American Legal History – Russell

83 S.W. 526

Supreme Court of Missouri, Division No. 1.

KEEN

v.

KEEN.

Nov. 23, 1904.

Appeal from Circuit Court, St. Charles County; E. M. Hughes, Judge.

Action in ejectment by Sophronia K. Keen against Ellis Keen. From a judgment for plaintiff, defendant appeals. Affirmed.

Attorneys and Law Firms

***526** D. P. Dyer and T. F. McDearmon, for appellant. Jno. F. McGinnis and C. W. Wilson, for respondent.

Opinion

MARSHALL, J.

This is an action in ejectment to recover an undivided one–half of 71 67/100 acres of land, being a part of United States survey No. 1,765, in St. Charles County, Mo. The petition is in the usual form, and the ouster is laid as of March 2, 1901. The answer is a general denial. Eli Keen is the common source of title. The

plaintiff claims one–half of the land, subject to the payment of debts, under section 2939, Rev. St. 1899, on the ground that she is the widow of Eli Keen, and that he died without any child or other descendants in being, capable of inheriting. The defendant claims to be the legitimate child of an alleged common-law marriage between Eli Keen, a white man, and Phœbe, a negro woman. There was a judgment below for the plaintiff, and the defendant appealed.

At the request of the parties the circuit court made a special finding of facts, together with conclusions of law, separately stated, which it is agreed is a fair statement of the facts, except that the defendant says that while the court found that Eli Keen and Phœbe lived together and cohabited without the sanction of marriage, and that the reputation was that they had never been married, it should have said they were never married "by ceremony"; but, as hereafter shown, the finding of the court covers both a ceremonial and a common–law marriage, and the addition of the words "by ceremony" would materially narrow the finding of the court, and would beg the very question involved in this case. For there is no pretense that there was any ceremonial marriage, and the only question is, was there a common–law marriage? The addition of the words "by ceremony" would therefore leave the question of common–law marriage an undecided question in the case, and it is plain that such a marriage was intended to be decided by the court, as well as a ceremonial marriage. This is an action at law, and by consent was tried by the court

without the aid of a jury. There is abundant testimony to support the finding of facts by the court, and therefore that finding of fact is conclusive upon the parties in this court. No instructions were asked or given, and the only question here, therefore, is, did the facts found warrant the conclusions of law reached by the trial court?

The findings of fact are as follows:

"Eli Keen was a white man, and about 1847 or 1848, being then under 21 years of age, removed to St. Charles county, Mo., with his father, and settled in this country about that time. The woman Phœbe was a negro woman, and, with a child, Martha, was held and owned as a slave by the father of Eli Keen. On June 1, 1850 or 1851, at the administrator's sale of his father's personal estate and slaves, Eli Keen became the purchaser of the negro woman Phœbe and her child, Martha, and thereby became the owner of them, and held them as slaves. Some time after he became the owner of Phœbe, the negro woman, about 1850 or 1851, Eli Keen began cohabiting with her, and continued cohabiting with her down to about 1882 or 1883. As the fruits of their intercourse, eight children were born, who are now living; the defendant, Ellis Keen, being the first born, and now in the fifty–first year of his age. Of these children, six were born prior to the general emancipation of slaves in this state in 1865, and two were born after that date; the youngest being ***527** born January 2, 1868. Eli Keen owned his own farm and home place, in St.

Charles county, Missouri; and from the time he began cohabiting with Phœbe, the negro woman, in 1850 or 1851, he lived in his own home, on his own farm, and Phœbe lived in the same house with him, and did the housekeeping. They occupied the same room and the same bed. They ate at the same table, and as the children were born they ate at the same table with Eli Keen and Phœbe; Eli Keen sitting at one end of the table, and Phœbe at the other. The children called Eli Keen 'Pa,' and Phœbe 'Ma,' and this was done in the presence of Eli Keen and Phœbe, without protest or objection from either of them. Eli Keen called the woman 'Phœbe,' and she called him 'Eli.' Eli Keen and Phœbe and the children born of their relations lived together as one family. They cared and provided for them (the children), and treated them like parents ordinarily treat their legitimate children. After the close of the War of Rebellion, a public district school for the education of negro children was organized under the laws of Missouri, and a public school building was erected for this purpose within a few hundred yards of Eli Keen's residence; the site for such building being given by Eli Keen on his home farm. Eli Keen and Phœbe sent their children to this school, and, for two terms after this school started, Eli Keen and other patrons at the expiration of the four–months term of the public school employed the teacher, and extended the term two months longer. Several of the older children—the defendant among them—were sent off to school in Iowa and Tennessee, Eli Keen paying all the expenses. Phœbe and the children were in

