected. *Minot v. Baker*, 147 Mass. 348, 17 N. E. 839 (1888). In Pennsylvania, it is provided by the Act of April 26, 1855, P. L. 328, the provisions of which were substantially re-enacted by the Act of May 23, 1895, P. L. 114, that a charitable trust shall not fail for want of a trustee, or by reason of the object's being indefinite or uncertain, but that the Orphans' Court shall carry into effect the intent of the testator, so far as it can be ascertained. *De Silver's Estate*, 211 Pa. 459, 60 Atl. 1048 (1905).

The instant case is in line with the trend of decisions effectuating the intent of the testator to make a charitable bequest, but, it is submitted that it goes further than any Pennsylvania court has heretofore gone, in that it supplies a trustee, not merely to execute the trust, but also to determine who shall be its beneficiaries.

VOLUNTARY ASSOCIATIONS—RIGHT TO EXPEL MEMBERS—NEW YORK STOCK EXCHANGE.—The plaintiff was a member of the New York Stock Exchange, a voluntary association organized for the mutual conveniences and advantage of its members. The association was governed by a constitution and by-laws which defined the duties and rights of the members. The plaintiff was charged with "rigging the market," an act prohibited by the association. He was tried by an authorized body of the exchange and he produced evidence in his defense. He was found guilty of the offense and expelled from membership. The plaintiff asked the court for an injunction to restrain the expulsion on the ground that the evidence adduced did not amount to legal proof. *Held:* That the court would not interfere where the association acted in accordance with its rules, and where its action is reasonable. *Miller v. Simons, as President of the New York Stock Exchange, et al.*, N. Y. Sup. Ct., Special Term, Part One, N. Y. County, February 4, 1925. Not yet reported.

The instant case is another assertion by a court that it will permit a self-governing association to make and enforce its own rules for securing fair conduct by its members. Such associations have been looked on with favor by the courts. *Dillard v. Paton*, 19 Fed. 619 (1884); *Moffatt v. Board of Trade of Kansas City*, 111 S. W. 894 (Mo. App. 1908). They may be regulated by the state under the police power, *House v. Mayes*, 219 U. S. 270 (1911); but in the absence of state regulation they may make any reasonable rules for their own members. *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84 (1896); *People v. Chicago Board of Trade*, 224 Ill. 370, 79 N. E. 611 (1906). These rules are not binding on a court in its adjudication of a dispute between members and the association, *West End Dry Goods Store v. Maun*, 133 Ill. App. 544 (1908); but the courts are unwilling to interfere in these disputes and will treat the rules of the association as binding on the members, *Thompson v. Adams*, 93 Pa. 55 (1884); *Belton v. Hatch*, 109 N. Y. 593, 17 N. E. 225 (1888); *People v. Chicago Board of Trade, supra*, unless such rules are contrary to law; *People v. Manufacturers Protective Ass'n*, 54 Misc. 332, 104 N. Y. Supp. (1907); or unless the association has acted fraudulently in applying its rules. *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670 (1879).

It is submitted that the instant case is correct and shows a sound policy.

WILLS—GIFTS TO CHARITY—EFFECT OF CODICIL REDUCING AMOUNT.—By a codicil to a will the testator reduced in amount a bequest to a charitable institution. By Section 6 of the Pa. Wills Act of 1917 (P. L. 403, 406) gifts by will to charitable and religious institutions are void if the will is executed within thirty days of the death of the testator. This testator died within thirty days of the execution of the codicil. *Held:* That the gift was valid. *In re Bingaman's Estate*, 281 Pa. 497, 127 Atl. 73 (1924).

The prohibition of bequests and devises for charitable and religious uses made within a fixed period before the death of the testator exists in several states, notably New York, California, Georgia, and Pennsylvania, in the last of which it has been a feature of the law of decedents' estates since 1855. It has been suggested that the public policy back of this prohibition was to pre-

