

Transcript of Record in Keen v. Keen (Supreme Court of the United States.)

This is a reproduction of a library book that was digitized by Google as part of an ongoing effort to preserve the information in books and make it universally accessible.

Google™ books

<https://books.google.com>





HARVARD LAW LIBRARY

Gift of
Hon. Oliver Wendell Holmes

RECEIVED

Handy/
Vch. by Daphn E...
W. P. Ryan

(4)

Holmes

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Handwritten signature

No. 188.

ELLIS KEEN, PLAINTIFF IN ERROR,

vs.

SOPHRONIA K. KEEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED MARCH 11, 1905.

(19,648.)

(19,648.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 188.

ELLIS KEEN, PLAINTIFF IN ERROR,

vs.

SOPHRONIA K. KEEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ.....	1½	2
Citation.....	2	2
Acceptance of service of citation.....	2½	2
Caption	3	3
Certified copy of judgment and order granting appeal.....	3	3
Abstract of record on appeal from St. Charles circuit court.....	6	5
Petition.....	6	5
Answer.....	7	6
Continuance.....	7	6
Hearing and submission.....	7	6
Finding of facts.....	7	6
Conclusions of law.....	10	9
Judgment.....	11	9
Motion for new trial filed and overruled.....	11	10
Motion and affidavit for appeal filed.....	11	10
Appeal bond filed and approved.....	11	10
Bill of exceptions.....	11	10
Evidence for plaintiff.....	12	11
Testimony of Sophronia K. Keen.....	12	11
Exhibit 1—Certificate of marriage.....	13	12
2—Marriage license.....	13	13
3—Declaration of election by widow.....	18	17
5—Stipulation as to title.....	37	40

Judd & Detweiler (Inc.), Printers, Washington, D. C., October 16, 1905.

	Original.	Print
Demurrer to evidence.....	38	40
Evidence for defendant.....	38	41
Will of Eli Keen.....	38	41
Testimony of Ellis Keen.....	41	44
Charles L. Hug.....	50	54
John Atkinson.....	56	60
Reason Keen.....	58	63
Mathew Keen.....	63	69
J. W. Bruns.....	68	76
Anna M. Smith.....	71	79
Ellis Keen (recalled).....	75	83
Anna M. Smith (recalled).....	75	83
Cora Brown.....	76	85
Frank Keen.....	78	88
Deed, Eli Keen to Phoebe Keen, November 21, 1883...	82	92
Testimony of Sarah Keen.....	83	93
Louisa Drayman.....	85	95
Barnard Drayman.....	87	98
Mat. Robinson.....	91	102
Anthony Miller.....	93	104
W. C. Brown.....	95	106
Mark Keen.....	98	110
Henry Williams.....	101	114
Dr. Johnson.....	102	116
B. C. Few.....	103	116
Defendant rests.....	103	117
Evidence for plaintiff.....	103	117
Exhibit 4—Renunciation, March 30, 1901.....	104	117
Testimony of James P. Daugherty.....	105	118
Joseph T. Bushart.....	107	121
Wilson Kessler.....	108	122
J. H. Plackemeyer.....	110	124
J. H. Plackemeyer.....	111	125
William Schnedler.....	112	127
Peter Bushart.....	113	128
J. K. Golicky.....	114	129
Findings of fact.....	115	130
Conclusions of law.....	118	133
Motion for new trial.....	119	134
Judge's certificate to bill of exceptions.....	120	135
Argument and submission.....	121	135
Judgment.....	121	136
Opinion.....	121	136
Allowance of writ of error, &c.....	132	143
Assignment of errors.....	132	144
Bond on writ of error.....	134	145
Clerk's certificate.....	139	148

1 UNITED STATES OF AMERICA, ss :

The President of the United States to the honorable the judge of the supreme court of Missouri, division number 1, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1904, thereof, between Sophronia K. Keen, respondent, and Ellis Keen, appellant, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington, D. C., in not exceeding thirty days from and after the date of the citation herein, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23rd day of January, in the year of our Lord one thousand nine hundred and five.

Issued at office in the city of Jefferson with the seal of the circuit court of the United States, for the western district of Missouri, dated as aforesaid.

{ Seal of the United States Circuit Court for the Western }
 { District of Missouri, Central Division. }

H. C. GEISBERG,
 Clerk Circuit Court United States, Western
 District of Missouri, Central Division.

Allowed by
 THEO. BRACE,
 Presiding Judge.

Feb. 20th, 1905.

1½ [Endorsed:] United States circuit court, western district of Missouri, central division Sophronia K. Keen resp't vs. Ellis Keen Writ of error to the supreme court of the State of Missouri. Filed Feb. 20 1905 Jno. R. Green clerk.

Return to Writ.

STATE OF MISSOURI, ss :

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 2nd day of March, A. D. 1905.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, Clerk.

2 The United States of America to Sophronia K. Keen, Greeting :

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the central division of the western district of Missouri, wherein Ellis Keen is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Theodore Brace, presiding judge of division number 1, of the supreme court of of Missouri, this 20th day of February in the year of our Lord one thousand nine hundred and five.

THEO. BRACE,
Presiding Judge.

2½ [Endorsed :] Supreme court of Missouri. Sophronia K. Keen resp't vs. Ellis Keen app'l't Citation. Filed Feb. 20 1905 Jno. R. Green clerk.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, } ss :

We hereby acknowledge due service of the within citation, this 22nd day of February A. D. 1905.

JNO. F. MCGINNIS AND
C. W. WILSON,
Attorney- for Defendant in Error.

3 STATE OF MISSOURI, *scilicet* :

Be it remembered, that heretofore to-wit, on the 20th day of September, 1902, there was filed in the office of the clerk of the supreme court of Missouri, a certified copy of the judgment and order granting an appeal in a certain cause from St. Charles county, Missouri, wherein Sophronia K. Keen was respondent and Ellis Keen was appellant, which said certified copy of the judgment and order granting an appeal is in words and figures as follows, viz :

STATE OF MISSOURI, }
 County of St. Charles. }

Proceedings in the circuit court of St. Charles county, Missouri, at a term begun and held at the court house in the city of St. Charles, county and State aforesaid, on the third day of March, 1902, before the Honorable E. M. Hughes, judge of the eleventh judicial circuit of the State of Missouri.

SOPHRONIA K. KEEN, Plaintiff (Respondent), }
 vs. } Ejectment.
 ELLIS KEEN, Defendant (Appellant).

Be it remembered, that, heretofore, to-wit ; on the the 30th day of April, 1902, it being the nineteenth day of the said March term, 1902, of the said St. Charles county circuit court, the following proceedings were had and made of record, in the above entitled cause, to-wit :

SOPHRONIA K. KEEN, Plaintiff, }
 vs. } Ejectment.
 ELLIS KEEN, Defendant.

Now at this day again appear the said parties, both plaintiff and defendant in person and by their respective attorneys, and
 4 said cause having heretofore been duly submitted to the court without a jury, (a jury having been waived by the said parties), upon the pleadings, evidence and admissions of the parties and being taken and held under advisement by the court. And the court being now sufficiently advised of in and concerning said cause and the pleadings, evidence and admissions herein ; doth find the issues in said cause, in favor of said plaintiff ; and the court having also stated in writing the conclusion of facts found separately from the conclusion of law found in said cause and filed its said conclusions both of the facts and of the law so found in said cause with the clerk of said court as requested by the defendant.

It is therefore ordered and adjudged by the court that the plaintiff have and recover of the defendant (in accordance with its said findings of the facts and the law) the possession of the undivided one half interest of, in and to the following described tract of land,

situate, lying and being in the county of St. Charles and State of Missouri, to-wit:

Commencing at the north west corner of a certain tract of land conveyed by Eli Keen & wife to George H. Keen, by deed dated August 19, 1896, & recorded in Book 70, page 92 of the recorder's office of St. Charles Co., Mo., and running thence north $8^{\circ} 5'$ east 56 $\frac{39}{100}$ chains to corner, thence south $82\frac{1}{2}^{\circ}$ east 12 $\frac{71}{100}$ chains to corner, thence south $8^{\circ} 5'$ west 56 $\frac{39}{100}$ chains to the north east corner of said George H. Keen tract, thence north $82\frac{1}{2}^{\circ}$ west 12 $\frac{71}{100}$ chains to the place of beginning and containing 71 $\frac{67}{100}$ acres, being part of United States survey No. 1765 and being the same tract of land devised to said Ellis Keen, in the last will and testament of Eli Keen, deceased, and upon which said Ellis Keen now lives, it being the property described in the plaintiff's petition.

And it is further ordered and adjudged by the court that plaintiff have and recover of defendant the sum of one hundred and fifty-six dollars for her damages for the unlawful withholding of the possession of said premises to the date of this judgment, and that plaintiff

5 have and recover of defendant the value of the monthly rents and profits of the said premises at the rate of eleven & $\frac{94}{100}$ dollars per month from the date of this judgment until possession of said premises is delivered to her, together with her costs in this behalf incurred, and that she have her writ for possession and execution for the same.

And again at said March term, 1902, of said court, and on said 30th day of April, 1902, the following further proceedings were had in said cause, to-wit:

WEDNESDAY, April 30th, 1902.

SOPHRONIA K. KEEN, Plaintiff,	}	Ejectment.
vs.		
ELLIS KEEN, Defendant.		

Now again comes the said defendant, by his attorneys, and moves the court for an appeal from the judgment and ruling of this court herein, and presents to the court his affidavit therefor, this day filed. And thereupon the said defendant is granted an appeal herein to the supreme court of this State. On motion leave is granted said defendant to file his appeal bond herein in the sum of twelve hundred dollars (\$1200.00), within ten days after this term of court.

And it is further ordered that leave be and is hereby given defendant to file his bill of exceptions herein, on or before July 1st, A. D. 1902.

STATE OF MISSOURI, }
 County of St. Charles, } ss :

I, Wm. F. Wolter, clerk of the circuit court within and for the county of St. Charles aforesaid, do hereby certify that the foregoing is a true copy of the judgment and order granting an appeal in the cause therein named, as fully as the same appears of record in my office.

In witness whereof, I have hereunto set my hand as clerk and affixed the seal of our said circuit court, at office in the [SEAL.] city of St. Charles, this 10th day of July, A. D. 1902.

WM. F. WOLTER,
 Circuit Clerk.

6

And afterwards to-wit, on the 14th day of September, 1904, the said appellant filed his abstract of the record in this cause, which said abstract is in words and figures as follows, viz :

In the Supreme Court of Missouri, — Term, 1904.

SOPHRONIA K. KEEN, Respondent, }
 vs. } No. —
 ELLIS KEEN, Appellant.

Appeal from the St. Charles Circuit Court.

Appellant's Abstract in Lieu of Complete Transcript.

On the 29th day of July, 1901, Sophronia K. Keen, plaintiff, filed her petition in the circuit court of St. Charles county, Missouri, against Ellis Keen, defendant, returnable to the September term, 1901, upon which a summons was duly issued and served on the 3rd day of August, 1901.

Omitting caption and signatures of counsel, said petition is in words as follows :

Petition.

Plaintiff for her cause of action states to the court that on the 1st day of March, 1901, she was lawfully entitled to the possession of the undivided one-half interest of, in and to the following described tract of land, situate, lying and being in the county of St. Charles, and State of Missouri, towit : Commencing at the northwest corner of a certain tract of land conveyed to Eli Keen and wife to George H. Keen by deed dated August 19th, 1896, and recorded in Book 70, page 92 of the recorder's office of St. Charles Co., Mo., and running thence north 8° 5' east 56 : 39-100 chains to corner, thence south 82½° east 12 : 71-100 chains to corner, thence south 8° 5' west 56 : 39-100 chains to the northeast corner of said

George H. Keen tract, thence north $82\frac{1}{2}^{\circ}$ west 12: 71-100 chains to the place of beginning, and containing 71: 67-100 acres, being part of United States survey No. 1765, and being the same tract of land devised to said Ellis Keen in the last will and testament of Eli Keen, deceased, and upon which said Ellis Keen now lives, and being so entitled to the possession thereof; that the defendant Ellis Keen afterward, on the second day of March, 1901, entered into such premises and unlawfully withholds from the plaintiff the possession thereof, to her damage in the sum of two hundred dollars.

Plaintiff further states that the monthly value of the rents and profits of said premises is thirty dollars.

Whereof plaintiff prays judgment for the possession of said premises, and two hundred dollars damage for unlawfully withholding the same from plaintiff, and thirty dollars for monthly rents and profits from the date of judgment until possession is delivered to plaintiff, and for her costs in this behalf incurred.

On the 2nd day of September, 1901, the defendant filed his answer, which omitting the caption is as follows:

Auswer.

Now comes the defendant and for answer to the petition of the plaintiff herein, denies specifically and generally each and every allegation in said petition contained. And having fully answered asks to be dismissed hence with his costs.

Continuance.

Afterwards, to-wit, on the 10th day of December, 1901, the plaintiff filed an application for continuance of said cause, and said cause was thereupon continued by consent.

Afterwards, on March 12, 1902, at the March term of the St. Charles circuit court, said cause came on for trial before the court, sitting without a jury.

And afterwards on March 19th, 1902, said cause was submitted upon argument and taken under advisement by the court.

And afterwards, during the March term, 1902, of said court, on the 30th day of April, 1902, the court found the facts in said case to be as follows:

Finding of Facts and Judgment.

SOPHRONIA K. KEEN, Plaintiff,	}	Ejectment.
vs.		
ELLIS KEEN, Defendant.		

The court finds the facts to be as follows in this case:

8 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 county about that time.

The woman Phoebe was a negro woman, and with a child Martha, was held and owned as a slave by the father of said Eli Keen. On June 1st, 1850, at the administrator's sale of his father's personal estate, and slaves, Eli Keen became the purchaser of the negro woman, Phoebe and her child, Martha, and thereby became the owner of them and held them as slaves. Some time after he became the owner of Phoebe, the negro woman, about 1850 or 1851, Eli Keen began cohabiting with her and continued cohabiting with her down to about 1862 or 1863, and 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 born January 2nd, 1868.

Eli Keen owned his own farm and home place in St. Charles county, Missouri, and from the time he began cohabiting with Phoebe, the negro woman, in 1850 or 1851, he lived in his own home, on his own farm, and Phoebe lived in the same house with him and did the house-keeping. 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 Phoebe, Ellis Keen sitting at one end of the table and Phoebe at the other. The children called Eli Keen "Pa" and Phoebe "Ma," and this was done in the presence of Eli Keen and Phoebe without protest or objection from either of them. Eli Keen called the woman Phoebe and she called him Eli. Eli Keen and Phoebe and the children 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 the 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 Phoebe sent their children to this school and for two terms after this school was 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.

Phoebe 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 Phoebe to several different persons as his wife. To several persons after his marriage to the plaintiff, Sophronia K. Keen, Eli Keen spoke of Phoebe Keen as his wife. So far as the evidence shows Eli Keen was never seen with Phoebe, 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 house, and he -as 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 Phoebe 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 grow 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 5th, 1900, he devised his entire estate to these children born of the relations between him and Phoebe, except the provisions therein made for his wife, Sophronia K. Keen, and in his will he designates or 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 are respectively devised to them in the will, and they are still living on such farms.

By deed dated November 22nd, 1883, and recorded December —, 1883, Eli Keen conveys his old home farm in St. Charles county, Missouri, the place at which he and Phoebe had lived for many years, to Phoebe, he designating her as Phoebe Keen, she to have and to hold for and during her natural life, and providing therein that upon the death of Phoebe and of himself, Eli Keen, the title to said farm should vest in Lettie Ann Skinner, Phoebe Wise, Mary Phillips and Alice Cora Brown, the daughters of said Phoebe Keen. In this deed Eli Keen expressly reserves to himself the use of one room in the house, which he designates in the deed as the room now occupied and used by him. In this deed Eli Keen does not describe or designate Phoebe as his wife, nor does he mention or designate these daughters of Phoebe as his children.

About 1882 or 1883, the exact date does not accurately appear from the testimony, the intercourse between Eli Keen and Phoebe ceased. She remained on his home farm for several years, and then moved to St. Charles, Missouri, where she lived up to the time of her death in 1896. About 1883 Phoebe ceased to buy goods at the stores on Eli Keen's credit. Her bills were thereafter charged to Phoebe Keen and she paid them.

10 On August 22, 1883, Eli Keen was married to the plaintiff, Sophronia K. Keen (nee 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 upon him. The plaintiff had no knowledge or information whatever of Eli Keen's relations with the negro woman Phoebe until a number of years after her marriage with him, and in fact received no definite information concerning the relations between Eli Keen and Phoebe until very shortly before Eli Keen's death, namely in December, 1900.

Eli Keen left no child or other descendants in being other than the defendant Ellis Keen and his brothers and sisters, the children of the relations with Phoebe, 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 1st, 1901, declining to accept the provisions made for her in said will.

On April 1st, 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 2929 of the Revised Statutes of 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, Phoebe, 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 Phoebe in November, 1883, conveying her the old home place above mentioned, although made after Eli Keen's marriage, to plaintiff, the plaintiff did not join.

E. M. HUGHES, Judge.

My conclusions of law from the above facts are that no marriage at common law ever existed between Eli Keen and Phoebe
11 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 one-half of the lands described in petition.

Damages are assessed in 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.

Motion for New Trial Filed and Overruled.

And afterwards, on the same day and at the same term of said court, and within four days after the judgment was rendered, the defendant filed a motion for a new trial, which said motion was on the same day, April 30th, 1902, overruled by said court, which duly appears upon the record of the court of that date.

Motion and Affidavit for Appeal Filed.

And afterwards, on the same day, April 30, 1902, and at the same term of said court, the defendant filed his affidavit for appeal, and by order of court duly entered of record on that date, said appeal was granted to the supreme court of Missouri.

Defendant was given leave to file his appeal bond within ten days after this term of court, and leave to file his bill of exceptions on or before July 1, 1902.

Appeal Bond Filed and Approved by Court.

And afterwards, on the 5th day of May, 1902, in vacation, the defendant filed his appeal bond, which was duly entered of record, as is shown by the file mark of the clerk as being filed within the time allowed by the court.

And afterwards, on the 25th day of June, 1902, defendant filed his bill of exceptions in said cause, as shown by an entry of record on that date in said cause as well as by the file mark and signature of the clerk of said court endorsed on said bill, and which bill of exceptions is in words and figures as follows:

Transcript of Testimony.

In the Circuit Court of St. Charles County.

STATE OF MISSOURI, }
County of St. Charles, } ss:

SOPHRONIA K. KEEN, Plaintiff, }
vs. }
ELLIS KEEN, Defendant. }

Messrs. C. W. Wilson and John F. McGinnis, attorneys-at-law, appeared for the plaintiff.

12 Messrs. T. F. McDearmon and D. P. Dyer, attorneys-at-law, appeared for the defendant.

Be it remembered, that on the trial of the above entitled cause at the spring term, 1902, of the circuit court of St. Charles county,

Missouri, held at the city of St. Charles and on the 12th and 13th days of March, 1902, before the Hon. E. M. Hughes, judge, a jury being waived, the following proceedings were had, to wit :

The plaintiff to sustain the issues on her part introduced evidence as follows, to wit :

SOPHRONIA K. KEEN, being duly sworn, testified as follows :

Direct examination by Mr. WILSON :

Q. State your name to the court of you please, Mrs. Keen?

A. Sophronia Keen Keen.

Q. State whether or not you are the widow of Eli Keen, deceased?

A. I am.

Q. When did Eli Keen die?

A. The morning of the 22nd of February, 1901—well, it was after midnight.

Q. When were you married to Mr. Keen and where?

A. I was married to Mr. Keen on the 22nd day of August at the home of my brother-in-law Benjamin Walker, on Washington's bottom, Wood county, West Virginia.

Q. What year?

A. 1883, the 22nd day of August.

Q. I will ask you to state if that's your marriage certificate.

A. This is my marriage certificate.

Mr. WILSON: We offer that in evidence, if the court please.

Col. DYER: We object to the certificate as not being properly certified by the record of any court, or duly certified or anything of that kind.

The COURT: What do you say, Mr. Wilson, to the objection?

Mr. WILSON: I don't think that it's required; it's the certificate of the officiating minister that married them.

Mr. McDEARMON: It's a certificate not showing it's properly recorded and without the proof of the clergyman whose name is attached; anybody can get a marriage certificate—get one up at any time.

COURT: I think, Mr. Wilson, you should have some evidence as to when this was given to her, the circumstances under which it was given to her and by whom.

Mr. WILSON: I will just ask Mrs. Keen.

Q. Who gave you that certificate, Mrs. Keen?

A. The Rev. James H. Burns; he was the officiating clergyman of the Methodist church at that time in our neighborhood, what's called a circuit rider, and unless he's deceased very recently, he is living in West Virginia now.

Q. Did he officiate at your marriage?

A. Yes sir.

13 Q. When was that certificate given to you ?

A. Not the day but in November following at Lubeck, Wood county, West Virginia. My husband spoke to me about getting it, and that was this man's residence and I asked him for it and he gave it to me.

(By the COURT):

Q. Did he give it to you—the minister whose name is attached thereto ?

A. Yes sir.

COURT: I think it's admissible, gentlemen, as a part of the transaction that occurred at that time, only it's not an official document.

(Which document is in words and figures as follows, to-wit, and marked Exhibit " 1 " :)

Certificate of Marriage.

This certifies that on the twenty-second day of August, in the year of our Lord, 1883, Eli Keen and Sophronia K. Barrett were united by me in holy matrimony at the residence of Benj. Walker, according to the laws of the State of West Va.

JAS. H. BURNS,
Officiating Clergyman.

Witnesses:

BENJ. WALKER.
LOTTIE MELINS."

To which ruling of the court defendant then and there excepted and saved his exception.

Mr. WILSON: Right in connection with the testimony of this witness I will offer in evidence a certified copy of the marriage license and certificate from Wood county, West Virginia.

COURT: Submit it to the opposite party; any objection, gentlemen ?

Col. DYER: No sir.

COURT: Let it be read in evidence or considered in evidence: What is it ?

Mr. WILSON: It's a license and certificate of the minister, and certificate of the officer as to its being copy of the license.

COURT: Let it be identified and considered in evidence.

Above papers are read in evidence and marked Exhibit " 2 " for identification.

(Which said paper is marked Exhibit " 2 " and is in words and figures as follows, to wit :)

Marriage License.

Married.

WEST VIRGINIA, }
 Wood county, } *To wit :*

To any person licensed to celebrate marriages :

You are hereby authorized to join together in the holy state of matrimony, according to the rites and ceremonies of your church or religious denomination, and the laws of the State of West Virginia, Eli Keen and Sophronia K. Barrett.

Given under my hand as clerk of the county court of the county of Wood, this 21st day of August, 1883.

TH. G. SMITH.

Clerk County Court of Wood County.

Clerk's Certificate.

Preliminary inquiries and answers thereto, made and ascertained by B. F. Stewart, clerk of the county court of the county of Wood, State of West Virginia, relative to Mr. Eli Keen of St. Charles county, and State of Missouri, and Miss Sophronia K. Barrett of Wood county, and State of West Virginia, to whom the accompanying marriage license is issued.

The full name of the parties are as follows :

His full name is Eli Keen.

Her full name is Sophronia Keen Barrett.

His age is 53 years.

Her age is 38 years.

He was born in Wood county, State of Virginia.

She was born in Wood county, State of Virginia.

His place of residence is St. Charles, State of Missouri.

Her place of residence is Wood county, State of West Virginia.

The name of the part-giving the foregoing information are Eli Keen of St. Charles county, State of Missouri.

Given under my hand this 21st day of August, 1883.

TH. G. SMITH,

Clerk County Court.

Minister's Return or Endorsement.

I, Jas. H. Burns, pastor of Lubeck circuit M. E. church, South, do certify that on the 22nd day of August, 1883, at the residence of Benjamin Walker I united in marriage the above named and described parties under the authority of the foregoing license.

JAS. H. BURNS.

Note 1. The clerk of the county court, at the time of issuing the license is required to ascertain from the party obtaining the same, as near as may be, the full names of both parties, their respective ages, and their places of birth and residence, and to make a record thereof before delivering the said license. He shall also, upon the license being returned to him, duly certified by the minister, file and preserve the same in his office, and within twenty days after receiving the same, record a full abstract thereof, together with the minister's certificate, and the name of person signing said certificate, and making an index of names of both parties married.

15 Note 2. The minister or other person celebrating such marriage, shall with thirty days thereafter return the said license to the office when- it issued, with endorsement thereon of the fact of such marriage, and the time and place of celebrating same, under penalty of forfeiture of his bond.

Note 3. If, at the time of celebrating any marriage out of this State, either or both of the parties thereto be a resident or residents of this State, a certificate or statement thereof, verified by affidavit of any person present at such celebration, may be returned to the clerk of the county court of the county in which the husband resides, if he be such resident, and, otherwise of the county in which the wife resides, and an abstract thereof shall be recorded by him in the manner prescribed in the fifteenth section.

A copy.

Teste:

B. F. STEWART,
Clerk Wood County Court.

STATE OF WEST VIRGINIA, }
County of Wood, } ss:

I, B. F. Stewart, clerk of the county court of Wood county, in the State of West Virginia, do hereby certify that the above and foregoing is a true and correct copy of the marriage license and clerk's certificate and minister's certificate relating to the marriage of Eli Keen and Sophronia Keen Barrett, as the same appears on file and of record in my said office.

In testimony whereof I have hereunto set my hand and official seal this 31st day of August, A. D. 1901.

B. F. STEWART, [SEAL]
Clerk Wood County Court.

Examination of witness resumed by Mr. WILSON:

Q. Did you state when Mr. Keen died, Mrs. Keen?

A. Yes sir.

By Col. DYER:

Q. About the 22nd of February?

A. The morning of the 22nd of February.

Mr. McDEARMON: 1901.

Q. Do you know the property in question in this case—that Ellis Keen lives on?

A. I have seen it.

Mr. WILSON: Will you gentlemen admit Ellis Keen is in possession of this tract?

Col. DYER: That's admitted; we have an understanding I think, I don't know whether entered of record, that we claim the property from Eli Keen; we don't go back of Eli Keen; he is the common source of title, and that the defendant here, Ellis Keen, was in possession of this property.

Mr. WILSON: We have a stipulation here that don't cover 16 the question that I asked the gentleman concerning; we have a stipulation to the effect that it is agreed Eli Keen owned the property at the time of his death and that both claim from the common source; we have no admission that Ellis Keen is in possession of the property.

Col. DYER: There is no question about that; we admit he is in possession; was at the time of bringing the suit and is now.

Q. Mrs. Keen, you filed a renunciation of your husband's will, did you?

A. How's that?

Q. You filed a renunciation of your husband's will, did you?

A. How is that?

Q. You filed a renunciation of your husband's will, did you?

A. Yes, sir.

Q. Look at that paper and see if that's the paper?

Q. No, just identify it as the paper.

A. Shall I read it?

A. Yes sir.

Mr. WILSON: Now in this connection we offer the renunciation of the will in evidence.

Col. DYER: You had better produce the will to see what you did renounce; there can be no renunciation of a paper without the paper to renounce; he should produce the paper and then show the renunciation of it.

COURT: What do you say about it?

Mr. WILSON: I say we are under no obligation to put the will in evidence.

Col. DYER: Then I notify you now that at the close of the case I will ask the court to non-suit you. I object to the renunciation of the paper without the paper itself being produced.

COURT: Well, it must be shown first, gentlemen, that there was a will, otherwise it descended to them as heirs or to the widow as a widow, whoever his heirs may be; if there be a will it ought to be established.

Mr. McDEARMON: There can be no renunciation of a will without the will.

Mr. WILSON: I don't propose to introduce that will in evidence if the court please.

Col. DYER: Then I object to the paper the gentleman offers.

Mr. WILSON: The court can pass upon the question of the admissibility of this renunciation; we offer the renunciation in evidence, the court can pass on the admissibility of it.

Col. DYER: I object to it on the ground it's not connected with any paper to which it purports to allude.

COURT: Do I understand you that you don't propose to introduce the will in evidence at all?

Mr. WILSON: I don't propose to introduce it in evidence; they will have it in evidence abundantly.

17 Col. DYER: You need not mind about us, you take care of your *prima facie* case.

COURT: Of course the court can't regulate the mode of introducing evidence, but when he declares he will not introduce the evidence the court must consider it alone; I don't think it's competent, gentlemen.

Mr. MCGINNIS: I wish to say this renunciation refers to a will; states the fact to be there is a will, and that will is renounced by this paper, that certained would identify everything connected with the will, therefore it would not be, at this stage of the case, our place to introduce anything of that kind, because this refers to a will and is duly recorded and probated.

COURT: I think you must show to the court first that there is a will to be renounced.

Mr. WILSON: I will state to the court as far as we are concerned it's a matter to introduce when the will is put in evidence; I take it for granted the will will be put in evidence, if they prefer I will reserve the renunciation and put it in when they put in the will itself.

COURT: Then you withdraw it?

Mr. WILSON: No sir, I let the court rule on it.

COURT: The court sustains the objection.

Above renunciation is marked Ex. 4 for identification, being the same inserted at pages 114 and 115 of this bill of exceptions.

Examination of witness resumed by Mr. WILSON:

Q. Did you file an election to take a half of your husband's estate under the statute, Mrs. Keen; just look at that paper?

A. Yes sir.

Mr. WILSON: Now we offer in evidence this paper.

Col. DYER: We make the same objection; it devolves on them to show that Eli Keen died without children or other descendants capable of inheriting so as to entitle this lady to make an election.

Mr. WILSON: It's simply a question of the order of the evidence; I propose to follow this up with evidence showing Keen left no child in being capable of inheriting.

COURT: I suppose, gentlemen, under those circumstances it may be admitted.

Col. DYER: If your honor please I suppose if she is going to elect to take, she is only entitled to elect to take under the statute after they produce the will and show what she is entitled to; if she elects to take half the estate, that presupposes there were no other children.

COURT: I understand Mr. Wilson to say he proposes showing that fact, and it's only a question of the order in which the testimony will be introduced.

Mr. McDEARMON: Suppose he fails to show that?

COURT: Then it will be of no regard.

Mr. WILSON: If we fail to show that we fail to make a case.

COURT: You may read it or consider it in evidence.

18 To which ruling of the court defendant then and there excepted and saved his exception.

The above paper is read in evidence, and is as follows, to-wit, being marked Exhibit "3" and is as follows, to wit:

"Know all men by these presents that whereas my husband, Eli Keen, deceased, died without any child or other descendants in being capable of inheriting, I, the undersigned, Sophronia K. Keen, widow of said Eli Keen, deceased, do hereby elect to take under the provisions of section 2939 of the Revised Statutes of the State of Missouri, of 1899, that is to say: I hereby elect to take *first*, all the real and personal estate which came to my said husband in right of the marriage, and all the personal property of the husband which came to his possession with the written assent of the wife, absolutely, not subject to the payment of the husband's debts; *second*, one-half of the real and personal estate belonging to her said husband, Eli Keen, at the time of his death, absolutely, subject of the payment of her said husband's debts. And I do hereby file this my declaration of election to take under the provisions of said section 2939, Revised Statutes of 1899, of the State of Missouri, and hereby give notice of my intention to take that portion of my husband's estate that is allowed me as his widow and upon the condition contained in said section of the statutes of the State of Missouri.

In witness whereof, I have hereunto set my hand and seal this 30th day of March, A. D., 1901.

SOPHRONIA K. KEEN. [SEAL.]

STATE OF ILLINOIS, }
County of Madison, } ss:

On this 30th day of March, 1901, before me personally appeared Sophronia K. Keen, who is to me known to be the same person described in and who executed the foregoing instrument of writing as a party thereto and acknowledged the same to be her free act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, at my office in the city of Alton in the county of Madison, and State of Illinois, the day and year last above written.

FRANK FISHER,
Notary Public.

[SEAL.]

My commission as notary public expires Dec. 22d, 1901.

STATE OF ILLINOIS, }
Madison County, } ss :

19 I, Henry Riniker, clerk of the county clerk and *ex-officio* recorder of civil commissioners in and for said county, do certify that Frank Fisher is now, and was on the 30th day of March, A. D., 1901, a notary public within and for Madison county, State of Illinois, residing at city of Alton, in said county and State, duly commissioned and qualified, and that his commission expires Dec. 22, 1904, and that full faith and credit is and ought to be given to his official acts as such. I further certify that the foregoing instrument is executed and acknowledged according to the laws of the State of Illinois.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Edwardsville, in said county, this 30th day of March, A. D., 1901.

[SEAL.]

HENRY RINIKER, Clerk.

STATE OF MISSOURI, }
County of St. Charles, } ss :

I, Henry H. Moehlenkamp, judge and *ex-officio* clerk of the probate court of St. Charles county, do hereby certify that the above and foregoing declaration of election of Sophronia K. Keen was filed in the office of the clerk of the probate court of St. Charles county, Missouri, on April 1st, 1901, and that the same was duly entered of record and is recorded in Will Record No. 6, at pages 472 and 473 of said office.

Witness my hand and the seal of said probate court, done at office in St. Charles, Mo., this 6th day of April, 1901.

HENRY H. MOEHLKAMP,
Judge of Probate.

STATE OF MISSOURI, }
County of St. Louis, } ss :

I, the undersigned, clerk of the county court and *ex-officio* recorder of deeds for said county and State, do hereby certify that the foregoing and annexed instrument of writing was filed for record in my office on the 6th day of July, A. D., 1901, at 10:40 o'clock a. m. and is truly recorded in Book 80, pages 273, 274 and 275.

Witness my hand and official seal on the day and year aforesaid.

ED. P. HEHMAN,
Clerk and Recorder.

Examination of witnesses resumed by Mr. WILSON :

20 Q. Mrs. Keen will you state whether or not your husband
 left any children at the time of his death ?

A. Not any children that I know of.

Q. Had he ever been married prior to his marriage with you ?

(By Col. DYER :) If you know ?

A. No sir.

(By Mr. MCGINNIS:)

Q. What is your answer ?

A. That he had not.

Q. How long did you know, or were you acquainted with Mr.
 Keen, Mrs. Keen ?

A. Well, I was acquainted with him when I was a little girl, and
 then when I was a young lady—it was in 1866—Mr. Keen visited
 West Virginia, and again in 1882 he visited there.

Q. About when did you first know Mr. Keen ; you say you knew
 him when you was a little girl, how long ago was that ?

A. I was about eight years old.

Q. What is your age ?

A. Fifty-six, going on fifty-seven.

Q. What was Mr. Keen's age, if you know ?

A. He was seventy-one years old in January preceding his death,
 he died in February.

Q. What day of the month, if you know ?

A. The 16th day of January.

Q. January 16th, 1901, he was seventy-two years old ?

A. Yes sir.

Q. You were related to Mr. Keen, were you not, by blood, prior to
 your marriage ?

A. Yes sir.

Q. What was the relationship ?

A. We were second cousins.

Q. Mr. Keen was a white man, was he ?

A. He was.

Q. Where did his family come from, moving to Missouri or out
 West ?

A. They came from Kentucky; moved from West Virginia to
 Kentucky.

Q. He went from Virginia to Kentucky ?

A. Virginia then, it's West Virginia now.

Q. Will you state to the court just what your relationship was ;
 you say second cousins, just state was this the relationship, his
 mother, Mr. Keen's mother was your grandmother's sister, is that
 the relationship ?

A. Yes sir.

Col. DYER : Her grandmother's sister ?

Mr. WILSON : Yes sir.

Cross-examination by Col. DYER :

Q. You say your grandmother was a sister of who ?

Mr. WILSON : Of Eli Keen's mother.

Q. Wasn't your mother and Eli Keen's mother own cousins without reference to your grandmother ?

A. You was talking about my grandmother's grandmother.

Q. That's so far off I don't know what it is ; well, will you state now to the court whether your mother and Eli Keen's mother were sisters ?

A. My grandmother—my mother's mother, and Eli Keen's mother were sisters.

Q. Then you are a third cousin, aren't you ?

A. Well, we call it a second cousin.

21 Q. Well, were you a second cousin, then ; the children of your mother and Keen's mother must have been first cousins, wasn't they ; you don't know exactly how that is yourself, do you ?

A. I am not very good at conundrums.

Q. That is a pretty good one, that's a fact ; you say you knew Eli Keen when you were a child ?

A. He visited there when I was a child eight or nine years old.

Q. How many years ago has that been since he visited there when you were a child ?

A. Give me a piece of paper and I can tell you.

Q. Well, you are fifty-six years old now, and the first time you ever saw Keen how old were you ?

A. The first time I ever remember seeing him was on his first visit there, and I was a young girl ; I think I was about eight or nine years old.

Q. Did you come to Missouri at any time to see him while he was out here before you married him ?

A. No sir.

Q. Were you ever in Missouri before you married Keen ?

A. No sir.

Q. Do you know what time Keen came to this country ?

A. I have heard him state, but I don't remember.

Q. I am asking for your knowledge, do you know how long Keen was a citizen of St. Charles county ?

A. Well, he was brought here when he was a boy seventeen years old.

Q. Well, if he was seventeen years old when he came here and died at the age of seventy-one years, he has lived in this county over fifty years, has he not ?

A. I think I have heard him speak of having lived here over fifty years.

Q. All you know about Keen living here for fifty years and whether he was married or unmarried you learned from him, didn't you ?

A. Well, from him and others.

Q. You was never here to see whether he lived with a wife or not, you never came here to see?

A. You mean before I was married?

Q. Yes.

A. No, I never saw him at all.

Q. Never come here; how long after you were married before you came here?

A. I was here in August, 1884.

Q. August, 1884?

A. Yes sir.

Q. How long did you stay here then?

A. Three months.

Q. Where did you stay?

A. I stayed in Alton, Illinois, and Missouri Point.

Q. How many times were you in Missouri Point when you was here?

A. I think I was over in Missouri Point twice.

Q. Did you stay all night there?

A. Yes sir, I think I did.

Q. More than one night?

A. Yes sir.

Q. How long altogether did you stay in Missouri in 1884?

A. I think altogether I was there a week.

Q. Altogether in Missouri a week, no longer?

A. I don't remember; I don't think I was there any longer.

22 Q. When did you come back again to Missouri after 1884?

A. I came to Alton.

Q. I am talking about Missouri; I ain't talking about Alton.

Mr. McGINNIS: She will explain that, Colonel, if you will let her.

Q. When did you come back to Missouri?

A. In the summer of 1888.

Q. In 1888?

A. Yes sir.

Q. How long did you stay in Missouri in 1888?

A. I don't remember how long I stayed there; I stayed in Alton, Illinois, made our home there, Mr. Keen and I.

Q. You never did make your home in Missouri, did you, in your life?

A. Well, I have been here this last summer a good deal of the time.

Q. I mean prior to Keen's death you never made your home in Missouri.

A. No, we made our home in Illinois.

Q. And you never considered Missouri your home.

A. Well, West Virginia was our home.

Q. You stayed in West Virginia?

A. Yes sir.

Q. And when you came to Alton you came on a visit?

- A. Well, we were there the better part of a year.
- Q. At Alton?
- A. Yes sir.
- Q. You kept house there?
- A. Yes sir.
- Q. How long had it been before Keen's death you were in Missouri; had you been here at all since 1888?
- A. Yes sir.
- Q. When?
- A. 1895.
- Q. How long did you stay then?
- A. Stayed a day and night.
- Q. Where?
- A. In St. Louis.
- Q. In St. Louis?
- A. Yes sir.
- Q. Is that all the time you stayed in Missouri, then, a day and night?
- A. Yes, I stayed in Alton a day and night and then in St. Louis a day and night.
- Q. Altogether you stayed two days and two nights at Alton and St. Louis in 1895?
- A. Yes sir.
- Q. Then when were you back here again after that?
- A. Back here in December, 1900.
- Q. December, 1900?
- A. Yes sir.
- Q. Was Keen sick at that time?
- A. Yes, he was.
- Q. How long had he been out in Alton before you came out here that time?
- A. I think he had been here since March.
- Q. Since March?
- A. Yes sir.
- Q. Had he been back to West Virginia in the meantime, between March and when you came here in December?
- A. I think not.
- Q. Then from March to December you hadn't seen him?
- A. No sir.
- 23 Q. You stayed in West Virginia and he was out there?
- A. Yes sir.
- Q. How much of his time in 1888 did he stay in West Virginia?
- A. In 1888?
- Q. Yes.
- A. He came there in the summer, I don't remember just exactly what time, but we came out here in August.
- Q. Then you remained here for sometime then?
- A. Yes sir.
- Q. How long?