the habit of dealing with the merchants in St. Charles, and bought goods, which were charged to Eli Keen, and Eli Keen paid the bills. A physician was called to visit the children when sick, which he charged to Eli Keen, and Eli Keen paid the bills. Eli Keen, at his own house, introduced Phœbe to several different persons as his wife. To several persons, after his marriage to the plaintiff, Sophronia K. Keen, Eli Keen spoke of Phœbe Keen as his wife. So far as the evidence showed, Eli Keen was never seen out with Phœbe, except when in his own house or yard. He was never seen off of the place with her. He was never known to visit friends with her. He was never known to introduce her to anybody as his wife outside of his own home, and he was never known to be with her and acknowledge her as his wife outside of his own house. While it was a known fact in the community in which they lived that Eli Keen and Phœbe were living together, and cohabiting and raising a family of children, as above detailed, it was the reputation in the community that they were so living together and cohabiting without the sanction of marriage. The reputation was that they had never been married. As the children grew up, the evidence shows that Eli Keen put the sons, Ellis, Reason, Matthew, and Mark, on tracts of land owned by him, and allowed them to occupy and use the same without charging them any rent; that he advised and consulted with them about the management of their affairs; that in his last will and testament, executed September 5, 1900, he devised his entire estate to these children born of the

relations between him and Phœbe, except the provision therein made for his wife, Sophronia K. Keen, the plaintiff, and in his will he designates and mentions them as his 'beloved children'; that in his will he devised the tract of land upon which the defendant now lives, and which is in controversy in this suit, to Ellis Keen, the defendant; that by his father's permission he had been living on this land since 1892, his father, Eli Keen, charging him no rent for the same; that the other sons, Reason, Matthew, and Mark, were, at and before Eli Keen's death, living on the farms that were respectively devised to them in the will, and they are still living on such farms. By deed dated November 22, 1883, and recorded December —, 1883, Eli Keen conveys his old home farm, in St. Charles county, Mo., the place where he and Phœbe lived for so many years, to Phœbe; he designating her as Phœbe Keen; she to have and to hold for and during her natural life; and providing therein that upon the death of Phœbe and of himself, Eli Keen, the title to said farm should vest in Lettie Ann Skinner, Phœbe Wise, Mary Phillips, and Alice Cora Brown, the daughters of said Phœbe Keen. In this deed Eli Keen expressly reserves to himself the use of one room in the house, which he designated in the deed as the room now occupied and used by him. In this deed Eli Keen does not describe or designate Phœbe as his wife, nor does he mention or designate these daughters of Phœbe as his children. About 1882 or 1883—the exact date does not accurately appear from the testimony—the intercourse between Eli Keen and Phœbe Keen ceased. She

remained in this home farm for several years, and then moved to St. Charles, Missouri, where she lived up to the date of her death, in 1896. About 1883 Phœbe ceased to buy goods at the stores on Eli Keen's credit. Her bills were thereafter charged to Phœbe Keen, and she paid them. On August 22, 1883, Eli Keen was married to the plaintiff, Sophronia K. Keen (née Barrett), in Wood county, West Virginia, upon license issued in accordance with the laws of West Virginia. The ceremony was performed by a minister of the gospel of the M. E. Church South, and from the date of their marriage down to the date of Eli Keen's death, on February 22, 1901, they have lived together as husband and wife. Prior to their marriage Eli Keen informed the plaintiff that he was an unmarried man, and had no children or other persons dependent ***528** upon him. The plaintiff had no knowledge or information whatever of Eli Keen's relations with the negro woman Phœbe until a number of years after her marriage with him, and in fact received no definite information concerning these relations between Eli Keen and Phœbe until very shortly before Eli Keen's death, namely, in December, 1900. Eli Keen left no child or children or other descendants in being, other than the defendant, Ellis Keen, and his brothers and sisters, the children of the relations with Phœbe, the negro woman. The plaintiff, in due form of law, filed her renunciation of the last will and testament of Eli Keen, her husband, on April 1, 1901, declining to accept the provisions made for her in said will. On April 1, 1901, by her election in