vent importunities by interested charities during the testator's last illness. *Hollis v. Drew Theological Seminary*, 95 N. Y. 166, 172 (1884). The Commissioners who drew the Pennsylvania Wills Act of 1917 doubted the wisdom of the provision, but did not suggest its abolition. See Report of Commission to Codify the Law of Decedents' Estates, 62. Outside of Pennsylvania, the question of the validity of the reduction of the bequest by a codicil executed within the period has not arisen. But in New York an increase of the bequest under such circumstances was held invalid, on the ground the testator had annulled the provisions of his will and substituted others. *Canfield v. Crandall*, 4 Dem. Surr. 111 (N. Y. 1885). But when the codicil makes no change in the charitable disposition made in the will, it is valid. *In re Farmers' Loan and Trust Co.*, 138 N. Y. App. Div. 121, 122 N. Y. Supp. 956 (1910); *affirmed* in 199 N. Y. 569, 93 N. E. 1120. *Accord, Estate of McCauley*, 138 Cal. 432, 71 Pac. 512 (1903). In Pennsylvania the well-settled interpretation of similar provisions of previous acts was to the effect that a gift to a religious or charitable use, created by a will executed prior to the fixed period, will not be defeated by a codicil that simply diminishes the amount of the gift or postpones the time fixed for its enjoyment, although the latter instrument is executed within one month of the death. *Carl's Appeal*, 106 Pa. 635 (1884); *In re Morrow*, 204 Pa. 484, 54 Atl. 342 (1903). The principal case is the first construction of this provision of the Wills Act of 1917. This differed from that of the previous acts only in the period of time fixed, which was changed from one month to thirty days; and the court felt that as this was not a substantial difference, the construction must be the same. Undoubtedly, since the legislature had the opportunity to make a change and failed to do so, the decision in the instant case is correct from the standpoint of *stare decisis*. It is doubtful, however, whether the Pennsylvania doctrine is legally sound. When the testator diminishes his bequest, he performs two distinctly different legal operations: one is an annullment, the other is the making, of a bequest; and this latter operation clearly comes within the statute. Hence it would seem that the theory of *Canfield v. Crandall, supra*, is sound, and is applicable alike to increase and decrease of bequests. It is true, however, that the Pennsylvania doctrine does not conflict with the public policy of the provision as suggested in *Hollis v. Drew Theological Seminary, supra*, and aside from a violation of legal reasoning, it leads to a just result; and it undoubtedly carries out the testator's intention. But an increase of the bequest is certainly contrary to the theory of the prohibition, namely, to prevent importunities; and it will be interesting to note how the Pennsylvania courts will rule on the question. From any point of view an increase would seem to be invalid.

WILLS—POWER TO APPOINT—ELECTION OF WIDOW TO TAKE AGAINST WILL.—The testator's father left to him half of his estate, for life, with remainder in trust for such persons as the testator should by will appoint, and with remainder over. The testator provided that his will was to dispose of this property over which he had the power of appointment as well as his own, and without further reference to the power gave certain legacies and, as the will stood at the time of his death, gave to his wife only the residue,

which was comparatively small. She elected to take against the will, and claimed her statutory allowance out of the combined estates which her husband had owned and over which he had exercised the power. *Held:* That she was entitled to a share only of the property which her husband had owned at the instant of his death. *Kates' Estate,* Supreme Court of Pennsylvania, January Term, 1925, No. 204.

This exact situation has apparently never before arisen in an American jurisdiction, the most closely analogous case being that in which the will directs conversion of realty into personalty, and the widow electing against the will seeks to take advantage of this provision. In such a case the very general view is that she cannot derive this advantage from the will which she has repudiated; *Hoover v. Landis,* 76 Pa. 354 (1874); *Cunningham's Estate,* 137 Pa. 621, 20 Atl. 714 (1890); *Geiger v. Bitzer,* 80 Ohio 65, 88 N. E. 134 (1909), and with note in 22 L. R. A. [N. S.] 285. This depends upon the rather instinctive feeling of the courts, which is no doubt correct, that when a wife elects to take against her husband's will she must give up all advantage of whatsoever kind, accruing therefrom; *Pearson v. Darrington,* 32 Ala. 227 (1858); *Ashelford v. Chapman,* 81 Kan. 312, 105 Pac. 534 (1909); 40 Cyc. 1959.

In view of this general trend, the interpretation of the statute in the principal case (Wills Act of 1917, Sec. 23 (a), P. L. 410: "When any person shall die testate, leaving a surviving spouse who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate") is the only logical one, although the words of the statute themselves are quite as susceptible of the construction placed upon them by the court below, in 5 Pa. D. & C. 570, which said: "The estate of this testator must be distributed, so far as his widow's rights are concerned, as though he had died intestate, but to determine what that estate is, resort must be had to the will, and inasmuch as, by that instrument, he made the trust fund a part of his own estate, his widow is entitled to her share therein." But *Cunningham's Estate, supra,* was decided under the practically identical wording of the Act of 1869, Sec. 1, P. L. 77, and by the established rule of construction of statutes the result reached in the principal case was a necessary conclusion as to the intent of the legislature in passing the present Wills Act. It had been decided, also, that the election of a widow relates back to the time of her husband's death; *Fitzgibbons's Estate,* 276 Pa. 105, 119 Atl. 837 (1923); and this tends to the same conclusion, because it shows that her rights are fixed at the date of the death, and are not determined by the will.

It is submitted, therefore, that the decision of the principal case is correct in theory, and a logical development of the line of Pennsylvania cases to some of which reference has been made above, and which are dealt with at length in the opinion of the principal case.