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VALIDITY OF CONTRACT OF MEMBERSHIP IN RELIGIOUS ORDER.

The recent case of the *Order of St. Benedict of New Jersey v. Steinhauser,* 179 Fed., 137, is rather interesting, involving as it does the legality of the vow of poverty taken by a member of a religious society as a condition precedent to his admittance to the order. The United States Circuit Court of Minnesota in considering the question decided that the vow is not contrary to public policy, but is valid and binding so long as the member retains his membership in the society.

The decision is unique in that, although adhered to by the United States Supreme Court, as well as by the State Courts, when they have been called upon to decide the merits of a like issue, the question has been but little mooted in the tribunals of this country.

Perhaps the earliest decision bearing on the question is that of *Goesele v. Bimeler,* 14 How. (U. S.) 589. In that case, a number of immigrants from Germany settled in Ohio and formed themselves into the Separatist Society. A plan for the community

of property, involving the vow of poverty, *i.e.*, the relinquishment of all individual rights to the ownership of property, was adopted. One Goesele had been a life long member of the society and at his death was in good standing in the order. After his decease, his heirs instituted proceedings against the society, joining Bimeler, a prime mover in the organization, as co-defendant. The complainants sought a division of the society's effects and an assignment to them of the property contributed by the deceased.

In a decision written by Justice McLean, the United States Supreme Court had slight hesitancy in denying the plaintiff a right of action, thus establishing the validity of such a vow.

The case of the *Order of St. Benedict v. Steinhauser* extends the doctrine slightly, for it also holds that property held by a member, who died in full fellowship at the time of his death, which was acquired with his earnings, belongs to the corporation and not to his heirs. In this case one Augustin Wirth joined the Order of St. Benedict in 1852, taking the vow of poverty as required by the by-laws of the association; it was further provided by these by-laws, that in consideration of the taking the vow of poverty, the order assured the new member a decent support for his life-time, while he remained in full membership. Consequently the contract of membership in the order could not be attacked on the ground of inadequacy of consideration.

The vow of poverty, as taken by Wirth, required him to renounce his right to individual ownership of property; it further provided that all property then in the possession of the new member, Wirth, as well as property acquired during membership, should be conveyed to the order as soon as possible.

Wirth, while a resident of Minnesota, and while a full-fledged member of the order, died in 1901. At his death he left valuable assets, including royalties on a number of religious works, which he had written during the late years of his life. Of these, the administrator took entire charge. The Order of St. Benedict then brought suit against the administrator claiming an equity in all moneys in issue, and basing their claim on the express covenant of poverty as agreed to by the deceased.

Justice Willard, in ordering a decree for the plaintiffs and thus holding the vow of poverty not contrary to public policy,

said: "That the purposes of the order are not contrary to public policy cannot for a moment be doubted. To doubt upon that point would be to doubt the doctrines of the Christian religion and the teachings of the moralists of all ages."

In accord with this decision is that of the Circuit Court for the Western District of Pennsylvania in the case of *Schwartz v. Duss,* 93 Fed., 528. In that case, the Harmony Society of Pennsylvania, which society had been the defendant in several similar cases, was again involved. The bill was for a partition and was brought by the heirs of a former member of the order, the members of the society being joined as co-defendants. As in the case of the *Order of St. Benedict v. Steinhauser,* the members of the society relinquished their right to the individual ownership of property.

The court, in decreeing that the plaintiff had no cause of action, said: "In view of the decision of the Supreme Court of Pennsylvania in *Schriber v. Rapp,* 5 Watts, 351, and the decisions of the Supreme Court of the United States in *Goesele v. Bimeler, supra,* and *Barker v. Nachtrieb,* 19 How. (U. S.), 126, it is clear that the above recited articles of agreement are valid contracts and that thereunder, upon the death of a member of the society in full fellowship, no claim, enforceable against the society or its property, passes to his heirs or personal representatives."