A. We came out here in August and I returned in June, the following year.

Q. Did he go back with you then?

A. No sir.

Q. When did he go back then?

A. In August; he came home in August, 1889.

Q. You claim to have been married in 1883?

A. Yes sir.

Q. How much of the time between 1883 and 1901, eighteen years, how much of that time did Keen spend in West Virginia?

Objection by Mr. Wilson: I don't see that that's at all material to the issues on this case.

COURT: Well, I don't know what it may develop; you may answer, madam.

A. Well, I didn't keep a memorandum exactly of all of the times he was there, but what leisure time he had from his business he spent at home.

Q. His business was in Missouri?

A. Yes sir.

Q. And his leisure time he spent there?

A. Yes sir.

Q. Was there any one year out of the eighteen that he wasn't there at all?

A. I don't remember that he was.

Q. Did he go there every single year from the time you were married, until he died?

A. Yes, as far as I remember now he did, twice a year.

Q. But you hadn't seen him in the last year of his life; you hadn't seen him since March or the spring of the year.

A. No, I hadn't seen him since March, but I had heard from him since the last year, that he died.

Q. That is, you saw him in March, 1900, in West Virginia, you say, then you came out in December, 1900, and he died in February, 1901; didn't he?

A. Yes sir, according to the best of my recollection that's the way it was.

Q. That year he was in feeble health, wasn't he?

A. Yes sir.

Q. Declining health?

A. Yes sir.

Q. He was so when you saw him there in March?

A. No, he left home in March a very hearty looking man; he weighed one hundred and eighty-two pounds and a half.

Q. You weighed him?

A. He told me his weight; he was very fleshy.

Q. When did he begin to lose flesh?

A. I didn't see him after that; after he came out here.

Q. When you did see him in December he had lost a good deal of that one hundred and eighty-two pounds, hadn't he?

A. He was a skeleton.

24 Q. And he finally died on the 22nd of February?

A. Yes sir.

Q. At the time you married—this certificate says, the age is given in that license as fifty-three years; your age is given at that time as thirty-eight; now do you know of your knowledge anything about how Keen had lived in St. Charles county prior to your marriage—of your own knowledge, not what anybody told you or he told you; I want to know if you know of how he had lived in St. Charles county during all of that time?

Objection by Mr. Wilson: We object to all of that as incompetent.

Col. DYER: She says he never was married; I want to find out whether he was or not; what knowledge she has; I am trying to find out what knowledge she has that Keen wasn't married.

COURT: I think that's competent; she says he wasn't married.

A. I took his word for it.

Q. You took his word for it; you know nothing yourself besides his word?

A. I never heard that he was married.

Q. You never heard; well, you don't know, do you?

A. Well, I believed him.

Q. But you have no knowledge of whether Keen, before he — fifty-three years of age, was married and had children or not, do you, except what Keen told you?

A. Well, his sisters and his relatives.

Q. There in West Virginia?

A. In Kentucky.

Q. These sisters lived in Kentucky, did they?

A. Yes, and they came to see me in West Virginia.

Q. These sisters never lived in Missouri, had they?

A. Yes sir, I think they had.

Q. Where had they lived?

A. They had been here at least.

Q. When were they here; you don't know when they were here, do you?

A. Well, I heard them talking about when they were here.

Q. And you know nothing now as to whether this man that you married when he was fifty-three years of age, you know nothing personally of whether he was married or whether he had children in Missouri or not prior to that time, do you?

A. Well, there's different ways of getting knowledge; I have witnesses that told me that he was a bachelor.

Q. But that you heard?

A. My husband told me.

Q. I am asking you about it, that's the only source of informa-

tion you got, is what Keen told you and what other people told you?

A. His sister.

Q. Anybody else?

A. His niece.

Q. From that source, that's all hearsay; did you know it from actual observation of yourself being there?

A. I wasn't here, I told you.

25 Q. And you don't know whether there are any children here of Keen's or not, in St. Charles county during that time, except what he told you; now I will get you to state whether or not at any visit you made after you were married, to Alton, whether Eli Keen introduced to you any persons that he claimed to be his children?

A. He never did.

Q. Was there ever anything said to you at Alton by him as to him having children in Missouri?

A. No sir.

Q. Did anyone come to you in Alton either during the last illness of Mr. Keen or before, representing themselves to be his children?

A. During his last illness there were several persons came there representing themselves to be his children—representing themselves.

Q. How many came there during his last illness representing themselves to be his children?

Objection by Mr. McGinnis: Can it be possible you could show the children by any testimony of that kind, that somebody had gone there and represented themselves as children.

COURT: Not without something else is elicited.

Q. Did Mr. Keen see them or any of them?

A. Yes.

Q. Did he see them in your presence?

A. He did.

Q. How many of them did he see?

A. He saw a man by the name of Reason in my presence.

Q. Reason?

A. Yes sir.

Q. What time was that?

A. In December.

Q. Was Mr. Keen in bed at that time?

A. He was.

Q. Was he at himself, conscious?

A. Sometimes.

Q. Well, what was the matter with him, you say sometimes he was dead; what did he die of, if you know?

A. I didn't understand your question if I said he was sometimes dead.

Q. You say sometimes he knew people and sometimes didn't; I

want to know what he had ; so as to know whether he was at himself lots of the time or out a good deal ; what was the matter with him ?

A. I had three physicians, one said he had atrophy of the nerves and the stomach, and another said he had a cancer of the stomach, and another said Bright's disease of the kidneys ; now mix them up and take your choice.

Q. Are those three doctors still living ?

A. So far as I know they are.

Q. Well, now did you see anyone else admitted to his room besides Reason Keen, of these persons claiming to be his children ?

A. I don't remember ; there was a great many persons coming and going there.

Q. I know a good many coming and going, but how many came and went and represented they were the children of Eli Keen.

Objection by Mr. McGinnis: I don't think she stated anything of that kind ; I don't think she stated they represented they were children of Keen's.

26 Q. How many of them represented themselves as being Keen's children, is what I asked ?

Mr. WILSON: She stated there were several there.

Col. DYER: I am trying to find out who they were.

A. I didn't know them.

Q. Were you present when Reason Keen was admitted to the room ?

A. Yes sir.

Q. Did he talk to Mr. Keen ?

A. He spoke to him once.

Q. What did he say to him in your presence ?

A. He would ask him how he was.

Q. How did Mr. Keen say to him ?

A. How did he say to him ?

Q. What did he say ?

A. He didn't talk much ; he was better or something like that.

Q. How did Reason Keen address him when he went in the room ?

A. I didn't hear him call any names.

Q. Did you hear him say, "father, how are you feeling ?"

A. No sir.

Q. Was anything said about him being father ?

A. He asked at the door "how father was," several different times.

Q. Well, how many times was he there,—what did you tell him when he asked at the door how father was ?

A. I would tell him Mr. Keen was better or worse, whichever his condition happened to be ; that is my husband.

Q. Then he was admitted but the one time ?

A. He came there a few days before Mr. Keen died and I told him

Mr. Keen was asleep and he came in the room, he was asleep but he opened his eyes and Reason asked him, "don't you know me," and he says, "no," Mr. Keen said, "no."

Q. That was the only time he was in there at all?

A. No, he had been there before that.

Q. How many times had he been in the room during Keen's sickness?

A. Once or twice, I don't remember; well, I wasn't there only during Mr. Keen's sickness.

Q. I am talking about when you was there, how many times did you see him there?

A. I don't remember; several times.

Q. Did you see any of the others there?

A. There was some other colored people came to the back door and inquiring.

Q. Do you know a brother or sister of Reason Keen, do you know either of them: do you know Ellis Keen, the defendant here?

A. I don't know that I would recognize him.

Q. Did you know Mathew Keen?

A. No sir.

Q. Reason Keen is the only one you do recognize; is that so?

A. I saw him, wasn't acquainted with him, but I saw him and heard them say what his name was.

Q. Reason Keen?

A. Yes sir.

Q. At either of the times when he was admitted to your house at Alton did you hear him address Mr. Keen as father?

A. No sir.

27 Q. I will ask you to state to the court whether or not while Keen was sick, other persons came there and asked to be admitted and said they were the children of Mr. Keen?

A. There was a man and woman came to the door on the afternoon of Friday; I think I had gotten there in the morning; it was either Friday or Saturday afternoon, I had got there, and they knocked at the door; there was five or six persons in the room at the time, and they said they wanted to see,—the woman says, "That's my father in there and I want to see him;" who she was I don't know. I says, "Mr. Keen is not able to see you;" there were several persons in the room at the time and he had had too much company, and they said they must see him and I shut the door in their faces.

Q. Wouldn't let them in?

A. No sir.

Q. That was a woman of color, was it?

A. Black, yes.

Q. Very black?

A. Well, I don't know; I wasn't taking particular notice.

Q. Did you ever see her after that?

A. Not that I know of.

Q. You wouldn't know her now if you saw her?

A. No.

Q. There was a woman come with a man?

A. Yes sir.

Q. And this woman says, "I must see him, he is my father," is that true?

A. They says, "That's my father in there;" she seemed very agitated, and I told them Mr. Keen wasn't able to see them, he had already had too much company; I didn't know who they were, and I shut the door.

Q. Did any more of them come to ask admission to see their father?

A. Yes, at the hospital a colored man came and asked to see his father; they come to me and said there was a colored man out there, and I didn't know who he was or what he was and I went to the door and he says, "How is father this morning."

Q. Who was that; do you know now who it was?

A. He told me who he was.

Q. Well, who?

A. I think he said his name was Ellis Keen.

Q. That's the defendant in this suit; would you recognize him in court if you would see him?

A. I am not sure.

Q. Is that the man you see? (Meaning the defendant.)

A. I could not tell you whether it is or not.

Q. Then did you let him see Mr. Keen?

A. No.

Q. You refused to let him see him in the hospital?

A. Mr. Keen told me to shut the door and lock it and keep everybody out.

Q. Who did?

A. My husband.

Q. How long was he in the hospital before he died?

A. How long before he died?

28 Q. Yes.

A. I took him to the hospital in December, and I brought him away from there, I took him on Sunday afternoon to the hospital.

Q. Any more of them come besides Ellis Keen to the hospital?

A. Did you want me to answer the other question?

Previous question is read by the stenographer.

A. I brought him away from there on Friday evening at his request.

Q. How long had he been there?

A. He had been there from Sunday evening until Friday evening, the following Friday.

Q. Not quite a week?

A. No.

Q. Did any other person come there and ask to see him at the hospital?

A. Yes sir.

Q. I mean to say any person claiming to be his child or children?

A. I don't remember of anyone else.

Q. You only recollect of seeing Reason Keen come to the house; you say his name was Reason Keen?

A. No, there were several colored men come to the house.

Q. I mean a colored man and woman come there and you shut the door in their faces?

A. Yes sir.

Q. The woman said, "That's my father"?

A. Yes sir.

Q. And Ellis Keen, he went to the hospital to see him?

A. Yes sir, and he was at the house also,—or said his name was Ellis Keen.

Q. How long did Reason Keen stay in the room with Eli Keen the day he was admitted?

A. He was there several minutes.

Q. Did he sit down?

A. No sir.

Q. Stood up all the time?

A. Yes sir.

Q. You didn't offer him a chair?

A. No.

Q. Can you recollect now the exact manner in which he addressed Mr. Keen when he came in; did he say, "Good morning sir," or did he say, "Good morning father"?

A. He just asked him how he was today, that's all I remember his asking him, and I never heard him call him father; he may have done so, but I don't remember it.

Q. Well, will you say now to the court that when he came in there he didn't address him and say, "Good morning, how are you today"?

A. He asked him how he was today.

Q. He asked him how he was after he went in?

A. Yes sir.

Q. There was no salutation when he went in; he didn't say, "How are you, Mr. Keen," did he?

A. I don't remember.

Q. Nor you don't remember him saying, "How do you feel today father"?

A. I don't think he called him father; if he did I don't remember it.

Q. You don't think so?

A. I don't remember it.

29 Q. And do you recollect of him calling him Mr. Keen?

A. No, he just says, "How are you today?"

Q. And what did Mr. Keen say?

A. Well, he was better or worse, whatever it happened to be.

Q. And was that all that they said?

A. I don't remember of any conversation.

Q. Did Mr. Keen make any inquiry of Reason about his family?

A. About Reason's family?

Q. Yes.

A. No.

Q. Did he make any inquiries about any others over in Missouri; did he ask him anything about how matters were getting along down here in the point, about the lands or crops, anything of that sort?

A. I don't remember it if he did.

Q. What did they talk about while he stood there as you say several minutes?

A. Mr. Keen wasn't very well and he was very feeble and he had but very little to say to anyone.

Q. Can you tell what it was; what did they talk about?

Objection by Mr. Wilson: I insist the witness has answered the gentleman's question by telling him the only thing was Reason's—passing between them, was the inquiry how he was feeling today, and that the reply was he was better or worse as the case happened to be; she has told that over and over.

(By the COURT:)

Q. Is that all you recollect of the conversation, madam?

A. I don't remember everything; there was a great many people coming and going; unless I had a stenographer there I couldn't remember every word said.

Q. Do you recollect any colored people coming there or people with negro blood in their veins other than these that claimed to be his children?

A. Yes sir.

Q. What did the other negroes have to do there; what were they doing there?

A. They wanted to rent some land I believe.

Q. What was their names?

A. I don't know.

Q. Did you hear the conversation between Mr. Keen?

A. They called at the door; there was four came there one day and came to the back door; they wanted to see Mr. Keen; I thought you had reference to them,—I don't know their names; there was a colored man, a tenant, by the name of Kiser came there to see Mr. Keen.

Q. Do you recollect a man by the name of Brown coming and saying he was a son-in-law?

A. Frank Keen introduced me to a man when I went there, as Brown; I have forgotten the name, and says, "This is a son-in-law of Mr. Keen."

Q. When was that?

A. The evening that I arrived,—the morning I arrived in Alton.

Q. What time did you arrive in Alton in December?

A. I arrived in Alton, I think it was the 18th of December, about that time.

30 Q. When you got there was his brother, Frank Keen, with him?

A. I arrived in Alton at ten o'clock at night, and I couldn't find anything about Mr. Keen's whereabouts until the next morning.

Q. Then the following morning where did you see Frank Keen?

A. I saw him in the room where Eli Keen was lying ill.

Q. And who was there with him at the time you got there in December besides his brother Frank Keen?

A. There was a colored woman there; Frank Keen introduced her to me as Eli's daughter-in-law, but I don't remember her name.

Q. Was it Mr. Brown's wife there, or was it Brown's wife introduced to you?

A. They said it was Eli Keen's son-in-law and daughter-in-law.

Q. Son-in-law and daughter-in-law?

A. That's what he said.

Q. But when Mr. Frank Keen introduced the people that were there taking care of Mr. Keen—

A. He said they were his servants.

Q. Disturbers?

A. His servants.

Q. But he said also at the same time they were daughter and son-in-law?

A. Daughter-in-law and son-in-law, and his servants.

Q. And when you looked at them—

A. Found they were a little off color.

Q. Found they were a little off color?

A. Yes sir.

Q. You were shocked?

A. Well, I came very near dying, so I would rather get over this part of it as quick as I can.

Q. How long did Brown stay there, and this daughter-in-law stay there, after that?

A. I think that Brown went away the next morning, if I remember right.

Q. Did Brown stay there from the morning you got there until the following morning?

A. He didn't stay there that night.

Q. Where did he stay?

A. Oh! I don't know.

Q. Had he stayed there the night before as you understood?

A. I don't know; I never inquired.

Q. When did Frank Keen leave?

A. Frank Keen staid there until Sunday evening and went to the hospital.

Q. Did he stay there until his brother was taken to the hospital; did he stay in the house until he did go to the hospital?

A. Yes sir.

Q. Slept in the same house?

A. Slept in the same room.

Q. Was there more than one room to the house where Keen was staying?

A. Oh! yes, there were several rooms, but he had only one small room.

Q. Then his brother Frank Keen remained in the room with him after you got there?

A. Yes sir.

31 Q. And slept in the same room with him until he was removed to the hospital?

A. Slept on a cot.

Q. In the same room?

A. I think so, if I remember right; that's my recollection.

Q. What became of the daughter-in-law, how long did she remain there?

A. She remained there until along in the afternoon, if I remember right.

Q. She didn't stay all night after you got there?

A. No sir.

Q. What was she doing there during the day?

A. She was cooking for Mr. Keen.

Q. What was Brown doing?

A. He was waiting on Mr. Keen.

Q. Mr. Brown was waiting on Mr. Keen; where were you when Mr. Frank Keen says, "this is a son-in-law and daughter-in-law of Mr. Keen?"

A. I was standing in the floor.

Q. Standing in the floor in the room?

A. Yes sir.

Q. Where was Mr. Keen at the time?

A. He was in bed.

Q. What sized room was that?

A. Not a very large room.

Q. Was Mr. Keen awake at the time you were talking to Frank?

A. Yes sir.

Q. Was he close enough to hear what Frank Keen said to you?

A. No, he was very deaf.

Q. Oh! deaf?

A. Yes sir.

Q. But Frank Keen didn't lower his voice any in telling you?

A. I don't remember.

Q. And he introduced,—there in the presence of Eli Keen he introduced Mr. Brown as a son-in-law and the woman that was there, daughter-in-law of Eli Keen?

A. As his servants.

Q. Well, did he say they were daughter-in-law and son-in-law, he told you that?

A. Yes, he says, this is,—called the woman's name, but I don't remember what it is, and says, "this is here," and he says, "daughter-in-law of Eli's."

Q. And what did he say about Brown?

A. He said Brown was a son-in-law of Eli.

Q. And did you have any further conversation there at that time with Mr. Frank Keen in the presence of Eli Keen about the son-in-law and daughter-in-law?

A. Frank Keen went on to state "this is Eli Keen's son-in-law and this is his daughter-in-law and they are his servants and he don't want them interfered with."

Q. That's what Eli said?

A. That's what Frank Keen said.

Q. He told you all the relations that existed,—that is to say he said, "this is a son-in-law and this is a daughter-in-law of Eli Keen's and Eli Keen don't want them interfered with, they are his servants"?

A. That's what Frank Keen told me.

Q. That is to say he didn't want you to drive the son-in-law and daughter-in-law out of the house, wasn't that it; wasn't that
32 what he meant?

A. I suppose that's what he meant?

Q. Didn't you understand it?

A. It might have been that was what he meant, but I don't know, and it didn't amount to that. (Witness snaps her fingers.) That was my husband.

Q. Exactly, of eighteen years standing?

A. Yes sir, I had nursed Mr. Keen when he was as low as he was then time and again; he had come from Missouri loaded up with malaria and I nursed him time and again.

Q. You don't have malaria in Virginia.

A. We don't have the malaria there you have here, thank God.

Q. You wouldn't have these lands in here, would you?

A. These lands are better here than they are in West Virginia.

Q. Even with malaria?

A. Yes sir.

Q. You say you were married to Keen in West Virginia at your brother's house?

A. At my brother's house, Benjamin Walker.

Q. And you think you were married by a circuit rider?

A. By a minister of the gospel.

Q. Called a circuit rider I mean?

A. He is called a circuit rider, but he is a minister of the gospel, Rev. Burns.

Q. Travels from place to place?

A. He is a regular ordained minister of the church.

Q. Oh! certainly, I have no doubt about it; after Mr. Eli Keen,—

Mr. Frank Keen had introduced Brown and this woman that were there as his daughter and son-in-law, of Eli Keen, did you ask Eli Keen anything at that time as to whether they were his daughter and son-in-law?

A. No; Mr. Keen was entirely too low to say anything to him or agitate him in any way.

Q. That was the day you got there?

A. Yes sir.

Q. He lived for two months and a half after it; he died the 22nd of February and you come on the 10th of December?

A. The 18th.

Q. The 18th of December,—then you were there two months and four days at his house; and after Frank Keen introduced that man and woman as Eli Keen's son-in-law and daughter-in-law, did you mention the fact to Eli Keen?

A. Never; I would be ashamed to look anybody in the face if I had.

Q. You never mentioned it to him?

A. No.

A. And you didn't ask him at any time whether that statement made by his brother Frank Keen was true or false?

A. No sir, I never mentioned the negro to him, not as his child.

Q. You knew Frank Keen was his brother, didn't you?

A. He told me he was.

33 Q. Wasn't you about as well acquainted with Frank as him?

A. No, I had never seen him but once, and that was in St. Louis in 1884; I saw him at the fair there; Mr. Keen introduced him to me.

Q. He was just as much kin to you as Eli, wasn't he?

A. Why no, Mr. Eli Keen was my husband, Frank Keen a second cousin.

Q. I am talking about blood, not about this marriage business; I ask you whether Eli Keen and Frank Keen wasn't alike related to you before you married?

A. Oh! well, I understand your question.

Q. Frank was so much kin to you as Eli, wasn't he?

A. Yes, he was second cousin.

Q. Then you knew that Frank Keen when he made that representation to you was the brother of your husband?

A. Yes sir.

Q. And you know that that representation was made in the room where Eli Keen lie and in your presence?

A. Yes, but Eli Keen never heard a word of it.

Q. And you never took occasion in the two months you stayed there until he died,—you never took occasion to repeat to him what you had heard?

A. No sir.

Q. You never said a word to him?

- A. No sir.
- Q. Nor he to you?
- A. No sir.
- Q. Did he ever ask you about the children?
- A. No sir.
- Q. Did he ever ask to see them?
- A. He said to lock the door and keep them out.
- Q. That applied to all?
- A. Yes sir.
- Q. Everybody?
- A. Yes sir.
- Q. He didn't want to see anybody?
- A. No sir.
- Q. Did he ever ask you to shut the door on either Reason Keen or Ellis Keen; did he ever tell you to keep those two out, and designate them by name?
- A. No, he said keep everybody out.
- Q. Oh! everybody?
- A. But he refused to see Reason Keen when he came there.
- Q. When?
- A. After we came back from the hospital.
- Q. How long was that,—how long before he died?
- A. Several weeks.
- Q. Several weeks before he died; he knew what he was about then, did he; did Eli Keen know what he was doing; was he perfectly conscious all this time?
- A. Not always.
- Q. When he refused to see Reason Keen, state to the court the purpose of that visit?
- A. Frank Keen came there and went up to the bed and he says, "Eli Reason is out here, don't you want to see him." He says, "No, tell him to go home, he has been running here two or three times a week all fall, tell him to go home and stay there."
- Q. That's what he told him?
- A. Yes sir, he did.
- Q. Well, I expect that was good advice. (No answer.)

Redirect examination by Mr. WILSON:

34 Mrs. Keen, Col. Dyer asked you about your relations with your husband, about your being in West Virginia and being separated from him, if I understood you in cross-examination you stated he returned to West Virginia every year during the time of your marriage; he was back in West Virginia every year that you remained there?

A. Or twice a year I looked for him; maybe there was one year he didn't come in the spring, but come in the fall, in August, but he had been coming most of the time twice a year; he came once and stayed some time; sometimes longer and sometimes shorter time.

Q. What season of the year did he generally go back there ?

A. In August and in the winter; in August and in the winter time, and sometimes he came the 4th of July, sometimes a little earlier than that.

Q. Now, during all of this time state to the court what were your relations with him ?

A. Why, I was his wife, and we had a very happy, pleasant home.

Q. There never was any disturbance or trouble between you and Mr. Keen was there ?

A. Not that I ever heard of until I come out here, as a matter of fact, we lived very pleasant.

Q. When he was here did he write to you; did you receive correspondence from him ?

A. Yes sir, the last letter I received from him was in August, 1900; I have the letter yet.

Q. Have you got that letter with you ?

A. Yes sir.

Q. Well, do you know anything about the reasons why he didn't go back to Virginia or West Virginia during the summer of 1900 ?

A. That will explain why he didn't go; he was ready to go and he was served with a summons in a case up here at St. Charles; he was going the next day to start for West Virginia, the letter is here in my pocket.

Mr. WILSON: We would like to offer that letter in evidence; we won't stop now to do it.

Q. About his being sick there, you came there in December ?

(By the COURT:)

Q. Right there before you go on to it, did he own a home in West Virginia ?

A. He bought a home for me, and that was his home in West Virginia.

(By the COURT:)

Q. He supplied it and provided for you during all that time ?

A. Yes sir, in all his letters he refers to coming home, or nearly all of them.

Q. Do you know as a proposition of fact where Keen voted during the time of your marriage, where he registered and voted ?

A. He voted there in West Virginia the year after he was married.

Objection by Col. Dyer: I don't think we should go into his politics.

Mr. WILSON: I don't think half of what you all talked about has any reference to the case.

35 Q. Now, Col. Dyer asked you about Reason Keen and the parties that came there claiming to be the children of Eli Keen, were they negroes or white people?

A. Negroes so far as I could see; they were dark; I would call them negroes.

Q. What was this man that called himself Ellis Keen, was he a white man or a negro?

A. He was a negro.

Q. What was Reason Keen?

A. He was a negro.

Q. Did you see any of the women that claimed to be daughters of Eli Keen?

A. Yes sir, I remember seeing them, I didn't know when you spoke a while ago, but I remember that they claimed they was.

Q. Do you know what ones; do you know them by sight?

A. No sir, there was some woman came there claiming to be—I believe it was the day he died or the day before—I don't remember about that time—I lost so much sleep.

Q. What were they, were they white people or negroes?

A. Negroes.

Q. Col. Dyer asked you as to your information as to this matter, about what Mr. Keen told you; state whether or not Mr. Keen told you whether he had any children or not?

Objection by Col. Dyer: I object to that; I didn't ask any question to bring that out.

Mr. WILSON: He asked her over and over again if she knew about this, and wasn't her information obtained from Keen; he asked repeatedly as to her knowledge of whether Keen had any children or not; whether or not her knowledge came from Keen and if Keen wasn't the only source of information.

Col. DYER: Oh, no!

Mr. WILSON: He asked if there was any other source of information than Keen and his sister and niece.

Col. DYER: I asked that as to whether he was married or not married; I asked her whether she knew Keen had any wife in Missouri; she said all she knew was what had been told her; I says, "Who told you he had no wife," I didn't ask a word about the children.

COURT: I think the objection is well taken; I don't think he called out anything of the kind in that connection.

Mr. WILSON: If the court please, his testimony in regard to that is proper testimony as to whether he was a married man or not.

COURT: Well, I don't know, Mr. Wilson, about it being competent; I should think this, when the law presumes right acting instead of wrong acting, the law would presume in a man married that he was single before that; it wouldn't presume he committed a felony; it would presume he acted right; I think the law would take the presumption if he married the lady he was a single man, I think that would be the presumption.

36 Mr. WILSON: But the point I make is this, whether or not a man is married may be established by reputation—family reputation; this woman testifies his sister and niece, who knew him, and he, told her he was unmarried and had no family.

COURT: I will exclude it at this time.

Recross-examination by Col. DYER:

Q. You say now in answer to Mr. Wilson that daughters—women, as well as men came there and that the daughters claimed to be the daughters of Eli Keen; how many of them?

A. There was two women came there, I don't know whether daughters or not.

Q. Well, they claimed to be daughters of Eli Keen?

A. They claimed that.

Q. When did they come?

A. I am not sure both claimed it, but women came there and one of them was spokesman, whether they both claimed to be daughters, I don't know.

Q. One of the two did, you know?

A. Yes sir.

Q. When was that visit made by that daughter, in your first visit to Alton or last visit to Alton?

A. During the time of his sickness, about the time of his death.

Q. Had you ever seen them before?

A. No sir.

Q. They never visited there before,—never came to see him when you lived in Alton,—out there on a visit?

A. No sir.

Q. Did the daughter see him; did this woman claiming to be his daughter see Mr. Keen when she came there during his last illness?

A. No sir.

Q. You wouldn't let her in?

A. He wasn't able to see any one.

Q. You wouldn't let her in, was that it?

A. I don't remember whether she was in the room or not, but she wasn't in Mr. Keen's room, I think she was at the door.

Q. Now, I will ask you, you say that those that called, you would call them negroes?

A. Yes sir.

Q. Could you tell how much, if any, white blood they had?

A. No.

Q. Was Mr. Keen a very white man himself, or was he a dark skinned man?

A. He was a white man.

Q. I know, but lots of us white people that differ in our general appearance about the skin; can you tell whether he was a dark skinned man or not?

A. He had black hair and eyebrows before they turned grey.

Q. Was he a dark skinned man?

A. He was very white.

Q. As white as most anybody you know of?

A. Yes, he had a fairer complexion than I have.

Q. Now, do you say that at no time and no place and under no circumstances did any person claiming to be the children of Eli Keen come to Alton before your last visit there when Eli Keen died; was that the first time that any of them had ever claimed to your knowledge to be the children of Eli Keen, was on that last visit?

A. It was.

37 Redirect examination by Mr. WILSON :

Q. Now Mrs. Keen they asked you about one matter I have overlooked—about your going there to Alton in Mr. Keen's sickness. When did you get the first notice that Mr. Keen was down sick?

A. I got a dispatch from him, I think it was on Wednesday evening, I don't remember the date, but I started in two hours after I got the dispatch.

Q. And reached Alton—then you got there I believe you said on the 18th of December; had you received any notice of his sickness prior to that?

A. I knew he wasn't very well, but the last I heard he said as soon as he got this matter arranged that he would be home.

Q. Now then after you got there you took charge of him, did you?

A. Yes sir.

Recross-examination by Col. DYER .

Q. Well, at the time you had been married before, hadn't you, before you married Keen?

A. No sir.

Q. Were you a maiden lady at the time you married Keen?

A. Yes sir.

Mr. WILSON : We next offer in evidence, if the court please, the stipulation entered into by the parties here as to the common source of title. I will read that, it is very short.

The above stipulation is read in evidence, marked Exhibit " 5 " and is as follows, towit :

In the St. Charles County Circuit Court.

SOPHRONIA K. KEEN, Plaintiff, }
 vs. } Ejectment.
 MATTHEW KEEN, Defendant. }

In the St. Charles County Circuit Court, September Term, 1901.

SOPHRONIA K. KEEN, Plaintiff, }
 vs. } Ejectment.
 ELLIS KEEN, Defendant. }

It is hereby agreed by and between the parties, both plaintiff and defendants in the above entitled causes, that the title to the lands described in the petitions of the plaintiff in said causes filed, was in Eli Keen at the time of his death, and that both plaintiff and said defendants claim title under said Eli Keen, deceased, and the
 38 necessity of intro-ucing proof at the trial of said causes to show title to said land in said Eli Keen is hereby waived. And it is agreed that this agreement may be used in evidence at the trial of said causes as an admission on the part of said parties, plaintiff and defendants, of the above mentioned facts.

JNO. F. MCGINNIS AND
 C. W. WILSON,

Attorneys for Plaintiff.

D. P. DYER AND
 T. F. McDEARMON,

Attorneys for Defendants.

Mr. WILSON: If the court please, the only additional matter that I desire to prove before the court at this stage was proof as to the rental value of the property and the fact it's all in cultivation—the entire tract is in cultivation. The gentlemen on the other side admit that the entire farm in controversy is in cultivation and that the rental value thereof is four dollars per acre per annum. That's the proof as to the rental value.

COURT: Yes, sir, and that the tract of land contains the quantity of acres set forth in the petition, you will admit that?

Col. DYER: Yes sir.

Mr. WILSON: It is admitted that the quantity of land in the tract is the amount as given in the petition.

This was all the evidence in chief introduced by the plaintiff. Thereupon the defendant prayed the court to give the following declaration of law, it being a demurrer to the evidence:

“The court declares the law to be that under the pleadings and evidence in the cause the plaintiff is not entitled to recover.”

Which the court refused to give. To which refusal of the court the defendant then and there excepted and saved his exception.

Thereupon the defendant to sustain the issues on his part introduced evidence as follows, to wit :

Col. DYER : I now offer in evidence a certified copy of the will of Eli Keen.

No objection being made said will was read in evidence and is in words and figures as follows, to wit :

“ In the name of God amen.

I, Eli Keen, a resident at present of the county of St. Charles, in the State of Missouri, being now in feeble health, but being of sound mind and memory, blessed be God for the same, do make and publish the following as my last will and testament, hereby revoking and declaring as null and void all other wills by me heretofore made.

First : It is my will that my executor hereinafter named, shall pay all my honest and just debts, as soon after my death, as the same can conveniently be done.

39 Second : I give and bequeath unto my beloved children, Ellis Keen, Reason Keen, Mathew Keen, Mark Keen, Mrs. Lettie Ann Skinner, Phoebe Wise, Mary Phillips and Alice Cora Brown the sum of one dollar to each, except as hereinafter provided.

Third : I give, devise and bequeath unto my son, Ellis Keen, in fee simple, and to his heirs and assigns forever, a tract of land in survey No. 1765 in St. Charles county, Missouri, containing 70.61 acres, being the same land on which he resides and cultivates. To have to and to hold said tract of land by Ellis Keen in fee simple and to his heirs and assigns forever.

Fourth : I give, devise and bequeath unto my son, Reason Keen, in fee simple and to his heirs and assigns forever, a tract of land in survey No. 1765 in St. Charles county, Missouri, containing according to a survey made by Carr Edwards, surveyor, one hundred and fifty acres, together with the accretions thereto belonging and is designated on the plat hereto attached as lot No. 2. To have and to hold said real estate by said Reason Keen in fee simple to his heirs and assigns forever.

Fifth : I give, devise and bequeath unto my son, Mark Keen, in fee simple, and to his heirs and assigns forever, lot No. 5 of survey No. 1765, containing according to a survey made by Carr Edwards, surveyor, one hundred acres.

Also a strip of ground of the eastern end of lot No. 4, and adjoining lot No. 5, said strip of ground to be seven chains wide and to commence at the land of C. Daudt, and run with that width in a southerly direction to the Missouri river, for a further description reference is made to the plat hereto attached. To have and to hold said real estate by Mark Keen in fee simple and to his heirs and assigns forever.

Sixth : I give, devise and bequeath unto my son, Matthew Keen, in fee simple, and to his heirs and assigns forever, lot No. 27, of David Nicholson's subdivision of survey No. 1838 in St. Charles

county, Missouri, containing one hundred and eight acres, more or less. To have and to hold said real estate by Matthew Keen in fee simple and to his heirs and assigns forever.

Seventh: I give, devise and bequeath unto my daughters, Mrs. Lettie Ann Skinner, Mrs. Phoebe Wise, Mrs. Mary Phillips and Mrs. Alice Cora Brown, in fee simple, and to their heirs and assigns forever (and as their separate estate, free from the control or interference of their husbands) the following described real estate situate and being in the county of St. Charles, and State of Missouri, to wit:

Part of the northwest quarter of section 27, township 48, range 5 east, containing one hundred and seven acres, more or less, and known as my old homestead, and is bounded on the north by 40 the county road, on the west by lands of Wm. Schnedler, and on the south by lands of Frank Keen and on the east by the St. Charles and Portage road. To have and to hold said real estate by my daughters, Lettie Ann Skinner, Phoebe Wise, Mary Phillips and Alice Cora Brown, as their separate estate, in fee simple, and to their heirs and assigns forever, share and share alike.

Eighth: I give, devise and bequeath unto my beloved wife, Ephronie K. Keen, now residing in Wood county, West Virginia, in fee simple, and to her heirs and assigns forever, all the real estate and personal property that I own in Wood county, West Virginia.

To have and to hold said real estate and personal property situate and being in Wood county, West Virginia, by Ephronia K. Keen, in fee simple and to her heirs and assigns forever.

Ninth: I also give, devise and bequeath unto my beloved wife, Ephronia K. Keen, (in addition to the above property) for and during her natural life, together with the rents, income and profits of the same, the following described tract of land, situate, and being in the county of St. Charles, and State of Missouri, viz: Part of survey 1760, commencing at the northwest corner of this tract, where it joins the land of Wise, rock at corner, thence south $82\frac{1}{2}$ east 21 chains 51 links to a rock in road, bearing north 8 east 15 feet; thence south $57\frac{1}{2}$ west 65 chains more or less to the Missouri river; thence along the meanders of the Missouri river to corner No. 11, a cotton wood stump. Thence north $7\frac{1}{2}$ west 34.50 chains to the place of beginning, containing all the accretions thereto belonging, one hundred acres, more or less, from the above tract there is excepted the school lot, conveyed to the school district, and on which is situated the Red school. To have and to hold said real estate by my wife, Ephronie K. Keen for and during her natural life, and at her death the same is to go and descend to my children Ellis Keen, Reason Keen, Matthew Keen, Mark Keen, Lettie Ann Skinner, Phoebe Wise, Mary Phillips and Alice Cora Brown in fee simple and to their heirs and assigns forever, share and share alike.

These devises and bequests in sections 8 and 9 of this will is to be in full of the share of my wife Ephronie K. Keen, especially in full of her claim for dower, homestead. Child's part, or absolute prop-

erty, as I do not wish her to have any more in my estate. I consider the farm I had conveyed to my wife in Wood county, West Virginia, and for which I paid the purchase money, she not contributing one cent, also the personal property in Wood county, West Virginia, which I have devised in this will to her, both together I value at \$8000.00, and the income of the 100 acres of land devised to her for and during her natural life, in St. Charles county, Missouri, more than ample, for the dower homestead absolute property,

or any other claim she would receive under the laws of Missouri, had I died intestate. Therefore, I have made no further provision for her in my will, as I have amply provided for her, and do not desire that she shall receive anything further out of my estate.

It is my further will, that should my wife, Ephronie K. Keen renounce my will, and take under the law, then the provisions made for her in this will shall be null and void, and that she be charged up with the sum of \$8000.00, the value of the farm and personal property I gave her, Wood county, West Virginia, which shall be deducted from her share in my estate.

Tenth: All the rest, and residue of my estate, be the same real, personal or mixed, property of every description and kind, as well as that in possession as in expectancy, I give, devise and bequeath unto my beloved children, Ellis Keen, Reason Keen, Matthew Keen, Mark Keen, Lettie Ann Skinner, Phoebe Wise, Mary Phillips and Alice Cora Brown, in fee simple and to their heirs and assigns forever, share and share alike.

Eleventh: I hereby nominate and appoint Louis H. Breker, as executor of this, my last will and testament.

In witness whereof, I have hereunto set my hand and seal this 5th day of September, 1900.

ELI KEEN. [SEAL.]

The foregoing instrument was at the date thereof signed and declared by the said Elia Keen to be his last will and testament, in the presence of us, who at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

CHAS. RECHTERN.
B. FEUERSTEIN.

Filed Feb. 27th, 1901.

HENRY H. MOEHLENKEMP,
Judge of Probate.

This will was probated in due form in the probate court of St. Charles county, Mo., March 6th, 1901.

The plat referred to in the above will is omitted by consent of the parties hereto.

ELLIS KENN, being duly sworn, testified as follows :

Direct examination by Col. DYER :

Q. State your name in full ?

A. Ellis Keen.

Q. How old a man are you, Mr. Keen ?

A. I am fifty-one years old.

Q. Where do you live.

A. I live in St. Charles county, opposite Alton, below West Alton.

Q. You live upon this seventy acres of land described here ?

A. Yes sir.

42 Q. How long have you lived on that land ?

A. I have had that land in possession since 1882.

Q. Since 1882 ?

A. Yes sir.

Q. Have you been cultivating it ever since 1882 ?

A. Yes sir, I have been cultivating it ever since 1882.

Q. How did you come to go in possession of it in 1882 ?

A. My father put me in possession of it.

Objection by Mr. Wilson : That's immaterial ; its admitted the title was in Eli Keen until the date of his death, and that he is the common source, it don't make any difference.

COURT : The character of the possession seems to be immaterial, gentlemen, prior to the death of Eli Keen, under the admissions and pleadings.