writing, executed, acknowledged, filed, and recorded according to law, plaintiff elected to take one–half of her husband's estate, subject to the payment of his debts, under the provisions of section 2939, Rev. St. 1899. The tract of land described in the petition was owned by Eli Keen at the time of his death. The defendant is in possession thereof. It is all in cultivation, and the rental value thereof is four dollars per acre per annum. Eli Keen told other parties that he had never been married until he married the plaintiff, in 1883. There was no evidence of any kind of any marriage contract or agreement between Eli Keen and the negro woman, Phœbe, other than is set forth in the above statement. The course of living between them continued and remained the same from the beginning of their cohabitation, in 1850 or 1851, down to their final separation and the cessation of their intercourse, in 1882 or 1883. In the deed made by Eli Keen to Phœbe in November, 1883, conveying to her the old home place, above mentioned, although made after Eli Keen's marriage to plaintiff, the plaintiff did not join.

"My conclusions of law from the above facts are that no marriage at common law ever existed between Eli Keen and Phœbe Keen, and that Eli Keen died without any child or children or other descendants in being capable of inheriting from him, and that plaintiff is entitled to recover possession of one undivided half of the lands described in the petition. Damages are assessed at the sum of one hundred and fifty–six dollars. Monthly rents and profits are assessed at

the sum of $11.94. E. M. Hughes, Judge."

1. Marriage. At the time Eli Keen and Phœbe began living together and cohabiting, in 1850 or 1851, the law of this state was that "marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential." Rev. St. 1845, c. 115, § 1. Eli Keen was a white man, and Phœbe was a negro; and the law of this state at that time further provided: "All marriages of white persons with negroes or mulattoes are declared to be illegal and void." Rev. St. 1845, c. 115, § 3. These provisions were carried, without change, into the revision of 1855 (Rev. St. 1855, c. 108, §§ 1, 3). Section 1 aforesaid was carried, unchanged, into the revision of 1865 (Gen. St. 1865, c. 113, § 1), and section 3 was consolidated with section 2 of the prior revisions, so as to make it read: "All marriages between parents and children, including grand parents and grand children of every degree, between brothers and sisters of the half as well as of the whole blood, and between uncles and nieces, aunts and nephews, white persons and negroes, are prohibited and declared absolutely void; and this prohibition shall apply to illegitimate as well as legitimate children and relatives." Gen. St. 1865, c. 113, § 2. Section 1 aforesaid has been carried into all the subsequent revisions, and is now the law in this state. Rev. St. 1879, c. 50, § 3264; Rev. St. 1889, c. 108, § 6840; Rev. St. 1899, c. 50, § 4311. Sections 2 and 3, as thus consolidated, were carried without change into the revision of 1879 (Rev. St.

1879, c. 50, § 3265). By the revision of 1889 said consolidated section was amended so as to insert between the words "aunts and nephews" and the words "white persons and negroes" the words "first cousins." And the section as so amended was carried into the revision of 1899 (Rev. St. 1899, c. 50, § 4312), and is the law now. Thus it appears that, under the laws of this state, marriage has always been considered "as a civil contract, to which the consent of parties capable in law of contracting is essential." The courts of this state, in dealing with common–law marriages, have always held the "marriage is a civil contract, to which the consent of parties capable in law of contracting is essential." State v. Bittick, 103 Mo., loc. cit. 191, 15 S. W. 327, 11 L. R. A. 587, 23 Am. St. Rep. 869; State v. Cooper, 103 Mo., loc. cit. 273, 15 S. W. 329; Banks v. Galbraith, 149 Mo. 529, 51 S. W. 105.