The case of the *General German Aged People's Home of Baltimore v. Hammerbacher,* 64 Md., 595, although holding only as to property in possession of the defendant at the time of his admission to the society, extended the doctrine and allowed the plaintiffs to recover possession of property, the ownership of which the defendant had fraudulently concealed upon his admission.

Justice Stone in rendering his decision decreed that the vow of poverty was not contrary to public policy, and, further, that Zolles, the deceased, had perpetrated a fraud on the plaintiff and that the plaintiff was entitled to have the administrator of his estate ordered to convey the property to the plaintiff.

And this doctrine is supported even though the administrator claim the funds or property for the benefit of creditors. *Cowles v. Whitman,* 10 Conn., 21. The decision is upheld on the ground that a constructive trust has been created for the plaintiff.

Therefore, it may be said that the vow of poverty as taken by a member of a religious order, by which he relinquishes his right to individual ownership, is deemed by the courts to be but an exercise of that inherent right of freedom of alienation of property; it is not contrary to public policy; but is valid and is decreed to be in accord with all the strict principles of morality.

THE ADMISSIBILITY OF EVIDENCE SOLELY TO ASSIST THE JURY IN THE EXERCISE OF A DISCRETION CONFIDED TO IT.

In *People v. Luis,* 110 Pac. (Cal.), 580, the defendant, a Chinaman, was tried for the murder of a Chinese woman. The defense offered evidence, that in the Chinese mind, a Chinese woman amounted to very little and that the taking of the life of such a woman was not a very serious matter. The object of the evidence was to enable the jury, if they found the defendant guilty of murder in the first degree, to intelligently exercise the discretion confided to them by Sec. 190, *Penal Code,* which provides as follows: "Every person guilty of murder, in the first degree, shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same," etc.

In holding the evidence inadmissible, the court said: "If we assume that a defendant in a murder case is entitled to introduce evidence not material or admissible on the question of his guilt, or the degree of his offense, solely for the purpose of assisting the jury in the exercise of a discretion confided to it, we are satisfied that the proposed evidence was not competent for that purpose. Whatever evidence may be so introduced, certainly evidence of the opinion of the murderer as to the value or importance of the life of the party murdered by him, can play no legitimate part in his favor."

One of the axioms on which our law of evidence rests is: All facts having a rational probative value are admissible, unless some specific rule forbids. *Wigmore, Evidence,* Sec. 10. We find no rule of evidence that precludes a defendant, in a murder case, from showing matters, not material or admissible on the question of his guilt or the degree of his offense, but merely to aid the jury in the exercise of a discretion confided to it.

A careful survey of the English cases, and of the reports of all the United States, shows no judicial decision that can rea-

sonably be construed as authority for excluding such evidence. The only decision found that tends to bear out the contention, that the evidence should be admitted, is the case of *People v. Costello,* 15 Cal., 350, in which the defendant, on trial for murder, offered to prove ownership, in fee simple, of a mining claim adjoining a claim owned by the deceased. It was held, that the defendant may show matters which justly tend to exculpate him or to reduce the grade of the offense. It should be submitted to the jury, subject, of course, to instructions from the court, as to its legal effect.

In homicide the definition consists of two parts, the outward act and the state of mind which accompanies it. If a person is incapable, because of idiocy or lunacy, from distinguishing between right and wrong as to the particular act at the time he does it, he may commit the outward act of homicide and not be guilty of a crime. There is no other crime in which so many different possible states of mind have to be considered.

The theory upon which the law of homicide is based has undergone many changes as civilization has advanced. Originally, in the Roman law, homicide was not a crime. In the first stages of recognition of the offense, a man had power of life and death over his slaves, and even over his own children. *Institutes of Justinian,* Book 1, title 9, Moyles' Translation.

While the English common law was greatly influenced by the civil and ecclesiastical laws, it made homicide a crime, and the punishment varied, according to the particular era in history, from the extraordinary laxity of the payment of a *bote* as compensation to the person injured by the death, to the barbarous severity of boiling the murderer to death.