To which ruling of the court defendant then and there excepted and saved his exceptions.

Q. Then you have been in possession of it since the death of Eli Keen ?

A. Yes sir.

Q. And now in possession of it ?

A. Yes sir.

Q. I will get you to state where you lived before you went on this particular tract of land in 1882 ?

A. I lived seven miles below St. Charles here on one of my father's farms ; I moved from that to the Point, on the place I am living now.

Q. When you say your father's farm, whose farm ; who is your father ?

A. Eli Keen, and he sold it to a man named Willis Bard, and when he sold it he furnished me a place in the Point,—that I live on now.

Q. How long did you live on this farm up here ?

A. I lived on it eight years.

Objection by Mr. Wilson : That's immaterial.

Mr. McDEARMON : It's to show the relation between Eli Keen and him.

COURT: The objection is overruled; you may proceed.

Q. Where did you live before then?

A. Before I lived on this farm?

Q. Yes?

A. I lived at home with my father.

Q. Whereabouts was that?

A. The old home place, just below the orchard farm.

Q. How far is that place from St. Charles?

A. About eight miles?

Q. How long did you live on that old home place?

A. I lived on that old place ever since 1861, up until 1882, and I married and went on this other place.

Q. You were born what year?

A. I was born in 1850.

Q. From 1850 until 1861 where did you live?

A. I lived on the old place close by Wilkie's, the farm that belonged to him through his father.

Q. How old were you when you began to recollect; how old were you when you recollect about yourself and where you lived?

A. I guess I was seven or eight years old.

43 Q. How many brothers and sisters have you and name them?

A. I have eight brothers and sisters, four brothers and four sisters.

Q. That is, including yourself?

A. Including myself, yes.

Q. Eight living, are there?

A. Eight living.

Q. Any dead?

A. Yes sir, there's some dead; two dead.

Q. Now, what were your brothers named?

A. My next oldest brother is named Reason, the next Matthew, the young brother Mark.

Q. Now, your sisters?

A. My sisters living, Lydia Ann the oldest.

Q. Married to who?

A. Married to Albert Skinner.

Q. Well?

A. Mary Jane Phillips, married to Louis Phillips; Phœbe Wise, married to Edward Wise; the youngest, Cora Brown, married to W. C. Brown.

Q. Are you the oldest one of the family?

A. I am the oldest one of the family.

Q. I will get you to state where this family of children were raised.

A. They were raised principally on the old home place, eight miles below St. Charles.

Q. What was your mother's name?

A. Her name was Phœbe.

Q. This old place that you mentioned, was that the place mentioned in the will as having been given to the daughters?

A. Yes sir.

Q. During the time that you lived on the old home place was your father, Eli Keen, there?

A. Yes sir.

Q. I will get you to state during the time by what name you called each of them, and what names were each of them called by the other children?

A. Called ma and pa.

Cross-examination by Mr. WILSON:

Q. Your mother was a negro woman, was she—black woman?

A. Yes sir.

Objection by Mr. Wilson: Now we object to the admission of any testimony on this subject for the reason that there could be no marriage between a negro and white man in this State.

COURT: What do you say, gentlemen, the marriage is denied since it's disclosed the mother was a negress, therefore, it's immaterial.

Mr. McDEARMON: There could be such a marriage relation between these parties that would enable the children of the parties to inherit under the provisions of our statute and under the decisions: the fact that the marriage may have been unlawful, may have been absolutely prohibited by the statute, wouldn't under the provisions of our statute disinherit or illegitimize the children; the question might arise about, which I don't know whether our supreme court

44 has directly passed upon, as to whether there could have been a marriage pending the institution of slavery between the white man here and the colored woman that would under any circumstances and under any conditions have legitimized the children, or enabled them to inherit from their father, but certainly after the war and after the constitution of this State of 1865 both of those parties, mother and father, white and black in this case, were able to contract matrimony, and if they did contract matrimony, lived together as man and wife subsequent to that time and prior to that time continued their marital relations from the time of slavery down to the time of the passage of the ordinance in this State by the constitutional convention, and thereafter lived together as man and wife, and recognized these children as their children, that legitimizes, that enables them to inherit notwithstanding the direct and positive prohibition of the statute on the subject.

COURT: Does the statute declare that any such alliances shall be void?

Mr. McDEARMON: It prohibits them.

COURT: Does it say the relations are void?

Mr. WILSON: Declares it absolutely void.

Mr. McDEARMON: Yes sir, and also declares and prohibits a man who has one wife from marrying another, and it declares just as

emphatically that such a marriage is void ; it don't use the word "absolutely" in that case ; I want to be strictly correct, it declares that a second marriage between any one of the contracting parties who had prior to the second marriage a husband or wife living, at the time of the second marriage, it prohibits that and declares such a marriage void ; the only difference between the language of the statute in that respect and the language of the statute in declaring the marriage of a white man and a black woman, or *vice versa*, is that in the first statute that is, prohibiting the marriage of the white and black—and it says "absolutely void ;" the use of the word "absolutely," your honor, will recognize at once, adds no force to the word "void ;" if a thing is void, it's void and it cannot be any voider ; now our supreme court have held, and Mr. Wilson can't dispute the proposition, in a recent case, that where a man has a living wife marries a woman in good faith, a ceremonial marriage or a common law marriage, and has children by her, that notwithstanding that marriage is void under the law and a divorce could be had on account of it, yet the children born of that second marriage—of that void marriage—can inherit under the provisions of the statute ; that was held by Judge McFarlane in the 126 Missouri in a case exactly like this—where the widow was claiming just as this widow is.

Court: Was one of the contracting parties a negro in that case ?

Mr. McDARMON: No sir, but I want the court to understand there is no stronger prohibition against the white and black race, that's the point.

45 Col. DYER: It's our purpose if permitted to prove that for forty years—nearly forty years—Eli Keen lived in this county with the mother of this witness ; that of that cohabitation children were born ; that he recognized the woman as his wife to his neighbors ; that he lived there just as any other man in the neighborhood lived with his family ; that his neighbors went to his house, ate at the same table with the father and mother of these children, and the children, they called him, father, and her, mother, in the presence of Eli Keen, and were known to be so all the time ; we don't pretend to say we will furnish to the court a certificate of a justice of the peace or preacher of the gospel that he had performed the marriage ceremony ; under our decisions and under the law a marriage is a civil contract that may be entered into by the parties without any of this outside performance that may be deemed necessary and is proper to be done in cases of that kind ; our law considers it a contract, and if we can show such a state of affairs existing between this man and this woman, we don't expect your honor to declare there was a valid marriage between these people, because the statute prohibits it, but we do expect under the decision of the supreme court and under the liberal statute that has been passed, we expect your honor to say that children born of that void marriage, are legitimate, not bastards, and capable of inheriting

from their father as if they had been the children of a man and woman against whom the statute is not prohibited.

Mr. WILSON: Mr. McDearmon makes the admission I understand, that will bring the whole case before the court now, and that is, this woman was a slave up to the time of her emancipation; do you gentlemen admit that fact; will you let that go as an admission of record?

Mr. McDEARMON: I don't think that it would in any way affect our rights in the premises, but I don't know that it is a fact, and therefore I won't admit it; I don't think it would affect the rights of the children of this marriage or cohabitation.

Col. DYER: We can show some of the children were born before 1865 and some after 1865.

Mr. McDEARMON: He wants me to admit the mother of the children during the prevalence of the slave institution in this country was a slave; I say to him I think we could perfectly safely admit that under the law, but I don't know it to be fact, and therefore don't admit it.

COURT: Well, gentlemen, I don't think it would be hardly fair to the parties or fair to the court or fair to the attorneys to pass upon the question as thus presented in this way, being entirely new to the court I don't think it would be entirely fair.

Mr. McDEARMON: I think myself it's a question the court would want to investigate.

Col. DYER: I would suggest to the court as far as this is con-
46 cerned, this being true, let the statement go as I have made it of what we propose to prove, and then your honor at some time to suit, you may pass upon the question; I think it's fairer to the court, this strikes at the very root of the case.

Mr. WILSON: My contention is if your honor please, that in view of the fact that Eli Keen was a white man and Phœbe was a negro woman, and I will say further in view of the statements of the gentlemen of what further they will prove, I propose to establish this woman was a slave from the time the relations began between them up to the time of the emancipation under the proclamation of 1865 that she was a slave; the point of my objection to the admission of the testimony is that the marriage between a negro and a white being prohibited, not only prohibited and declared void, but being made by the statute a felony; and the statute on the subject of the marriage between negroes and whites goes further than with any other class of prohibited marriages, because the legislature follows it up with the declaration that no marriage between a negro and white, even though it was solemnized under the jurisdiction of other States and other countries, will be held valid in this State; they say void absolutely; the point that I make is this, intermarriage between these parties being prohibited by law and made a crime, testimony as — the cohabitation, acknowledgment and reputation cannot raise any presumption of marriage between the parties; it isn't presumptive proof; cohabitation, acknowledgment and reputation in a case

where the parties are capable of contracting the relations with each other when produced before the court, in the absence of circumstances indicating that there could be or was no lawful marriage, may be accepted as prohibitive—as evidence having prohibitive force; to prove a marriage which doesn't raise a presumption of marriage, it's simply proof, and this kind of proof has no more tendency to establish a common law marriage, than it does a regular ceremonial statutory marriage; the point is this, that there can be no presumption of fact from cohabitation and acknowledgment and reputation of an actual marriage when the law itself prohibits the marriage and forbids it; you can't find that there was an actual marriage in the face of the fact that the law prohibits it on mere presumptive proof. That's the point, and now we object to this testimony as being incompetent on that point, and I take the time to address the attention of the court to it because I want the court to understand these points and gather them as we go along, and I think you will find when you come to examine the law in the case that the point is conclusive on this proposition, that there can be no such thing as a common law marriage between a negro and white in this State, in fact testimony showing cohabitation, acknowledgment and reputation cannot be received for the purpose of showing the marriage.

COURT: The court will receive the evidence subject to exclusion.

47 Examination by ELLIS KEEN is resumed by Col. DYER:

Q. Now, I will get you to state how old you were when you left the home place where your father and mother lived to go off to another place; how old were you?

A. I was thirty-two years old.

Q. Had you lived there with them practically from the time of your birth?

A. All my life.

Q. And worked on the farm there with your father?

A. Yes sir.

Q. Now, I will get you to state to the court how your father and mother lived there at the house?

A. Why, they lived together the same as any other man and woman or wife.

Q. Did they have a separate room?

A. No sir, they had the same room.

Q. I mean to say, they didn't have separate rooms but occupied the same room?

A. Yes sir.

Q. And did they occupy the same room during your recollection of all the time you remained there?

A. Yes sir.

Q. Did they occupy the same bed?

A. Yes sir.

Q. Were you there when the younger children were born—the last of them?

A. Yes sir.

Q. I will get you to state whether your father was there when your mother gave birth to these children?

A. Yes sir, he was there.

Q. At the table as you grew up to be a man and these other children were going on, state whether you and your father and mother ate from the same table?

A. Yes sir, we all ate at the same table.

Q. Your mother sitting at the head and your father at the foot of the table?

A. Yes sir.

Q. Your mother poured the coffee and your father cut the meat, is that true?

A. Yes sir.

Q. And did that course obtain all the time you lived there in St. Charles county?

A. Yes sir.

Q. When you had meat, I suppose?

Mr. WILSON: I don't like to interfere with the gentleman, but I would like for him to not lead the witness; let the witness testify.

Col. DYER: I was only doing it to shorten the examination.

Q. I will get you to state whether at any time you went to school; did you go to school when you were a boy?

A. Yes sir.

Q. Where did you go to school?

A. Before we got a school in our neighborhood he sent me to a school here in St. Charles two years.

Q. How old was you then?

A. I was sixteen or seventeen years old.

Q. Then after that, did you go to school anywhere else?

48 A. Yes, sir, we got a school house in our own neighborhood and I went to school at home.

Q. Who built the house, if you know?

A. It was built by the district.

Q. Built by the district?

A. Yes sir, he furnished the land for the school and it was an understanding between them.

Objection by Mr. Wilson. Objection sustained.

To which ruling of the court, defendant then and there excepted and saved his exceptions.

Q. State who was the teacher at that time?

A. We had several different ones from Iowa.

Q. Did you go to school at that school house?

A. Yes sir.

Q. It was on land your father had?

- A. Yes, sir, it was on the home place.
- Q. Did he send you to school?
- A. Yes sir.
- Q. How far was the school house from the dwelling house?
- A. It was about a quarter of a mile.
- Q. Did your brothers and sisters go to school there, too?
- A. Yes sir.
- Q. Do you know of your own knowledge that your father paid for the schooling—do you know of your own knowledge?
- A. Yes, sir, he paid for the schooling.
- Q. After you left there were you sent to school anywhere?
- A. Yes, sir, he sent me to Iowa to school.
- Q. Which of your brothers and sisters were sent to Iowa?
- A. My next oldest syster—Lydia Skinner, was sent there.
- Q. Did you go together?
- A. Yes sir.
- Q. Did any of the others go?
- A. A half sister of mine was sent with her; she went at the same time; she is dead.
- Q. How long did she stay there?
- A. Two years.
- Q. How long did you stay there at school?
- A. I stayed there three years.
- Q. How long did your sister Martha stay?
- A. Two.
- Q. And what was her name, Skinner, Martha?
- Mr. WILSON: Martha is the one dead, she is a half-sister.
- A. Lydia Skinner.
- Q. She was older than you?
- A. Martha?
- Q. Yes?
- A. Yes sir.
- Q. Now I will get you to state—well, this half sister, you say she was a half sister?
- A. Yes sir.
- Q. You mean to say she was the daughter of your mother or your father?
- A. My mother.
- Q. Daughter of your mother?
- A. Yes sir.
- Q. Then it was you were the next born of the mother?
- A. Yes sir.
- Q. And that made her—the first one—the half sister?
- A. Yes sir.
- Q. Now, who paid the bills up there in Iowa?
- A. He did.
- Q. Who?
- A. My father.
- Q. Eli Keen?

A. Yes sir.

Q. After that where were you sent ?

A. I was sent to school in Nashville Tennessee.

Q. How long were you there at school ?

A. One year.

Q. Who sent you there ?

A. My father.

Q. Who paid your expenses while there ?

A. He did.

Q. Do you recollect what year that was in, Mr. Keen ?

A. That I went to school ?

Q. At Nashville ; do you recollect what year it was ?

A. In 1877.

Q. In 1877 ?

A. Yes sir, the winter of 1877.

Q. When was the last time you saw your father ?

A. The last time that I saw him was last February a year ago.

Q. What time in February ; he died on the 22nd of February ; what time in February did you see him ?

A. Well, I don't remember just the date, but only a few days before he died ; it was the same week that he died.

Q. It was the same week ; how often had you seen him during his sickness, if more than once ?

A. I saw him quite often during his sickness up until this woman came there that claimed to be his wife, but after she come I didn't see him but once or twice.

Q. Why ?

A. She wouldn't allow me in.

Q. Did you go there and apply to get in ?

A. Yes sir.

Objection by Mr. Wilson : That has nothing to do with the case.

The COURT : I don't see its materiality.

Mr. McDEARMON : She went over that yesterday.

Col. DYER : It only affects it in this way, in my judgment ; I want to show the relations that existed between this man and his father down to the death of the father, and show he had treated his son and how his son treated him as far as I can.

COURT : Just refer to it that he applied for admission and she denied it.

Col. DYER : That's all we want.

Q. Did you apply for admission there ?

Objection by Mr. Wilson. Objection overruled.

A. Yes sir.

Q. How often were you there before the 18th of December,—beginning the 18th of December, the time Mrs. Keen came there, how often had you seen Mr. Keen there during his sickness ?

A. I saw him every week regular, once a week, yes sir.

Q. Did you see any of your brothers and sisters there at the same time?

A. Yes sir.

Q. How many of them?

A. They all at different times called to see him.

Q. How many did you see there, yourself, and who were they?

A. I saw all of my brothers, and I think three of my sisters.

50 Q. Did you have any talk with your father at that time, did you go in?

A. Yes sir, I would go in and talk with him.

Q. How did you address him then?

A. I addressed him as father.

Q. And did he talk to you?

A. Yes sir.

Q. Did he have any talk with you children about your business affairs or anything of that sort?

A. Yes sir, he would always want to know how we were getting along.

Objection by Mr. Wilson.

Court: The matter of their conversation I don't think is competent.

To which ruling of the court defendant then and there excepted and saved his exceptions.

Q. Was there ever any time between the time that you can first remember and the time that you last saw him,—anything existing between you and your father other than that of father and son?

A. No sir.

Objection by Mr. Wilson: We object to that as being perfectly irrelevant.

Objection overruled.

Cross-examination by Mr. WILSON:

Q. You say you had one half sister?

A. Yes sir.

Q. What was her name?

A. Martha.

Q. Do you know her age?

A. Yes sir, if she was living she would be about fifty-five years old.

Q. Who was four or five years older than you were, was she?

A. She was three or four years older than I am; between three and four.

Q. She wasn't a daughter of Eli Keen's?

A. No sir, she was not.

Q. You know as a proposition of fact, don't you Mr. Keen, that

your mother was a slave that was purchased by your father from his father's estate after his death, wasn't she?

A. I think she was.

Q. She was held as a slave up to the emancipation of slaves?

A. He bought her for housekeeper and she taken charge of the house and everything the same as his wife.

Q. He bought her and kept her there in the house and these relations began with her in that way?

A. Yes sir.

CHARLES L. HUG, being duly sworn, testified as follows:

Direct examination by Mr. McDEARMON:

Q. Mr. Hug give the reporter your name?

A. Charles L. Hug.

Q. Where do you live now, Mr. Hug?

A. In St. Louis.

Q. How long have you lived there?

A. About six years and a half.

51 Q. Where did you live before you went to St. Louis?

A. Here in St. Charles.

Q. How long did you live in the city of St. Charles?

A. Since my birth.

Q. What business were you engaged in here before you went to St. Louis?

A. Grocery business.

Q. Were you running the business independently for yourself or were you clerking for somebody else?

A. Well, I worked for my father a great many years, and after his death I succeeded him and run the business myself twelve or fifteen years.

Q. Your father was in the grocery business, was he?

A. Yes sir.

Q. And after his death you succeeded him and carried on the business?

A. Yes sir.

Q. Did you know Eli Keen?

A. Yes sir.

Q. Tell the court whether Eli Keen dealt with your father while he was in the business and you were clerking for him.

A. Yes sir, he dealt with my father as far back as I can remember, he always dealt with him, yes sir.

Q. Did you know the woman known as Phœbe Keen?

A. Yes sir.

Q. Did you know that she lived with Eli Keen?

A. I did, yes sir.

Q. Did you know the children claimed at least by Eli Keen and Phœbe Keen?

A. Yes sir.

Q. Tell the court whether or not Phœbe Keen and the sons and daughters of Eli Keen and Phoebe dealt with your father while he was running the grocery business?

A. Yes sir, they did.

Q. Did they do a cash business or were they put on the books?

A. Why it was put on the books, yes sir.

Q. Put on the books?

A. Yes sir.

Objection by Mr. Wilson: The court understands my general objection goes to all this testimony as being incompetent, and I want to make the additional point at this stage of the testimony of the son Ellis; it's been shown Phœbe Keen was a slave, purchased by his father, and we made the additional point that this testimony is entirely incompetent for the purpose of establishing any marriage between Eli Keen and this woman as a slave; that she would not be competent to contract marriage, even any attempt to show an actual ceremonial marriage; she wasn't competent to contract.

COURT: And the court receives all that testimony subject to rejection on the final hearing; I understand your objection to apply to all testimony of that character.

Mr. WILSON: Yes sir.

COURT: And the court receives it conditionally; proceed.

Q. Now when she, Phœbe Keen, or any of these boys or girls that you recognized as the children of Eli and Phœbe, came to
52 your father's store and purchased the necessaries of life, state to whom you charged the bill?

A. To Eli Keen.

Q. To Eli Keen?

A. Yes sir.

Objection by Mr. Wilson: We object to that as being entirely incompetent in any view of the case.

Mr. McDEARMON: Well, I think your objection Mr. Wilson is broad enough to cover the whole field.

COURT: I think the ruling of the court on the former objection would comprehend that.

Mr. WILSON: I don't understand the court in making that ruling would preclude me from making an objection when the testimony is submitted.

COURT: Oh! no; object to the testimony as you like and when you like of course; go ahead.

Q. You said they were charged to Eli Keen?

A. Yes sir.

Q. How long did that condition prevail during the time your father was conducting the business and you were clerking for him, about?

A. Well, Mr. Keen dealt with my father as far back as I can re-

member and up to the time I took charge of the store which was about 1876,—no, 1873.

Q. Now do you know anything about who paid those bills that were made by Eli Keen, Phœbe Keen and these children at your father's store, and they were charged up to your father; who paid the bills?

A. Why Mr. Keen paid the bills.

Q. Which Keen?

A. Eli Keen.

Q. Now after your father's death and you opened the business and conducted it, tell the court whether or not Phœbe Keen and these children dealt with you in the same way that they had with your father?

A. They did, yes; the goods were charged to Mr. Keen.

Q. How long did that continue, Mr. Hug?

A. Fifteen years.

Q. Fifteen years with you?

A. Yes sir.

Q. To whom did you give the credit and to whom did you charge the bills that were made by Phœbe Keen and these children when they came there and bought groceries?

A. To Eli Keen.

Q. Who paid those bills, Mr. Hug?

A. Mr. Eli Keen.

Q. Did you ever visit Mr. Keen's place?

A. Yes sir, I visited there on one occasion, collecting a bill.

Q. What time was that, Mr. Hug?

A. Now my recollection is not clear on that. I think it was about twelve years ago, twelve or fifteen, possibly, I am not sure. I remember simply the circumstance of my being there but the date I am not clear of, it's been twelve or fifteen years ago.

Q. Twelve or fifteen years ago you visited Mr. Keen, where was he then living?

A. At the home place.

Q. Now the home place is located where,—so the court will understand it. The home place is the place referred to in the will,—I will suggest, is the property referred to in the will as given to the daughters, and what is called the orchard farm place.

53 Mr. WILSON: We can agree on that; it's the old brick house down here that's devised to these daughters in the will; that's the home place.

Q. He was living there?

A. Yes sir, it was their residence.

Q. Do you know how long he lived there in your life?

A. Well, as far back as I can remember.

Q. Did Phœbe Keen live there with him as far back as you remember?

A. Yes sir.

Q. Do you know whether these children were brought up there on that place?

A. Yes sir, I know they were.

Mr. WILSON: Well, were you there?

Q. Now you say you visited Mr. Keen on one occasion to collect the bill, at this home place?

A. Yes sir.

Q. Well, you may tell the court what occurred when you went there and how you found things; did you see Mr. Keen?

A. Yes sir.

Q. Did you go to the house?

A. Yes sir.

Q. Did you take a meal there or not?

A. I did.

Q. Sat down to the table?

A. Sat at the table, yes sir.

Q. Was it at the time the family were taking their meals?

A. Yes sir.

Q. What meal was it, noon meal or evening meal?

A. The noon meal, yes sir.

Q. Tell the court how the family sat at the table and who was at the table?

A. Well, the children were all there.

Q. The children were all there, did you see Phoebe?

A. She was at the one end of the table, yes sir.

Q. She was at one end; where was Eli?

A. Mr. Keen at the other.

Q. Did you have an occasion while you was there to address Mrs. Phoebe during your stay there on that occasion; did you have any occasion to converse with her and address her in any way?

A. I don't remember whether I spoke to her or not; my business was with Mr. Keen and it was about the noon hour when he paid the bill and he requested that I have dinner, and I did so. I sat at the table.

Q. Did you hear any of the children on that occasion address Eli or Phoebe, and if so how did they address them; what did they call them?

A. I couldn't say; I don't remember that.

Q. How long did you stay there, Mr. Hug?

A. I was there possibly two hours.

Cross-examination by Mr. WILSON:

Q. When did you go into business yourself, Mr. Hug?

A. About 1873.

54 Q. About 1873?

A. Yes sir.

Q. When did you make this visit to Mr. Keen?

A. About 1876 I was there.

Q. When?

A. About dates I won't be sure, 1876 though my brother and myself started in, some years after that I bought my brother out.

Q. When did you make this visit to Mr. Keen?

A. I think it was ten or fifteen years ago; it's over ten, but I don't think it was more than fifteen years ago.

Q. When did you go out of business here, Mr. Hug?

A. I went out of business in 1895.

Q. In 1895?

A. Yes sir.

Q. Mr. Hug don't you know as a matter of fact Mr. Keen never lived at that place from 1880 on?

A. I couldn't say Mr. Wilson; no, I couldn't say.

Q. You don't know when he left the place there?

A. Well, he ceased living there or at least didn't make it his home for sometime, I don't remember the date, but I say that I charged the bills to Mr. Keen and he came to the store frequently, and he visited the store after he left—he visited the farm; the family seemed to have his care and his attention always, even after he had left there.

Q. Don't you know as a proposition of fact that prior to fifteen years,—for twenty years, twenty-two years, Keen hasn't lived on that place or made his home there?

A. I couldn't say, Mr. Wilson; it's been sometime ago; I couldn't say, it was some time ago.

Q. Are you as certain about all your other testimony as you are about the date you made that visit there?

A. Well, you mean the circumstances?

Q. I say are you as certain about all of your other testimony in this case?

A. I am sure I had the meal at the noon hour, yes.

Q. Are you as certain about all your other testimony as you are about the time you were there?

A. I say as to about the time I couldn't say particularly; I couldn't say the exact date; I couldn't give the exact date I was there.

Q. You say you was down there about two hours?

A. Possibly two hours, more or less.

Q. What were you doing there for two hours?

A. Well, of course I had dealt with the family a great many years and before approaching the subject of my visit, the cause of my visit, I usually talked a few minutes, maybe for half an hour, on other topics.

Q. Was you in the habit of taking bills there?

A. When I needed money.

Q. Had you ever been there before?

A. Yes sir.

Q. Didn't you state in your examination a while ago you paid a visit there once?

A. I only took dinner there once and that's why I remember that particular visit so well.

Q. Mr. Keen was in the habit of coming in to town frequently, and when you wanted money you got it by his coming into the store, his bills were paid there, were they not?

A. Yes sir.

55 Q. Did you ever go there to collect a bill for any other purpose except this one occasion you mention?

A. Well, I wouldn't say positive that I did; simply the circumstance of my having taken dinner there was the reason I remembered this so well, this collection.

Q. Well, how old a man were you when you went down there on that occasion, made that trip?

A. Well, of course not being able to give the exact date I couldn't give my age at that time.

Q. What is your age now?

A. It's forty-nine.

Q. You are forty-nine years old now?

A. Yes sir.

Q. When do you first remember Eli Keen?

A. I say I remember him as far back as I can remember anything.

Q. As far back as you remember anything; you remember him in slave time,—before the war?

A. Well, I was at that time thirteen or fourteen years old.

Q. Could you remember things when you were thirteen or fourteen years old?

A. I remember a few circumstances.

Q. Do you remember Eli Keen from the time you were ten or thirteen years old?

A. Yes sir, I remember him at that time; I know he was a customer of my father's.

Q. And you knew this old woman was a slave of Keen's, didn't you, that he had there on the place?

A. Well, that part,—of course, I was only about thirteen or fourteen years old, and the question of slavery,—well, I suppose I understood that, yes; I guess I understood that,—well, I don't know it either, because she at that time, as far back as I can remember, she had the privilege to come there and buy goods; when she ordered goods it was never questioned; she received the goods at once.

Q. And Keen paid the bills?

A. Yes sir.

Q. That was all there was to it?

A. Yes sir.

Q. Never any fuss about your bills,—they were paid without question?

A. Yes sir.

Q. Now how long were you in business here; you say you went in in 1876, how long were you in business here?

A. Well, I was in with my brother, we started in in 1876; my father died in 1873, and I succeeded him and was in a few years; there was an intermission of possibly a year and a half that I didn't keep store, sold out, and then in 1876 my brother and I run the store for some years, and I bought him out.

Q. Then how long did you continue in business?

A. Then up to 1895.

Redirect examination by Mr. McDEARMON:

Q. What brother was that, Mr. Hug?

A. Julius.

Q. Where is he now?

A. He is in Kansas City.

56 JOHN ATKINSON, being duly sworn, testified as follows:

Direct examination by Mr. McDEARMON:

Q. Give the reporter your full name?

A. John Atkinson.

Q. Where do you live, Mr. Atkinson?

A. St. Louis.

Q. How long have you lived there?

A. About nine years; since 1892.

Q. Where did you live before you went to St. Louis to reside?

A. At St. Charles.

Q. How long did you live in St. Charles?

A. Since 1847.

Q. Born here?

A. Born here in St. Charles, yes sir.

Q. What business were you in after you grew up to manhood?

A. Dry goods; retail dry goods.

Q. Did you know Eli Keen?

A. Yes sir.

Q. Did you know Phoebe Keen?

A. Yes sir, knew them both.

Q. Did they deal at your store, Mr. Atkinson?

A. Yes, at intervals during the term of probably—at intervals for probably fifteen years, twelve or fifteen years.

Q. I will ask you if Phoebe Keen was in the habit, or at any time did come to your store and buy goods on credit?

A. Yes sir, she did.

Q. To whom were such goods charged?

A. To Keen, Eli Keen, charged to him.

Q. Who paid the bills, Mr. Atkinson?

A. He paid the bills.

Q. How long did that continue?

A. The accounts?

Q. Yes.

A. Well, I think they bought there as I say, at intervals, twelve or fifteen years, ran regular accounts, had a regular account.

Cross-examination by Mr. WILSON:

Q. When did you begin business here, Mr. Keen?

A. In 1866.

Q. Did you know Eli Keen prior to that time?

A. Well, I knew of him, I knew his name, knew of him, but of course I wasn't particularly acquainted with him.

Q. You say you knew Phoebe?

A. Yes sir.

Q. She was a negro woman, was she?

A. Yes sir.

Q. When did they first begin dealing with you?

A. Commenced?

Q. Yes.

A. Well, I should think somewhere about, probably 1875 or 1877, somewhere along there, I don't remember the exact dates.

Q. That's when they commenced?

A. I don't remember of them buying much before that time, they may have come in and bought off and on.

57 (By Mr. McDEARMON:)

Q. About what date did you say they commenced buying?

A. About, I think, 1875 or 1877; they may have bought before that, I don't remember; I can remember back as far as 1875 or 1877 they commenced.

Q. Now, all that you know about the matter is that Phoebe came in there and bought goods and they were charged to Eli Keen and he paid the bills; that's all there was about it?

A. Yes sir, that's it, yes.

Q. And you say this dealing continued for ten or fifteen years?

A. About twelve or fifteen I think—let's see, well, probably not that long, maybe about twelve years, at intervals, twelve years.

Q. When did that dealing with you stop?

A. Well, let me see, I think she commenced running a separate account, had goods charged to her separately, I think somewhere about probably 1884 or 1885.

Q. 1884 or 1885?

A. Yes sir, charged to her separately and not charged to him; I understood she was living here in town, moved up to town here, at St. Charles.

Q. You don't know just when Keen left them and ceased to live with them?

A. No, I don't know.

Q. But about 1884 she moved to town and run a separate account?

A. I think so, as near as I can remember.

Q. That wasn't charged against Keen, and not paid by Keen?

A. No sir, charged to her as Phoebe Keen.

Redirect examination by Col. DYER:

Q. The account was run in the name of Mrs. Phoebe Keen, was it, 1884 and 1885?

A. Yes sir, the last account.

Q. And that's while she lived here?

A. Yes sir, after she moved to St. Charles.

Q. When they first were dealing at your store together, did you ever see the two in your store together, Mr. Atkinson?

A. I don't believe I have ever seen them together, no sir, but he would always come in and pay the bills at the end of the year; they run yearly accounts.

Q. She never brought any order from Keen?

A. No sir.

Q. Whenever she came and asked for the goods you charged it to Keen and Keen paid it without asking any questions about it, did he?

A. Yes sir.

Q. That's the way you dealt mostly with other people, too, didn't you?

A. Yes sir.

Objection by Mr. Wilson: That's no- proper; it don't make any difference how he dealt with other people.

Objection sustained. To which ruling of the court, defendant then and there excepted and saved his exceptions.

58 Examination by Mr. McDEARMON.

Q. If you have any other matter to state, go on; I understood you were about to say something.

A. I was going to say the bills, the bills varied from twenty-five to thirty to forty or fifty dollars, but in one bill—you spoke of him objecting to it—the only time he made any objection was a bill of about ninety or ninety-one dollars, he said they were buying too many goods; just made some little objection, kick.

(By Col. DYER:)

Q. But he paid it all the same?

A. Oh, yes, he paid it; he paid it.

REASON KEEN, being duly sworn, testified as follows :

Direct examination by Mr. McDEARMON.

Q. What is your name ?

A. Reason Keen.

Q. Where do you live now, Mr. Keen ?

A. I live down in Missouri Point, below West Alton.

Q. How long have you lived down there ?

A. Seventeen years the 17th of March.

Q. Are you married ?

A. Yes sir.

Q. What is your business there ; what do you do ?

A. Farming.

Q. Are you farming on a part of the lands that were owned by your father at his death ?

A. Yes sir, which he willed me.

Q. Are you on that tract of land which is devised to you under the will of your father ?

A. Yes sir.

Q. How long have you lived on that tract of land ?

Objection by Mr. Wilson : We object to that as not at all material and a waste of time.

Mr. McDEARMON : It's on the th-ory all this testimony is presented on, that Eli Keen was recognizing these children as his and taking care of them.

COURT : It may be admitted on the same condition as the other testimony.

Mr. WILSON : As far as his recognition of them as children, they have a specific recognition of them here in the will.

COURT : Yes, I don't know why the gentlemen don't accept that as the most solemn and official recognition of them he might make.

Mr. McDEARMON : Of course there's no doubt about that.

COURT : I will permit you to proceed subject to exclusion.

Q. Mr. Keen, how old are you ?

A. Forty-six.

Q. Forty-six ?

A. Yes sir.

Q. Have you any brothers and sisters ?

A. Yes sir.

Q. Name them, please, in the order of their age, commencing with the oldest ?

A. Ellis Keen, Lydia Ann Skinner, Mary Phillips, Phœbe Wise, Cora Alice Brown.

59 Q. Well, any others ?

A. That's four, ain't it ?

Q. Matthew, is he a brother of yours ?

A. Yes sir.

Q. Is Mark a brother of yours ?

- A. Mark Keen.
- Q. How many children are there living, of brothers and sisters are there living now?
- A. There's eight with me.
- Q. Eight including yourself?
- A. Yes sir, including myself.
- Q. Where were these children born and raised, Reason, if you can tell the court?
- A. They was born down—some of them was born on the Wilkie place and some on the home farm.
- Q. Some was born where?
- A. On the place he sold Wilkie there.
- Q. What was that place; was that your grandfather's or your father's old home place?
- A. I believe it was my father's old home place.
- Q. Well, some of them were born there and others born at the—
- A. At the home place.
- Q. The home place?
- A. Yes sir.
- Q. How many of them were born at the home place—the orchard farm place—the place deeded to your mother and the daughters and sisters?
- A. I don't know exactly how many.
- Q. Were you born there?
- A. Where?
- Q. At the home place?
- A. No sir.
- Q. You was born on the old Keen place?
- A. Yes sir, the old Keen place.
- Q. What was your father's name?
- A. Eli Keen.
- Q. What was your mother's name?
- A. Phœbe Keen.
- Q. Are they living or dead?
- A. Dead.
- Q. Both dead?
- A. Yes sir.
- Q. How long since you can recollect of your mother and father living together on the home place down there?
- A. I recollect twenty-five or thirty years, I guess.
- Q. How much?
- A. About twenty-five or thirty years, I guess, as near as I can get at it.
- Q. Twenty-five or thirty years as near as you recollect?
- A. Yes sir.
- Q. Did you live with them all the time they were living on the old place?
- A. Yes sir.

Q. How old were you when you left the home place, your father and mother?

A. Left the home place?

Q. Yes, this we call the home place, or about how old; it's not material if you can't give exactly the date; do you remember when, what year you left the home place?

A. Yes sir. I left in 1884 I believe or 1885.

Q. You left in 1884 or 1885?

A. Yes sir, I think it was.

Q. Were your father and mother then living there together on the place?

A. Yes sir.

60 Q. They were then living together, were they?

A. Yes sir.

Q. When did your father leave there and go down in the Point, do you remember?

A. He went one year when,—when I moved down there he moved with me.

Q. And what year did you go down there?

A. 1885 I think, or 1884.

Q. 1884 or 1885, which year was it?

A. 1885 I think, I think it was, I don't know the exact date, but I have been there seventeen years next Sunday.

Q. Now what were the relations between your father and mother, or how rather did they live there together at the home place; did they occupy the same room at night?

A. Yes sir.

Q. Was there more than one bed in that room; do you know in other words whether or not they slept in the same bed?

A. Yes sir, they slept in the same bed.

Q. How long did that continue, Reason, so far as you remember?

A. As long as I remember.

Q. As long as you remember?

A. Yes sir.

Q. Who was the housekeeper; who took charge of everything in the house there; who managed the affairs of the household?

A. My mother.

Q. Your mother?

A. Yes sir.

Q. Who run the farm; who conducted the farm operations?

A. My father and us boys.

Q. How did you do when you come to sit down to your meals morning, noon and night; did the family separate or did they all sit down to the table together?

A. We all set down to the table together.

Q. Who was at the head of the table and who was at the foot?

A. My mother and father at the head and foot.

Q. Your mother and father; when you or any of the children had

occasion to address your father or your mother, what did you call them ?

A. Called them father and mother.

Q. Was that continued for years in the presence of both the father and mother ?

A. Yes sir.

Q. Did your father ever make any objection to your calling Phœbe your mother ?

A. No sir.

Q. Did she ever make any objection to you calling Eli Keen your father ?

A. No sir.

Q. Did you go to school ?

A. Yes sir.

Q. Where ?

A. Down on the home place.

Q. Down at the home place ?

A. Yes sir.

Q. Was that a public school or private school ?

A. A private school.

Q. Built by the district for a public school ?

A. No, a private school ; my father built it to school us children.

Q. Was it on his land ?

A. Yes sir.

Q. How far from the old homestead ?

61 A. I don't know exact ; about a quarter of a mile to guess at it.

Q. How many years did you attend school there ?

A. I don't know exactly.

Q. Well, about ?

A. Eight or ten years I guess.

Q. You got all the education that books can give then at that school ?

A. Yes sir, I never went anywhere else ; I staid at home.

Q. Did any of your brothers and sisters attend that school ?

A. Yes sir, they all attended it at times.

Q. They all attended it ?

A. Yes sir.

Q. Were there any other children attending that school besides your father's ?

A. Yes sir.

Q. What others ?

A. My uncle Frank's.

Q. Any besides his ?

A. Yes sir.

Q. Any others ?

A. Yes sir, a couple or more went.

Q. Who taught school there ?

A. Different ones.

Q. I will ask you if W. C. Brown taught there?

A. Yes sir.

Q. Did you go to school to Brown?

A. No sir.

Q. You had got through with the school when he went there to teach?

A. Yes sir.

Q. Do you know whether your father paid any tuition in that school for his children,—I mean by that, paid for their teaching?

A. Yes sir, he paid the teacher; hired him and paid him.

Q. You say he hired him himself?

A. Yes sir, him and Uncle Frank.

Q. He and your Uncle Frank?

A. Yes sir.

Cross-examination by Mr. WILSON:

Q. That school was a public one, was it, Reason, maintained down there as a public school, and the teachers were paid like the public school teachers here?

A. No, it was a private school.

Q. Isn't that a public school down there now?

A. No sir.

Mr. McDEARMON: Mr. Wilson, I overlooked one matter, before you go on to the cross examination.