There is no pretense in this case that there was any ceremonial or statutory marriage between Eli and Phœbe, and, as he was a white man and she was a negro, there could never have been a legal ceremonial or statutory marriage between them. From the time their relations began, in 1850 or 1851, until the emancipation of slaves, Phœbe was incompetent to make any kind of a civil contract; and, if she had during that time attempted to enter into a common–law marriage, it would be void, and she could have repudiated it after she became free. Johnson v. Johnson, 45 Mo. 595. When Eli and Phœbe began their relation to each other, and until

1865, it was not possible or legal for them to have entered into the civil contract of marriage, because she was not competent to contract, and because any such thing as a marriage between them was then, and is now, illegal and void. In addition to ***529** this, the trial court found the fact to be that there never was any common–law marriage entered into between them.

It is argued, however, that, although she was not capable of contracting marriage prior to 1865, nevertheless at that time she became capable in law of doing so, and that as she continued the relations with Eli after that time, and until 1882 or 1883, a common–law marriage must be presumed. There are several very potent reasons that would deter any court from indulging in any such presumption, to wit, first, the law made such a marriage illegal and void, and since 1879 such a marriage has been a crime that might be punished as a felony or a misdemeanor (Rev. St. 1879, c. 24, § 1540; Rev. St. 1889, c. 47, art. 8, § 3797; Rev. St. 1899, c. 15, art. 8, § 2174), and therefore no one will be presumed to have entered into or attempted to enter into an illegal and void marriage; second, the trial court found the fact to be that there never was any such common–law marriage entered into after or before 1865; third, there was no change in their manner of living together after 1865; and, fourth, the conduct of Eli and Phœbe after 1865 shows that they never had entered into any common–law marriage at any time. For instance, in 1882 or 1883 they ceased to live together, and their relations terminated. She

remained on his farm for several years after that, and then moved into St. Charles, where she lived up to the time of her death, in 1896; and he went to West Virginia, and on August 22, 1883, he married the plaintiff herein, and continued to live with her until his death, in February, 1901. In view of these facts, no court would indulge a presumption of a common–law marriage, for one of the things that must appear to warrant the existence of a common–law marriage is that the contract between the contracting parties was that the relation of husband and wife should continue for their joint lives, and that neither one nor both could rescind the contract or destroy the relation. State v. Cooper, 103 Mo., loc. cit. 273, 15 S. W. 327; Banks v. Galbraith, 149 Mo., loc. cit. 536, 51 S. W. 105. The conduct of the parties is a conclusive demonstration that Eli and Phœbe never entered into a common–law marriage.

The defendant, however, contends that the case of Lee v. Lee, 161 Mo. 52, 61 S. W. 630, is decisive of this case, because, it is said, while Phœbe was incapable of making or entering into a contract of marriage prior to 1865, still, as Eli was her master, his consent could supply her want of capacity to contract, and that the effect of his marriage to her was to manumit her. Lee v. Lee, supra, was, however, essentially different from the case at bar. The facts in that case were that there was a marriage before the war between two slaves, which with the consent of a master, had been entered into, and afterwards dissolved with his consent, and

another marriage entered into by the man with another slave, with the consent of the master, and a marriage ceremony performed between the latter after their emancipation; and after the man's death a suit in partition was begun between the children of the first marriage and the widow of the second marriage and her children, and the question was whether the children of the first marriage were entitled to inherit from the man. It was expressly said that it was not necessary to decide whether the first marriage was legal or not, because, by section 2920, Rev. St. 1899, it was provided that "the children of all persons who were slaves, and were living together in good faith as man and wife at the time of the birth of such children, shall be deemed and taken to be legitimate children of such parents," and upon this statute the decision was rested. No such case is here presented, and hence that decision affords no support for the contention in this case.

The result is that there never was any kind of a marriage between Eli and Phœbe—either ceremonial, statutory, or common law.

2. The defendant contends, however, that as section 2918, Rev. St. 1899, provides that "the issue of all marriages, decreed null in law, or dissolved by divorce shall be legitimate," the defendant is a legitimate child of Eli Keen, and capable of inheriting from him, and further contends that this section was not intended to legalize void marriages, but to make the children of illegal or void marriages legal. And incidentally it is urged that in Green v. Green, 126 Mo. 17, 28