About the beginning of the seventeenth century, the criminal law was for the first time made the subject of special treatises, which to a great extent altered both its form and its substance. The steady growth from that date has evolved into the present day law, which divides homicide into murder and manslaughter. Each of those are subdivided into several degrees according to the state of mind and other circumstances attending the killing.

While our law was going through the process of such radical changes from the various influences of civilization, the advancement of custom and law in China have been correspondingly slow.

Inasmuch as the evidence offered in the case at bar was for the sole purpose of aiding the jury, in case of conviction, in determining the degree of punishment, and it tended to show what is a national idea and theory that has been bred into the minds of the Chinese for countless ages, it seems that out of justice to the defendant the court should have followed *People v. Costello, supra,* and submitted the evidence to the jury with proper instructions from the court as to its legal effect.

THE LEGALITY OF THE CLOSED SHOP.

In the case of *Schuarz v. International Ladies' Garment Workers' Union,* Chicago *Legal News,* Vol. 42, No. 7, the legal world has another contribution, by Justice Goff of the Supreme Court of New York, on the much mooted question of the legality of the closed shop.

The treasurer of an association of manufacturers of cloaks and skirts for women, as plaintiff, brought an action against the labor unions operating in the trade, to restrain them from interfering with the business of the members of the plaintiff's association, and from acts in furtherance of a conspiracy. It appeared that the unions were maintaining a strike against the members of the plaintiff's association; that they had made certain demands of every manufacturer in the trade, among which was that not to employ non-union men; and that the plaintiff had conceded all such demands, except that for a closed shop. The court held the purpose of the strike to be against public policy and illegal.

There are two classes of cases involving the legality of the closed shop; one where there is no contract between the employer and the union to maintain the same; the other where there is such a contract.

There are two lines of decisions, supported by weighty authorities, concerning the first of the above classes; one line holding that moral coercion, on the part of the unions, to compel the employer to maintain a closed shop is legal, *National Protective Association v. Cummings,* 170 N. Y., 315; *Parkinson v. Building Trades Council,* 154 Cal., 581; the other line holding that such action on the part of the unions is illegal, *Plant v. Wood,* 176 Mass., 996; *Lake v. The Clothing Cutters and Trimmers' As-*

sembly, 77 Md., 396. These two lines of decisions show the two radically different methods the courts have of ascertaining whether the defendants have or have not committed a legal wrong.

The courts that consider the actions of the defendants to be legal, consider primarily the rights of the defendants, that a man, not under a contract with another, may work or refuse to work as he pleases, and whatever one man may do alone, he may do in combination with others. *National Protective Association v. Cummings, supra.* The courts that held the opposite view consider the injury done to the plaintiff, and assume that if the defendants have injured the plaintiff, they are liable for the injury, unless they can show a legal excuse. *International & Great Northern R. Co. v. Greenwood*, 2 Tex., C. A., 81; *Erdman v. Mitchell*, 207 Pa. St., 89.

In this day of powerful combinations there can be no doubt that the granting or withholding of labor may be made under circumstances and conditions which inflicts injury on others, and leaves the actors without any legal excuse for the injury inflicted. *Arthur v. Oakes*, 63 Fed., 310.

With the courts differing on the fundamental principles as to the liability of the defendants, it becomes desirable that there should be some criterion by which the legality or illegality of the defendant's acts might be established. This criterion certainly cannot be found in recognizing an inherent right in man to do certain acts, irrespective of the circumstances under which he does them. That injury is done to the plaintiff in every such case cannot be denied, and the recognition of such a right would be in contravention of that principle of the common law, which holds a man liable for the injury he does another without legal excuse. The public has an interest in the correct determination of all these cases, and its interst should not be lost sight of by the courts. *McCord v. Thompson-Starrett Co.*, 198 N. Y., 587.