Examination resumed by Mr. McDEARMON:

Q. Do you remember when your father died?

A. Yes sir.

Q. You remember his last illness?

A. Yes sir.

Q. He died over in Alton, did he not?

A. Yes sir.

Q. Did you visit him over there while he was sick?

A. Yes sir.

Q. How often?

A. I visited him every day pretty near until Mrs. Keen come?

Q. Visited him pretty nearly every day until Mrs. Keen came?

A. Yes sir.

Q. Did you visit him after Mrs. Keen came?

A. Yes sir.

62 Q. That is, you refer now to the plaintiff in this case?

A. Yes sir.

Q. Several times after she came?

A. Yes sir.

Q. Were you in his presence and her's at any time?

A. Yes sir.

Q. When you went in did you address your father ?

A. Yes sir.

Q. What did you call him ?

A. Pa.

Q. Called him pa ?

A. Yes sir.

Q. Did he say anything to you ?

A. Yes sir.

Q. If so, what ?

A. I asked him how he was, and sometimes he said better or worse, however he was; and he asked how everything was in the Point, and how the folks was, and how was all the children.

Cross-examination by Mr. WILSON :

Q. You stated that your mother was dead ?

A. Yes sir.

Q. She was a negro woman, was she ; a colored woman ?

A. A colored woman.

Q. When did she die ?

A. She died about five years ago I guess ; I don't know the exact date now.

Q. She died about 1895 or 1896, didn't she ?

A. Yes sir, she has been dead about five years ; I think I got it in my Bible.

Q. You knew that your mother was a slave ; she was purchased by your father and owned by him,—bought from your grandfather's estate, don't you ?

A. I don't know that, no sir.

Q. You never heard that ?

A. No sir, I might have heard other people talking it but I never heard them say anything about it.

Q. Wasn't that a public school down there ; just to refreshen your memory wasn't that a public school and Henry Ketler was trustee ; you know Mr. Ketler, don't you ?

A. Yes sir.

Q. Wasn't he one of the trustees that had charge of that school ?

A. Well, I think it was a private school.

Q. Did you hear your brother Ellis testify here a while ago ?

A. Yes sir.

Q. He testified that it was a public school ; now which is right, you or Ellis ?

Objection by Col. Dyer : That's an improper question.

Objection sustained.

Court : He tells what he thinks to be the truth.

A. My father built it and I supposed it was a private school for his children.

Q. You supposed it was a private school ?

A. Yes sir, that's my judgment about it.

63 **MATHEW KEEN**, being duly sworn, testified as follows :

Direct examination by **COL. DYER**.

Q. Your name is Mathew Keen ?

A. Yes sir.

Q. How old a man are you, Mr. Keen ?

A. Thirty-nine years old.

Q. Where were you born ?

A. Born in St. Charles county.

Q. On what place; designate the place ?

A. I couldn't just tell you that.

Q. Where was your father living the first time you recollect, on what place ?

A. On the old home farm.

Q. How long did you continue to live on the old home farm ?

A. I lived there until I was twenty-three years old.

Q. You lived there until you was twenty-three years of age ?

A. Yes sir.

Q. Then where did you go ?

A. I married and lived in St. Louis awhile.

Q. You was married when you was twenty-three years old ?

A. When I was twenty-three, yes sir.

Q. I will get you to state whether you are in possession of any lands in St. Charles county ?

A. I am.

Q. How long have you been such.

A. Since 1883.

Q. Who put you in possession ?

A. My father.

Q. Did you make improvements on the land yourself ?

A. Yes sir, I have.

Q. Built a house there,—or was there a house there when you went there ?

A. There was a piece of a house there and I improved it.

Q. How did your father come to put you on the place ?

A. He sent for me to come and take the place; I went and seen him and talked to him about it, and he told me to move down on the place.

Objection by Mr. Wilson: I submit all that detail is perfectly immaterial and improper, its not this land.

Q. State whether your father ever charged any rent ?

A. He did not charge me any rent.

Mr. WILSON: That's not this land.

Col. DYER: He is one of the children.

Q. I will get you to state whether or not during your living at the old place you went to school ?

A. I did.

- Q. Where did you go to school ?
- A. At the school house there on the farm, the old home farm.
- Q. Who built the school house if you recollect ?
- A. I was quite small when that was built, I can't say ; I know my father hauled lumber.
- Q. Do you know who taught school when you went ?
- A. There was several different ones.
- Q. Well, do you know whether it was a public school,—the teacher paid out of public money, or by your father ?
- 64 A. I will tell you the best of my ability, the first term of school it was a public school ; the first term of school I think was only four months, and at the expiration of the four months, father and uncle employed a teacher and continued it a month or so longer, otherwise a public school.
- Q. How long did it continue a public school ?
- A. Up until there was no more school there,—no one to go to school.
- Q. Did your brothers go to school at the same time you did ?
- A. Yes sir.
- Q. All of them ?
- A. Yes sir.
- Q. And your sisters, too ?
- A. Yes sir.
- Q. Now at the house where you lived, will you state to the court whether your father and mother lived there together in that house ?
- A. They did.
- Q. Did they have a separate room in the house ?
- A. They had a room of their own, yes.
- Q. Did they occupy the same bed ?
- A. Yes sir.
- Q. During all the time you were there ?
- A. Yes sir.
- Q. State whether or not when you went to the table, whether the family, including your brothers and sisters and mother and father ate at the same table ?
- A. All ate together.
- Q. Did you have any visitors there ?
- A. Yes sir.
- Q. White and colored people ?
- A. Both, yes sir.
- Q. I will get you to state whether the visitors who made visits at your house, white or colored, whether they ate at the same table with you ?
- A. They had to.
- Q. Or there wasn't any other place for them to eat ?
- A. No sir, no other place.
- Q. Now in the presence of these visitors did you speak to your father or mother ?
- A. Yes sir, certainly I did.

- Q. How did you address them in the presence of visitors?
 A. By ma and pa.
 Q. Did you call your mother in the presence of your father?
 A. In the presence of anyone.
 Q. In the presence of your father?
 A. Father or anyone, and father the same thing; knew nothing else.
 Q. Was any objection made by your father to calling her mother?
 A. No sir, I was taught it from both.
 Q. You was taught it from both of them?
 A. Yes sir, both of them.
 Q. Was there ever at any time any objection made by your father to having you call your mother "mother" and him "father"?
 A. No sir.
 Q. Were you sent to school anywhere besides at that school?
 A. No sir, I never went away to school, only at home.
 Q. Do you know of your other brothers going, or sisters?
 A. Yes sir, my oldest brother and oldest sister and half sister of mine went.
 Q. Do you know from your father, who paid the bills for the education of the children?
 A. He paid them, my father.
- 65 Q. Now in dealing at stores do you know of their keeping an account at stores in St. Charles?
 A. Yes sir, they run an account.
 Q. Did you ever buy anything on your father's account at the store?
 A. Yes sir.
 Q. Did he tell you to buy it on his account?
 A. Yes sir.
 Q. Did he pay the bills afterwards?
 A. Yes sir.
 Q. Now how many rooms were there in this house where you were raised?
 A. Well, there were two houses on the place; the old house I think had five rooms, the new house had eight.
 Q. Well, the old house having five rooms, was it a one-story house with five rooms on the ground floor?
 A. No sir, three rooms on the first floor and two upstairs.
 Q. Tell where your father and mother's room was with reference to the dining room?
 A. Their room was,—in the old house you have referred to?
 Q. Yes.
 A. It was on the east side.
 Q. Did the door from their sleeping room open into the dining room?
 A. Yes sir, it did; when the house was built it was a round house like, and the rooms came around, three rooms on the first floor.
 Q. Then he built a new house?

- A. Yes sir.
- Q. On the same place?
- A. On the same place, yes sir.
- Q. Where was the room they occupied in the new house with reference to the dining room?
- A. Upstairs in the east end of the house.
- Q. Upstairs in the east end of the house?
- A. Yes sir.
- Q. During all the time you was there and when your father was there, state whether he and your mother occupied the same room?
- A. They did, yes sir.
- Q. State how many of the children are younger than you, if any?
- A. Two.
- Q. And you are how old?
- A. Thirty-nine.
- Q. Thirty-nine?
- A. Yes sir, born in 1863.
- Q. Well, this new house that he built was a two story double brick, wasn't it?
- A. Yes sir.
- Q. And in that house you and your mother and your father and brothers and sisters lived?
- A. Yes sir.
- Q. And your mother died in what year?
- A. My mother died in,—let's see, 1896, I think.
- Q. In 1896, in St. Charles?
- A. Yes sir, February 27th.
- Q. 27th of February?
- A. Yes sir.
- Q. 1896?
- A. Buried on the 29th of February.
- Q. What year was it she moved from the home place up to town, do you recollect that?
- A. No, I couldn't say just exactly; I was living in St. Louis at the time.
- Q. You were living in St. Louis at the time?
- A. Yes sir.
- Q. Now after you moved out on to this place at the instance of your father, did your father visit you?
- A. He did, yes sir.
- Q. Did he ever stay all night at your place?
- A. Staid all night and ate and drank and slept there.
- Q. Often?
- A. He didn't stay at night so often, but he ate there quite often.
- Q. What was his course of conduct towards you while he was there when he come to visit you; would he talk about your business?
- A. Yes sir, he would advise me.
- Q. Manifest an interest in your welfare?

A. Yes sir, and tell me how to do.

Q. And never charged you anything for the rent ?

A. No sir.

Q. When did your father leave the home place if you know and go down into the Point ?

A. He went down in March, 1885.

Q. March, 1885 ?

A. Yes sir.

Q. And where did he live down in the Point ?

A. He lived with my brother, Reason.

Q. The last witness on the stand here ?

A. Yes sir.

Q. Did you visit him at your brother Reason's ?

A. I staid there a while with him.

Q. How long did you stay there ?

A. I staid until March, 1887.

Q. Did he have a room there ?

A. He slept with Reason all the time.

Q. In the same bed you mean ?

A. Same bed with Reason.

Q. Did he eat at the same table with Reason ?

A. Yes sir, we all eat together.

Q. That was before Reason was married ?

A. No sir, Reason was married.

Q. Well, how did he come to sleep with Reason ?

A. We give him the best bed ; we robbed his wife and she had to sleep on a small bed with the baby in the same room.

Q. She slept on a small bed and your father slept with him, is that right ?

A. Yes sir.

Q. That is after he moved to the Point ?

A. Yes sir.

Q. How long did he stay there ?

A. He staid there until he died,—until he went to Alton to take treatment under the doctor.

Q. How much of the time from 1883 up to the time of his death was he absent from St. Charles county ; how much of his time was he in West Virginia, or anywhere else ?

A. Oh ! very little of his time ; the biggest portion of his time he was here in Missouri ; he would sometimes go out in the warm part of the season, but he would only be gone about a month when he would come back.

Q. Did you visit him while he was sick ?

A. Yes sir, I did.

Q. How many times ?

A. I visited him quite frequently at the first part of his sickness, and when he stayed on this side at his old home place in the Point, up until the time his wife came.

67 Q. Then did you visit him after she came?

A. Only the first day she was there I have seen his face.

Q. Did you go there afterwards to see him?

A. I did, yes sir, time and again.

Q. You were not admitted?

A. No sir, I had the door slammed in my face.

Q. Now I will get you to state when was the first time you ever saw her?

A. The first time ever I saw her I couldn't just exactly call the date but it was on the first Friday she came out, while he was ill.

Q. That was during his last illness?

A. Yes sir.

Q. You had never seen her before December, 1900?

A. I think near about the 20th of December, the first time I ever seen her in my life.

Q. You never had seen her before?

A. No sir.

Q. I will get you to state up to and the last time you talked with your father, did you address him as father?

A. I did; always did; knew nothing else.

Q. What would he call you?

A. He always called me Bud—sometimes would say Mathew.

Q. Called you Bud and Mathew?

A. Yes sir; that's what everyone called me.

Q. Well, then as I understand you, you are thirty-nine years of age, and you were born in the year—

A. 1863.

Q. Born in the year 1863?

A. Yes sir.

Q. Now did this relation between your mother and father continue after 1865 up to the time when your mother moved to town?

A. Yes sir.

Q. From 1865 up?

A. Yes sir.

Q. Of course you don't recollect much of what occurred before 1865; you were only two years old?

A. Well, I guess from my birth up until they parted it was the same as long as I can remember back.

Q. As long as you can remember back these were the relations that existed between them?

A. Yes sir, up until 1884 I know.

Q. Did the visitors in this house—those that came there to see them, how would they address your mother; by what name would they call them?

A. A great many of the old settlers well acquainted with her called her Aunt Phoebe; others called her Mrs. Keen.

Q. How many people would you say came there and addressed her as Mrs. Keen?

A. All the young folks principally called her Mrs. Keen.

Q. Was that said in the presence of your father?

A. Yes sir.

Q. Any objection made by him to it?

A. No sir, and others that wasn't so well acquainted.

Q. Others that were not so well acquainted?

A. Yes sir.

68 Q. She was thus addressed by both black and white people?

A. Yes sir.

Cross-examination by Mr. WILSON:

Q. When did your mother go to St. Charles?

A. When?

Q. Yes?

A. What do you mean?

Q. When did she move to St. Charles?

A. From the farm?

Q. Yes.

A. I couldn't say; I was living in St. Louis when she moved here.

Q. When did you go to St. Louis?

A. I went to St. Louis in 1887, and during the time she moved to St. Charles I reckon.

Q. She lived on the farm for some years after your father went away from there, did she?

A. Yes sir.

Q. When did your father and mother separate?

A. Well, he was there in 1894, August, 1894, is the last time I seen him there on the place, that is to stay.

Q. 1894 or 1884?

A. 1884, I mean, August, 1884.

Q. You never saw him there after that?

A. Yes sir, I seen him there after that, but not to stay.

Q. Well, your father and mother separated in 1884, is that your statement, they separated in 1884?

A. Yes sir, for me to know that they didn't interfere with each other any more; they stayed all night in August, 1884, the same as ever.

Q. After that they separated?

A. After that he didn't bother around any more, that is not to stay there any more.

Q. He didn't live with her any more after 1884, did he?

A. No sir.

Q. You say there are two of the children younger than you are, which ones of them?

A. Cora Brown and Mark Keen.

Q. How old is Mark?

A. Mark, I don't just exactly know, but he is younger than I am ; about five years younger than I am.

Q. About five years younger than you are ?

A. Yes sir.

Q. How old is Mrs. Brown ?

A. She is two years younger I think.

Q. Mrs. Brown is two years younger than you are and Mark about five ?

A. Yes sir, there's about two years difference in each of our ages.

Q. Mark is the youngest of the family ?

A. Yes sir.

Q. He is thirty-four or five years of age, is he ?

A. Yes sir, he is something in that neighborhood.

J. W. BRUNS, being duly sworn, testified as follows :

Direct examination by Col. DYER :

69 Q. State your name please ?

A. John W. Bruns.

Q. How long have you lived in St. Charles county, Mr. Bruns ?

A. I have lived all my life except about sixteen years and a half ; I have lived here about forty-seven years.

Q. How old a man are you now ?

A. Pretty well on to sixty.

Q. What, if any, official position do you hold in the county ?

A. Justice of the peace in the township.

Q. In St. Charles township ?

A. Yes sir.

Q. And are you deputy sheriff also ?

A. Yes sir.

Q. Did you know Eli Keen ?

A. I did.

Q. When did you become acquainted with him first, Mr. Bruns ?

A. I became acquainted with him in 1867, in the early spring.

Q. Where ?

A. Down in the prairie—down at his home.

Q. Did you live there for any length of time ?

A. I lived there about eighteen months.

Q. How close to him ?

A. About three hundred yards, probably less.

Q. Were you frequently at his house during the eighteen months you were there ?

A. I was, yes sir.

Q. Did you know Phœbe Keen ?

A. I did.

Q. Did you know these boys, Ellis Keen and Reason Keen ?

A. Yes sir, I did.

Q. And the girls too ?

A. Yes sir.

Q. Well, now in your visits to the house did you see them as well as Keen?

A. I did.

Q. Will you state to the court how they lived there as far as you were able to observe?

A. Well, they lived there just the same as any other family were; they were altogether; mixed up together.

Q. Did you ever see them at the table?

A. I did at one occasion, yes sir; I saw them at dinner one time.

Q. How were they seated at the table?

A. I couldn't just describe how; I know a hired hand and Mr. Keen and several of the children were there and Phœbe, they were all at the table.

Q. What portion of the table did she sit—at the head of the table?

A. Well, that I don't remember; I don't know which they called the head of the table but I know they were all at the table there.

Q. They ate together?

A. Yes sir.

Q. I will get you to state if you know how these children addressed Eli Keen?

A. They called him pa, I think, that's my recollection.

Q. What did they call Phœbe?

A. They called her ma; I have heard them call—I am not positive whether father or pa, but my recollection is they called him pa.

Q. Did you hear the children call him pa?

A. Yes sir.

70 Q. In the presence of Mrs. Keen?

A. Yes, Phœbe, we use to call her.

Q. Did you hear them call her ma in the presence of Eli Keen?

A. Yes sir, I have.

Q. Did you see anything whatever in their conduct towards each other, the manner in which they addressed them, different from any other family, and a mother and children?

A. No sir, I did not; they lived together just the same as any other family.

Q. That was 1867 or 1868?

A. From about the latter part of February or first of March, about that, 1867, up to some time in September, 1868, I think.

Q. Then you left there?

A. Yes sir.

Q. You came where—to St. Charles?

A. I came to town, yes.

Q. Were you down at his place after you moved to town?

A. I have been there since, but only one time I recollect of.

Q. What year was that?

A. About 1869, about a year and a half after that time.

Q. About a year and a half after you left there, did you observe any difference from what it was before?

A. No sir.

Q. The same thing existed then as when you left there?

A. Yes sir.

Cross-examination by Mr. WILSON:

Q. Who did you live with there?

A. I lived with my family; I was on Mr. Kirkpatrick's land.

Q. You were farming?

A. Yes sir.

Q. Did your families visit intimately?

A. I don't know that my wife was ever there, but Aunt Phoebe was at our house frequently; I have been there a number of times.

Q. Did you ever take a meal there?

A. No sir.

Q. Never spent the night with them?

A. No sir.

Q. Didn't spend the evening with them?

A. No sir.

Q. Had no social intercourse between them and your family?

A. No, except I would go there sometimes asking for help and I have worked with one of their hired hands; I know on one occasion I came there at dinner time, in the evening, I went there that day we were cutting some wood over on Park's island in the lake and Keen's hand wanted to help me, we were going to cut there together.

Q. What was his hand's name?

A. His name was Frank, I believe.

Q. Frank what?

A. I don't know; I never knew his name.

Q. White man or negro?

A. White man.

Q. You knew old Phoebe, did you?

A. Yes sir.

Q. She was a negro woman, wasn't she?

A. Yes sir.

Q. Black?

A. Yes sir.

71 Q. All that you saw there was on the one occasion you went there you saw them at the table together—all of them together?

A. Only that one time was the only time I saw them at the table, as far as I recollect of; that's about the only time I was there during meal times.

Q. In 1869 did you go to Keen's house?

A. 1869 or 1870 I did say, a year and a half; it might have been in 1870; 1869 or 1870.

Q. Did you go back to Keen's house then?

A. Yes sir.

Q. You didn't know Keen prior to that time?

A. I didn't know him prior to the time I moved down there, no sir.

Redirect examination by Col. DYER :

Q. You say you saw them only at the table one time ?

A. Yes sir.

Q. The other occasions you saw them together at the house ?

A. I saw them together every time I went there ; if Mr. Keen was at home he was among his family there the same as anyone else.

Q. And the manner in which they addressed one another was the same as the time you saw them at dinner ?

A. Yes sir.

ANNA M. SMITH, being duly sworn, testified as follows :

Direct examination by Col. DYER :

Q. What is your given name, Mrs. Smith ?

A. My name is Anna M. Smith.

Q. Where do you live ?

A. I live in St. Louis.

Q. Who was your father ?

A. Eli Keen ; that was my father's name.

Q. Was he the father of Eli Keen as you understand it ?

A. Yes sir.

Q. Then you and Eli Keen were of kin ?

A. Yes sir.

Q. That made you a half sister of Eli Keen, is that the way it was ?

A. Yes, sir, that's the way it was.

Q. Were you a slave ?

A. I was born belonging to my father.

Q. When were you emancipated ?

A. When he died.

Q. Do you recollect what year that was ?

A. I don't remember what year it was.

Q. Before or after the war ?

A. Oh ! long before the war.

Q. You were emancipated by his will, were you not ?

A. Yes sir, by his will.

Q. You were made a free woman then ?

A. Yes sir, a free girl, I wasn't a woman.

Q. And you are a half sister of Eli Keen ?

A. Yes sir.

72 Q. Did you visit Eli Keen on the place down below here ?

A. Yes sir.

Q. When did you first begin to visit there with him ?

A. Well, I visited so long and so many times I can't tell you ; I visited before the war, when they were in the little old house, and I visited after they built the new house—the old homestead.

Q. How long did you continue to visit them ?

A. All along.

Q. You knew Phoebe, did you ?

A. Yes sir.

Q. Now did you ever stay there at nights ?

A. Yes sir.

Q. Do you know how Eli Keen and Phoebe lived there together ?

A. Lived just as any other man and his wife.

Q. Did they have a separate room at the house ?

A. No sir.

Q. Did they have a room at the house ?

A. They had a room.

Q. I mean a room from the balance of the family—did they occupy that room together ?

A. Yes sir, they occupied that room together.

Q. And occupied the same bed ?

A. Yes sir, occupied the same bed.

Q. You have seen that ?

A. I have seen that.

Q. How often ?

A. It would be hard to tell ; I use- to go up there and stay two or three weeks at a time.

Q. State whether you knew these children ?

A. Yes sir.

Q. You knew them all pretty much ?

A. I knew them all.

Q. State to the court how they were treated there at that house by their father and mother ?

A. They were treated just like any other father and mother would treat children.

Q. How would they address the father, Eli Keen ?

A. Pa.

Q. How would they call their mother ?

A. Ma.

Q. Did they call them that in the presence of Eli Keen ?

A. Yes sir.

Q. And also in the presence of Mrs. Keen ?

A. Yes sir.

Q. Were you ever there when visitors would come in ?

A. Yes sir.

Q. White and colored ?

A. White and colored, yes sir.

Q. State how the visitors generally addressed Mrs. Keen in the presence of Mr. Keen ?

A. Mrs. Keen, or Aunt Phoebe, one or the other ; some would address her as Aunt Phoebe, some of the old settlers, and others would come in and address her as Mrs. Keen.

73

Q. Have you heard her addressed as Mrs. Keen by the visitors and neighbors in the presence of Eli Keen ?

A. Yes sir.

Q. Was there ever any objection made to it by Eli Keen in your presence or these visitors?

A. No sir.

Q. Did you ever have any conversation with reference to these children being his?

A. Yes sir.

Q. What did he say about his wife?

A. He always said they had gone together to remain together and raise the children.

Objection by Mr. Wilson: Eli Keen's statement to her with regard to that is hearsay.

COURT: That was Eli Keen's statement, is it; what he said?

Col. DYER: What Eli Keen said, recognizing this woman as his wife.

COURT: I suppose that's competent.

Mr. MCGINNIS: That's under the general objection.

Col. DYER: Oh! everything is under the general objection.

Q. What did you hear Eli Keen say to her, or tell you about her.

A. He frequently told me, him and her would live together as long as they lived, and she had helped him make the property, and worked as hard as ever he worked for it, and he intended to take care of the children and school them; of course I went there as a visitor.

Q. Do you know whether he did send the children to school?

A. Yes sir.

Q. Did he as far as you know always recognize these children as his?

A. Yes sir.

Q. Did he seem to take interest in them?

A. Yes sir, he did; just the same interest any other father would take in his children.

Q. Did he seem to take the same interest in Phoebe that a husband would take of a wife?

A. Yes sir.

Cross-examination by Mr. WILSON:

Q. When did you first know Eli Keen and Phoebe?

A. I knew Eli Keen ever since I knew myself; I remember him just as long as I remember myself; I can't tell you just how long, and I am going on sixty-five years old.

Q. How long did you remember Phoebe?

A. Well, not quite so long; I remember her ever since I was twelve years old.

Q. Do you remember Phoebe—you remember she was bought by Eli Keen, do you not, at the sale of his father's estate?

- A. I don't know anything about that.
- Q. Did you know Phoebe before old man Eli Keen's death?
- A. Yes sir.
- Q. She was a slave of Eli Keen's father, wasn't she?
- A. Yes sir.
- Q. Owned by him?
- A. Yes sir.
- Q. And after his death she went to Eli Keen?
- A. She went there to live, yes sir.
- 74 Q. She was a slave when you knew her before the war?
- A. Yes sir.
- Q. Now these relations between Eli Keen and Phoebe Keen began long before the war, didn't they?
- A. Well, yes, I guess it did.
- Q. Do you remember the date of old man Eli Keen's death, the father of this Eli Keen that you are talking about?
- A. I can't remember the date of his death.
- Q. Wasn't it in 1850?
- A. I guess it was along there, I won't say positive.
- Q. Did you know them at the time, or about the time, when this first child, Ellis Keen, was born?
- A. I went over a very short time after he was born, and he was a young baby when I was there.
- Q. That was some fifty years ago, was it?
- A. Yes sir.
- Q. How old were you when you went there then?
- A. Well, now I can't just tell you because I didn't keep these things in my mind; I couldn't just tell you how old I was exactly, but I was getting along quite in years, as much as seventeen or eighteen years old I suppose.
- Q. How old were you when you was emancipated?
- A. I was going on fourteen years old.
- Q. You was emancipated by the will of old Eli Keen, Sr., were you?
- A. Yes sir.
- Q. Where did you live after you were emancipated; when you were first emancipated, where did you live?
- A. I lived in St. Louis.
- Q. You continued to live down there all the time?
- A. Yes sir.
- Q. You still make that your home, do you?
- A. Yes sir, still make it my home.
- Q. Do you remember when Eli Keen and old Phoebe separated and discontinued their relations?
- A. I don't know so much about that; I know Aunt Phoebe moved up here to St. Charles, and I didn't know they had separated; I never did know they separated, but I knew when she moved up to St. Charles.
- Q. Do you know what time that was?

- A. No, I didn't pay any attention to it.
- Q. Well, at the time you went there when Ellis was a baby, Phoebe was a slave, wasn't she, there in Mr. Keen's charge?
- A. She was there; he didn't tell me she was a slave; no, he didn't tell me she was a slave.
- Q. You knew she was a slave held by his father before that?
- A. I knew that, yes.
- Q. Phoebe was a negro woman, a colored woman?
- A. She was a colored woman.
- Q. Pretty black too, wasn't she; was her color distinct?
- A. She was a colored woman.
- Q. Your mother was a colored woman, wasn't she?
- A. Yes sir.
- Q. Your mother was a slave owned by old man Eli Keen, Sr.?
- A. She was.

75 ELLIS KEEN, being re-called, testified as follows:

Direct examination by Mr. McDEARMON:

- Q. What was that erroneous statement you made in regard to possession?
- A. I taken possession of the place I am living on, I believe I said 1882, and it was 1892.
- Q. In 1892 instead of 1882 you took possession down there?
- A. Yes sir.

ANNA M. SMITH, being re-called, testified as follows:

Direct examination by Col. DYER:

- Q. You and your mother were emancipated by the will of your father, Eli Keen?
- A. Yes sir.
- Q. Now, Phoebe was also in the family of old man Keen, your father, was she?
- A. Yes sir.
- Q. After the death of him she went to live with Eli Keen?
- A. Yes sir.
- Q. You know nothing about the terms upon which she went there?
- A. No sir, I don't know anything about the terms.
- Q. You say you were there shortly after Ellis was born?
- A. Yes sir.
- Q. Were you there when the other children were born?
- A. No sir, I wasn't there when any of them were born; I saw pretty much of all of them when they were babies.
- Q. Did you see Mr. Keen there after this child was born—Ellis?
- A. Yes sir, he was there all the time.

Q. How shortly after he was born before you saw him?

A. I guess he was nine months or a year old.

Q. Were you there shortly after the birth of any of the other children?

A. Yes sir, I was there when they were babies.

Q. How did he treat them when they were babies?

A. He treated them like any other man treated his children; he would nurse them and talk with them and play with them and sleep with them.

Q. You could see no difference between the treatment of him to these children and the treatment of any father to his children?

A. No sir.

Q. And that continued as long as you visited there?

A. Yes sir.

Cross-examination by Mr. WILSON :

Q. Well, do you remember what children Phoebe had at the time old man Eli Keen died?

A. When he died?

Q. Yes, before she went there to Eli's?

A. I don't think she had but one, and that was Martha.

Q. That was a child named Martha?

A. Yes sir.

76 Q. She had that child when she went there to Eli Keen?

A. Yes sir.

Q. What was she called; was she called Poke?

A. Some of them did call her Poke as a nickname.

Q. Old Phoebe was called Poke in the family?

A. Well, I remember hearing her called Poke, but her name was Phoebe and they called her Phoebe, but I do remember some people called her Polk; I never called her that though because I knew her name was Phoebe.

Redirect examination by Col. DYER :

Q. Do you know how Martha—did she live there at the house too with them after Ellis was born?

A. Yes sir.

Q. Do you know how Mr. Keen called her?

A. He called her Martha.

Q. What did she call him?

A. She called him pa.

Q. State whether or not he sent Martha to school as he did these others?

A. Yes sir, he sent her to school.

Q. She is dead now?

A. Yes sir, she is dead; he treated them just like any other children that I knew.

CORA BROWN, being duly sworn, testified as follows :

Direct examination by Col. DYER :

Q. What is your given name, Mrs. Brown ?

A. Cora.

Q. How old are you ?

A. Thirty-seven.

Q. Thirty-seven ?

A. Yes sir.

Q. Where were you raised ?

A. St. Charles.

Q. St. Charles county ; you have lived here always ?

A. Yes sir.

Q. Are you a daughter of Eli Keen ?

A. That's what they tell me.

Q. Well, were you raised in his family ?

A. Yes sir.

Q. Your mother was named what ?

A. Phœbe.

Q. How long did you stay at the house with the family ?

A. Until I married.

Q. What time were you married, Mrs. Brown, do you recollect ?

A. The year 1885.

Q. Up to that time you lived with the family ; how old were you when you married ?

A. Twenty years old.

Q. Then after that where did you live ?

A. I lived with my husband here in St. Charles.

Q. In the city of St. Charles ?

A. Yes sir.

Q. Were you sent to school ; did you go to school while living with your father ?

A. Yes sir.

Q. Where did you go to school ?

A. At the Keen school house.

Q. Anywhere else ?

A. No sir, I never.

Q. I will get you to state after you grew up to be a good chunk of girl, say fifteen or sixteen years old, you worked about the house with your mother ?

A. Yes sir.

Q. I will get you to state what you called your father ; how you addressed him ?

A. I called him pa.

77 Q. How did you call your mother ?

A. Called her ma.

Q. I will get you to state whether you called them these names all the time as you addressed them ?

A. Yes sir.

- Q. As far back as you can remember ?
- A. Yes sir, as far back as I remember.
- Q. State to the court how you lived there in the house as a family ; how did you live ; did you all live there together ?
- A. Yes sir, we all lived together.
- Q. State how it was at the table ?
- A. We all ate together when it was convenient for us to do so.
- Q. State whether there were visitors at your father's house, white and black, any time ?
- A. Frequently.
- Q. Do you know how your mother was addressed by these visitors ?
- A. Sometimes she was addressed as Aunt Phoebe and others as Mrs. Keen.
- Q. Were these names or address- made in the presence of Eli Keen ?
- A. Often times when he was present.
- Q. And were these conversations had in his presence, and talks to Mrs. Keen in his presence ?
- A. Yes sir.
- Q. State whether it was the older class of people that called her Phoebe or the younger class ?
- A. It was the older class, and those most familiar with her.
- Q. The younger people that visited there——
- A. Called her Mrs. Keen.
- Q. White and black, called her Mrs. Keen ?
- A. Yes sir.
- Q. State Mrs. Brown whether they had a room they occupied together ?
- A. They occupied the same room.
- Q. All the time that you knew them ?
- A. Yes sir, except on special occasions we were crowded and sometimes maybe gave company father's place.
- Q. Are you the youngest child ?
- A. I have a brother younger than I am.
- Q. Who ?
- A. Brother Mark is younger than I am.
- Q. From the time you were a little girl up to the time you left there I will get you to state to the court what the conduct of Eli Keen was towards you—that of a father ?
- A. That of a father.
- Q. Always treated you kindly ?
- A. Always kind.
- Q. Did he ever address you as daughter ?
- A. I don't know ; I don't remember.
- Q. What did he call you generally ?
- A. Called me Cora.
- Q. You always addressed your father—or did you address your father in the presence of visitors at the house as pa ?
- A. Yes sir.

Q. And your mother as ma ?

A. Yes sir.

78 Q. And in the presence of both your ma and pa ?

A. Yes sir.

Q. Was any objection made by Mr. Eli Keen to that ?

A. None that I ever heard of.

Q. None that you ever heard of ?

A. No sir.

Q. Where are you living now, Mrs. Brown ?

A. Monroe street—539 Monroe street.

Q. In this city ?

A. Yes sir.

Cross-examination by Mr. WILSON :

Q. This school you attended was a public school ?

A. Yes sir, both public and private at one or two terms ?

Q. One or two terms; what do you mean by a public and private ?

A. The first two terms as well as I remember, the first of the term was public, and father didn't think it was long enough, so they made it a private school, paid school—paid the teacher.

Q. That was the families of your father—

A. And uncle Frank.

Q. Were any other children going to school there ?

A. Yes sir, others went, but they didn't live in the district; the two districts settled that matter between them.

Q. That was a colored school that was established ?

A. Yes sir.

Q. Your mother was a colored woman ?

A. Yes sir.

Q. Now you say you were married in 1885; what time were you married ?

A. The 13th day of October.

Q. Do you remember when your father and mother separated ?

A. Not exactly, but along in the year between 1882 and 1883, somewhere's along in there.

Q. Somewhere's between 1882 and 1883 ?

A. Somewhere about that ? I am not positive, but along in there they had their little confusion.

Q. They separated, and at the time you were married they had separated ?

A. Yes sir.

Q. The father went away and left your mother and the family there on the place ?

A. Yes sir.

Q. They continued to live on the place ?

A. Yes sir.

Q. How long after that was it before your mother moved to town ?

A. I think about the year 1886 or 1887, I am not positive, its been quite a while.

Q. As I understand you they separated about 1881 or 1882, somewhere's along there ?

A. Or 1883, somewhere's along there, I am not positive.

Q. From 1881 to 1883 ?

A. Yes sir.

Q. You were born about 1865, were you ?

A. Yes sir.

FRANK KEEN, being duly sworn, testified as follows :

79 Direct examination by Col. DYER :

Q. Mr. Keen, how old a man are you ?

A. I am seventy-six.

Q. Seventy-six years of age ?

A. Yes sir, seventy-seven in June.

(By Mr. WILSON :)

Q. You say you are seventy-seven in the coming June ?

A. Yes sir.

Q. You were older than he, were you ?

A. Yes sir, he was seventy-one last January.

Q. Where do you live now, Mr. Keen ?

A. Down here at Orchard farm.

Q. How far did you live from him from 1865 up to the time of his death ?

A. Oh! well, he died in Alton, it's over twenty miles.

Q. He died in Alton, but how long did you live by him when he lived in St. Charles county ?

A. Well, when he lived up in our neighborhood we joined farms.

Q. How many years did you live by him ?

A. Well, I lived there all the time, and he quit sometime in 1880, but I lived there all the time.

Q. You know all these boys and girls, Ellis Keen, and Mathew and Reason Keen ?

A. Yes sir.

Q. How long have you known them ?

A. Every since they were born I guess; I have been here before they were, and I have been here a long time.

Q. You knew them when they were born ?

A. Yes sir.

Q. I will get you to state whether you were frequently at your brother's house ?

A. Yes sir, we went together once in a while, of course.

Q. Did you know Phoebe ?

A. Sure, I knew her too.

Q. I will get you to state whether you were a bout there shortly after the births of each of these children ?

A. I never was far off you know.

Q. You saw them when they were little children ?

A. Yes sir.

Q. And saw them raised up ?

A. I did.

Q. I will get you to state how these children addressed their father; how they called him ?

A. They called him pa.

Q. What did they call their mother ?

A. Called her mother or ma.

Q. How did Phoebe, as we will designate her, and your brother conduct themselves towards each other in your presence ?

A. Well, I don't know; they was all right you know.

Q. They lived there together in the same house, didn't they ?

A. Yes sir, all lived in the same house.

Q. Did these children call her ma and mother, all in the presence of each of them ?

A. Yes sir.

Q. Did you see any difference in the conduct of that family from any other ordinary family ?

A. No sir; no sir, I didn't see any difference at all.

80 Objection by Mr. Wilson.

COURT: It would be proper to describe their conduct towards each other.

Q. Do you know whether they had a room there they occupied together as husband and wife ?

A. Well I never was there much in the night you know; I generally visited in the day time, and it was only across the fence and I went home at night; I suppose they did; I suppose they did.

Q. Have you eaten meals with them at the house ?

A. Oh! yes, lots of times.

Q. With these children and the mother and father ?

A. All together I have eaten with them.

Q. Did you eat at the same table with them ?

A. Yes sir.

Q. Mrs. Keen would sit at the head of the table would she ?

A. Sometimes.

Q. And Mr. Keen at the other end of the table ?

A. Well, not particular all the time—generally sat down most any way; they wasn't so particular about it.

Q. And the children ate together, with their mother and father ?

A. Yes sir, as many as could get at the table.

Cross-examination by Mr. WILSON :

Q. How long have you known Phoebe ?

A. Well, I guess I knew her a long time; it must have been in 1847 in Kentucky, in that time.

- Q. Phoebe was a slave that belonged to your father, wasn't she?
 A. Oh! sure, yes, sir.
 Q. She was a negro woman, wasn't she?
 A. Yes sir, was colored, yes.
 Q. When did your father die?
 A. He died in January, 1850.
 Q. Do you remember the sale of his slaves, when it took place; the sale of his personal property?
 A. I was there, but I might not remember everything, but I was there at the same.
 Q. Eli Keen bought Phoebe at that sale, didn't he?
 A. Yes sir, he did.
 Q. Did she have a child?
 A. Yes sir.
 Q. What was that child's name?
 A. Well, that's this Martha you are talking about.
 Q. How old was she at the time of that sale?
 A. I couldn't recollect now; she was a small girl.
 Q. A child about three years old, wasn't she?
 A. I guess she was about that; I don't know.
 Q. Eli bought Phoebe and the child both at that sale, didn't he?
 A. Yes sir.
 Q. Now these relations between Eli Keen and Phoebe Keen began while she was there as his slave, didn't they?
 A. Oh! I suppose it did; it was in slave time you know.
 Q. It was in 1850 when he bought her, wasn't it?
 81 A. 1850, in June, he bought her; that's when the sale was.
 Q. Now then, Mr. Keen, when did your brother Eli leave—separate from that family?
 A. He quit farming sometime in 1880, and I couldn't tell you exactly the year, 1881 or 1882, somewhere's along that way he quit farming.
 Q. He ceased to live there with them about 1881 or 1882?
 A. He kept a room; he had a room there until his death; he always reserved a room for himself.
 Q. When he made the deed he reserved the right to the use of the room—when he made the deed to that property?
 A. That's what he always said; he had a room, and he always had some things there, you know papers and things, for a good while.
 Q. Now do you know when he went down in the Point?
 A. Well, I don't recollect exactly, but after he quit there he commenced working down in the Point somewhere's about that time.
 Q. Do you remember when your brother was married to Mrs. Keen here?
 A. I don't know nothing about that; nothing about it; the first time I seen her was in 1884 at the fair, I suppose that's the time he must have got married and come right on; I don't know, but I met

them at the fair, and that's the first time I seen them together until she come here this time in his sickness.

Q. Well, now in 1884 where did you meet them?

A. At the fair in St. Louis.

Q. Did your brother Eli introduce her to you as his wife?

A. We talked together a little and she was with him and he says to me, "they say this is my wife;" that is, "they say this is my wife;" I suppose it was his way of talking you know; he says, "they say this is my wife;" now I supposed it was.