S. W. 752, 1008, it was held that children of a marriage entered into in good faith by a woman with a man who had a wife at the time were legitimate, and hence it is claimed that as marriages, where either party has a former wife or husband living, are declared to be void (Rev. St. 1899, § 4313), and as the marriage between parents and children, grandparents and grandchildren, brothers and sisters, uncles and aunts, nephews and nieces, and between first cousins, are prohibited and declared by the same section of the statutes to be void that prohibits marriages between whites and negroes, and declares such marriages to be void, therefore the children of a marriage between a white person and a negro are as much legitimate, under section 2918, supra, as the children of any of the other marriages so prohibited or declared void. The logic employed and the conclusion reached might be conceded, but it would avail defendant nothing in this case, for the simple reason that there was no marriage of any kind between Eli and Phœbe, and therefore the statute relied on (section 2918, Rev. St. 1899) can have no application here. This case is different from the case of Green v. Green, supra, in this: that in that case Green "was married in due form," while here there was no marriage of any kind or character shown. Hence the ***530** application of the statute (section 2918, Rev. St. 1899) to the children of the Green marriage, and the inapplicability of the statute to the case at bar.

The conclusion follows that the judgment of the circuit court was right, and

it is therefore affirmed. All concur, except ROBINSON, J., absent.

All Citations

184 Mo. 358, 83 S.W. 526

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26 S.Ct. 494

Supreme Court of the United States.

ELLIS KEEN, *Plff. in Err.*,

v.

SOPHRONIA K. KEEN.

No. 188.

Argued and submitted March 7, 8, 1906.

Decided April 2, 1906.

Synopsis

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of St. Charles County, in that state, in favor of plaintiff in an action of ejectment. *Dismissed* for want of jurisdiction.

See same case below, 184 Mo. 358, 83 S. W. 526.

Attorneys and Law Firms

**494 *Mr.* David P. Dyer for plaintiff in error.

Messrs. Charles W. Bates, *John F. McGinnis*, and *C. W. Wilson* for defendant in error.

Opinion

Statement by Mr. Justice **Brown:**

This was an action of ejectment begun by Sophronia K. Keen in the circuit court of St. Charles county against Ellis Keen, to recover a tract of land in that county to which plaintiff averred she was lawfully entitled. The petition was in the usual form of a declaration in ejectment, and the answer a general denial.

Eli Keen was the common source of title, plaintiff claiming one half of the land, subject to the payment of debts, under § 2939 of the Revised Statutes of Missouri, upon the ground that she was the widow of Eli Keen, who died in 1901, leaving, as plaintiff alleged, no children capable of inheriting.

Defendant claimed to be the legitimate child of an alleged common-law marriage between Eli Keen, a white man, and Phoebe, a negro woman.

There was judgment below for the plaintiff, which was affirmed by the supreme court. 184 Mo. 358, 83 S. W. 526.

Mr. Justice **Brown** delivered the opinion of the court:

The court deduced, as a conclusion of law from certain facts found, that no marriage at common-law had ever existed between Eli Keen and Phoebe, a former slave of Eli's father, and that the former died without leaving any child or children or other descendants capable of inheriting from him, and hence that plaintiff was entitled to recover possession of an undivided half of the lands as his wife. No ceremonial marriage was claimed.

It is difficult to see any facts upon which to found our jurisdiction of the case. No Federal question appears in the pleadings or in the testimony, a transcript of which is contained in the record. The first glimmer of one appears in the motion for a new trial in the circuit court, in which it is charged that the judgment deprived the defendant of his property without due process of law, and also denied him the equal protection of the laws, contrary to the 14th Amendment to the Constitution. But no allegation is made as to why the judgment had this effect. No notice was taken of the constitutional point in the opinion of the supreme court, although the writ of error from this court was allowed by the presiding judge. In the assignment of errors filed in this court the only error charged is that, although the court below found there was no common-law marriage between Eli Keen and Phoebe, yet, in its special findings, it found all the facts required to establish such common-law

marriage ****495** between them, and that from the facts so found the law presumed a null and void marriage between said Eli Keen and Phoebe Keen, the issue of which was capable of inheriting, under the statutes of Missouri. Rev. Stat. § 2918. No reference is made to the Constitution of the United States in this connection. In addition to this, the question what facts constitute a common-law marriage is purely a local one. We have searched the record for a Federal question, but have found none. *The writ of error is, therefore, dismissed*.

All Citations

201 U.S. 319, 26 S.Ct. 494, 50 L.Ed. 772

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