It seems that the correct rule would be to hold the defendants *prima facie* liable for the injury done to the plaintiff, and leave them to excuse their acts by showing that the best interest of the public is subserved by holding their actions to be lawful. As was said by *Wm. Draper Lewis*, 18 Harvard Law Review, 444, "What is needed is to get rid of the notion that there are some acts which a man has an inherent right to do under all circumstances, and hold to the fundamental position of our common law

—that he who injures his fellow-man is liable for that injury, unless he can show that the community regards his act as conducive to the public welfare."

It appears that the principal case was decided according to this view. The facts show the unions were very strong in the Borough of Manhattan, and practically controlled the labor of that trade; that all the demands of the unions were complied with, except that of the closed shop, so the question of the legality of the closed shop was squarely presented for determination, and the court held, "That the primary purpose of the strike was to drive non-union employees out of the trade in the borough, except on the condition of joining one of the defendant unions, that the purpose was against public policy and illegal."

As to the second class of cases—where there is a contract between the employer and the union to unionize his shop—it would seem that the unions would be placed in a better position, as the freedom of contract is involved. But concerning the legality of the contract in cases where the purpose is to enforce the contract between the parties, and to justify the discharge of third parties according to its provisions, the courts are divided, as in the cases where no contract exists between the parties.

The case of *Berry v. Donovan,* 188 Mass., 353, was an action for damages brought by a workman against the representatives of a labor union for causing his discharge, there being a contract between the employer and the union to employ only union men; and an opportunity having been given to the plaintiff to join the union, the employer was requested to discharge him. The court decided the case on the ground of unlawful interference with a workman already employed, reserving its opinion as to a workman needing employment and prevented from getting it. But the result seems to be that the court considered the contract to be unlawful; for if unlawful, all acts done under it would be justified.

In the case of *Jacobs v. Cohen,* 183 N. Y., 207, the question of the lawfulness of the contract was directly presented, and the court held the contract to be lawful, at the same time failing to overrule the prior case of *Curran v. Galen,* 152 N. Y., 33, where the contract was decided to be unlawful, but attempted to distinguish the two cases.

It may be said, from the cases just referred to, that the tendency of the authorities is against the validity of such a contract.

and the reason given by the courts for so holding seems to be based on the ground of public policy. "Such an agreement," said the court, in *Jacobs v. Cohen, supra,* "when participated in by all or by a large proportion of employees, becomes oppressive and contrary to public policy, because it operates generally upon the craftsmen in the trade and imposes upon them, as a penalty for refusing to join the favored union, the practical impossibility of obtaining employment at their trade and thereby gaining a liveli hood."

A TRESPASSER'S RIGHT OF SELF-DEFENSE WHEN ASSAULTED.

The law of self-defense is older than the law itself. It is well settled that one has a right to resist force with force when he is put in fear of bodily harm. But some doubt has recently arisen as to whether one who is a trespasser is entitled to the right of self-defense when he is attacked by the owner of the premises on which he is a trespasser. This question was raised in a late Texas case, *Cox v. State,* 123 S. W., 696, where the trespasser seeking illicit intercourse with the owner's wife entered his house during his absence and was surprised by the unexpected return of the owner. The trespasser attempted to flee, but was overtaken by the owner and was being severely assaulted when he turned upon the husband and assaulted him. In an action for aggravated assault the trespasser, Cox, pleaded self-defense. The court instructed the jury that though the defendant's purpose in entering the house was unlawful, where he abandoned his purpose and sought to escape from the house before being pursued by the owner, he may resist the pursuit and repel assault by force and plead self-defense.