Q. You had some conversation with Mr. and Mrs. Keen?

A. A little bit; we wasn't together long; it was getting late and was cloudy and we went up on the streets you know and wasn't together very long.

Q. That was after he had left there?

A. He had quit business there; he would come backwards and forwards of course, but he had quit business, quit farming; left his business on the farm and quit off speculating in buying land and the like of that.

Q. When did Phoebe move to town?

A. I recollect when she moved but I swear I couldn't tell you.

Q. About when, Mr. Keen?

A. I don't recollect; I couldn't study it up; Mr. Wagoner was living on the place; he could tell you; he will be here after while; it was sometime in May anyhow, but I couldn't tell you exactly the year; I didn't take any particular account of it.

Q. Now when did Phoebe die?

A. Well, its been about six years ago now.

Q. She died here in St. Charles, didn't she?

82 A. Yes sir, I was at the funeral; she died right up on the hill here at the Brown's.

Col. DYER: I next offer in evidence the record, showing conveyance to Phoebe Keen of the home place down here in 1883; there ain't any controversy about that; that is to show in 1883 Eli Keen conveyed to Phoebe Keen during life this piece of land described in this will as willed to these children.

Mr. WILSON: I take it that testimony is entirely incompetent; I don't see what it has to do with the case.

Mr. McDEARMON: To show he was providing for the woman we claim was his wife.

Mr. WILSON: That was made after his marriage to Mrs. Keen.

Mr. McDEARMON: It don't make any difference, your marriage is no more valid than ours if we are right.

COURT: Let it be admitted subject to the objection.

The above deed which is considered in evidence is dated the 21st day of November, 1883, acknowledged the same day, and filed for record December 4th, 1883, and is as follows, to-wit:

“ *Know all men by these presents*, that I, Eli Keen of the county of St. Charles, in the State of Missouri, have this day, for and in consideration of the sum of one dollar to me, the said Eli Keen in hand paid by Phoebe Keen, of the county of St. Charles in the State of Missouri, assigned, transferred, bargained and sold, and by these presents do assign, transfer, bargain and sell, unto the said Phoebe Keen, the following described tracts or parcels of land, situate in the county of St. Charles, in the State of Missouri :

That is to say : My home place, containing one hundred seven 12-100 acres, it being part of the northwest quarter and part of the southwest quarter of section twenty-seven of township forty-eight, range five east, and being the same tract of land I acquired from Ezra Overall, and the same tract of land sold by Samuel S. Watson to Robert McClarin, to which deed reference is herewith had for courses and distances.

Provided, however, that said Phoebe Keen shall enjoy the use, benefit and proceeds of said tracts of land only during her life-time, and after her death and my own death said tract of land shall descend in equal shares to the following named persons, their heirs and assigns, namely, Martha N. Keen, Liddy Keen, Mary Z. Keen, Phoebe A. Keen and Carrie Keen.

And provided further that I reserve to my own use the right of one room in the dwelling house on said farm, it being the same which I now occupy.

To have and to hold the premises hereby conveyed, with all the rights, privileges and appurtenances thereto belonging, or in any wise appertaining, unto the said Phoebe Keen and her said five children above named.

83 In witness whereof I have hereunto subscribed my name and affixed my seal this twenty-first day of November, 1883.

ELI KEEN. [SEAL.]

STATE OF MISSOURI, }
County of St. Charles, } ss.:

Be it remembered that Eli Keen, who is personally known to the undersigned, notary public, commissioned for a term expiring June 6th, 1885, within and for said county, to be the person whose name is subscribed to the foregoing deed, as a party thereto, this day appeared before me, and acknowledged he executed and delivered the same as his voluntary act and deed, for the uses and purposes therein contained.

Given under my hand and notarsal seal this twenty-first day of November, 1883.

[SEAL.]

GUSTAVE BRUERE,
Notary Public.

(The foregoing deed was filed for record on December 4, 1883, and was recorded in the recorder's office of St. Charles county, Mo., in Book 33, page 376.)

SARAH KEEN, being duly sworn, testified as follows:

Direct examination by Col. DYER :

Q. Mrs. Keen, what is your given name?

A. Sarah Keen.

Q. You are the wife of Mathew Keen?

A. I am.

Q. When were you married to him?

A. In 1887.

Q. Where?

A. In St. Louis.

Q. In 1887?

A. Yes sir.

Q. Did you know Eli Keen before you married your husband?

A. I did.

Q. Where did you meet him?

A. I met him in 1884 here in St. Charles. His son Matthew introduced him to my—my husband now.

Q. Where did you meet him in St. Charles?

A. I met him down here on Main street.

Q. How were you introduced to him by Matthew Keen?

A. "My father Mr. Keen."

Q. What did Mr. Keen say to you?

A. He received the introduction.

Q. What did he say, if anything about Matthew being his son?

A. Yes sir, he was talking; he was talking about his girls and boys, both.

84 Q. What did he say about them, and name them, if he did?

A. I was going down to his house, and so his son met me at a lady's house—she and her daughters were—

Objection by Mr. Wilson: We object to this testimony for this reason, it's clearly incompetent; this occurred after the separation between Keen and old Phoebe according to all the testimony shown here—the meeting and being introduced; I can't see the relevancy of this.

COURT: It's on the same basis as the other testimony—the fact of the recognition he gave them as children and so forth.

MR. WILSON: He acknowledges that in his will.

COURT: It seems to me that's the most solemn and earnest recognition that could be.

Q. Did you go down to his place before you were married?

A. Yes sir.

Q. Did you see your husband's mother?

A. I did.

Q. Where did you see her?

A. At her house.

Q. Was Mr. Eli Keen present?

A. I went down with him.

Q. You went down with him?

A. Yes sir.

Q. Had you ever seen Mrs. Keen before?

A. No sir, I hadn't seen any of them before.

Q. What did Mr. Keen say there in your presence to Mrs. Keen or Aunt Phoebe as we call her?

A. We got out of the wagon and he had taken me to the house and Mrs. Keen, his wife, met us at the door, and when we got to the door he says, "Miss Sexton, here is my wife, Mrs. Keen," and then she taken us on in.

Q. And your name was before you was married what?

A. Sexton.

Q. Mr. Keen introduced you to her how?

A. As his wife, Mrs. Keen.

Q. How long did you remain there that time?

A. I remained there a couple of days.

Q. Did you observe at that time you were there how they lived together?

A. I did.

Q. State to the court whether they occupied at the time the same room at the house as far as you could see?

A. I couldn't say they slept in the same room because I never seen them, only what their daughters told me they were cleaning up.

Q. Well, at the table, did you meet at the table?

A. Yes sir, we did.

Q. I will get you to state whether your mother—or your husband's mother sat at the same table with Mr. Keen?

A. She did; we all sat at the same table.

Q. I will get you to state how the children addressed Mr. Keen; how did they call him?

A. All called him pa and ma.

Q. Called him pa and the mother ma?

A. Yes sir.

Q. Was that in the presence of each other?

A. Yes sir.

85 Q. What time was that do you say, Mrs. Keen?

A. That was in 1884.

Q. Do you recollect what month of the year it was?

A. Yes sir, it was in August.

Q. What time were you married?

A. I was married in 1887.

Q. In 1887?

A. Yes sir.

Q. Were you out at that place any time after your visit in 1884?

A. Yes sir.

Q. Before Mr. Keen left there?

A. No, he wasn't there at the time I was there.

Q. Do you know what time Mrs. Keen came to St. Charles to live ; that is from your own knowledge ?

A. Well, I don't remember the time, but it was after we were married.

Q. It was after you were married ?

A. Yes sir.

Q. But the time you don't recollect ?

A. No sir.

Q. You were married in 1887 ; up to that time she lived there on the place ?

A. Yes sir.

Q. Did you observe any difference in the way that family was conducted, of husband and wife and children, from any other family you had ever visited ?

A. No, they always treated them the same as my mother and father treated me ; I never saw any difference.

Q. Saw no difference ?

A. No sir.

Cross-examination by Mr. WILSON :

Q. You say that was in 1884 ?

A. Yes sir, it was in 1884 when I first met them.

Mrs. LOUISA DRAYMAN, being duly sworn, testified as follows :

Direct examination by Col. DYER :

Q. What is your full name, Mrs. Drayman ?

A. Louisa Drayman.

Q. How long have you lived in St. Charles county ?

A. I was born and raised here ?

Q. You are of German descent ?

A. Yes sir.

Q. Your father and mother were Germans ?

A. Yes sir.

Q. When were you married, Mrs. Drayman ?

A. I was married thirty-eight years ago.

Q. What was your father's name ?

A. My father's name was Frank Luberic.

Q. Whereabouts have you lived since your marriage ?

A. Right down there in the prairie at Orchard farm was my first place—the old Park place.

Q. You know the place Eli Keen lived ?

A. Yes sir.

86 Q. How far was that place from the place you and your husband went to live ?

A. That wasn't very far ; about half a mile, I guess not that and I lived closer than that—in talking distance.

- Q. For how many years did you live neighbor to Eli Keen ?
- A. Ever since I was down there.
- Q. How long has that been, Mrs. Drayman ?
- A. That's been thirty-eight years past.
- Q. You lived close neighbors to him all the time ?
- A. Yes sir.
- Q. Did you know Phoebe ?
- A. Yes sir.
- Q. Do you know these children that were raised there ?
- A. Yes sir.
- Q. Did you see them during their raising ?
- A. Yes sir, I seen them all the time.
- Q. Did you visit at the house ?
- A. Very often.
- Q. I will get you to state whether you know how these children addressed their father ?
- A. Father and mother ; pa and ma.
- Q. Pa and ma ?
- A. Yes sir.
- Q. Did they always do that in your presence ?
- A. Always pa and ma in my presence.
- Q. Was Mr. Keen there and Phoebe at the time they thus addressed them ?
- A. Yes sir.
- Q. Did you ever take meals there ?
- A. Yes sir, I have took a couple of meals there already.
- Q. I will get you to state whether the family was seated at the table together ?
- A. When I took meals it was in the afternoon at lunch time, you know.
- Q. Oh ! at lunch time ; do you know of your own knowledge how Mr. Keen lived there with Mrs. Keen—with Phoebe ?
- A. I suppose like man and wife.
- Q. Did they have a room there they occupied themselves ?
- A. In the new brick house they told me th at was the old lady's room, and the old man was in there too.
- Q. The old house ; do you know anything about that ?
- A. The old house ; I don't know much about it ; they built shortly after I come there.
- Q. I will get you to state if you ever had any talk with Mr. Keen himself about his wife, Phoebe ?
- A. I never talked to him about it only that time they had a little family trouble, and she come and wanted my husband to take her to town, and he come and said he could take care of her—that was his family.
- Q. That was his family ?
- A. Yes sir.
- Q. Do you recollect what his language was ?

A. Well, we was living at Orchard farm then yet ; that's been I guess about twenty-five years ago.

Q. He said that was his family ?

A. That was his family.

Q. How did he address Mrs Keen, Phoebe, when he spoke to her ; what did he call her ?

A. He always called her Phoebe in my presence.

Q. What did she call him ?

A. She called him Eli.

Q. You never heard her address him otherwise than as Eli ?

A. I always heard her call him Eli and he called her Phoebe.

87 Q. And he called her Phoebe ?

A. Called her Phoebe.

Cross-examination by Mr. WILSON :

Q. You say about twenty-five years ago she came there and wanted to leave ?

A. I don't know whether just twenty-five years or not ; we was living at Orchard farm yet ; we have been married thirty-eight years.

Q. Do you know when Eli Keen left those people down there and went away ?

A. No sir, I don't know what year that was or when ; I don't know when he went away.

Q. You don't mean to say Eli Keen has been living there with those people thirty-eight years, ever since you knew him ?

A. Only when he went away ; he was living with them that time, yes.

Q. It's been twenty-two years since he went away, hasn't it ?

A. It might be, I don't know, I never kept count of it ?

Q. You have lived there thirty-eight years ?

A. Yes sir.

Q. You were there in 1864 ?

A. I got married down there, yes sir, the time Mr. Parks was renting the place.

Q. When did you marry, what year ?

A. I don't know ; my husband, I guess he knows.

Q. Was it in 1864 ?

A. Pa how long is that ? He knows it, how long it was.

Q. That would be thirty-eight years ago ?

A. Thirty-eight years I have been down there.

Q. Now then from the time that you saw them about 1864, when you went there, they were there together until Keen left, and you don't remember just when that was ?

A. I don't remember when he left.

Q. That's been a good many years ago though, hasn't it ?

A. I suppose it has ; I believe she lived in town here about sixteen years, I don't know.

Q. Lived in town about sixteen years, and she lived down there on the farm some years after Eli Keen had left them.

A. She lived there but I don't know how long she lived there.

Q. Didn't she live there sometime after Eli Keen left her?

A. Yes sir, she lived there.

BARNARD DRAYMAN, being duly sworn, testified as follows :

Direct examination by Col. DYER :

Q. What is your given name, Mr. Drayman?

A. Bernard Drayman.

Q. How old a man are you?

A. Sixty-three—I will be sixty-four this fall.

88 Q. How long have you lived in St. Charles county?

A. I have lived in St. Charles county about fifty-one years.

Q. Where were you born?

A. In Germany.

Q. Did you come from Germany to this country when you were a child?

A. Yes sir, I was under age; I was eleven years old when I come away from there.

Q. Come with your father and mother?

A. Yes sir.

Q. And they came directly to St. Charles county?

A. Come right here to St. Charles.

Q. Do you recollect what year you were married Mr. Drayman?

A. I think that was in 1863; somewhere along there.

Q. 1863 or somewhere about that?

A. Yes sir.

Q. After you were married whereabouts did you live?

A. Lived down the prairie all the time.

Q. How close to Eli Keen did you live?

A. The county road — between us and the house; I suppose we were about two hundred and fifty yards apart.

Q. How long did you live there with him so close as that?

A. About three or four years.

Q. Then where did you live?

A. Then I moved to a place about a mile away from there that belonged to Mr. Parks; he is dead.

Q. You lived there how long?

— I lived there some eight or ten years.

Q. Were you frequently a visitor at Keen's house, say from 1865 up to 1884?

A. Yes sir, off and on I went to his house, and he come to our house every Sunday—pretty near every Sunday.

Q. Did you know his wife Phoebe?

A. Yes sir, I knew her.

Q. Do you know these children?

A. All of them, yes sir; all that eight; I know them; them that's dead I don't know.

Q. But these boys, you know Ellis Keen?

A. Yes sir.

Q. And Reason?

A. Yes sir.

Q. And Mathew?

A. Yes sir.

Q. And Mark?

A. Yes sir.

Q. And you know Mrs. Phillips?

A. Yes sir.

Q. And Mrs. Wise and Mrs. Brown?

A. Yes sir, four boys and four girls.

Q. You know them all?

A. I know them all; I knew them better then than now; they grew out of my sight somehow; I hardly know them now when I see them.

Q. You knew them when they were little fellows and as they grew up?

A. Yes sir.

Q. They worked there about the place did they—on Keen's farm?

A. Yes sir, whenever he wanted them to work he called them out and they worked.

Q. In being about the house, did you see the children
89 about the house?

A. Yes sir, seen them about the house, in the yard and everywhere; every day while I lived there I seen some of them.

Q. Did you ever hear them talk to Eli Keen,—the children?

A. Yes sir.

Q. And to the mother?

A. Yes sir.

Q. What would they call the father?

A. Pa.

Q. And their mother?

A. Ma.

Q. Did they call them ma and pa in the presence of Mr. Keen and Phoebe?

A. They was in the yard sometimes together and they would call them right in the presence of all of them—that is that was there.

Q. Do you know—have you ever seen them at meals there, at the table?

A. I have.

Q. State whether the whole family sat at the table?

A. No sir, they did not; I was there in butchering time, killing hogs, and some of the children was at the table and Eli himself and she was waiting on the table; Phoebe, I called her, sometimes I called her Mrs. Keen when she came over to our house; at her home I always called her Aunt Phoebe.

Q. Well, did you observe any difference between the conduct of that family with Eli Keen at the head and the conduct of any other family in the neighborhood?

A. I couldn't say that I did; the children had the same privilege as any other children.

Q. And the wife?

A. And the wife, I didn't see any difference.

Q. I will get you to state whether or not you ever were in the room of Eli Keen and his wife while you were there; did you ever go in their sleeping room?

A. I went there one morning on some business and I knocked at the front door at the front of the house and I got no answer, no one come, and I walked around the kitchen way, when I got there, there was a girl in the kitchen kindling fires; I asked where Eli was; she says, "upstairs in their bed room, go upstairs and go to the right to the first door, is their bed room;" I went up there and knocked at the door and they halloed "come in," and I went in, and I seen both of them there resting yet.

Q. Both of them in the same bed?

A. Yes sir, I could tell you exactly the way they were placed if you want to know.

Q. I don't care about that; I don't want to go into the particulars about that; I want you to say whether you saw them in the morning before they had gotten up, occupying the same bed?

A. Yes sir, I did.

Q. Do you recollect what year that was?

A. That must have been somewhere thirty-two years ago—I am not certain about the year, it might be a little different, but it was in that time.

Cross-examination by Mr. WILSON:

Q. Phoebe—old Aunt Phoebe was a negro woman, was she?

A. Yes sir, a colored woman, that's right.

90 Q. You say they lived there as far as you could say just like any other family living together?

A. Yes sir.

Q. The children calling him pa and her ma?

A. Yes sir.

Q. What was the reputation there in the community there; was it a reputation that they were married or not married?

A. Well, I couldn't state that.

Q. What did the people—do you understand the word reputation?

A. The people around there?

Q. Yes.

A. Well, I couldn't say that; I never heard much talk about that.

Q. Didn't you tell me this morning that the reputation in their neighborhood was they wasn't married?

A. Yes sir, that's right.

Q. That was the reputation in the neighborhood, that they were not married ?

A. I don't know about the neighborhood, whether they knew anything about it or not; I didn't know whether they were married or not married.

Q. Did you hear it talked about around the neighborhood any ?

A. I heard it talked about that they were not married.

Q. All the talk you heard was that they were not married ?

A. That's the talk I heard.

Redirect examination by Col. DYER :

Q. That is to say you never heard anybody say the reputation was there had been any preacher said a ceremony, or justice of the peace, that they had been married that way ?

A. That's it, yes sir.

Q. But the general reputation was they were living there as husband and wife ?

A. Yes sir.

Q. Everybody knew it ?

A. Yes sir.

Q. All the difference was they said they had not been married ?

A. Yes sir.

Q. You understood from that, the ceremony had not been performed ?

A. Yes sir.

Q. But the general reputation all over the neighborhood was they were living there as husband and wife ?

A. Yes sir.

Recross-examination by Mr. WILSON :

Q. Wasn't it the reputation they were living there together without being married, Mr. Drayman; wasn't that the reputation among the white people, that they were there and not married; wasn't that the reputation among the white people in that neighborhood ?

A. Well, I told you I couldn't answer that question because I don't know, and I didn't hear anybody else say; they wasn't married, of course, I heard several people say that, that they wasn't married, that they was living there as man and wife.

Q. What was the general understanding among the white people, wasn't it that they were not married ?

A. Why, certainly.

91 Redirect examination by Col. DYER :

Q. You mean by that, by the general reputation——

Objection by Mr. Wilson.

Col. DYER : That's all; stand aside; if we start Wilson any more we will never get done; go on.

MAT. ROBINSON, being duly sworn, testified as follows :

Direct examination by Col. **DYER** :

- Q. What is your name in full?
 A. Mat. Robinson.
 Q. Where do you live?
 A. I live here in town.
 Q. Did you know Eli Keen in his life time?
 A. Yes sir, I did.
 Q. Did you ever live near him?
 A. Yes sir.
 Q. What year did you live near to him?
 A. Well, along in 1855 and all along there.
 Q. 1855?
 A. Yes sir.
 Q. Did you ever see him after 1865?
 A. Yes sir, worked for him.
 Q. What years after 1865 did you work for him?
 A. Well, I worked for him along in 1867 and some part of 1866.
 Q. Did you know these children that have been testifying here; did you know Ellis and Reason and Mathew and Mark?
 A. Yes sir.
 Q. And the girls?
 A. Yes sir, I knew them all.
 Q. You say you worked for him?
 A. Yes sir.
 Q. You worked there at his house?
 A. Yes sir.
 Q. Did you board there while you worked for him?
 A. Yes sir.
 Q. Do you know how he and his wife, Phoebe Keen lived?
 A. Well, they lived the same as any other man and wife as far as I could see.
 Q. You are no kin to them, are you?
 A. Not a bit sir.
 Q. Do you know whether they occupied the same room while you were there?
 A. Yes sir.
 Q. I will get you to state at the table whether this woman and the man sat at the table with these children?
 A. Yes sir, I have ate with them lots of times; all ate at the same table.
 Q. What would they call their father in your presence?
 A. Well, they called him pa.
 Q. What did they call their mother?
 A. Called her ma.
 Q. When both of them were sitting at the table?
 A. Yes sir.

Q. Did you ever hear any objection come from Keen that they called him pa and her ma?

A. No sir.

92 Q. Did you ever have any talk with Keen about these children?

A. No sir, I never had no talk with him about it.

Q. But they lived there together just as man and wife?

A. Yes sir.

Q. How often after 1867 were you there, if at all?

A. I was up there every Sunday or two; stayed there when I wasn't working anywhere else, made that my home part of the time.

Q. About how long; over what period of time did that run,—say from 1867 how many years were you there off and on?

A. Well, I was there most all the time, backwards and forwards, to visit there.

Q. Well, up to what time?

A. Well, up until the time they left the prairie,—until I left the prairie; I believe I left a little before they did.

Q. Did this condition of affairs, as you have described it exist all the time, and every time you was there?

A. Yes sir.

Q. The same thing?

A. Yes sir.

Q. All along?

A. Yes sir, I knew them before they ever moved there; they lived in a little log house on the side of the road.

Q. Before they moved to the new house?

A. Before they moved up to this place at all.

Q. Well, these same relations that you have described as existing when you first knew them, continued to exist as long as you knew them?

A. Yes sir.

Cross-examination by Mr. WILSON:

Q. Mat, you are a colored man, are you?

A. Yes sir.

Q. Now you say you knew Eli Keen in 1855, along about there?

A. Yes sir.

Q. Phoebe Keen was a colored woman, was she?

A. Yes sir.

Q. She was a slave owned by Eli Keen, wasn't she?

A. I don't know anything about that; I know they were living together when I first knew them.

Q. Were you a slave down there?

A. Yes sir.

Q. Prior to 1855?

A. Yes sir.

Q. In 1855 who did you belong to?

A. Goggil, and Joe Alexander.

Q. You didn't know them,—know him, until 1855?

A. No sir.

Q. Now when did you go to town; when did you move up town?

A. Moved to town in 1884.

Q. In 1884; you don't know when Eli Keen separated from the family down there, do you?

A. Well, it was somewhere along in 1883, 1882 or 1883, because he was frequently down at my house; I lived down below there on the Shumack place, and he used to come down there, and I have saw him backwards and forwards down there.

93 Q. Eli Keen left them in 1882 or 1883?

A. Somewheres along there.

Q. Now then the old woman continued to live down there, and the family on the farm for several years, and then moved up to town, did they?

A. Moved to town, yes sir,

Q. Do you know when they moved to town?

A. I don't know exactly; I was living here in town.

Q. It was several years though after Eli Keen had left them?

A. Yes sir.

ANTHONY MILLER, being duly sworn, testified as follows:

Direct examination by Mr. McDEARMON:

Q. What is your name.

A. Anthony Miller.

Q. Where do you live, Mr. Miller?

A. Cape Girardeau, Missouri.

Q. Did you ever live in this county?

A. I have never made it my home; I have visited this county several times,—worked down here.

Q. Did you know Eli Keen?

A. Yes sir, I became acquainted with him in 1872.

Q. In 1872?

A. Yes sir.

Q. Where did you meet him?

A. At his residence, home.

Q. Under what circumstances,—just tell the court now when and how you met him and what occurred between you and him, briefly?

A. Well, in 1872, I was harvesting,—came from my part of the country up here harvesting, and I worked for Mr. Benne out here at Bushit town a while and got through with the crop, that is harvesting, and harvesting wasn't quite done, and I went to St. Louis and stayed there—

Objection by Mr. Wilson.

Q. You need not state where you went; state when you got with Keen?

A. Anyway I got with four or five youngsters and went up by Mr. Keen's late in the evening or just afternoon I would say, being without money, as a good many young fellows would do we stopped at Mr. Keen's to get our meals; an older gentleman was with us and he approached Mr. Keen to get something to eat, and he invited us in,—said we could get something; we went in and taken a chair, and he said wait a few minutes and his wife would be in and fix something for us; we waited probably five or ten minutes; in came a colored lady, and he addressed her as his wife; said to us, "That's my wife," and "Phoebe," he says, "fix something to eat for these men, they want something to eat," so they did,—she did rather,—fixed something to eat.

Q. How long did you stay there on that occasion?

A. We taken our meals there, and he had a little more harvest-
ing to do and we helped that evening and stayed over night
94 until the next morning and evening, so we taken our dinner,
supper and breakfast, and by noon we were done, and after
that I left.

Q. Did all of them sit at the same table?

A. Oh! yes, sir, all of them sat at the same table.

Q. Do you remember how many children he had at that time?

A. Oh! I remember of three; there may have been more, that
was in 1872 probably.

Q. 1872?

A. Yes sir, of course, I didn't take particular notice to everybody
about the house, but the striking incident was him calling this
woman his wife and her being colored.

Q. Did you ever visit the place after that while Mr. Keen lived
there?

A. Yes sir, I come up there in 1873, 1874 and 1875.

Q. Did you see Mr. Keen?

A. Yes sir.

Q. Go in the house?

A. I never went in the house but once after that, in 1874.

Q. Did you see Mrs. Keen,—Phoebe?

A. Yes sir, I saw the same lady he addressed to me as his wife.

Q. Did you see her in his presence?

A. I did, sir.

Q. Did you address Mrs. Keen at all?

A. I did; when I spoke to her the second time, in 1874, as Mrs.
Keen, because I had been introduced to her as Mrs. Keen in the
first place.

Q. Did you address her as Mrs. Keen in the presence of Mr. Keen?

A. Yes sir.

Q. Was anybody else with you on that occasion?

A. There was four others besides me.

Q. I speak of the time you went there in 1874?

A. No sir, there was none with me at that time.

Q. There were four others at the first visit?

A. At the first time, yes sir.

Cross-examination by Mr. WILSON:

Q. What's your name?

A. Anthony Miller.

Q. What's your age?

A. Forty-eight,—will be forty-nine the 14th of December next.

Q. What was your age when you saw Phoebe there?

A. I was nineteen.

Q. You were just out,—you came from Cape Girardeau county you says?

A. Yes sir.

Q. You came up here harvesting?

A. Yes, sir.

Q. You are a colored man, are you?

A. Supposed to be; the surrounding circumstances show me to be.

Q. The record don't show; I want that fact to go in the record; you are a colored man?

A. Yes sir, identified so.

Redirect examination by Col. DYER:

Q. Well, are you kin to the Keens?

A. Not that I know of.

Q. No ways related to them one way or another?

95 A. Only by the race of Adam I suppose.

Q. Only by the race of Adam; we are all kin, I reckon, unless Adam was a darkie, I wouldn't admit the fact, but if he was a white man I would still admit the fact we are of the same race.

(No answer.)

W. C. BROWN, being duly sworn, testified as follows:

Direct examination by Mr. McDEARMON.

Q. Mr. Brown, where do you live now?

A. 539 Monroe and Benton avenue.

Q. In this city?

A. Yes sir, in this city.

Q. You knew Eli Keen, did you?

A. Yes sir.

Q. This lady that testified here a while ago, was your wife, was she?

A. Yes sir.

Q. When were you married?

A. The 13th day of October, 1885.

Q. Where were you married?

A. At St. John's church on Washington street between Basston avenue and Sixth.

Q. How long did you know your wife before you were married?

A. Four or five years.

Q. What was your business at the time you got acquainted with your wife?

A. Well, school teacher.

Q. Did you teach down in the Keen neighborhood?

A. Yes sir, I taught there one term.

Q. Where at; what school house?

A. They call it the Keen school house,—down in the prairie.

Q. Keen school house?

A. Yes sir.

Q. That was the school house located on the old home place?

A. Yes sir, on the corner of the home farm.

Q. You taught there how long?

A. Four months.

Q. Where did you live?

A. I boarded there at Mrs. Keen's.

Q. Boarded at Eli Keen's?

A. Yes sir.

Q. What year was that Mr. Brown?

A. That was 1882 and the term of 1883.

Q. 1882 and 1883?

A. Yes sir.

Q. Was Eli living there then?

A. Yes sir.

Q. Was that your first acquaintance with him?

A. No sir.

Q. You had known him before that, had you?

A. Yes sir.

Q. Did your wife go to school to you?

A. Yes sir.

Q. Well, you lived with the Keen family down there then during the time you were teaching school four months?

A. Yes sir.

Q. State how Eli Keen and Phoebe Keen lived there in that family; what relation they bore to each other, that is how they lived?

A. Well, they lived as any other man and his wife, as far as I could see.

Q. Do you know whether they slept in different apartments or in the same room?

A. Well, the boys and I had the back part of the house and the girls and the old lady and old gentleman had the front part; I don't know how they divided up.

Q. You don't know how they divided that up?

A. No sir, they had different parts of the house.

Q. Were all the children born at that time, when you taught down there,—all that are now living?

A. Yes sir.

Q. How old was your wife about?

A. She must have been seventeen or eighteen years old.

Q. Seventeen or eighteen?

A. Yes, sir.

Q. How did they eat, when they gathered around the table to their meals; did they all sit down or not?

A. Yes sir, all sat down as a general thing; sometimes maybe one would not be there in time, but they all sat down there together.

Q. Who seemed to have charge of the domestic affairs about the house?

A. The old lady always had.

Q. Who was that?

A. Phoebe Keen.

Q. Phoebe Keen?

A. Yes sir.

Q. Well, who was running the farm; who was conducting the farm branch of the business?

A. Reason, I think.

Q. The old man had surrendered to Reason, had he?

A. Yes sir, I think so, I am sure.

Q. Was Ellis living there then?

A. No sir, Ellis was living I think below, on a farm that was some below.

Q. How did the children address Eli Keen and Phoebe Keen when they spoke to them?

A. Ma and pa.

Q. Ma and pa?

A. Yes sir.

Q. Were there any visitors there during the time you lived there Mr. Brown?

A. Yes sir.

Q. White and black?

A. Yes sir, Mr. Hug came there.

Q. Mr. Hug was there while you were there, was he?

A. Yes sir.

Q. Did you hear these children of Eli and Phoebe address each of those two in the presence of strangers at any time?

A. Well, when anybody came along it was all the same.

Q. What did they say?

A. They always called them ma and pa; I never saw any difference; I couldn't tell any difference at all.

Cross-examination by Mr. WILSON:

Q. You went down there in the fall of 1882 and taught school there during the fall and into the winter of 1883; was that the time you were there teaching?

A. Yes sir, I think I started in November.

97 Q. Started in November, 1882, and when did this school run out?

A. Something like the 23rd of February.

Q. February, 1883 ?

A. Yes sir.

Q. During that period you lived in the famly; boarded at Eli Keen's place.

A. Yes sir.

Q. During that time Brown, Mr. Keen was there every meal, wasn't he ?

A. No, he was there most all the time when I was there; sometimes he went down in the Point, but as a general thing he was there, and might be gone a day, or day or two, sometimes.

Q. Isn't it a fact Eli Keen and the old lady separated about 1882 or 1883 ?

A. They separated after I left there; after my school was out.

Q. When did they separate ?

A. I don't know anything about their separating particular, but it was after the spring of 1883.

Q. You were continually running back and forth, wasn't you, visiting your wife ?

A. Yes sir, and I found him there up until 1885.

Q. Do you mean to say he lived with the family until 1885, or you casually saw him ?

A. Sometimes I would go every four or six weeks; I couldn't tell whether he lived there or not, that is when I saw him there.

Q. Don't you know as a proposition of fact he had separated and had gone off and was married in 1883 ?

A. No sir.

Q. You don't know anything about it ?

A. Don't know a thing about it.

Q. You didn't know he had separated from them at all ?

A. No sir.

Q. You never did find out they had separated at all, did you ?

A. Yes sir, I found out afterwards they had separated, but it was after I had married; I didn't know a thing of it until after I married.

Q. You didn't know they separated until after you married ?

A. No sir.

Q. You married when ?

A. 13th of October, 1885.

Q. You didn't know anything about this deed being made to the old lady until after you were married ?

A. I didn't know that until she was here in town; probably five or six years before she died.

Q. Do you know when the old lady moved to town ?

A. I am not sure, but it seems to me it might be 1887, or probably as late as 1888.

Q. At the time you were down there, Reason was running the farm, was he ?

A. Yes sir, when I taught school there, but not when I got married.

Q. Who was running the farm then?

A. I don't know who was running it then; it seems to me a Daugherty had it.

Q. In 1882 or 1883 when you went there Reason was running it and the next year it was rented out to Daugherty or somebody else; Eli Keen never run the farm—didn't run the farm after that?

A. I don't know anything about that.

Q. You don't know anything about that?

A. No sir.

Q. How old are you, Mr. Brown?

A. I was forty-six the last day of April.

Q. You are a man of color, ain't you?

A. I look that way, yes sir.

Col. DYER: We will admit he's a gentleman of color.

Redirect examination by Mr. McDEARMON:

Q. You have been teaching school here in St. Charles, haven't you?

A. Yes sir, since 1880; I come June 9th, 1880.

Recross-examination by Mr. WILSON:

Q. But you have not been teaching school all the time, have you?

A. Up until June, 1897, that was my last term I taught, but I have been substitute since that time.

Q. You are by profession a barber, ain't you, keep a barber shop?

A. Yes sir.

Redirect examination by Col. DYER:

Q. You had nothing to do with the color of your skin, did you, yourself, individually?

A. No sir.

MARK KEEN, being duly sworn, testified as follows:

Direct examination by Col. DYER:

Q. Your name is Mark Keen?

A. Yes sir.

Q. You are the youngest of the family?

A. Yes sir.

Q. How old are you?

A. Thirty-four.

Q. You are the youngest of the boys and the youngest of the girls?

A. Yes sir, youngest of all.

Q. You were born what year?

A. 1868, the 2nd day of the year.

Q. 1868; where were you raised?

A. On the place known as the old homestead; born and raised there.

Q. What was your mother's name?

A. Phoebe.

Q. What was your father's name?

A. Eli.

Q. I will get you to state if you know how the family lived there together while you were a boy and up to the time you were a man?

A. The same as any other family as far as I know of.

Q. Did your father and mother occupy the same room?

A. Yes sir.

Q. As long as you knew them?

A. Yes sir.

Q. They always sat at the same table?

A. Yes sir, and he always advised us in our house to continue the same way.

Q. He advised you that?

A. Yes sir.

99 Q. I will get you to state whether you occupy any of the land Mr. Keen had?

A. I occupy the place he willed to me at the present time.

Q. When did you go on to that piece of land?

A. The spring of 1896.

Q. The spring of 1896?

A. Yes sir.

Q. You are on that land yet?

A. That land I am living on now; I am occupying another piece I have yet.

Q. In 1896 how did you come to go on this piece of land?

A. I married and built a house on the land I live on; my father furnished the lumber and I built the house.

Q. You have lived there ever since?

A. Yes sir.

Q. I will get you to state if your father ever charged you for living on the place?

A. He never charged any rent, but he charged for building the house, \$117.25.

Q. Did you pay it?

A. I paid it and got a receipt for it.

Q. The land you went on, he never made any charge for that?

A. No sir.

Q. Do you know how he did with the other boys, whether he put them on land or not?

A. He did; he put us all on the places we are occupying or ever have occupied.

Q. And you are occupying—you and your brothers are occupying the land that each of you went on before Keen's death?

A. Yes sir.

Q. And those same lands that you have occupied since 1896 were conveyed to you by this will in 1901?

A. Yes sir.

Q. Did you see people come to your father's house while you were living there with your father and mother?

A. Very frequently.

Q. White people and colored people?

A. Very seldom a day passed that someone wasn't there.

Q. Would they come and visit the same as other people visited in the neighborhood?

A. Yes sir.

Q. Take meals at the same table?

A. Yes sir.

Q. White people as well as colored?

A. Yes sir.

Q. I will get you to state if you ever heard your father address your mother, and what he called her?

A. Generally called her Phoebe.

Q. And what did she call him?

A. Eli.

Q. That's the way as long as you remember that they addressed each other?

A. I don't remember them ever addressing each other any other name.

Q. State whether Keen would advise you children how to do and what to do often after you went on your own places?

A. He did until he died.

Q. Did you see him during his last illness?

A. I saw him about two months before he died, was the last time I saw him.

Q. You saw him in Alton?

A. Yes sir, after he moved there and was sick.

Q. Did you talk with him while he was sick?

A. Yes sir.

100 Q. How did you address him when you went in?

A. As pa.

Q. Did he greet you and shake hands with you?

A. Yes sir.

Q. Ask you how you were getting along?

A. Yes sir.

Q. Did you go off to school anywhere, or where were you sent to school?

A. I never attended any school except the school on the old home-
stead.

Q. Who were your teachers ?

A. There were several different ones ; white teachers, and colored teachers, both.

Q. You went to that school then, did you ?

A. Yes sir.

Q. How many children went to the school the same time you did ?

A. Generally all went from our family and Uncle Frank's and other families living around there that wasn't in the school district, but attended the same school ; there was no school in the district they lived ; sometimes the attendance was eighteen or twenty and more than that.

Q. Do you know of you all making bills at the stores and charging things to your father ?

A. I did.

Q. And do you know whether he paid them or not ?

A. Yes sir.

Q. Settled the bills as you made them ?

A. Yes sir.

Q. Do you know of your mother doing that ?

A. Yes sir.

Q. And he settled the bills ?

A. He always did, as far as my recollection.

Q. And during sickness of any of the children did doctors attend you ?

A. Yes sir, Dr. Johnson has been our family doctor as well as I know of ever since Mr. Overall's death, Dr. Overall.

Q. I will get you to state whether Dr. Johnson was there frequently ?

A. Whenever we needed a doctor he was called.

Q. Do you know whether or not Eli Keen paid the doctor's bills ?

A. I don't know who paid them, but I suppose he did.

Objection by Mr. Wilson.

Q. Well, you need not suppose ; you know Johnson well enough to know someone paid him.

A. I know someone paid him.

Cross-examination by Mr. WILSON :

Q. You say you are thirty-four years old ?

A. Yes sir.

Q. Born January, 1863 ?

A. The 2nd day of January, 1868.

Q. Now Eli Keen and Phoebe separated about when, 1882 or 1883 ; when did they separate ?

A. It must have been about 1884 or 1885.

Q. Don't you know they separated in 1883 or prior to 1883 ?

15—188

A. Well, I don't know as I do.

Q. That school that you went to there was a district school, wasn't it?

A. Yes sir—well, it was both.

101 Q. It was a colored school—district school established for colored children?

A. For the purpose of educating colored children.

Q. And you all attended that colored school?

A. It's the only school I ever attended myself.

HENRY WILLIAMS, being duly sworn, testified as follows:

Direct examination by Col. DYER:

Q. Your name is Henry Williams?

A. Yes sir.

Q. Colored man, ain't you?

A. Well, it ain't no use to say anything?

Q. Well, I want to satisfy Mr. Wilson; you are a regular genuine colored man?

A. It's been talked over enough without saying any more.

Q. How long have you lived in this county, Mr. Williams?

A. I have been here about twenty-five or thirty years.

Q. Where were you raised?

A. Johnson county, Missouri.

Q. Johnson county, Missouri?

A. Yes sir.

Q. And you came here after the war?

A. Yes sir.

Q. Are you acquainted with Mr. Cockeral up there in Johnson county?

A. No sir.

Q. Well, did you know Eli Keen?

A. Yes sir.

Q. Did you ever live down there in the point near him?

A. Yes sir, I have been there all the time.

Q. Are you living there now?

A. I am an inmate of the soldiers' home, but I am there on a furlough.

Q. What soldiers' home?

A. Quincy.

Q. Quincy?

A. Yes sir.

Q. You got a furlough and are there now?

A. Yes sir.

Q. Did you visit Eli Keen's home any while he lived there?

A. I have been around the place.

Q. Did you ever see him at his house?

A. Yes sir.

Q. Did you know his wife?

A. No sir.

Q. You didn't know her?

A. Not at all.

Q. Did you ever have any talk with Mr. Keen about his wife, Phoebe?

A. No sir, never had any talk at all.

Q. Never had any talk with him?

A. No sir.

Q. You don't know anything then about how they lived there together?

A. No sir.

Q. Wait a minute; I was under the impression that you knew a great deal more than you do.

A. The only thing I know about it is just like this—

Q. Let's have it; maybe that's just what I want?

A. The only thing I know about Mr. Eli Keen, he asked Mr. Evans that lived down in the point where Mr. Bud Keen lives; if he thought it was any danger of him moving his son Reason

102 down in the point there; that the place up there where Mr. Reason was living; that he deeded that to his wife and that he would have to pay rent, and he would put him on that place where he wouldn't have to pay rent; that's all I know about it; he wanted to know if there was any danger of moving Reason down in the point.