The very nature of self-defense is such that it should not be denied to any one whose position is such that its exercise is necessary to the preservation of his life, yet the very nature of this doctrine is also such that it should be applied with the utmost caution. Self-defense is the resistance of force or seriously threatened force, actually impending or reasonably apparent, by force sufficient to repel the actual or apparent danger and no more. 35 *Cyc.,* 1373. One assaulted may repel force with force and acts done in self-defense cannot be an assault. *People v. Lynch,* 101 Cal., 229. Nor is one justified in using force to expel a mere

trespasser on land. *Wharton v. People,* 8 Ill. App., 232. An unarmed trespasser on one's premises must be requested to leave and gentle means of removal must be employed before a resort to blows may be had. *State v. Burke,* 82 N. C., 551. Where the prosecuting witness, the owner of the premises, was advancing on the defendant who was a trespasser, in a threatening manner, the court instructed the jury that the defendant had a right to defend himself by force. *State v. Hutchings,* 24 S. C., 142. In the case of the *State v. Lazarus,* 1 Mills Const. Reports (S. C.), 34, the prosecuting witness went to the defendant's house to demand pay for services he had rendered to the defendant. He was ordered to leave, and upon his refusal to do so, was severely beaten by defendant with the bar of the door. The court said in its instructions to the jury that while law permits men to defend their persons and property and to preserve the immunities of their dwellings, it is careful to restrain the indulgence of ungovernable or revengeful spirits, and while a man may put another out of his house who persists in remaining, yet he may not inflict a violent battery.

While it seems from these cases that one who is a trespasser has the right to protect himself, when put in fear of danger to his life, yet there are other and more numerous cases which limit the right of self-defense by holding that one who provokes the difficulty may not avail himself of this defense. The fact that an assault was provoked is no defense. 69 Ala., 229. Where the defendant provoked the difficulty, he cannot plead self-defense. *Henry v. State,* 79 Ala., 42. In *People v. Miller,* 49 Mich., 23, the defendants went voluntarily on the premises of the prosecuting witness with the intention of provoking a conflict, and although they were attacked by the prosecuting witness, Talman, with a pitchfork, and disarmed and assaulted him, there can be no pretense that they were acting in self-defense, because the evidence shows conclusively that they were not in any fear of Talman.

But notwithstanding the number of such decisions, it seems reasonable that anyone who is in danger of life or limb may defend himself even though he is where he has no right to be at the time. Self-defense is the natural and inalienable right of every human being, and is to be held sacred and inviolable by every law of human or civil institution, and should not be limited or cut off by the doctrine of provoking the difficulty. The act which cuts

off self-defense must be a hostile one reasonably calculated to produce the occasion or bring on the difficulty and it must be so intended by the defendant. *McCaudle v. The State,* 57 S. W. (Tex.), 672, 673.

STARE DECISIS.

The recent case of *Herron v. Whiteley Malleable Casting Co.,* 93 N. E., 555, is of interest to the commercial world, in that it suggests certain tests for applying the doctrine of *stare decisis.*

In this case the plaintiff sold machinery to the company of which the defendant is the receiver, and plaintiff claims a prior lien upon the funds in the hands of the receiver by virtue of a statute. Prior to the sale in question, the section of the statutes, upon which the appellant relies, had come before the Supreme Court of Indiana in three cases at different times. By the first decision, *Goodbub v. Horning,* 127 Ind., 181, material men were held to have a prior lien, over general creditors on the fund in the hands of the receiver. When the question came up for a second time, the court held in *McElwaine v. Hosey,* 135 Ind., 481, that material men did not have a prior lien over general creditors, without giving notice as required by statute, and that the preferred claims referred to were limited to claims for services of employees. Then when the question came up for the third time the court held in *Jendses v. Jendses,* 145 Ind., 624, in harmony with its first decision, that the statute did include material men.

The appellant had sold the machinery within three or four months of the time that the last decision was rendered, and he claimed that by virtue of it, he was entitled, on the doctrine of *stare decisis,* to a prior lien over general creditors.