Q. Danger of what?

A. Why the bushwhackers; I call them robbers.

Q. Down in the point?

A. Yes sir.

Q. And they thought not?

A. Mr. Evans said he thought not.

Q. And he had deeded his wife a piece of land and if Reason stayed there he would have to pay rent?

A. Yes sir.

Q. And he would move him where he wouldn't have to pay rent?

A. Yes sir.

Q. Where did you have that talk with him?

A. Down at Mr. Joseph Evans' down in the point.

Q. When was that?

A. In 1884.

Q. I am very much obliged to you, I didn't know you knew that much; you belong to the Grand Army?

A. I am one of Uncle Sam's boys; that's the reason I tell them they all look alike to me.

Cross-examination waived.

Dr. JOHNSON being duly sworn, testified as follows :

Direct examination by Col. DYER :

Q. Dr. Johnson did you know Eli Keen ?

A. Yes sir.

Q. I will get you to state whether or not you were ever called to visit Eli Keen or any member of his family ?

A. Yes sir, I was called occasionally to visit the children ; I don't think I was ever called to the house to see him or his wife.

Q. Well, you were called to see the children ?

A. Yes sir.

Q. I will get you to state what year was that, Doctor ; do you recollect ?

A. No sir, I do not ; I came here in 1865 ; Dr. Overall was treating him then, and I went into partnership with Dr. Overall, and in a year or two I think I was called into the family.

Q. I will get you to state whether or not Mr. Keen paid for your services as a physician in visiting his family ?

A. Yes sir, he paid whatever he owed me.

Col. DYER: I think we will close here with the statement there is one witness we spoke to the court about this morning, whose testimony we deem material, cumulative to a certain extent but that sort of cumulation we deem material, and we may submit his testimony later on ; he can't come here on account of smallpox.

103 Mr. WILSON: The understanding was you would prepare a statement.

COURT: Is it of the same character ?

Col. DYER: Only of the fact that later in the time ; I don't know exactly what time,—that he said this woman Phoebe was his wife, but in 1883 or 1884 when he said that.

COURT: Mr. Wilson, do you desire a written statement as to what this witness will swear to ?

Mr. WILSON: Yes, I want a written statement for this reason, if the matter is to be put in the record I want to know what it is, and I don't want any inserted about what that witness will testify to or what we admit as would be his testimony unless they put it in the record ; I want it so there will be no mistake about it.

COURT: Then make a written statement, Col. Dyer.

Col. DYER: We will stop then with that understanding, that we have a right to introduce that statement.

Mr. WILSON: I don't know that we admit the statement ; we may adjourn the matter on the understanding we had this morning that the court would pass on the competency of the testimony and say whether or not the gentlemen are in a position to demand his testimony.

Col. DYER: This is the statement they are kind enough to admit subject to competency and relevancy.

“B. C. FEW of Alton, Illinois, will testify that he is at present

judge of the police court in the city of Alton. That in 1893 he had conversation at the house of Reason Keen in St. Charles county, with Eli Keen, now deceased. That in that conversation Eli Keen said that Reason was his son and that he had several other children, seven or eight in number, and that he had deeded his old homestead some years before to his former wife, the mother of Reason Keen and the other children spoken of."

Mr. WILSON: We make the additional objection to that that that's a statement made by Eli Keen after his marriage to his other wife.

Mr. McDEARMON: Oh! that don't matter.

Mr. WILSON: Well, let me make the objection, we don't expect you to agree to our view of the case and subject to the other general objections.

COURT: Let it be received subject to the objection and also subject to the general objection to the introduction of any testimony of that character, heretofore made.

This was all the evidence introduced by the defendant.

Thereupon the plaintiff, to further sustain the issues on her part, introduced evidence in rebuttal as follows:

Mr. WILSON: We introduce the renunciation of the will of the widow.

COURT: Any objection?

104

Col. DYER: No sir.

The above renunciation is marked Exhibit 4, and is dated March 30, 1901, and filed in the office of the probate court of St. Charles county, on April 1st, 1901. A true copy being as follows, to-wit:

"Know al- men by these presents, that I Sophronia K. Keen, widow of Eli Keen, deceased, do hereby renounce the last will and testament of my said husband, Eli Keen, deceased, dated September 5th, 1900, and filed for probate on the 27th day of February, 1901, and duly probated on the 6th day of March, 1901, in the probate court of the county of St. Charles in the State of Missouri, and duly recorded in Will Record No. 6, at pages 448, 449, 450, 451, 452 and 453 of said probate court of St. Charles county, Missouri, and I do hereby refuse to accept the provisions made for me by said last will and testament.

In witness whereof, I have hereunto set my hand and seal this 30th day of March, A. D., 1901.

SOPHRONIA K. KEEN. [SEAL.]

STATE OF ILLINOIS, }
 County of Madison, } 88:

On this 30th day of March, A. D., 1901, before me personally appeared Sophronia K. Keen, who is to me known to be the same person described in and who executed the foregoing instrument of writing as a party thereto, and acknowledged the same to be her free act and deed for the purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal at my office in the city of Alton, in the county of Madison, and State of Illinois, the day and year last above written.

FRANK FISHER,
Notary Public.

My commission as notary expires Dec. 22d, 1904.

[SEAL.]

STATE OF ILLINOIS, }
Madison County, }^{ss.}

I, Henry Riniker, clerk of the county court and *ex officio* recorder of civil commissions in and for said county, do certify that Frank Fisher is now, and was on the 30th day of March, A. D., 1901, a notary public within and for Madison county, State of Illinois, residing at city of Alton, in said county, and State, duly commissioned and qualified, and that his commission expires Dec. 22nd, 1904, and that full faith and credit is and ought to be given to the official acts as such. I further certify that the foregoing instrument is executed and acknowledged according to the laws of the State of Illinois.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Edwardsville, in said county, this 30th day of March, A. D., 1901.

HENRY RINIKER, Clerk."

105 JAMES P. DAUGHERTY, being duly sworn, testified as follows:

Direct examination by Mr. WILSON:

- Q. Please state your name. Mr. Daugherty?
A. My name is James P. Daugherty.
Q. What is your age?
A. I have passed my seventy-second birthday.
Q. How long have you lived in St. Charles county?
A. Since 1846.
Q. Since 1843?
A. 1846.
Q. 1846?
A. Yes sir.
Q. Were you acquainted with Eli Keen?
A. Yes sir.
Q. How long since your first acquaintance with Eli Keen began?
A. Oh, I couldn't say; shortly after they came here; along about 1850 perhaps or 1848 or 1850, somewhere's along there.
Q. Well, from that time on did you know Eli Keen; from the time of your acquaintance?

A. Well, now there was considerable time I think I was away from here, about five years; and I think Eli Keen was at Pike's peak about five years; I don't know exactly how long he was away from here, quite a while I know.

Q. What period of time was it you were away from here, about what years?

A. I think it was along about 1866, from 1866 on.

Q. From 1866 on?

A. No, wait a minute, because I was gone about five years, and 1869 I was back here again.

Q. Now Mr. Daugherty, whereabouts did you live in the county, say from 1846 up to the time you left here, about 1864 or 1865?

A. Well, my father while I was a boy, lived just down below the Stonebreaker place, below St. Charles, about four miles north.

Q. Was that in the neighborhood of where the Keens lived?

A. No sir, not at that time; after 1869 I was living right in Mr. Keen's neighborhood all the time; twenty years any how right straight along.

Q. Now did you know Phoebe?

A. Yes sir.

Q. She was a negro woman, was she?

A. Yes sir.

Q. Mr. Daugherty, I will ask you to state what was the reputation in the community where Keen lived there as to whether or not he and Phoebe were married.

A. Well, I think the reputation was they were not married; I never heard that they were married; I heard that they were living together; never saw them in the room together by themselves, but they lived in the same house.

Q. Well, what was the reputation in the community, the general reputation, that they were not married or were married?

A. Yes sir, that they were not married, that was their reputation.

106 Q. That they were not married?

A. Yes sir.

Q. You knew them as living down there together before the war, didn't you, Mr. Daugherty?

A. Yes sir.

Q. Did you know whether or not Phoebe was a slave that belonged to Eli Keen?

A. Well, that was always my understanding of it; my understanding was that she was purchased at Eli's father's sale, but I wasn't at the sale, but my understanding was that she belonged to Eli Keen.

Cross-examination by Col. DYER:

Q. In 1865,—after 1865 were you in Eli Keen's house any time before he died?

A. I don't think that I was ever inside of Eli's house but once.

Q. When was that?

A. It was along about 1869 or 1870.

Q. 1869 or 1870, who did you see there then?

A. I saw Eli Keen himself and I saw Phoebe, too.

Q. Did you see any of the children?

A. Oh! I suppose I did; I didn't notice; I went over to see Mr. Keen, it seems to me that he was sick at the time, and I went over to inquire after his health,—I am not positive about that though.

Q. Was he in bed?

A. I think he was, but I could not be positive about that either,—he was in his room, I mean.

Q. The general reputation is there was never any ceremony performed, is that what you understood, of marriage?

A. Yes sir, there was never any ceremony performed.

Q. But the general understanding was they were living there together?

A. Yes sir.

Q. As man and wife?

A. As man and wife, raising a family together.

Q. As man and wife?

A. Yes sir.

Q. But that no ceremony had ever been said?

A. Yes sir.

Q. And that was the general reputation in the neighborhood?

A. I think that was the general impression throughout the neighborhood as well as I know.

Redirect examination by Mr. WILSON:

Q. The general reputation, Mr. Daugherty, was they were living together without marriage, wasn't that the general reputation in the neighborhood?

A. They were simply living together and raising a family of children.

Examination by the COURT:

Q. Was it the general reputation they were living together immorally and illegally, was it or not?

A. Why it was not legal.

Q. Illegally?

A. Yes sir, they were living together illegally as far as I know.

107 Q. You mean to say that was the general reputation in the community?

A. Oh! well, I never heard anybody say that they were married, that they were man and wife.

Redirect examination by Mr. WILSON:

Q. What did you answer the court's question; the general reputation was they were living together illegally?

A. Well, is it legal for a man to live with a woman not married to her?

Col. DYER: That's the question before the court right now; don't ask any harder one.

Q. I asked what your answer to the court was; did you answer the court that the reputation was they were living together illegally; was that your answer to Judge Hughes' question?

A. Yes sir, that was my answer.

Recross-examination by Col. DYER:

Q. That is, that no ceremony had been said?

A. Well, I never heard of them being married or anything of that kind.

Q. Well, that reputation was based on the proposition, was it, that there never had been any ceremony performed between these people; was it that, or that they were living together as husband and wife, but it was illegal because one was a black person and the other a white one; how was that?

A. Well, my understanding of it that Phoebe belonged to Eli Keen and they were living together before the war.

Q. And after the war?

A. They lived together after the war.

Q. The same way?

A. Same way, yes sir.

Q. Kept on living that way as far as you knew?

A. Yes sir.

Redirect examination by Mr. WILSON:

Q. Do you know when Eli Keen left down in that neighborhood?

A. No sir, I couldn't say; I couldn't tell the year.

JOSEPH T. BUSHART, being duly sworn, testified as follows:

Direct examination by Mr. WILSON:

Q. Mr. Bushart where do you live?

A. At present I live here at St. Charles,—near St. Charles.

Q. How old a man are you; what is your age?

A. Sixty-three.

Q. How long have you lived in St. Charles county?

A. Ever since I was born.

Q. Did you know Eli Keen in his life time?

A. Yes sir.

Q. How long since you first became acquainted with Eli Keen?

108 A. Oh! I expect it's been fifty years; I have known him ever since I can recollect, as near as I recollect.

- Q. Did you live down in the neighborhood where Eli Keen lived ?
 A. Well, I lived within I suppose five miles of his place.
 Q. Did you ever work for Eli Keen, or any of that family connected ?
 A. How ?
 Q. Did you know any of the family besides Eli ?
 A. Well, I knew his brother and his sister, Mrs. Mackabee.
 Q. Did you work on the adjoining farm there of Eli Keen back as early as 1855 ?
 A. Well, I worked once in a while on the place where his sister was; on the farm his sister and brother-in-law was living, but I think there was a farm between them, between the Keen farm and this place Mackabee was on.
 Q. Did you know Phoebe ?
 A. No sir, I couldn't say that I did.
 Q. Did you know her by sight ?
 A. Well, I have seen the woman, but if I had met her on the street any other time I couldn't say that I would have known her.
 Q. Mr. Bushart, what was the reputation in the community there where Eli Keen lived as to whether or not they were married, he and Phoebe ?
 A. Well, my understanding was they were living together the same as man and woman, but they had never been married.
 Q. Phoebe was a negro woman, was she ?
 A. Yes sir.
 Q. Well, was that the reputation in the community ?
 A. Well, that seemed to be floating, that or whatever you might call it, as far as I knew of her.

Cross-examination by Col. DYER :

- Q. The general reputation was they were living together as husband as wife but that no ceremony of marriage had ever been said ?
 A. That had always been my understanding.
 Q. And that's all you do understand, ain't it, Mr. Bushart ?
 A. Yes sir.

WILSON KESSLER, being duly sworn, testified as follows :

Direct examination by Mr. WILSON.

- Q. What is your name ?
 A. Wilson Kessler.
 Q. What is your age, Mr. Kessler ?
 A. Sixty-eight.
 Q. How long have you lived in St. Charles county ?
 A. Well, I have lived off and on every since about 1858.
 Q. Did you know Eli Keen ?
 A. Yes sir.

Q. When did your acquaintance,—first acquaintance with Eli Keen begin?

A. Along about 1863.

Q. Did you live down in the neighborhood of where Eli Keen was living?

A. Yes sir, I lived on what was called, when I first got acquainted with Mr. Keen, was on the Kobel farm; Keen lived opposite; Keen lived on the opposite side of the street.

Q. Opposite side of the road?

A. Opposite side of the road.

Q. During what time was that?

A. That was in 1863 and 1865; I lived there in 1865 and moved to Illinois,—was absent six or seven years.

Q. Then where did you go?

A. I went to Illinois,—north of Decatur; I came back here in 1871.

Q. Did you go back down in the country there?

A. No sir, I come up here in St. Charles.

Q. Now what was the reputation in the neighborhood where Keen lived as to whether or not he and Phoebe were married?

A. Well, the impression was there you know that he was living with this colored woman, that was all.

Q. That he was living with a colored woman?

A. Yes sir.

Q. Was the reputation that he was married or not married?

A. The reputation was he wasn't married.

Q. That he wasn't married?

A. Yes sir.

Q. Did you know Phoebe?

A. I had met her several times, but I wasn't acquainted with her; I was acquainted with Mr. Keen.

Q. She was a negro woman, wasn't she?

A. She was a negro woman, yes sir.

Cross-examination by Col. DYER:

Q. The general reputation was they were living together, husband and wife, but were not married; is that true?

A. I don't know whether as husband and wife.

Q. Your understanding was they lived together as husband and wife?

A. They were living together.

Q. That is, cohabiting with each other?

A. Yes sir, of course.

Q. And never had been married?

A. Yes sir, that was my impression.

Q. It's your impression no ceremony was ever said?

A. Yes sir.

Q. But they were living together and had for years in the same building and same house, as if they had been married?

A. Yes sir.

Q. And raising children as if they had been married?

A. Yes sir.

Q. You so understood it?

A. They were called his children, I understood that, yes sir.

Q. And they were called his children and generally recognized as his children in the community?

A. Yes sir.

Q. And the only thing you ever heard said was Keen was living there with this woman raising a lot of children and had not been married to the woman; that's it, isn't it?

A. That's it, yes sir.

110 J. H. PLACKEMEYER, being duly sworn, testified as follows :

Direct examination by Mr. WILSON :

Q. Mr. Plackemeyer, where do you live?

A. Down at Orchard farm.

Q. How long have you lived in that neighborhood?

A. Well, I have lived in that neighborhood since 1846,—I think 1846.

Q. How old are you?

A. I am over seventy-three years old.

Q. Did you know Eli Keen?

A. Yes sir.

Q. How long have you known Eli Keen?

A. Well, I knew him at the time his father moved down on the prairie.

Q. From the time his father moved down in the prairie?

A. Yes sir.

Q. Did you know Phoebe?

A. Yes, I knew her after while, not at that time, I was young.

Q. What was the reputation, Mr. Plackemeyer, in the neighborhood where Eli Keen lived as to whether he and Phoebe were married or not, what was the reputation?

A. Well, I don't know; I tell you I never took much attention to that, no sir, but I attended to my own business and he attended to his'n.

Q. You never heard anything about it?

A. No sir.

Q. Don't know what the reputation was?

A. No sir.

Q. Do you know what the people said in the community generally; what was the general understanding in the community?

A. I will tell you just one thing, I attend to my business and I don't care about other people's business.

Q. Were you at the sale of old Eli Keen's slaves, the old man Eli, the father of Eli?

A. No, I wasn't at the sale; at that time we lived about,—well about two miles, pretty near two miles.

Q. Well, Eli commenced living with this negro woman down here about 1850, didn't he?

Col. DYER: He says he don't know anything about it.

Mr. WILSON: Well, but we will see.

COURT: He may answer.

To which ruling of the court defendant then and there excepted and saved his exceptions.

Q. Do you know, Mr. Plackemeyer, about when Eli commenced living with this negro woman down there?

A. Well, after while he commenced farming; you must talk a little louder, I can't hear good; I can hear a man say something and then I don't know what it means, in one way you must excuse me.

Q. I say didn't Eli Keen and old Phoebe begin living together down there about 1850, do you know?

A. Well, I don't know whether at that time; I bought my place in 1852.

111 Q. Were they living together then?

A. Yes sir.

Q. Well did you hear me when I asked you what the reputation was in the neighborhood as to whether they were married or not?

A. No, I told you I didn't know; sometimes I can't understand; you must excuse me, I can hear what the people say, but I don't know what it means.

Q. Did you hear me then; what was the reputation in the neighborhood down there where Eli Keen lived as to whether or not he was married; what was the reputation among the people; what was the talk?

A. Well, that I don't know hardly; I didn't inquire of other people; I just attend to my own business.

Cross-examination by Col. DYER:

Q. It's about as much as you could do to take care of yourself, wasn't it?

A. Yes sir, you must excuse me, you know other people can hear me and I can't hear the sound of it.

J. H. PLACKEMEYER, being duly sworn, testified as follows:

Direct examination by Mr. WILSON:

Q. Mr. Plackemeyer, what is your name?

A. J. H. Plackemeyer.

Q. What is your age?

A. Forty-eight the 20th of last November.

Q. How long have you lived in St. Charles county ?

A. I was born and raised here.

Q. Did you live down in the neighborhood where Eli Keen lived ?

A. Yes sir.

Q. Did you know Eli Keen ?

A. Yes sir.

Q. How long did you know him ?

A. Well, I knew him as long as I could remember ; lived in about a mile and a half or three quarters.

Q. Did you know Phoebe, the old woman that lived with him ?

A. Yes sir.

Q. She was a negro woman, was she ?

A. Yes sir.

Q. Mr. Plackemeyer, what was the reputation in the neighborhood where Eli and Phoebe lived as to whether or not they were married ?

A. Well, the reputation was that they were not married.

Cross-examination by Col. DYER :

Q. The reputation was that they were living together there as man and wife would live together, but had never been married, that's true, ain't it ?

A. Yes sir, that was the reputation.

Q. It was the understanding in the neighborhood that he was living with her and she was having children by him, ain't that so ?

A. Yes sir.

Q. And they had raised a large family of children ?

A. Yes sir.

112 Q. And the understanding was in the neighborhood that no marriage ceremony had ever been said ?

A. The talk was they wasn't married.

Q. They wasn't married ?

A. Yes sir.

Q. And that was the whole question, but they were living together as if they had been married ?

A. Yes sir.

Q. Just like people that were married ?

A. Yes sir.

Q. That was the understanding, wasn't it, that they were living together just as people that were married lived together, cohabiting together, she bearing him children, ain't that true ?

A. Yes sir, certainly.

Redirect examination by Mr. WILSON :

Q. But it was the reputation they were living together that way without being married ?

A. Yes sir.

Col. DYER : Of course, we ain't making any point on that.

WILLIAM SCHNEDLER, being duly sworn, testified as follows :

Direct examination by Mr. WILSON :

Q. Mr. Schnedler, what is your name ?

A. William Schnedler.

Q. How old are you ?

A. Sixty-one.

Q. How long have you lived in St. Charles county ?

A. Ever since I have been in this country, about forty-three years, I guess ; forty-three or forty-five years, I don't know exactly.

Q. Whereabouts ; what portion of the county did you live in ?

A. Down in the point.

Q. Did you know Eli Keen ?

A. Yes sir.

Q. How far did you live from Eli Keen ?

A. We joined together.

Q. Adjoining farms ?

A. Yes sir.

Q. How long have you lived down there in the neighborhood of Eli Keen's place ?

A. Well, over forty years.

Q. Now, Mr. Schnedler, did you know Phoebe ?

A. Yes sir.

Q. She was a negro woman, was she ?

A. Yes sir.

Q. What was the reputation, Mr. Schnedler, in the neighborhood with reference to whether or not Eli Keen and Phoebe were married ?

A. Well, I don't know nothing about it, but they always said they was not married ; that was the talk all around.

Cross-examination by Col. DYER :

Q. The general understanding was there never had been any preacher marry them, is that it ?

A. Well, I don't know.

Q. Said they wasn't married ?

A. Yes sir.

113 Q. But the reputation was he was living with her as if they were married ?

A. He lived with her, yes sir.

Q. And she was bearing him children ?

A. Yes sir.

Q. And they were raising a family of children ?

A. Yes sir.

Q. And the reputation in the neighborhood was they never had been married,—that is no ceremony had ever been said ?

A. Well, I don't know about that.

Q. But they said they never had been married ?

A. Yes sir.

Q. But still they were living together like they had been married?

A. It looked like it.

PETER BUSHART, being duly sworn, testified as follows :

Direct examination by Mr. WILSON :

Q. What is your name ?

A. Peter Bushart.

Q. What is your age, Mr. Bushart ?

A. Sixty-nine.

Q. How long have you lived in St. Charles county ?

A. Lived all my life here,—raised here.

Q. Born and raised in this county ?

A. Yes sir.

Q. Did you know Eli Keen ?

A. I did.

Q. Did you live down in the neighborhood of Eli Keen ?

A. Yes sir.

Q. How long ?

A. Well, I think we went in 1842 or 1843; either in 1842 or 1843, I know we was down there at the 1844 flood.

Q. And lived there continuously ?

A. Yes sir, until 1895.

Q. Until 1895 ?

A. Yes sir.

Q. Did you know Phoebe,—this woman Eli Keen lived with ?

A. No sir, I might have seen her.

Q. What was the reputation in the community, Mr. Bushart, as to whether or not Eli Keen and Phoebe were married ?

A. Well, I couldn't say as I heard any men discuss that at all; I heard some young men talk about it that they were not, but I don't know whether responsible men.

Q. All the talk you heard was they were not ?

A. That they were not.

Cross-examination by Col. DYER :

Q. Mr. Bushart, you understood all the time that Eli Keen and this woman were living together there as husband and wife, didn't you ?

A. That's what I understood.

Q. But that there never had been any ceremony said, ain't that what you said ?

A. I never heard anything about that at all.

Q. Never heard anything about it ?

A. No sir.

Redirect examination by Mr. WILSON:

Q. You understood Eli Keen was living with a negro woman down there, didn't you?

114 A. I understood that by some young men, not by responsible men, they were talking about it.

J. K. GOLICKY, being duly sworn, testified as follows:

Direct examination by Mr. WILSON:

Q. Mr. Golicky, did you know Eli Keen?

A. Yes sir.

Q. How long?

A. Since the fall of 1879.

(By Col. DYER:)

Q. Since what?

A. The fall of 1879.

Q. Did you ever have any conversation with Eli Keen concerning his marriage or his not being married?

A. Yes sir, on several occasions.

Q. Well, when?

A. Why I talked to him, he talked to me about it in 1893.

Q. 1883 or 1893 you mean?

A. 1883, the fall of 1883, and then he talked to me about it again in 1888; in 1883 and 1888.

Q. Well state what he said to you?

A. Why, he gave me an introduction to his wife, this woman, in 1884 I think, as well as I recollect, at the ferry landing,—any how at the old ferry landing at the river, and he talked to me and said he had never been married until he got married in 1883.

Cross-examination by Col. DYER:

Q. He told you that in 1884, that he had not been married until he got married in 1883?

A. Yes sir.

Q. And you never was at his house?

A. I have been at Mr. Keen's house dozens of times, and spent hours and hours with him, talking.

Q. Over what years?

A. From 1879 on up.

Q. 1879 up; where was he living then?

A. Why I wasn't at his place in 1879 but I was at his place after he came down to the point, and he stopped at my place several times going back and forth, is where I got acquainted with him in 1879 or 1880, and from that up to 1887.

Q. Did you ever visit at his house?

A. Yes sir.

17—188

Q. Eat dinner there?

A. That was after he moved down below; I never was at his place up there; I was at his place, but that was here about four years ago; he took me up there.

Q. Were you ever at his place and seen these children there?

A. No sir.

Q. Nor you never saw his wife, his so-called Phoebe, did you?

A. No sir, I never saw her.

Redirect examination by Mr. WILSON:

Q. Well, he told you he had never been married until 1883?

A. Until 1883, and he introduced me to this woman sitting here now as his wife and he had me take him over some potatoes and onions and such things.

Mr. McDEARMON: We don't care about that onion business.
115 Col. DYER: Yes, we do, I want to know whether they were good or bad.

A. You will have to ask Mr. Keen whether they were good or bad, I don't know.

That was all the evidence introduced in the case.

The cause was then submitted to the court on the application of the parties for a finding of facts under the statute in such case made and provided, and the court took the same under advisement.

That thereupon, to-wit: on the 30th day of April, 1902, and during the same term of the court, to-wit, the March term, 1902, of said court, the court made and delivered in writing the following findings of facts and law, to-wit:

SOPHRONIA K. KEEN, Plaintiff,	}	Ejectment.
vs.		
ELLIS KEEN, Defendant.		

The court finds the facts to be as follows in this case:

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 county about that time. The woman, Phoebe, was a negro woman, and with a child, Martha, was held and owned as a slave by the father of said Eli Keen.

On June 1st, 1850, at the administrator's sale of his father's personal estate and slaves, Eli Keen became the purchaser of the negro woman, Phoebe and her child, Martha, and thereby became the owner of them and held them as slaves. Sometime after he became the owner of Phoebe, 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 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 Phoebe, the negro woman, in 1850 or 1851, he lived in his own home, on his own farm, and Phoebe lived in the same house with him and did the house-keeping. 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 Phoebe, Eli Keen sitting at one end of the table and Phoebe at the other. The children called Eli Keen "pa" and Phoebe "ma," and this was done in the presence of Eli Keen and Phoebe without protest or objection from either of them. Eli Keen called the woman Phoebe and she called him Eli. Eli Keen and Phoebe 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 Phoebe sent their children to this school and for two terms after this school was 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.

Phoebe 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 Phoebe to several different persons as his wife. To several persons, after his marriage to the plaintiff, Sophronia K. Keen, Eli Keen spoke of Phoebe Keen as his wife. So far as the evidence showed Eli Keen was never seen out with Phoebe 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 Phoebe 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 Phoebe, 117 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 22nd, 1883, and recorded December, —, 1883, Eli Keen conveys his old home farm in St. Charles county, Missouri, the place where he and Phoebe had lived for many years, to Phoebe, he designating her as "Phoebe Keen," she to have and to hold for and during her natural life and providing therein that upon the death of Phoebe and of himself, Eli Keen, the title to said farm should vest in Lettie Ann Skinner, Phoebe Wise, Mary Phillips, and Alice Cora Brown, the daughters of said Phoebe Keen. In this deed Eli Keen expressly reserves to himself the use of one room in the house, which he designates in the deed as the room now occupied and used by him. In this deed Eli Keen does not describe or designate Phoebe as his wife, nor does he mention or designate these daughters of Phoebe as his children.

About 1882 or 1883, the exact date does not accurately appear from the testimony, the intercourse between Eli Keen and Phoebe Keen ceased. She remained on 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 Phoebe ceased to buy goods at the stores on Eli Keen's credit. Her bills were thereafter charged to Phoebe Keen and she paid them.

On August 22nd, 1883, Eli Keen was married to the plaintiff, Sophronia K. Keen, (nee 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 22nd, 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 upon him. The plaintiff had no knowledge or information whatever of Eli Keen's relations with the negro woman, Phoebe, until a number of years after her marriage with him, and in fact received no definite information con-

cerning these relations between Eli Keen and Phoebe, until very shortly before Eli Keen's death, namely in December, 1900.

118 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 Phoebe, 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 1st, 1901, declining to accept the provisions made for her in said will.

On April 1st, 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 Revised Statutes of 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, Phoebe, 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 Phoebe 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.

E. M. HUGHES, Judge.

My conclusions of law from the above facts are that no marriage at common law ever existed between Eli Keen and Phoebe 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 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.

To which finding the defendant then and there duly excepted and then and there saved his exceptions.

That thereupon, and on this day the court rendered judgment in favor of the plaintiff, which judgment is set forth in the record proper.

To which action of the court in rendering said judgment the defendant at the time objected and his objection being by the court overruled, the defendant then and there duly excepted and saved his exception thereto.

119 That thereupon, on the same day, and during the same term of the court the defendant filed his motion to set aside the finding of the court, the verdict rendered and the judgment entered thereon, and for a new trial, which motion is in words and figures as follows, to-wit :

STATE OF MISSOURI, }
County of St. Charles, } ss :

In the Circuit Court of the County of St. Charles, March Term, 1902.

SOPHRONIA K. KEEN, Plaintiff, }
vs. } Ejectment.
ELLIS KEEN, Defendant. }

Now at this day comes the above named defendant and moves the court to set aside the finding and the verdict herein, and the judgment entered thereon, in the above entitled cause, and to grant him a new trial for the reasons and causes following, towit :

1st. The finding as made by the court is not supported by the evidence in the cause.

2nd. The finding as made by the court is contrary to the evidence in the cause.

3rd. The finding and verdict of the court is not warranted by the evidence in the cause.

4th. The verdict and judgment is against the law and the evidence.

5th. The finding is against the evidence, the weight of evidence and all of the evidence in the cause.

6th. The judgment of the court upon the facts found is contrary to and against the law.

7th. The court erred in its finding of facts.

8th. The court erred in its conclusions of law upon the facts.

9th. The evidence in the cause shows that a common law marriage existed between Eli Keen and Phoebe Keen, and while such marriage may have been void under the laws of the State, for the reason that Eli Keen was a white man and Phoebe Keen was a negro woman, yet such marriage had the effect to make legitimate the children, including the defendant, of such void marriage.

10th. Under the evidence in the cause and under the laws of the State applicable thereto, the defendant is the legitimate child of Eli Keen and capable in law of inheriting from the said Eli Keen.

11th. The evidence in the cause shows that Eli Keen at 120 the time of his death left children (including the defendant) surviving him, all of whom were capable under the law of inheriting from him, the said Eli Keen.

12th. The finding and judgment of the court deprives the defendant of property without due process of law, and is therefore in vio-

lation of the Constitution of the United States, and of the State of Missouri.

13th. The finding, verdict and judgment of the court denies to the defendant the equal protection of the law, and is therefore contrary to the Constitution of the United States and especially contrary to the provisions of section 1, article fourteen of the amendments to the Constitution of the United States.

14th. The court erred in its conclusions of law that there was not a void marriage and that the defendant was not the issue of a void marriage between Eli Keen and Phoebe Keen, and that plaintiff was entitled to recover possession of the premises sued for, and damages for their detention and monthly rents.

15th. The court erred on the trial of said cause in excluding proper and legal evidence offered by defendant.

16th. The court erred on the trial of said cause in admitting improper and illegal evidence by plaintiff.

17th. The judgment under the law and the evidence should have been in favor of the defendant.

T. F. McDEARMON,
D. P. DYER,

Attorneys for Defendant, Ellis Keen.

That thereupon, and on the same day, and during the same term, the court overruled said motion, to which action of the court in overruling said motion the defendant then and there at the time aforesaid duly excepted, and saved his exception.

That thereupon, and on the same day the plaintiff asked and the court allowed the defendant to present and file his bill of exceptions on or before the 1st day of July, 1902.

And the defendant presents his bill of exceptions and asks that the same be signed, sealed and made a part of the record, which is accordingly done, this 24th day of June, 1902.

E. M. HUGHES, Judge.

Filed June 25th, 1902.

WM. F. WOLTER,

Clerk of the Circuit Court, St. Charles County.

June 21st, 1901.—I have examined the foregoing bill of exceptions and find it satisfactory and correct.

C. W. WILSON,
Attorney for Plaintiff.

121 And afterwards to-wit, on the 13th day of October, 1904, the further following proceedings were had in said cause, viz:

SOPHRONIA K. KEEN, Resp., }
v. } 11375.
ELLIS KEEN, App.

Come now the said parties by attorneys, and after argument herein, submit this cause to the court.

And afterwards to-wit, on the 23rd day of November, 1904, the further following proceedings were had in said cause, viz :

SOPHRONIA K. KEEN, Respondent, } 11375. Appeal from St. Charles
vs. } County Circuit Court.
ELLIS KEEN, Appellant. }

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Charles county circuit court rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant her costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit :

In the Supreme Court of Missouri, Division No. 1, October Term, 1904.

SOPHRONIA K. KEEN, Respondent, }
vs. } No. 11375.
ELLIS KEEN, Appellant. }

This is an action in ejectment to recover an undivided one
122 half of seventy one and sixty seven hundredths acres of land,
being a part of United States survey No. 1765, in St. Charles
county, Missouri. The petition is in the usual form and the ouster
is laid as of March 2nd, 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 2929 R. S.
1899, on the ground that she is the widow of Eli Keen, and that he died
without any child or other descendents in being, capable of inher-
iting. The defendant claims to be the legitimate child of an alleged
common law marriage between Eli Keen, a white man, and Phoebe,
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 Phoebe 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.

123 The finding of fact is 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, Phoebe, was a negro woman, and with a child, Martha, was held and owned as a slave by the father of Eli Keen.

On June 1st 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, Phoebe, and her child, Martha, and thereby became the owner of them and held them as slaves. Sometime after he became the owner of Phoebe, 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 born January 2nd, 1868.

Eli Keen owned his own farm and home place in St. Charles county, Missouri, and from the time he began cohabiting with Phoebe, the negro woman, in 1850 or 1851, he lived in his own home, on his own farm, and Phoebe lived in the same house with him and did the house-keeping. 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 Phoebe, Eli Keen sitting at one end of the table and Phoebe at the other. The children called Eli Keen "pa" and Phoebe "ma" and this was done in the presence of Eli Keen and Phoebe without protest or objection from either of them. Eli Keen called the woman Phoebe and she called him Eli. Eli Keen and Phoebe 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.

124 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 Phoebe 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.

Phoebe 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 Phoebe to several different persons as his wife. To several persons, after his marriage to the plaintiff, Sophronia K. Keen, Eli Keen spoke of Phoebe Keen as his wife. So far as the evidence showed Eli Keen was never seen out with Phoebe 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 Phoebe 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, Mathew 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
125 with them about the management of their affairs. That in his last will and testament executed September 5th, 1900, he devised his entire estate to these children born of the relations between him and Phoebe, 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, Mathew 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 22nd, 1883, and recorded December — 1883, Eli Keen conveys his old home farm in St. Charles county, Mo., the place where he and Phoebe lived for so many years, to Phoebe, he designating her as "Phoebe Keen," she to have and to

hold for and during her natural life and providing therein that upon the death of Phoebe and of himself, Eli Keen, the title to said farm should vest in Lettie Ann Skinner, Phoebe Wise, Mary Phillips, and Alice Cora Brown, the daughters of said Phoebe 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 Phoebe as his wife, nor does he mention or designate these daughters of Phoebe as his children.

About 1882 or 1883, the exact date does not accurately appear from the testimony, the intercourse between Eli Keen and Phoebe 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 Phoebe ceased to buy goods at the stores on Eli Keen's credit. Her bills were thereafter charged to Phoebe Keen and she paid them.

126 On August 22nd, 1883, Eli Keen was married to the plaintiff, Sophronia K. Keen (nee 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 22nd, 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 upon him. The plaintiff had no knowledge or information whatever of Eli Keen's relations with the negro woman, Phoebe, until a number of years after her marriage with him, and in fact received no definite information concerning these relations between Eli Keen and Phoebe, 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 Phoebe, 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 1st, 1901, declining to accept the provisions made for her in said will.

On April 1st, 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 Revised Stats. 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

127 Eli Keen and the negro woman, Phoebe, 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 Phoebe 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.

E. M. HUGHES, Judge.

My conclusions of law from the above facts are that no marriage at common law ever existed between Eli Keen and Phoebe 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 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."

I.

Marriage.

At the time Eli Keen and Phoebe 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." (R. S. 1845, ch. 115 sec. 1.) Eli Keen was — white man, and Phoebe 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." (R. S. 1845 chap. 115 sec. 3.)

These provisions were carried without change into the revision of 1855 (R. S. 1855, ch. 108, secs. 1 & 3), section one aforesaid was carried unchanged, into the revision of 1865, (R. S. 1865 ch. 113 sec. 1)

128 and section three was consolidated with section two 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." (R. S. 1865 ch. 113 sec. 2.)

Section 1 aforesaid has been carried into all the subsequent revisions and is now the law in this State. (R. S. 1879 ch. 50 sec. 3264; R. S. 1889, ch. 108 sec. 6840; R. S. 1899, ch. 50 sec. 4311.)

Sections 2 and 3 as thus consolidated was carried without change into the revision of 1879 (R. S. 1879 ch. 50 sec. 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 (R. S. 1899 ch. 50 sec. 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 that "marriage is a civil contract, to which the consent of parties capable in law of contracting is essential." (State v. Bittick 103 Mo. l. c. 191; State v. Cooper 103 Mo. l. c. 273; Banks vs. Galbraith 149 Mo. 529.)

There is no pretense in this case that there was any ceremonial or statutory marriage between Eli and Phoebe, and as he was a white man and she was a negro, there could never have been a legal ceremonial or statutory marriage between —. From the time their relations began in 1850 or 1851, until the emancipation of slaves, Phoebe 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 Phoebe 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 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 R. S. 1879, ch. 24 sec. 1510; R. S. 1889 ch. 47 art. 8 sec. 3797; R. S. 1899 ch. 15, art. 8 sec. 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 Phoebe 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, 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 22nd, 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
 130 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. 1. c. 273, Banks v. Galbraith 149 Mo. 1. c. 536). The conduct of the parties is a conclusive demonstration that Eli and Phoebe never entered into a common law marriage.

The defendant, however, contends that the case of Lee v. Lee 161 Mo. 52 is decisive of this case, because, it is said, while Phoebe was incapable of making or entering into a contract of marriage prior to 1865, still as Eli was her master, his consent would 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, 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 sec. 2920 R. S. 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
 131 between Eli and Phoebe, either ceremonial, statutory, or common law.

II.

The defendant contends, however, that as section 2918 R. S. 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 marriage, but to make the children of illegal or void marriages legal. And incidentally it is urged, that in Green v. Green 126 Mo. 17, 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, (R. S. 1899 sec. 4313,) and as the marriage between parents and children, grand parents and grand children, 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 Phoebe and therefore the statute relied on (sec. 2918 R. S. 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 application of the statute (sec. 2918 R. S. 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.

W. C. MARSHALL, J.

And afterwards to-wit, on the 20th day of February, 1905, the further following proceedings were had in said cause, viz :

SOPHRONIA K. KEEN, Respondent,	}	11375.
vs.		
ELLIS KEEN, Appellant.		

Now at this day, there is presented to the Honorable Theo. Brace, presiding judge of division No. 1, of the supreme court of the State of Missouri, in chambers, a writ of error to the Supreme Court of the United States, a citation directed to said respondent, citing and admonishing her to appear at a Supreme Court of the United States on the 22nd day of March, 1905 ; an assignment of errors and a bond in the sum of twenty-five hundred dollars, which said writ of error is allowed, said citation signed, said assignment of errors filed and said bond approved, ordered filed and made a part of the record herein.

Which said assignment of errors is in words and figures as follows, to-wit :

Supreme Court of the United States, October Term, 1904.

ELLIS KEEN, Plaintiff in Error,
 vs.
 SOPHRONIA K. KEEN, Defendant in Error. } No. —.

Comes now Ellis Keen, plaintiff in error, by his counsel, and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment of the supreme court of the State
 133 of Missouri in the above entitled cause, and assigns error thereto as follows:

1. The court erred in said cause in deciding that the court below, in its special finding of facts, found that no marriage at common law ever existed between Eli Keen and Phoebe Keen, whereas, in truth and in fact, the court below, in said special finding of facts, found all of the facts required to establish a null and void common law marriage between them, and from which facts so found, the law presumed a null and void marriage between said Eli Keen and Phoebe Keen. The court below further found, in said special finding of facts, that plaintiff in error was one of the issue of said null and void legally presumed marriage, and in said special finding of facts, it did not find any fact or facts that could rebut said legal presumption of said null and void marriage.

2. The court erred in said cause in not deciding that the court below, in its special finding of facts in the cause, found all of the facts required by law to raise a legal presumption of a null and void marriage, and that from said finding of facts, the law presumed that a null and void common law marriage in fact, or *de facto*, existed between said Eli Keen and Phoebe Keen, and that the issue of said null and void marriage who survived said Eli Keen, deceased, were capable of inheriting from him, under the statutes of Missouri.

3. The court erred in said cause in deciding that said Eli Keen died without any child or children or other descendants in being, capable of inheriting from him, said decision being contrary to the special finding of facts of the court below, in the cause, upon which facts so found, the law raised a presumption that there was a null and void marriage between said Eli Keen and Phoebe Keen, and plaintiff in error having been found, in said finding of facts, to be one of the issue of said null and void marriage that the law presumed from the facts so specially found, who survived said Eli Keen.

4. The court erred in said cause in deciding that the plaintiff in the court below (defendant in error) was entitled to recover
 134 the possession of the undivided one-half of the land described in her petition.

5. The court erred in said cause in not reversing the judgment of the court below, the latter court having erred in its conclusions

and decisions of the questions of law arising in the case on the facts so specially found by it, and stating in writing separately from said special findings of fact, as follows:

"My conclusions of law from the above facts are that no marriage at common law ever existed between Eli Keen and Phoebe 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 one-half of the lands described in petition."

6. The court erred in said cause in affirming the judgment of the court below, and in not reversing the same and rendering judgment for the defendant, plaintiff in error, or ordering the latter court to render a judgment in his favor in the cause.

Wherefore the plaintiff in error prays the honorable court to examine and correct the errors assigned and for a reversal of the judgment of the supreme court of the State of Missouri, entered in the above entitled cause, and for a reversal of the judgment of the court below, the circuit court of St. Charles county, Missouri, in said cause, and render a judgment for the plaintiff in error herein, or order that a judgment for him be rendered in the cause.

D. P. DYER,
Attorney for Plaintiff in Error.

And which said bond is in words and figures as follows, to-wit:

Know all men by these presents, that we, Ellis Keen as principal, and Lydia Ann Skinner, Raisin Keen, Phoebe Wise, Cora Brown, Mary J. Phillips, Mark E. Keen and Matthew Keen, as sure-
135 ties, are held and firmly bound unto Sophronia K. Keen in the full and just sum of twenty-five hundred dollars, to be paid to the said Sophronia K. Keen to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this — day of January, in the year of our Lord, one thousand nine hundred and five.

Whereas, lately at the October term, A. D. 1905, of the supreme court of the State of Missouri, in a suit depending in said court between Sophronia K. Keen, respondent, and Ellis Keen, appellant, judgment was rendered against the said Elli-Keen, appellant as aforesaid, and the said Ellis Keen having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sophronia K. Keen citing and admonishing her to be and appear at a Supreme Court of the United States to be held at Washington, D. C. not exceeding thirty days from and after the date of the citation in said cause.

Now, the condition of the above obligation is such, that if the said Ellis Keen shall prosecute said writ to effect and answer all damages

and costs, if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.]

ELLIS KEEN.
 LYDIA ANN SKINNER.
 RAISIN KEENE.
 PHEBE WISE.
 CORA BROWN.
 MARY J. PHILLIPS.
 MARK E. KEEN.
 MATTHEW KEEN.

[SEAL.]
 [SEAL.]
 [SEAL.]
 [SEAL.]
 [SEAL.]
 [SEAL.]
 [SEAL.]
 [SEAL.]

Sealed and delivered in presence of—

Approved by—

THEO. BRACE,

Chief Justice Supreme Court of Missouri.

136 STATE OF MISSOURI, }
 County of St. Charles, } ss :

Before me, Ben L. Emmons a notary public, within and for the county of St. Charles, in the State of Missouri, personally appeared Ellis Keen, principal, in the within bond, to me well known, who upon his oath states that he is worth over and above all indebtedness the sum of twenty five hundred dollars, and that he owns an undivided interest in real property to that amount, subject to execution, in St. Charles county, Missouri.

ELLIS KEEN.

Subscribed and sworn to before me this 16th day of February, 1905.

[SEAL.]

BEN L. EMMONS,
 Notary Public.

My com. exp. April 21, 1906.

STATE OF MISSOURI, }
 County of St. Charles, } ss :

Before me, Ben L. Emmons a notary public, within the county of St. Charles, in the State of Missouri, personally appeared Lydia Ann Skinner, surety in the within bond, to me well known, who upon oath states that she is worth over and above all indebtedness the sum of five thousand dollars, and that she owns an undivided interest in real property to that amount, subject to execution, in St. Charles county, Missouri.

LYDIA ANN SKINNER.

Subscribed and sworn to before me this 16th day of February, 1905.

[SEAL.]

BEN L. EMMONS,
Notary Public.

My com. exp. April 21, 1906.

137 STATE OF MISSOURI, }
St. Charles County, } ss :

Before me, Ben L. Emmons, a notary public, within and for the county of St. Charles, in the State of Missouri, personally appeared Raisin Keen, surety in the within bond, to me well known, who upon oath states that he is worth over and above all indebtedness the sum of two thousand dollars, and that he owns an undivided interest in real property to that amount, subject to execution, in St. Charles county, Missouri.

RAISIN KEEN.

Subscribed and sworn to before me this 16th day of February, 1905.

[SEAL.]

BEN L. EMMONS,
Notary Public.

My com. exp. April 21, 1906.

STATE OF MISSOURI, }
County of St. Charles, } ss :

Before me, Ben L. Emmons, a notary public, within and for the county of St. Charles, in the State of Missouri, personally appeared Phoebe Wise, surety in the within bond, to me well known, who upon oath states that she is worth over and above all indebtedness the sum of twenty-five hundred dollars, and that she owns an undivided interest in real property to that amount, subject to execution, in St. Charles county, Missouri.

PHEBE WISE.

Subscribed and sworn to before me this 16th day of February, 1905.

[SEAL.]

BEN L. EMMONS,
Notary Public.

My com. exp. April 21, 1906.

138 STATE OF MISSOURI, }
County of St. Charles, } ss :

Before me, Ben L. Emmons, a notary public within and for the county of St. Charles, in the State of Missouri, personally appeared Cora Brown, surety in the within bond, to me well known, who upon oath states that she is worth over and above all indebtedness the sum of twenty five hundred dollars, and that she owns an un-

divided interest in real property to that amount, subject to execution, in St. Charles county, Missouri.

CORA BROWN.

Subscribed and sworn to before me this 16th day of February, 1905.

[SEAL.]

BEN L. EMMONS,
Notary Public.

My com. exp. April 21, 1906.

STATE OF ILLINOIS, }
Madison County, }^{ss.}

Before me, Lucy P. Francis, a notary public, within and for the county of Madison, in the State of Illinois, personally appeared Mark E. Keen, surety in the within bond, to me well known, who upon oath states that he is worth over and above all indebtedness the sum of two thousand (2000) dollars, and that he owns an undivided interest in real property to that amount, subject to execution, in St. Charles county, Missouri.

MARK E. KEENE.

Subscribed and sworn to before me this 17th day of February, 1905.

[SEAL.]

LUCY P. FRANCIS,
Notary Public.

139 STATE OF MISSOURI, *sc* :

I, John R. Green, clerk of the supreme court of the State of Missouri, certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the cause wherein Sophronia K. Keen is respondent, and Ellis Keen is appellant, as fully as the same appears of record and on file in my office.

Witness my hand and seal of said court hereto affixed.

Done at office in the city of Jefferson, this 2nd day of March, 1905.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, Clerk.

Endorsed on cover: File No. 19,648. Missouri supreme court Term No. 188. Ellis Keen, plaintiff in error, vs. Sophronia K. Keen. Filed March 11th, 1905. File No. 19,648.

U.S. Supreme Court U. S.
FILED
JAN 8 1906
JAMES H. KENNEDY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ELLIS KEEN,

Plaintiff in Error,

vs.

SOPHRONIA KEEN,

Defendant in Error.

} No. 188.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF MISSOURI.

DAVID P. DYER,

Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ELLIS KEEN,

Plaintiff in Error,

vs.

SOPHRONIA KEEN,

Defendant in Error.

No. 188.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF MISSOURI.

STATEMENT FOR PLAINTIFF IN ERROR.

Eli Keen was a resident of the County of St. Charles, in the State of Missouri, for more than fifty years. At the time of his death he was the owner of various tracts of valuable land in the County of St. Charles.

The father of Eli Keen was a citizen of Missouri prior to his death in 1850. He was the owner of certain slaves during his life and at the time of his death. These slaves were sold by his administrator in June, 1850. Among them was a negro woman named Phoebe. At the sale Eli Keen became the purchaser of Phoebe, and for more than thirty years thereafter they lived together as husband and wife, to

whom during this time were born eight children, the eldest being the plaintiff in error in this case. The father and mother and these eight children lived together in the same house, ate together at the same table. The children called Eli father and Phoebe mother. Eli introduced Phoebe as his wife and in every way treated her as such. The children were sent to school by their father, their bills were paid by him and when they were married he provided a home for each of them upon the lands he owned. Eli and Phoebe continued to live and co-habit together until 1883—a period of thirty-three years.

In 1879 the legislature enacted and the Governor approved a statute which provided that “No person having one-eighth part or more of negro blood shall be permitted to marry any white person, etc.” A violation of this statute was made a felony.

In November, 1883, Eli Keen conveyed his “home place” to Phoebe during her natural life, and to certain of his children by her, after her death. In August, 1883, in the State of West Virginia, a formal ceremony of marriage took place between Eli Keen and the defendant in error, Sophronia Keen.

Phoebe Keen died in 1896.

On the 5th of September, 1900, Eli Keen made his last will and testament, in which (after making provisions for the defendant in error), he devised to each of his children, (born of his co-habitation with Phoebe), a tract of land in St. Charles County. These were his only children—none having been born of his so-called marriage with defendant in error.

One of the tracts so devised was to his son, Ellis Keen, the plaintiff in error. That tract of land is the subject of the present litigation. In February, 1901, Eli Keen died—

his will was duly admitted to probate in St. Charles County and his estate is there being administered.

On the 1st day of April, 1901, the defendant in error, in pursuance of Section 2949, Revised Statutes of 1899, filed in said Court her renunciation of said will and declined to accept the provisions made for her therein.

Thereafter, on the 29th of July, 1901, she began in the Circuit Court of St. Charles County this suit to recover the lands devised to the plaintiff in error. **This suit is an action ~~for~~ ejectment, and the petition is in the statutory form, and the parties claimed title from a common source.**—Eli Keen.

The cause came on for trial in March following before the Court without the intervention of a jury. The Court in pursuance of Sec. 695 (Statutes of Missouri, 1899), made a special finding in writing of the facts, and stated also in writing the conclusions of law arising upon the facts. These may be found on pages 6 to 8 of the printed transcript and are as follows:

FINDING OF FACTS AND JUDGMENT.

SOPHRONIA K. KEEN,	}	Ejectment.
vs.		
ELLIS KEEN,		
<i>Plaintiff,</i>		
<i>Defendant.</i>		

The Court finds the facts to be as follows in this case:

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 county about that time. The woman, Phoebe, was a negro woman, and with a child, Martha, was held and owned as a slave by the father of said Eli Keen.

On June 1st, 1850, at the administrator's sale of his father's personal estate and slaves, Eli Keen became the purchaser of the negro woman, Phoebe and her child, Martha, and thereby became the owner of them and held them as slaves. Sometime after he became the owner of Phoebe, 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 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 Phoebe, the negro woman, in 1850 or 1851, he lived in his own home, on his own farm, and Phoebe 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 Phoebe, Eli Keen sitting at one end of the table and Phoebe at the other. The children called Eli Keen "pa" and Phoebe "ma," and this was done in the presence of Eli Keen and Phoebe without protest or objection from either of them. Eli Keen called the woman Phoebe and she called him Eli. Eli Keen and Phoebe 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 Phoebe sent their children to this school and for two terms after this school was 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.

Phoebe 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 Phoebe to several different persons as his wife. To several persons, after his marriage to the plaintiff, Sophronia K. Keen, Eli Keen spoke of Phoebe Keen as his wife. So far as the evidence showed Eli Keen was never seen out with Phoebe 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 Phoebe 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 Phoebe, 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 22nd, 1883, and recorded December —, 1883, Eli Keen conveys his old home farm in St. Charles County, Missouri, the place where he and Phoebe had lived for many years, to Phoebe, he designating her as "Phoebe Keen," she to have and to hold for and during her natural life and providing therein that upon the death of Phoebe and of himself, Eli Keen, the title to said farm should vest in Lettie Ann Skinner, Phoebe Wise, Mary Phillips and Alice Cora Brown, the daughters of said Phoebe Keen. In this deed Eli Keen expressly reserves to himself the use of one room in the house, which he designates in the deed as the room now occupied and used by him. In this deed Eli Keen does not describe or designate Phoebe as his wife, nor does he mention or designate these daughters of Phoebe as his children.

About 1882 or 1883, the exact date does not accurately appear from the testimony, the intercourse between Eli Keen

and Phoebe Keen ceased. She remained on 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 Phoebe ceased to buy goods at the stores on Eli Keen's credit. Her bills were thereafter charged to Phoebe Keen and she paid them.

On August 22nd, 1883, Eli Keen was married to the plaintiff, Sophronia K. Keen (nee 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 22nd, 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 upon him. The plaintiff had no knowledge or information whatever of Eli Keen's relations with the negro woman, Phoebe, until a number of years after her marriage with him, and in fact received no definite information concerning these relations between Eli Keen and Phoebe, 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 Phoebe, 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 1st, 1901, declining to accept the provisions made for her in said will.

On April 1st, 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, sub-

ject to the payment of his debts under the provisions of Section 2939 Revised Statutes of 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, Phoebe, 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 Phoebe 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.

E. M. HUGHES,
Judge.

My conclusions of law from the above facts are that no marriage at common law ever existed between Eli Keen and Phoebe 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 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.

To which finding the defendant then and there duly excepted and then and there saved his exceptions.

That thereupon, and on this day the Court rendered judgment in favor of the plaintiff, which judgment is set forth in the record proper.

To which action of the Court in rendering said judgment the defendant at the time objected and his objection being by the Court overruled, the defendant then and there duly excepted and saved his exception thereto; Record, 6-9, 130-133.

That thereupon, on the same day, and during the same term of the Court the defendant filed his motion to set aside the finding of the Court, the verdict rendered and the judgment entered thereon, and for a new trial., the material portions of which motion are as follows, to-wit:

The verdict and judgment is against the law and the evidence.

The judgment of the Court upon the facts found is contrary to and against the law.

The Court erred in its conclusions of law upon the facts.

Under the evidence in the cause and under the laws of the state applicable thereto, the defendant is the legitimate child of Eli Keen and capable in law of inheriting from the said Eli Keen.

The evidence in the cause shows that Eli Keen at the time of his death left children (including the defendant) surviving him, all of whom were capable under the law of inheriting from him, the said Eli Keen.

The finding and judgment of the Court deprives the defendant of property without due process of law, and is therefore in violation of the Constitution of the United States, and of the State of Missouri.

The finding, verdict and judgment of the court denies

to the defendant the equal protection of the law, and is therefore contrary to the constitution of the United States and especially contrary to the provisions of Section 1, Article Fourteen of the amendments to the Constitution of the United States.

The judgment under the law and the evidence should have been in favor of the defendant; Record, 134-135.

Thereupon, and on the same day, and during the same term, the Court overruled said motion, to which action of the Court in overruling said motion the defendant then and there at the time aforesaid duly excepted, and saved his exception; Record, 10, 135.

That thereupon, and on the same day the plaintiff asked and the Court allowed the defendant to present and file his bill of exceptions on or before the 1st day of July, 1902; Record, 10, 135.

And afterwards, on the same day, April 30, 1902, and at the same term of said Court, the defendant filed his affidavit for appeal, and by order of Court duly entered of record on that date, said appeal was granted to the Supreme Court of Missouri.

Defendant was given leave to file his appeal bond within ten days after this term of court, and leave to file his bill of exceptions on or before July 1, 1902.

And afterwards, on the 5th day of May, 1902, in vacation, the defendant filed his appeal bond, which was duly entered of record, as is shown by the file mark of the Clerk as being filed within the time allowed by the Court.

And afterwards, on the 25th day of June, 1902, defendant filed his bill of exceptions in said cause, as shown by an entry of record on that date in said cause as well as by the

file mark and signature of the clerk of said Court endorsed on said bill; 10, 135.

On February 20, 1905, a writ of error was issued from this Court to the Supreme Court of Missouri, together with a citation to the defendant in error, and the service of the latter was acknowledged February 22, 1905; Record, 1-2, and a bond given and approved; Record, 4-5. Said writ of error was duly returned by the Clerk of the latter Court; Record 5, the cause docketed and the record therein filed by the Clerk of this Court on March 11, 1905.

The errors assigned herein, and prayer for reversal, are as follows:

1. The Court erred in said cause in deciding that the Court below, in its special finding of facts, found that no marriage at common law ever existed between Eli Keen and Phoebe Keen, whereas, in truth and in fact, the Court below, in said special finding of facts, found all of the facts required to establish a null and void common law marriage between them, and from which facts so found, the law presumed a null and void marriage between said Eli Keen and Phoebe Keen. The Court below further found, in said special finding of facts, that plaintiff in error was one of the issue of said null and void legally presumed marriage, and in said special finding of facts, it did not find any fact or facts that could rebut said legal presumption of said null and void marriage.

2. The Court erred in said cause in not deciding that the Court below, in its special finding of facts in the cause, found all of the facts required by law to raise a legal presumption of a null and void marriage, and that from said finding of facts, the law presumed that a null and void common law marriage in fact, or *de facto*, existed between said Eli Keen and Phoebe Keen, and that the issue of said null and void

marriage who survived said Eli Keen, deceased, were capable of inheriting from him, under the Statutes of Missouri.

3. The Court erred in said cause in deciding that said Eli Keen died without any child or children or other descendants in being, capable of inheriting from him, said decision being contrary to the special finding of facts of the Court below, in the cause, upon which facts so found, the law raised a presumption that there was a null and void marriage between said Eli Keen and Phoebe Keen, and plaintiff in error having been found, in said finding of facts, to be one of the issue of said null and void marriage that the law presumed from the facts so specially found, who survived said Eli Keen.

4. The Court erred in said cause in deciding that the plaintiff in the Court below (defendant in error) was entitled to recover the possession of the undivided one-half of the land described in her petition.

5. The Court erred in said cause in not reversing the judgment of the Court below, the latter Court having erred in its conclusions and decisions of the questions of law arising in the case on the facts so specially found by it, and stating in writing separately from said special findings of facts, as follows:

“My conclusions of law from the above facts are that no marriage at common law ever existed between Eli Keen and Phoebe 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 one-half of the lands described in petition.”

6. The Court erred in said cause in affirming the judgment of the Court below, and in not reversing the same and

rendering judgment for the defendant, plaintiff in error, or ordering the latter Court to render a judgment in his favor, in the cause.

Wherefore the plaintiff in error prays the honorable Court to examine and correct the errors assigned and for a reversal of the judgment of the Supreme Court of the State of Missouri, entered in the above entitled cause, and for a reversal of the judgment of the Court below, the Circuit Court of St. Charles County, Missouri, in said cause, and render a judgment for the plaintiff in error herein, or order that a judgment for him be rendered in the cause.

The defendant in error claimed that Eli Keen died without issue living, capable of inheriting and that she as his widow, was entitled under the laws of Missouri to one-half of his estate, subject only to the payment of debts, and therefore entitled to recover in this action.

The defendant, a mulatto, claimed title to the same as devisee under the last will and testament of his father, said Eli Keen, and, to defeat the plaintiff's claim for dower in fee in said premises and also her right to maintain ejectment for said premises, proved that he was the son of said Eli Keen and Phoebe Keen, a negro woman and a former slave of said Eli Keen, and that he and other children were the issue of a null or void marriage between them, entered into about 1850 or 1851, many years before his marriage to plaintiff, and that they remained husband and wife and cohabited together continuously as such from that time until 1882 or 1883, and that on the death of the said Eli Keen in December, 1900, he left children in being, the issue of his marriage with said Phoebe, capable of inheriting from him, and that therefore plaintiff could not make an election, as she had attempted to do, under Section 2941, R. S. Mo. 1899, to take dower under Section 2939 thereof, and be thereby invested with an absolute interest therein, subject

to the payment of the debts of said Eli Keen, or maintain ejectionment for said premises if endowed under any other Section of the Statutes.

The trial of the cause was had on March 12, 1902, before said Circuit Court, sitting without a jury, and the evidence was heard and the cause taken under advisement. The Court, in pursuance of Section 695, R. S. Mo. 1899, made a special finding of the conclusions of the facts found in writing, stating separately in writing, as required by said section, the conclusions of law from them, and announced the same and entered judgment for plaintiff for possession of the premises sued for and damages, on April 30, 1902; Record, 6-9.

In order to place the finding intelligently before the Court, the various sections of the Revised Statutes of Mo. 1899, having a bearing on the facts of this case, are here given. A reference is also given at the end of each section to the earliest revision of the laws of the State embodying the same laws, which show that the laws as set forth in these sections antedate by many years the facts found in this case, and also show the policy of the laws of the State. While various verbal changes and re-arrangements into sections have been made in these laws as originally enacted, the substance of them remain the same, and all of them are in force yet except the section in regard to the emancipation of slaves, which does not appear after the R. S. Mo. 1855.

All of the sections hereinafter quoted are taken from the Revised Statutes of Missouri of the revision of 1899:

MARRIAGE.

Sec. 4311. Marriage a civil contract.—Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential. Sec. 1, p. 401, R. S. Mo. 1835.

Sec. 4312. Certain marriages prohibited.—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, first cousins, white persons and negroes, are prohibited and declared absolutely void; and this prohibition shall apply to illegitimate as well as legitimate children and relatives. Secs. 2 and 3, p. 401, R. S. Mo. 1835.

Sec. 4313. What marriages shall be void, unless etc.—All marriages, where either of the parties has a former wife or husband living, shall be void, unless the former marriage shall have been dissolved. Sec. 5, p. 1062, R. S. Mo. 1855; Sec. 76, p. 305, R. S. Mo. 1825.

LEGITIMACY AND INHERITABILITY.

Sec. 2921. Causes of divorce.—When a marriage has been or shall be solemnized between two persons, and either party at the time of the contract of marriage was and still is impotent; or had a wife or husband living at the time of the marriage * * * * * the injured party, for any of the causes above enumerated, may obtain a divorce from the bonds of matrimony; but no such divorce shall affect the legitimacy of the children of such marriage. Sec. 1, p. 225, R. S. Mo. 1835.

Sec. 2916. Bastards may inherit when and how.—Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, and such mother may inherit from her bastard child or children, in like manner as if they had been lawfully begotten of her. Sec. 7, p. 328, R. S. Mo. 1825.

Sec. 2917. Bastards legitimated by subsequent marriage, when.—If a man having by a woman a child or children,

shall afterward intermarry with her, and shall recognize such child or children to be his, they shall thereby be legitimated. Sec. 8, p. 328, R. S. Mo. 1825.

Sec. 2918. Issue of certain marriages legitimate.—The issue of all marriages decreed null in law, or dissolved by divorce, shall be legitimate. Sec. 8, p. 328, R. S. Mo. 1825.

Of the Emancipation of Slaves, R. S. Mo. 1855, p. 1478.
Section 1.—Any person may emancipate his or her slave, by last will, or any other instrument in writing, under the hand and seal, attested by two witnesses, and proved in the Circuit Court of the county where he or she resides, or acknowledged by the party in the same court. Sec. 23, p. 744, R. S. Mo. 1825.

Note: The foregoing section does not appear in any subsequent revision in any form.

REVISED STATUTES OF MISSOURI, 1899. CRIMES.

Sec. 2174. Illegal marriages.—No person having one-eighth part or more of negro blood shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more of negro blood; and every person who shall knowingly marry in violation of the provisions of this section shall, upon conviction, be punished by imprisonment in the penitentiary for two years, or by fine not less than one hundred dollars, or by imprisonment in the county jail not less than three months, or by both such fine and imprisonment; and the jury trying any such case may determine the proportion of negro blood in any party to such marriage from the appearance of such person. New section 1540 in R. S. Mo. 1879.

DOWER.

Sec. 2933. Dower in real estate.—Every widow shall be endowed of the third part of all the lands whereof her husband, or any other person to his use, was seized of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of dower, in the manner prescribed by law, to hold and enjoy during her natural life. Sec. 1, p. 332, R. S. Mo. 1825.

Sec. 2939. Husband dying without children, widow, how endowed.—When the husband shall die without any child or other descendants in being, capable of inheriting, his widow shall be entitled: first, to all the real and personal estate which came to the husband in right of the marriage, and to all the personal property of the husband which came to his possession with the written assent of the wife, remaining undisposed of, absolutely, not subject to the payment of the husband's debts; second, to one-half of the real and personal estate belonging to the husband at the time of his death, absolutely, subject to the payment of the husband's debts. Sec. 1, p. 332, R. S. Mo. 1825.

Sec. 2941. Husband dying childless, widow may elect, etc.—When the husband shall die without a child or other descendant living, capable of inheriting, the widow shall have her election to take her dower, as provided in Section 2933, discharged of debts, or the provisions of Section 2939, as therein provided. Sec. 1, p. 332, R. S. Mo. 1825.

Sec. 2948. Land passing by will held in lieu of dower.—If any testator shall, by will, pass any real estate to his wife, such devise shall be in lieu of dower out of the real estate of her husband whereof he died seized, or in which he had an interest at the time of his death, unless the testator, by his will, otherwise declared. Sec. 4, p. 333, R. S. Mo. 1825.

Sec. 2949. Renunciation of will.—In such case the wife shall not be endowed in any of the real estate whereof her husband died seized, or in which he had an interest at the time of his death, unless she shall, by writing, duly executed and acknowledged as in cases of deeds for land, and filed in the office of the Court in which the will is proved and recorded, within twelve months after the proof of the will, not accept the provisions made for her by said will. Sec. 4, p. 333, R. S. Mo. 1825.

Sec. 2943. Election, how made.—Such election shall be made by declaration, in writing, acknowledged before some officer authorized to take the acknowledgment of deeds, and filed in the office of the clerk of the Court in which letters testamentary or of administration shall have been granted within twelve months after the grant of the same; and such declaration shall also be filed in the recorder's office in the county in which letters testamentary or of administration were granted, within fifteen months after the grant of the same, otherwise she shall be endowed under the provisions of Sections 2933, 2935 and 2936; and in all cases when any widow entitled to the benefit of election under this chapter shall be of unsound mind or a minor, the lawful guardian of such person may elect for his said ward, in the same manner and with like effect as said ward might do were she capable in law of so electing. Sec. 4, p. 333, R. S. Mo. 1825.

TRIALS BY THE COURT WITHOUT A JURY.

Sec. 695. Trial of question of fact by court—duty as to findings.—Upon the trial of a question of fact by the court, it shall not be necessary for the court to state its finding, except generally, unless one of the parties thereto request it with the view of excepting to the decision of the court upon

the questions of law or equity arising in the case, in which case the court shall state in writing the conclusions of facts found separately from the conclusions of law. Sec. 2, p. 90, Laws of Mo. 1849.

POINTS AND AUTHORITIES.

1. The motion to set aside the finding and judgment and for a new trial filed in the Circuit Court of St. Charles County, and overruled by it, is based in part on the grounds that the judgment of the Court deprived the defendant of his property, without due process of law, in violation of the Constitution of the United States, and denied to him the equal protection of the law, contrary to the Constitution of the United States, and especially contrary to the provisions of Section 1, Article XIV, of the Amendments to the Constitution of the United States. The decision of the Supreme Court of the State, affirming the judgment of the Circuit Court, although no reference was made to these claims of defendant in said opinion, it necessarily decided said claims against him, and the decision raised a federal question in this case which this Court has jurisdiction to review under Section 709, R. S. U. S.

Chicago Burlington & Quincy Ry. Co. vs. Chicago
166 U. S. 226-231;

Manley vs. Park, 187 U. S. 547, 550;

Missouri, Kansas & Texas Ry. Co. vs. Elliott, 184
U. S. 530, 533, 535;

Harding vs. Illinois, 196 U. S. 78, 85,

and see

Rogers vs. Alabama, 192 U. S. 226, 229,

wherein the federal question was raised by motion to quash an indictment, and

Leigh vs. Green, 193 U. S. 79, 85;

Mallett vs. North Carolina, 181 U. S. 589, 592;

wherein the federal questions were raised by motions for

rehearings entertained by the Courts and the questions passed on.

2. The Statutes of Missouri are not complained of by the defendant, as they are as fair and just to him as he could ask, and so had been all previous interpretations of them by the Courts of the State, from the time, January 11, 1822, of the original enactment of Sec. 2918, R. S. Mo. 1899, although the rights of a mulatto had never been passed on by them in a case precisely like the one at bar. It is the judgment of the Court below that, he claims, deprives him of his property without due process of law, and denies to him the equal protection of said laws by the construction placed on said laws in the decision of this cause. The XIV Amendment of the Constitution of the United States, notwithstanding the fact that he was duly notified and defended the case, extends to him its protection against such construction of said laws and the judgment rendered by the Court.

James vs. Bowman, 190 U. S. 127, 136;

Rogers vs. Alabama, 192 U. S. 226, 230;

Fayerweather vs. Rich, 195 U. S. 276, 297;

Chicago, Burlington & Quincy Ry. Co. vs. Chicago,
166 U. S. 226, 233;

Gibson vs. Mississippi, 162 U. S. 565, 581;

Scott vs. McNeal, 154 U. S. 34, 45;

Neal vs. Delaware, 103 U. S. 370, 397;

Virginia vs. Rives, 100 U. S. 313, 318;

Ex parte Virginia, 100 U. S. 339, 346-347.

Dict. No. vs. Hopkins, 118 U. S., 356, 373-374.

3. The definition of what constitutes a marriage, contained in Section 4311, R. S. Mo. 1899, is merely declaratory of the common law that was in force in Missouri when said section was originally enacted.

Dyer vs. Brannock, 66 Mo. 391, 401-417,

and this Court is not bound to follow the ruling on that question, of the Court below, as it is a matter of general law, as shown by the decision just cited; and this Court is at liberty to put its own construction on it;

Chicago, Milwaukee and St. Paul Ry. Co. vs. Solan,
169 U. S. 133, 136;
Baltimore & Ohio Ry. Co. vs. Baugh, 149 U. S.
368, 371-379;
Bucher vs. Cheshire Rd. Co., 125 U. S. 555, 583;
Burgess vs. Seligman, 107 U. S. 20-33, 35;
Pana vs. Bowler, 107 U. S. 529, 541;
Boyce vs. Tabb, 18 Wall. (85 U. S.) 546, 548;
Pease vs. Peck, 18 How. (59 U. S.) 595, 598;
Morgan vs. Curtenius, 20 How. (61 U. S.) 1, 3;
Swift vs. Tyson, 16 Pet. (41 U. S.) 1, 18.

And the fact that the decision of the case at bar is in conflict with an unbroken line of decisions of the same Court on the interpretation of said statute, beginning with the decision of the case of

Lincecum vs. Lincecum, 3 Mo. 441,

decided in 1834, adds ten fold force to said rule in this cause. But if it were a local State law, this Court has authority to construe it so as to preserve the constitutional rights of the defendant:

Cronley vs. Christensen, 137 U. S. 86, 92;
Stanley vs. Schwalby, 162 U. S. 255, 278-279;
University vs. People, 99 U. S. 309, 321;
Insurance Co. vs. The Treasurer, 11 Wall. (78 U.
S.) 204, 208;
Buck vs. Colbath, 3 Wall. (70 U. S.) 334, 340;
Bock vs. Perkins, 139 U. S. 628, 630;
McNulty vs. Lochridge, 141 U. S. 327, 331.
Bechtel Bros vs. Holtzner, 118 U. S. 356, 366-367.

And for this purpose the Court will examine and ascertain

whether the grounds of the decision, as stated in said opinion herein, were the real ones, or whether they were stated as an evasion, or merely to give color to a refusal of the constitutional rights of this colored defendant, and to thereby deprive him of his property;

Chapman vs. Goodman, 123 U. S. 540, 547-548;
Rogers vs. Alabama, 192 U. S. 226, 231.

Besides the decision is not a *construction* of said statute, but a virtual *repeal* of it.

4. Defendant had a vested right in and title to the premises sued for, and he could be divested of it without his consent only by due process of law, in a proper proceeding to condemn it for a private way of necessity, and for drains and ditches across the lands of others for agricultural and sanitary purposes, or for a public use, and in either case he must receive just compensation;

Sections 20 and 21, Article II, Constitution of Missouri;

Leete vs. State Bank, 115 Mo. 184, 198, 203;

Reed vs. Swan, 133 Mo. 100, 109-110;

Chicago, Burlington & Quincy Ry. Co. vs. Chicago, 166 U. S. 226, 235-241;

Madisonville Traction Co. vs. St. Bernard Mining Co., 196 U. S. 239, 251-252.

5. The Court below bases its opinion that the defendant was not capable of inheriting from Eli Keen, chiefly on the ground that Phoebe was his slave at the time the marriage between them was claimed by defendant to have been consummated, and therefore she was incompetent to contract. This is not only a mistake of law under the facts found, but it is also immaterial in the case if correct, as all null or void

marriages originate in the fact that either one or both of the parties to it are incompetent to contract generally, or specially in regard to marriage, and the marriage therefore illegal. Consent by the master to the marriage of slaves supplied a sufficient competency to contract on their part a *de facto* marriage, the issue of which inherited under the statute;

Lee vs. Lee, 161 Mo. 52, 56-57, and cases cited.

The only limitation on the right of persons to emancipate slaves under the laws of Missouri, was contained in Section 1, p. 1478, R. S. Mo. 1855, set forth in the statement of this cause, which required it to be by last will, or any other instrument in writing under the hand and seal of the person, attested by two witnesses and proved in the Circuit Court of the County where he or she resided, or acknowledged by the party in the same Court, and when the facts showed a manumission by implication, as in this case by marriage under the facts found, a will or deed to that effect was presumed, and she was thereby rendered a free person and competent to contract generally;

Durham vs. Durham, 26 Mo. 507, 510;

Lewis vs. Hart, 33 Mo. 535, 541.

Among the acts deemed sufficient to show a manumission by implication are the following: Consent by the owner of the slave that he marry a free woman;

Reeve's Domestic Relations, 4th Ed. 419;

marriage of the villain neife with a freeman;

Cobb on Slavery, Sec. 271, p. 243;

contracting by a master with his slave;

Id., Sec. 269, p. 242, and Sec. 369, p. 305;

bringing an action by a master against his slave for a debt, or making a devise of property to him;

Id., Sec. 382, p. 311;

Outfield vs. Waring, 14 John. (N. Y.) 188, 192;

Hall vs. Mullin, 5 Har. & John. (Md.) 190, 191, 195;

LeGrand vs. Darnall, 2 Pet. (27 U. S.) 664, 670;

Guillemette vs. Harper, 4 Rich. Law Repts. (S. C.) 186, 191;

Cully vs. Jones, 9 Ired. (N. C.) 168, 169;

Nancy vs. Snell, 6 Dana (Ky.) 148, 152;

or treating him as a free person;

Lewis vs. Hart, 33 Mo. 535, 541;

Durham vs. Durham, 26 Mo. 507, 510;

Burk vs. Negro Joe, 6 Gill & John. (Md.) 136, 143;

Naylor vs. Hayes, 7 B. Monroe (Ky.) 478, 479;

Henderson vs. Jason, 9 Gill. (Md.) 483, 491.

6. Notwithstanding the capacity of Phoebe to contract generally, the marriage between her and Eli Keen, was null and void under Section 4312, R. S. Mo. 1899, declaring all marriages between parties within certain degrees of consanguinity, and between white persons and negroes, absolutely void. But Section 2918, which was first enacted many years prior to the former, and which has continued to be the law of the State ever since its enactment, notwithstanding the word "deemed" in the original was changed to "decreed" in Sec. 11, p. 519, General Statutes of Mo. 1865, which substitution of words did not change its meaning or interpretation;

Green vs. Green, 126 Mo. 17, 23;

Gates vs. Seibert, 157 Mo. 254, 275

provides that "The issue of all marriages decreed (deemed)

null in law, or dissolved by divorce, shall be legitimate," so that defendant and his brothers and sisters were children in being at the time of the death of said Eli, capable of inheriting from him. This deprived plaintiff of the right, after she had renounced the will of said Eli, of making an election to take one-half of the real estate belonging to him at the time of his death, absolutely subject to the payment of his debts under Section 2939 of said statutes, and she could not maintain ejectment;

Johnson vs. Johnson, 30 Mo. 72, 84, 91;
Green vs. Green, 126 Mo. 17, 25.

7. But if Phoebe had been incompetent to contract generally, it would not have prevented her from entering into the null and void marriage with Eli, nor have made the issue of that marriage illegitimate, nor have prevented them from inheriting from him. A married woman, in Missouri, until the enactment of Section 6864, R. S. Mo. 1889, now Section 4335, R. S. Mo. 1899, was incompetent to make a legal contract, as much so as Phoebe was prior to her manumission by her husband or by the Constitution of Missouri, which went into force July 4, 1865;

Brown vs. Dressler, 125 Mo. 589, 592, 593;
Musick vs. Dodson, 76 Mo. 624, 625;
Towles vs. Owsley, 44 Mo. App. 436, 437.