The court declined to recognize the doctrine of *stare decisis* and placed its decision on the ground that, while the decisions of the courts of last resort are generally regarded as binding authority upon lower tribunals, still beyond the limits of the case in which the decision was rendered they are not the law. Such decisions are merely evidence of what the law is, which evidence is of greater or less persuasive force as the decisions are, or are not harmonious, apparently well considered or of long standing. A court, it is held, will never apply the rule of *stare decisis* where

the decisions relied upon are conflicting, not well considered, or made so recently before the contract or property right to be affected, was made or acquired, that the same could not reasonably be presumed to have been made upon the faith of the decision relied upon.

While the decision in this particular case was doubtless justifiable where the court in a comparably short interval of time has rendered two palpably conflicting decisions, the latter opinion showing misconceptions in the former determination, there can be found many cases opposed to it. Upon the principle of *stare decisis* there are many cases, and a review of them shows that the courts have taken both sides of the question. Some holding that former decisions are binding in subsequent cases, while others hold that they are not, and that the subject is open to review by a subsequent tribunal.

The Indiana view is supported in the case of *State v. Williams*, 13 S. C., 546, in which the court said, "The Supreme Court will not follow the line marked out by a single preceding case, placing its decision on the rule *stare decisis* alone, without regard to the ground on which such case was decided." In the case of *Pratt v. Brown*, 3 Wis., 603, the principle of *stare decisis* arose, and the court held, that where a question involving important private rights has been only passed upon once, and cannot be said to have been acquiesced in, it is the duty of the courts to re-examine such question when properly called upon. In *State v. Hill*, 47 Neb., 456, it was held that in the absence of complications resulting from property rights, it is the privilege if not the duty of courts to re-examine questions and modify or overrule previous decisions shown to be wrong.

The opposing view is also very strongly supported, that is, that former decisions should rule. In the case of *Gray v. Gray*, 34 Ga., 499, the court said that "when a question has once been decided by this court we desire it to be distinctly understood that such decision is with us, authority. With us such decision is conclusive of what the law is, until changed by the law-making power, or is reversed or materially changed as provided for by statute." In *Semp v. Hasting*, 4 G. Greene (Ia.), 448, the court said that "a rule or principle of law once fully recognized by the Supreme Court, should not be overruled unless it is palpably wrong or has been changed by legislative enactment."

The United States Supreme Court holds that the construction of a statute by a state court, so far as contract rights acquired under it are concerned, becomes as much a part of the statute as if embodied in it and a change of construction is utterly ineffective to impair those rights. To hold otherwise would be as unjust, as to hold that a right acquired under a statute may be lost by its repeal. *Geljche v. Dubuque,* 1 Wall., 175; *Christy v. Pridgeon,* 4 Wall., 196; *Douglass v. County of Pike,* 101 U. S., 677, 687. So generally after a question has once been deliberately decided in the court of errors, such question will not be considered any longer open in that court. *Gibbons v. Ogden,* 17 Johns (N. Y.), 488. *Bowman v. Freeholders of Essex,* 73 N. J. L., 543, 547.

Several state courts hold in accordance with *Davidson v. Beggs,* 60 Ia., 309, that a rule announced as a decision of the Supreme Court will be adhered to without attempting to vindicate its correctness when it has been the law of the state for at least fifteen years.

The rule *stare decisis* means generally that when a point has once been settled by judicial decision, it forms a precedent for the guidance of courts in similar cases. It expresses the principle upon which rests the authority of judicial decisions as precedents in subsequent litigations, and adherence to it is necessary to preserve the stability and symmetry of our jurisprudence. *Menge v. The Madrid,* 40 Fed., 677, 697.

In view of the foregoing authorities, it would seem that while in this particular case the Indiana court might have been justified in denying to the appellant the right to rely upon the former decision, still, in cases where it is shown that the parties relying upon a former decision of the highest tribunal of the state, entered into a *bona fide* contract, the court should not deny to such party the protection of *stare decisis.* To allow a later opinion to pronounce a former one not well considered would often amount merely to overruling a decision upon fresh argument, or more mature deliberation of the former arguments. The result would be, of course, to greatly interfere with the stability of business transactions entered upon on the faith of previous decisions and to render such rights liable to be defeated by a subsequent decision.

THE NEGRO DEFINED.

In many of the states where a considerable portion of the population is colored, statutes define the term negro and establish his status where the same is considered, because of local conditions, as essentially different from that of Caucasians. Where legislatures have either negligently or intentionally left the terms "negro" and "colored" undefined, courts have faced difficulty in reaching exact decisions on the point of just what proportion of negro blood in a person of mixed racial descent will constitute him or her a "negro" or "colored." The question is purely academic, and its settlement lies largely in the discretion of the court, in combining technical definitions of ethnological experts and accepted public opinion on the subject.

In the recent case of *State of Louisiana v. Treadway,* 52 So., 500, an exhaustive review of statutory and judicial law resulted in a divided court on the question in issue. Here the defendant, a male octoroon, was indicted, charged with having lived in concubinage with a female member of the Caucasian race. The statute governing the alleged offense made criminal, concubinage between members of the Caucasian race and members of the negro or black race.

The decision hinged on the question in issue: "Was an octoroon a member of the negro or black race?" The court decided, three to two, that the defendant, an octoroon, was not a negro within the meaning of the statute.

The dissenting opinion draws no distinction between negroes and colored persons, claiming that the terms were synonymous by popular usage and legislative intent, basing their opinion on the decision in the case of *Lee v. New Orleans and Great Northern Railroad Co.,* 125 La., 236. Here the court holds that, "since emancipation, the word colored person and negro have been used interchangeably." This appears to be erroneous in view of the accepted definitions, expressed legislation and judicial opinions. In the case of *Jones v. The Commonwealth,* 80 Va., 538, the court held that a man of mixed blood is not a negro unless he has at least one-fourth negro blood in his veins. With the possible exception of Virginia, the term "negro" has not been recognized as including within its meaning persons of mixed negro blood, but on the contrary has been so used only when coupled with

defining words or a definition adopted elsewhere statutorily. *Mississippi Code* of 1906, Sect. 3244; *Georgia 2 Civil Code* 1895, Art. 3, Sect. 1820; *South Carolina Constitution* of 1895, Art. 3, Sect. 33; *West Virginia Code* of 1906; *Alabama Constitution* 1901, Sect. 102; *Virginia Code* of 1873, p. 1208, Chap. 192, Sect. 8; *Kentucky Revised Statutes* of 1894, Sect. 2097-2098; *Texas Revised Statutes* 1895, Art. 3908.

A *resume* of the statutes and judicial decisions shows a distinct classification in which colored persons are differentiated from both negroes and Caucasians, and the only difficulty lies in determining the fraction of negro blood in any person which will constitute him a member of the negro race.

Lee v. New Orleans and Great Northern Railroad Co., supra, holds that, in the absence of proof as to race, there is no presumption either way. *Jones v. The Commonwealth, supra,* holds to the contrary that a man is presumed not to be a negro until he is proven to be one. The latter holding seems to be correct because in most of the cases the establishment of the accused as a negro means his conviction, and as every man is considered innocent until he is proven guilty, why should not a man be presumed to be white or colored until he is proven to be a negro? Prosecutions under such statutes are penal in this nature; strict construction against the state and in favor of the accused is the established rule, governing.

The *Century Dictionary* includes within its definition of the word "colored" as "negroes," persons of mixed negro blood to the degree of quadroons, *i.e.,* those who have one-fourth negro blood, but does not include octoroons. There is a decision in the case of *The People v. Dean,* 14 Michigan, 406, which says that "all those persons having one-fourth black blood were colored."

The statutes mentioned above, the weight of judicial interpretation and popular meaning seem to show that the term "negro" includes all persons whose blood is at least one-quarter black. That is, a black man, a mulatto or a quadroon is a negro. An octoroon is not.