If Phoebe had been and remained a married white woman, incompetent to contract at the time they entered into the marriage relation and remained so by reason of that fact, the result would have been precisely the same as if she had remained a slave in regard to her incompetency to contract and the issue of the marriage would have been legitimate;

Lincecum vs. Lincecum, 3 Mo. 441, 442;
Dyer vs. Brannock, 66 Mo. 391, 397, 418, 419;

Green vs. Green, 126 Mo. 17, 22;

Pain vs. Pain, 57 Mo. App. 110, 112.

In Green vs. Green, just cited, it is stated that the wife entered into the marriage in good faith, without notice that her husband had a former wife living. This can mean no more than that there was a *de facto* marriage between them, as the first marriage could be dissolved only by divorce. Pain vs. Pain, 37 Mo. App. 110, 114, and the other cases make no such reference, but if it means more then it adopts the rule of the civil or Spanish law, under which plaintiff forfeited her rights by continuing the relation after she received notice of the first marriage;

Smith vs. Smith, 1 Texas, 621, 633.

8. But assuming for the sake of argument that it was necessary that said Phoebe should have been competent to contract generally, in order to have entered into a null or void marriage with said Eli, and that the marriage did not manumit her, Sec. II, Art. I, Constitution of Missouri, which took effect July 4, 1865, and which is now Sec. 31, Art. II, prohibiting slavery or involuntary servitude, except in punishment of crime, manumitted and rendered her competent to contract. The relation was continued between them for a period of seventeen or eighteen years after the latter date, and during the latter date two more children were born of it, who were undoubtedly legitimate under Section 2918, R. S. of Mo. 1899, as the continuation of the relation during the latter period of itself constituted a null or void marriage between them, just as it would a valid one but for the prohibition of the statute;

Johnson vs. Johnson, 45 Mo. 595, 599, 601;

a marriage between a slave and a free woman and cohabitation continued after he was emancipated;

- Dyer vs. Brannock, 66 Mo. 391, 418, approving an instruction on pp. 397, 398 ;
 Bush vs. Supreme Tent of Knights of Maccabees, 81 Mo. App. 562 ; 567 ;
 Donelly vs. Donelly, 8 B. Monroe, 113, 117 ;
 Teter vs. Teter, 101 Ind. 129, 133 ;
 Jackson vs. Claw, 18 Johnson, 346, 350 ;
 Poole vs. People, 24 Col. 510, 514 ;
 Williams vs. Kimball, 88 Mich. 279, 280-281 ;
 Smith vs. Smith, 1 Tex. 621, 629, 631 ;
 The Bradalbone case, 1 Scotch and Divorce App. 182, 196 ;
 Fenton vs. Reed, 4 Johnson, 52, 53 ;
 Adger vs. Ackerman, 52 U. S. C. C. A., 568, 574, a Missouri case ;
 1 Bishop (New Commentaries) on Marriage, Divorce & Separation, Secs. 970, 979.

And if the defendant was strictly illegitimate prior to 1865, he was recognized by both said Eli and Phoebe from 1865 on as their child, and he was thereby legitimated under Section 2917, aided by Sec. 2918, R. S. Mo. 1899 ;

- Dyer vs. Brannock, 66 Mo. 391, 418 ;
 Gates vs. Seibert, 157 Mo. 254, 271, 279 ;
 Adger vs. Ackerman, 52 U. S. C. C. A. 568, 578.

9. It is self-evident that whatever facts will constitute a valid marriage between parties, will also constitute a null or void one. No ceremony, civil or religious, is necessary for that purpose, and the contract may be either express or implied, and every presumption, including the good faith of the parties, will be indulged in its favor ;

- Johnson vs. Johnson, 30 Mo. 72, 84, 91,

marriage of a white man and Indian woman presumed from cohabitation, rearing and caring for issue;

- Boyer vs. Dively, 58 Mo. 510, 528;
 Cargile vs. Wood, 63 Mo. 501, 512;
 Dyer vs. Brannock, 66 Mo. 391, 401-417;
 Adair vs. Mette, 156 Mo. 496, 512;
 Ashford vs. Metropolitan Life Ins. Co., 80 Mo. App. 638, 643;
 Adger vs. Ackerman, 52 U. S. C. C. A. 568, 570, and cases cited.

10. Marriage "is a present and perfect consent, the which alone maketh matrimony without either public solemnization or carnal copulation, for neither is the one nor the other, the essence of matrimony, but consent only." (Swinburne.) This is quoted with approval in

Adair vs. Mette, 156 Mo. 496, 512.

The question then is whether the facts found by the Court below established, as a matter of law, a *de facto* marriage between said Eli Keen and Phoebe, either before or after 1865, and entitle any one of their issue to inherit from him. The defendant is a devisee of the land sued for, and not dependent upon the question of inheritance, and plaintiff is a dowress whose right depends entirely on the proposition that said Eli left no child capable of inheriting from him. Under the authorities the answer to the foregoing proposition must be in the affirmative. Introducing Phoebe as his wife to several different persons, and acknowledging her as his wife during the existence of the relation between them were declarations to that effect which were a part of the *res gestae* and competent evidence which declarations he would not have been permitted to deny after they had **continued for thirty-three years with cohabitation, constituted a *de facto* marriage between them or at least facts**

from which the law conclusively ~~proves~~^{presumes} a marriage, and not mere evidence of a marriage;

Hervey vs. Hervey, 2 Blackstone, 877, 879;
 Ashford vs. Metropolitan Life Ins. Co., 80 Mo. App.
 638, 643;
 Hutchins vs. Kimmel, 31 Mich. 126, 132;
 Langtry vs. State, 30 Ala. 536, 537;
 Dickerson vs. Brown, 49 Miss. 357, 369-370,

a marriage between a white man and a negro woman, prohibited by law;

Thorndell vs. Morrison, 1 Casey (25 Pa. St.) 326,
 328, by cohabitation alone;
 Adger vs. Ackerman, 52 U. S. C. C. A. 568, 571, a
 Missouri case.

But if there had been no admissions or declarations made by said Eli or Phoebe, the facts that they cohabited together **for over thirty years, and gave birth to eight children, whom they supported, educated and provided for,** established a marriage between them as a matter of law;

Johnson vs. Johnson, 30 Mo. 72, 84, 89.

Notwithstanding the separation of Johnson from his wife, 89, and subsequent denial of the marriage by him, 91, the Court in the latter case set aside the verdict of the jury finding against the marriage, and decided the rights of the parties.

See Boyer vs. Dively, 58 Mo. 510, 528.

11. The evidence required to establish a marriage in civil cases is not nearly so great and the presumptions in favor of it much more pronounced than in criminal prose-

ctions for bigamy, incest, adultery, and in civil actions for criminal conversation where strict proof is required.

State vs. Cooper, 103 Mo. 266, 271;

Adger vs. Ackerman, 52 U. S. C. C. A. 658, 670, a Missouri case.

12. The conduct of said Eli and Phoebe instead of demonstrating that they never intended to enter into a marriage, as stated in the opinion of the Court below, demonstrated precisely the contrary, and establishes conclusively, under the authorities, that they entered into a *de facto* marriage, which they would not have been permitted to deny, the latter point having been specially held in

Hervey vs. Hervey, 2 Blackstone, 877, 879;

Johnson vs. Johnson, 30 Mo. 72, 91.

The fact that they separated after having cohabited together for thirty years, acknowledged, introduced and treated each other as husband and wife during that time, reared and educated a family of children for whom he provided by executing conveyances to them during his life, and making devises to them by his last will and testament, and that he continued to call Phoebe his wife after he had been married to plaintiff—is no evidence whatever of bad faith on their part, but is evidence of the strongest character which furnishes a conclusive presumption that the separation was made with the utmost reluctance, three or four years after the enactment of the statute making a marriage between whites and negroes a felony, and that said statute caused the separation. The gross error of the ruling that such conduct showed bad faith between them is best shown by contrasting it with the facts in Dyer vs. Brannock, 66 Mo. 391, from which the following are extracts in regard to the marriage between Zachariah Wilson and Jane Collins.

“They stood up on the floor of the sitting room, or most public room in the house, side by side, with joined hands, and it was announced to those present by the mother or brother of Jane, that she and Wilson had agreed to marry, to which they both assented by an inclination of the head. They then retired to a bedroom and cohabited together as man and wife for three weeks. When Major Long reached St. Louis on his expedition to the Rocky Mountains, Wilson joined the expedition.” pp. 396, 397.

“That the husband, in pursuing his avocation, determined to join Major Long’s exploration party to the Rocky Mountains, could hardly be regarded as a very strong proof of predetermined bad faith, nor his subsequent marriage five years afterwards.” p. 417:

The subsequent marriage was to Sally Adams in St. Louis, and said Jane was then residing in the adjoining County of St. Charles, survived said Sally, and after the death of the latter, resumed the marriage relation with said Zachariah.

13. The finding of facts and conclusions of law are stated separately, the form of them being in strict accordance with Sec. 695, quoted in the statement. This finding is a special verdict, and is binding and conclusive, and so held by the Court below as there was ample evidence to support it.

Record 137 and 184 Mo. 358, 366;
Case vs. Espenschied, 169 Mo. 215, 220;
Freeman vs. Moffitt, 119 Mo. 280, 294.

They are part of the record and no instructions nor exceptions are necessary to review the cause;

Nicholas vs. Carter, 49 Mo. App. 401, 404, 405;
Bailey vs. Wilson, 29 Mo. 21, 22;
Blount vs. Spratt, 113 Mo. 48, 54, 56.

14. The conclusion of the Court on the facts, found "that no marriage at common law ever existed between Eli Keen and Phoebe Keen," is strictly a conclusion of law, and it is a correct abstract legal proposition under the facts found, but it has no bearing on the present case, as it means a valid common law marriage, and defendant only claims that there was, and the law only required that there should have been, a null or void marriage of any kind, either at common law or under the statute, which question of law it leaves unstated. The findings under the authorities simply proved a marriage of some kind that was void, or at least contained all of the facts from which the law presumes a void marriage, and no fact that would rebut the presumption. The law does not require it to have been a common law marriage. This conclusion of law is therefore clearly erroneous. But if it could by any possibility be classed as a finding of fact, it would not have justified a judgment against defendant, because it did not find that there was no null or void marriage and it could not have affected the question of a null or void marriage of any kind between them and is mere surplusage, and defendant would have been entitled to judgment notwithstanding the finding, just as a judgment may be rendered *non obstante verdicto*. It is evident that both of the Courts below held that the marriage must have been legal in order to give defendant, or his brothers and sisters the right to inherit, and that is clear error. Error is just as apparent in the other conclusion of law, "that Eli Keen died without any child or children or other descendants in being, capable of inheriting from him," under the facts found and the authorities, and for these errors it was the duty of the Supreme Court of Missouri to have reversed the judgment because the conclusions of law are in conflict with the facts found;

Blount vs. Spratt, 113 Mo. 48, 55;

Sutter vs. Streit, 21 Mo. 157, 160;

South St. Joseph Land Co. vs. Bretz, 125 Mo. 418,
423;
Hughes vs. Ewing, 162 Mo. 261, 294;
Leavitt vs. Taylor, 163 Mo. 158, 169, 170;
Fitzpatrick vs. Weber, 168 Mo. 562, 572;
Scotts City Bank vs. Miller Lumber Co., 102 Mo.
App. 75, 82.

It is respectfully submitted that the judgments of the
Circuit Court of St. Charles County and the Supreme Court
of Missouri should be reversed.

DAVID P. DYER,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED
JAN 30 1906
JAMES H. HENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1905

No. 188

ELLIS KEEN, PLAINTIFF IN ERROR

vs.

SOPHRONIA K. KEEN, DEFENDANT IN ERROR.

IN ERROR TO SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

C. W. BATES,
ATTORNEY FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

October Term, 1905.

NO. 188.

ELLIS KEEN,
Plaintiff in Error.
VS.
SOPHRONIA K. KEEN,
Defendant in Error.

} In error to the
Supreme Court
of the State of
Missouri.

STATEMENT.

This suit was begun in the Circuit Court of St. Charles County Missouri by the Defendant in Error, Sophronia K. Keen, against the Plaintiff in Error, Ellis Keen, on July 29th 1901, returnable to the September Term 1901. Summons was duly issued and served August 3rd 1901. It was an ordinary suit in ejectment in which Defendant in Error sought to recover from Plaintiff in Error the possession of an undivided half interest in a tract of land containing 71.65 acres, together with damages and rents profits. (See Transcript of Record pages 5 and 6.)

On September 2nd 1901 the Plaintiff in Error appeared filed his answer. The cause was continued by consent to the March term 1902 of the court, (Transcript of Record page 6.)

At the March Term 1902 the cause was tried before the

Court without a jury, (A jury being waived by the parties) resulting in a judgment in favor of the Defendant in Error. (Transcript of Record pages 3 and 6.)

From this judgment an appeal was taken to the Supreme Court of the State of Missouri, where after full hearing the judgment of the Trial Court was affirmed. By writ of error the cause is brought to this Court.

The facts disclosed at the trial and as shown by the Record in the cause are briefly stated as follows;

One Eli Keene was the owner of the property in controversy, and both the Plaintiff in Error and Defendant in Error claim title under *him*. He, Eli Keen, died testate, on the 22nd day of February 1901. He left surviving him his widow the Defendant in Error Sophronia K. Keen. His will was duly probated accordiug to law in St. Charles County, Missouri. The widow, Sophronia K. Keen, not being satisfied with the provision made for her in her husband's will, filed her renunciation of the will in the time and manner provided by the Statutes of the State of Missouri, and elected to take under the Statute.

It is provided in the Statutes of Missouri, that when the husband shall die without any child or other decendants in being capable of inheriting, his widow shall be intitled to take one half of the Real and Personal Estate belonging to the husband at the time of his death, absolutely, subject to the payment of the husband's debts.

Rev. Stat. of Mo. 1899 Sec. 2939.

And it is further provided that if the widow in such case desires to take under this Statute, she must file her election to do so in writing within twelve months after the grant of letters on her husband's estate.

Rev. Stat. Mo. 1899 Sec. 2943.

Mrs. Keen elected to take one half of her husband's Estate, subject to the payment of debts, in pursuance of the provisions of this Statute. In the will of Eli Keen the tract of land in controversy was devised to the Plaintiff in Error, Ellis Keen. Mrs. Keen having rncounced her husband's will and filed her election to take one half of his estate, under the Statute and

in exact compliance with the provisions of the laws of Missouri, it is not denied or questioned that she is entitled to an undivided half interest in the tract of ~~land~~ land in suit, and that the judgment in her favor in the case is right, if it be true that Eli Keene *died without any child or other decendants in being capable of inheriting from him.*

Mrs. Keen contends that her husband, Eli Keen, died with any child or other decendants in being capable of inheriting. While the Plaintiff in Error contends that Eli Keen died with children in being capable of inheriting. The Record clearly shows, and the fact is undisputed, that Eli Keen who was a white man was lawfully married to the Defendant in Error a white woman in Wood County, West Virginia, on August 22nd 1883, and the relation of husband and wife continued to exist between them, until terminated by the death of Eli Keen on February 22nd, 1901.

The Plaintiff in Error, Ellis Keen, is one of the eight children, who were the fruits of unlawful relations that existed between Eli Keen, who was a white man, and one Phoebe, a negro woman. The history of their relations may be briefly stated as follows: The negro woman Phoebe with a child Martha was a slave and owned by the father of Eli Keen who resided in St. Charles County, Mo. On June 1st, 1850, at administrator's sale of the personal property and slaves owned by his father's estate, Eli Keen became the purchaser of the negro woman Phoebe and her child Martha, and thereby became the owner of them as slaves. Eli Keen took the negro woman Phoebe to his home in St. Charles County, Mo., and some time after began cohabiting with her and continued his relations with her until about the year, 1882 or 1883, at which time their cohabitation stopped. The negro woman Phoebe continued to live in St. Charles County Mo., until her death in 1896. As the fruits of the intercourse between Eli Keen and the negro woman Phoebe there were born eight children of whom Ellis Keen, the plaintiff in error was the eldest, being in the fifty-first year of his age at the date of trial in March 1902. The youngest was born in January 1868. The cohabitation between Eli Keen and the negro woman,

Phoebe, from its inception in 1850 or 1851 until its cessation in 1882 or 1883, was carried on in St. Charles County, Missouri. Pretty much all the testimony at the trial bore upon the character of the relations that existed between Eli Keen and the negro woman, Phoebe, and their manner of living during the years of their cohabitation, but we deem it sufficient to say for the purposes of this statement that it is a conceded fact that no ceremonial marriage ever took place between Eli Keen and the negro woman, Phoebe, and no attempt was made at the trial to prove a ceremonial or statutory marriage. There was a total absence of evidence to show that there was ever any actual marriage agreement made between Eli Keen and the negro woman, Phoebe, In fact the evidence produced tended strongly to show that no contract of marriage was ever entered into by them, and that the relations that existed between them, from its inception to its close, was one of concubinage, pure and simple, and that they both so understood it. In addition to this, while the evidence showed that Eli Keen and Phoebe cohabited and raised a family of children, it also showed that the reputation in the community in which they lived was that they were not married, and that they were cohabiting without sanction of marriage. At the time that Eli Keen and Phoebe began cohabiting and at all times since, marriages between white persons and negroes were prohibited and declared void, by express Statute in the State of Missouri.

Gen. Stat. of Mo. 1845 p. 729 Sec. 3.

Gen. Stat. of Mo. 1855 p. 1062 Sec. 3.

Gen. Stat. Mo. 1865 p. 458 Sec. 2.

Wagner Stat. Mo. 1872 p. 929 Sec. 2.

Rev. Stat. Mo. 1879 Sec. 3265.

Rev. Stat. Mo. 1889 Sec. 6841.

Rev. Stat. of Mo. 1899 Sec. 4312.

And at all times during the continuance of the relations between them a marriage between a white and negro in the State was a criminal offense.

Rev. Stat. 1899 of Mo. Sec. 2174.

Gen. Stat. of Mo. 1845 p. 729 Sec. 4.

Gen. Stat. of Mo. 1855 p. 1062 Sec. 4.

During all the time that Eli Keen and the negro woman, Phoebe, were cohabiting it was declared, by express Statute in Missouri, that marriage is considered in law a civil contract, to which the consent of parties *capable in law of contracting* is essential.

Rev. Stat. (1899) Mo. Sec. 4311.

Gen. Stat. Mo. 1845 page 729 Sec. 1.

Gen. Stat. Mo. 1855 page 1061 Sec. 1.

The constitutionality or validity of none of these statutory provisions were called in the question by the Plaintiff in Error in the State Courts, and we understand that the validity of none of them are questioned in this Court by him. The Plaintiff in Error is confessedly the off-string of the unlawful relations between Eli Keen, a white man, and his slave, the negro woman, Phoebe. But at the date of Eli Keen's death the following Statutory by provision was in force to-wit:

"The issue of all marriages decreed null in law, or dissolved by divorce, shall be legitimate."

Rev. Stat. of Mo. 1899 Sec. 2918.

This Statute was in force as early as 1845, and has been in force at all times since. Now while it is conceded that no lawful marriage could or did exist between Eli Keen and his negro woman and slave Phoebe, it is contended by Plaintiff in Error Ellis Keen, that he and his brothers and sisters are legitimated by this Statute, and consequently that they are capable in law of inheriting from him, Eli Keen, and if capable of inheriting from him, then Mrs. Keen is not entitled to take half of her husband's estate. Thus it is seen that the controversy in this case finally narrowed down to the proposition as to whether the marriage relation was ever contracted or ever existed between Eli Keen, the white man, and Phoebe, the negro woman. For it is the issue of *marriage* decreed null in law, or dissolved by *divorce* that are legitimated by the Statute. Now we repeat the validity or constitutionality of no law of the State of Missouri that has any bearing upon this controversy was or is called in question by the Plaintiff in Error. Indeed the validity or constitutionality no law of the State, involved here, can be seriously questioned. That the

suit from its inception was regular, and the whole proceeding was conducted in strict conformity to the laws of the State, the law of the land, is not questioned and cannot be denied. When brought to its final analysis, the whole complaint of the Plaintiff in Error is reduced to the narrow contention, that the trial court in the first instance and the Supreme Court of the State of Missouri on appeal from its judgment, erred in finding and holding, as a fact under the evidence produced in the case, that Eli Keen, the white man, and Phoebe, the negro woman, were never married, and consequently that Eli Keen died without any child or other descendants in being capable of inheriting.

This is the only error set up in the assignment of errors herein filed by the Plaintiff in Error. The assignment of errors contains no statement or charge that the judgment and findings of the Court denies the Plaintiff in Error the equal protection of law or that they deprive him of property without due process of law. Transcript of Record pages 144 and 145.

In strict truth, on the facts presented in this record, the Plaintiff in Errors claim is still further reduced to the very narrow contention that the trial Court and the State Supreme Court erred in refusing to *presume* the existence of *a void common law* (sic) marriage between Eli Keen and the negro woman, Phoebe, from evidence of a cohabitation and course of living, that was *not sufficient even to create a reputation of marriage in the community in which they lived.*

We submit that on this record the writ of error should be dismissed for want of jurisdiction. Or if the Court finds the record sufficient to confer technical jurisdiction on this Court, the judgment should be affirmed, as it is manifestly for the right party.

JOINDER IN ERROR

ELLIS KEEN, Plaintiff in Error,

VS.

SOPHRONIA K. KEEN, Defendant in Error.

Now comes the Defendant in Error, Sophronia K. Keen, and for answer to the assignment of errors herein filed denies

that there was any error committed in the trial of said cause and says that there is no error in the Record in said cause.

C. W. BATES,
Attorney for Defendant in Error.

POINTS AND AUTHORITIES.

I.

It is the constitutional right of the State of Missouri to prescribe what shall constitute marriage between her own citizens and within her bounds. No citation of authority on this proposition is needed, it is a doctrine of such universal recognition.

II.

The decision of the Supreme Court of Missouri is the law of the State on that subject, and will be so accepted by this Court.

Leeper vs. Texas 139 U. S., 462, 467.

South Ottawa vs. Perkins, 94 U. S. 260, 268.

Howard vs. Kentucky, *unreported*.

III.

This is an action at law, and by consent, was tried by the Court without the aid of a jury. As the testimony abundantly supported the finding of facts made by the trial Court, that finding of facts is conclusive upon the parties in this Court.

Keen vs. Keen 184 Mo. 358, 366.

Nichols vs. Carter 49 Mo. App. 402.

IV.

And as no instructions were asked or given, the only question for decision, is, did the finding of facts warrant the conclusions of law reached by the trial Court.

Keen vs. Keen 184 Mo. 366.

V.

The conclusions of law are amply sustained by the finding of facts. It is not pretended that any ceremonial or statutory

marriage ever took place between Eli Keen and Phoebe. There was no direct evidence of any kind or of any witness, of any agreement between them to become husband and wife. The *facts found* are wholly insufficient to raise a presumption of marriage between them.

First. The Court found as a *fact* there was no reputation of marriage. That the reputation was that they had never been married.

In order to raise a presumption of marriage the *facts* of cohabitation as husband and wife. Acknowledgement that they were husband and wife, and reputation, in the community where they resided, that they were husband and wife.

Cargile vs. Words 63 Mo. 512, 513.

Williams vs. Herrick (Rhode Island S. C.) 49.

Central Law Journal 388, 389 and cases cited.

Ashferd vs. Ins. Co. 80 Mo. App. 644.

Second. The trial Court found the facts, that the intercourse between the two parties all occurred in Missouri, and that Keen was a white and Phoebe a negro. That Phoebe was a slave.

From these facts it conclusively appears that no lawful marriage could have occurred.

Gen. Stat. Mo. 1845, page 729, Sec. 3.

Gen. Stat. Mo. 1855, page 1061, Sec. 3.

Carried in Revisions down to 1899 and now in force.

Rev. Stat. Mo. 1899 Sec. 4312.

And also that any actual marriage between them would have been a criminal offense.

Gen. Stat. Mo. 1845, page 729, Sec. 4.

Gen. Stat. Mo. 1855, page 1061, Sec. 4.

Which continued in force until repealed by act of 1879 now Rev. Stat. Mo. 1899, Sec. 2174.

No Court would presume the existance of a *void common law marriage*.

Keen vs. Keen 184, Mo. 358, 356.

Cargile vs. Woods, 63 Mo. 512, 513.

Third. In order to constitute marriage, at common law,

the parties must agree to become husband and wife for their joint lives, upon the understanding that neither one nor both can dissolve the relations. There must be an agreement to become husband and wife.

- Banks vs. Galbraith 149 Mo. 536.
- Adair vs. Mette 156 Mo. 496, 511.
- State vs. Cooper 103 Mo. 273, 274.
- State vs. Bittick 103 Mo. 183, 191.
- McKenna vs. McKenna 180 Ill. 577.
- Robinson vs. Robinson 188 Ill. 371.
- Rundle vs. Pegram 49 Miss. 757.

Fourth. An agreement of cohabitation upon any other terms would be for concubinage and not marriage.

Fifth. Eli Keen and Phoebe knew the facts they are conclusively presumed, to have known the law. It is impossible to *presume* that, with their knowledge of the facts, they in good faith entered into any actual marriage agreement.

The Statute of Missouri legitimates the issue of void marriages, but in order to come within its provisions *marriage* in fact must be shown. Rev. Stat. Mo. 1899 Sec. 2918. "The issue of all marriages decreed null in law shall be legitimate," not the issue of concubinage.

- Keen vs. Keen 184 Mo. 358 to 376.

VI.

The writ of error should be dismissed for want of jurisdiction. The record fails to show any Federal question in the case. The assignment of errors filed by the Plaintiff in Error, does not assign or set up that the proceedings or judgments of the lower Courts deprived him of any right, privilege or immunity contrary to the provisions of the Federal Constitution.

- Arrowsmith vs. Harmoning 118 U. S. 194.
- Walter vs. Sauvinet 92 U. S. 90, 92, 93.
- Holden vs. Hardy 169 U. S. 366, 384, 385.
- O'Neil vs. Vermont 144 U. S. 323, 334, 335.
- Church vs. Kelsey 121 U. S. 282.

This Court will not assume jurisdiction for the mere pur-

pose of determining whether or not the State Courts conclusions on a controverted issue of fact was right. The record nowhere shows that Plaintiff in Error was deprived of property without due process of law or that he was denied the equal protection of the laws.

In *Converse* 137 U. S. 624.

Maxawell vs. Dow 176 U. S. 581.

The sole issue presented in this record is:

Did the action of the State Court in refusing to *presume* the existence of a *void common law marriage* between Eli Keen and the negro woman, Phoebe, on the facts found by the Court, deny the Plaintiff in Error the equal protection of the laws, or deprive him of property without due process of law?

This is the only error assigned in the assignment of errors filed. It is the only issue presented in Plaintiff in Error's brief.

ARGUMENT.

At the outset, we address the attention of the Court to the fact, that the judgment of the State Court does not deprive Plaintiff in Error of all interest in his father's estate. He and his brothers and sisters, will hold one-half of Eli Keen's valuable estate under the terms of his will. The judgment in the case does not nullify or set aside the will. It remains in full force. Its provisions are only interfered with to the extent of allowing the widow to take half of the estate under the statute, the law of Missouri wisely providing that the wife may not be bound by the husband's will, but shall enjoy the privilege of taking under the statute. Plaintiff in Error is not disinherited and turned out penniless. As to the real contentions in the case:

It is admitted by counsel for Plaintiff in Error on page 21 of his brief filed in this Court that the validity of the Statutes of Missouri are not called in question, as they are as fair and just to him as he could ask. Nor does he make any complaint that any unfair or unjust rule of procedure was enforced against him the State Courts.

The suit was brought against Plaintiff in Error in a State Court of competent jurisdiction. He was duly summonsed. He appeared and defended the case. Every right that is allowed any litigant in the State Courts in similar cases was conceded to him. When reduced to its last analysis, his sole complaint is that the State Circuit Court refused to *presume* the existence of a *void common law marriage* upon mere proof of the facts, that they had cohabited and reared a family of children, between parties who were forbidden by law to inter-marry—between whom no lawful marriage could have taken place in the State, and between whom any actual marriage in fact in the State would have been a criminal offense, and that the State Supreme Court erred in sustaining the action of the trial Court in the premises.

In the assignment of errors filed in this cause, he states his objection to the action of the Supreme Court of Missouri in these words:

"1. The Court erred in said cause in deciding that the

“Court below, in its special finding of facts, found that no “marriage at common law ever existed between Eli Keen and “Phoebe Keen, whereas in truth and in fact, the Court below “in said special finding of facts, found all the facts, required “to establish *a null and void common law marriage* between them, and from which facts so found, the law *presumed* “*a null and void marriage*, between said Eli Keen and “Phoebe Keen.”

“(2) The Court erred in said cause in not deciding that the “Court below, in its special finding of facts in the cause, found “all the facts required by law to raise a legal *presumption* “of a *null and void marriage*, and that from said finding of “facts the law *presumed* that a *null and void common law* “marriage in fact or *de fact* existed between Eli Keen and “Phoebe Keen.”

Transcript of Record page 144.

There is no suggestion in the assignment of errors that the judgment of the State Court is in violation of any provision of the Federal Constitution. No suggestion that it deprives the Plaintiff in Error of any right, privilege or immunity guaranteed to him by the Constitution of the United States.

But the whole contention is that the State Circuit Court erred in interpreting its own finding of facts, and that the State Supreme Court erred in sustaining the trial Court, and that the error of the State Courts consists solely in the refusal to hold, under the facts as found by the Circuit Court, the law *conclusively presumed* the existence of a *null and void common law marriage* between Eli Keen and Phoebe, the mother of Plaintiff in Error.

We think upon the face of the record this Court should dismiss the writ or error for want of jurisdiction to hear the cause, on the one hand, and are clear, on the other that if this Court holds that the record shows *technical jurisdiction* in it, then the judgment of the lower Court should be affirmed because its decision of the *controverted issue is manifestly right*.

We will briefly discuss these two propositions, in reverse order, and:

I.

It being conceded that there was no ceremonial or statutory marriage in the case, the contention is confined to the claim that there was a common law marriage.

As there was no direct proof of any kind or of any witness of an agreement in the present tense between Eli Keen and Phoebe that they could be husband and wife for life, (the trial Court so found the fact) the contention is further confined to the claim that under the facts as found the law *presumed* the existence of *a common law marriage* between them.

As it is conceded that no *lawful marriage* could have taken place between Eli Keen and Phoebe, (the trial Court found the facts to be that the intercourse between them was in St. Charles County, Mo. That Eli Keen was a white and Phoebe a negro—that Phoebe was a slave when the cohabitation began and continued to be until 1865—that no change in the character of the relation occurred from its inception to its close. Transcript of Rec. pages 130 to 133) the contention is finally narrowed to the claim on the part of Plaintiff in Error, that under the facts as found by the trial Court, the law *presumed* that a *null and void common law marriage in fact*, or *de facto*, existed between Eli Keen and Phoebe.

As the evidence was abundant to support the finding of facts made by the trial Court, that finding of facts is conclusive upon the parties in this Court.

Keen vs. Keen 184 Mo. 366.

The facts found by the trial Court bearing upon the issue of marriage are briefly stated as follows:

(1) That Eli Keen was a white man and Phoebe a negro woman and a slave.

(2) On June 1st 1850 Eli Keen purchased Phoebe, and thereby became the owner of her and held her as a slave.

(Transcript of Rec. page 130.)

(3) Some time after he became the owner of Phoebe and

while she was his slave (in 1850 or 1851), they began cohabiting and raised a family of children as the fruits of their intercourse, the Plaintiff in Error being the eldest of these children.

(4) The cohabitation between Eli Keen and Phoebe began in 1850 or 1851 and continued down to 1882 or 1883, during which time they lived together on Eli Keen's farm and home place in St. Charles County, Missouri.

(5) That Eli Keen and Phoebe and the children lived together as one family.

(6) That Eli Keen provided for the family—paid the store bills and doctors bills—sent the children to school, and made provisions for and assisted them as they grew up.

(7) That Eli Keen always acknowledged the paternity of these children, and in his will designates them as his "beloved children."

(8) To several persons, in his own house, Eli Keen introduced Phoebe as his wife, and to several persons, after his marriage to Defendant in Error, Sophronia K. Keen, Eli Keen spoke of Phoebe as his wife.

(9) That so far as the evidence showed, Eli Keen was never seen with Phoebe except in his own house or yard. He was never seen off the place with her. He was never known to visit friends with her. He was never known to introduce her as his wife outside of his own house, and he was never known to be with her and acknowledge her as his wife, outside of his own house.

(10) That while it was a known fact in the community in which they lived, that Eli Keen and Phoebe were living together and cohabiting, as above detailed, it was the reputation in the community that they were so living together and cohabiting without sanction of marriage. The reputation was that they had never been married.

(11) About 1882 or 1883, the exact date does not appear, the intercourse between Eli Keen and Phoebe ceased. She continued to live on this home farm (which Eli Keen conveyed to her for life in December 1883), for several years and then moved to St. Charles, Mo., where she lived up to the date of her death in 1896. About 1883 Phoebe ceased to buy goods at

the stores on Eli Keen's credit. Her bills were thereafter charged to Phoebe Keen and she paid them.

(12) On August 22nd., 1883 Eli Keen was lawfully married to Defendant in Error, Sophronia K. Keen, (nee Barrett) in Wood county, West Virginia, upon license issued in accordance with the laws of West Virginia and from the date of their marriage down to the date of Eli Keen's death on February 22, 1901, they lived together as husband and wife.

(13) Prior to their marriage he informed Defendant in Error that he was an unmarried man, and he had no children or other persons dependent upon him. She had no knowledge or information whatever of Eli Keen's relations with the negro woman, Phoebe, until a number of years after her marriage with him, and in fact received no definite information concerning these relations between Eli Keen and Phoebe until very shortly before Eli Keen's death, namely in December, 1900. Eli Keen told other parties that he had never been married until married to Defendant in Error in 1883.

(14) There was no evidence of any kind of any marriage contract or agreement between Eli Keen and the negro woman, Phoebe, other than is set forth in the above statement.

(15) 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.

(16) Eli Keen, at his death, left no child or children or other decendants in being, other than the Plaintiff in Error Ellis Keen, and his brothers and sisters, the children of his relations with the negro woman Phoebe.

Transcript of Record pages 130 to 133.

The foregoing is a full and fair summary of the *facts* found by the *trial court*.

Those facts fully justify and sustain its conclusions of law, that no marriage at common law ever existed between Eli Keen and Phoebe Keen, and that Eli Keen died without any child or children or other decendants in being capable of inheriting from him.

First. Under the *facts* found by the trial court no

presumption of marriage could arise in this case, even though there had been no impediment to a lawful union between the parties. The Court found *as a fact* that the *reputation* was that they had never been married—that they were living together without sanction of marriage.

In order to justify a presumption of marriage in such cases three *facts* must concur or be shown, namely:

- (1) Cohabitation as man and wife.
- (2) Acknowledgement of the relation.
- (3) Habit or course of living of such character as to acquire the *reputation of marriage* in the community where they live.

Cargile vs. Wood 63 Mo. 513.

Williams vs. Herrick 49 Cent. Law Journal, 388, 389
and cases cited.

Ashford vs. Ins. Co. 80 Mo. App. 644.

Cohabitation alone is not sufficient.

Cargile vs. Wood 63 Mo. 513.

Williams vs. Herrick 49 Cent. L. J., 388, 389.

Reputation alone will not suffice.

Cargile vs. Wood 63 Mo. 513.

Cohabitation, acknowledgement and reputation must all be shown to raise a *presumption* of marriage.

So was the law declared in Missouri thirty years ago, in a case when the legitimacy of a child of two *white persons* was denied by the judgment of the court, and in a case where there existed no impediment to a *lawful marriage* between the parents.

Cargile vs. Wood 63 Mo. 513.

Second. The *presumption* of marriage arising from proof of cohabitation, acknowledgement and reputation, is not a conclusive *presumption of law*, but is merely a *rebuttable* presumption of fact.

Cohabitation, acknowledgement and reputation is only presumptive proof of marriage.

So was the law declared in Missouri thirty years ago, and subsequently reiterated, in cases involving the legitimacy of children of *peisons* where no legal impediment to their marriage existed.

Cargile vs. Wood 63 Mo. 513.

Adair vs. Mette 156 Mo. 512.

Third. Had the *facts* in this case shown (*as they did not*) all three elements—cohabitation, acknowledgement and reputation—no *presumption* of marriage between Eli Keen and the negro woman Phoebe could have arisen, because the presumption was completely *overthrown, neutralized or destroyed* by the other established and admitted facts found by the Court which conclusively showed that they *could not* lawfully intermarry.

(1) The fact that Eli Keen was a white man and Phoebe was a negro.

(2) The fact that she was a slave.

From these facts, as the intercourse between them occurred exclusively in Missouri, these conclusions inevitably flow.

(*a*) They could not *be* or *have been* lawfully married, because marriage between them was forbidden by law, and any attempted marriage would have been void.

Keen vs. Keen 184 Mo. 358, 373, 374.

This is conceded by Plaintiff in Error.

(*b*) Any actual marriage between them would have been a criminal offense under the laws of Missouri.

Gen. Stat. Mo. 1845 page 729 Sec. 4.

Rev. Stat. Mo. 1899 Sec. 2174.

Counsel for Plaintiff in Error concedes that this was true since the Act of 1879.

Rev. Stat. Mo. 1879 Sec. 1540.

But he seems to have conceived the idea that the Act of 1879 was the first law making a marriage between whites and negroes a criminal offense. As early as 1845 this statutory provision was in force in Missouri:

“Sec. 4. Whoever shall contract marriage in fact, con-

“trary to the prohibition in the two sections next preced-
“ing * * * * * Shall be deemed guilty of a
“misdemeanor, and shall upon conviction be punished by fine
“or imprisonment or both, at the discretion of the jury which
“shall try the cause. Or if the conviction shall be by confes-
“sion, or on demurrer, at the discretion of the Court.”

Gen. Stat. Mo. 1845 page 729 Sec. 4.

Gen. Stat. Mo. 1855 page 1061 Sec. 4.

It was in force and continued to be the law of the State until finally repealed and superceded by the Act of 1879, now Rev. Stat. Mo. 1899 Section 2174.

(c) The law does not and will not *presume* the existence of a *void common law marriage*, or *presume* the existence of a void marriage of any kind.

Cohabitation and reputation at best are but *prima facie* evidence of marriage.

Cargile vs. Wood 63 Mo. 512, 513.

Adair vs. Mette 156 Mo. 512.

Williams vs Herrick 49 Cent. Law Journal 388, 389 and *cases cited*.

The most ordinary way of rebutting such evidence of marriage is to show lack of capacity to intermarry.

The presumption of marriage on such evidence is indulged in favor of innocence as against crime. In favor of virtue as against immorality. In favor of lawful living as against unlawful cohabitation.

Cargile vs. Wood 63 Mo. 511, 512.

But, in a case like this, where to indulge the presumption is to show that the parties had entered into an unlawful and forbidden union and committed a criminal offense, the presumption will not be indulged.

It would be a bald *legal* and *judicial* absurdity to *presume* from proof of cohabitation and acknowledgement, the existence of a *void common law marriage*.

Cargile vs. Wood 63 Mo, 513.

“But cohabitation may be notoriously illicit, and known to

be so in the neighborhood in which the parties reside. In such case the law would surely not presume that it furnished any presumption or evidence of marriage.

Cargile vs. Wood 63 Mo. 513.

Adair vs. Mette 156 Mo. 512.

Fourth. But it is contended that even though it be conceded that no marriage between the parties existed prior to 1865, for the reason that Phoebe was a slave and incapable of contracting.

Rev. Stat. Mo. 1899 Sec. 4311.

Johnson vs. Johnson 45 Mo. 595.

Still the presumption of marriage must be indulged after 1865 because they continued to cohabit after she was emancipated and was possessed of capacity to contract. But the trouble with this contention is that it admits that the relation between the parties was without sanction of marriage—was illicit—in the beginning, and the law presumes they so continued to the end.

Cargile vs. Wood 63 Mo. 514.

And the incapacity to intermarry because one was a white and the other a negro still remained.

Keen vs. Keen 184 Mo. 358, 373, 374.

And the Court found as a *fact* supported by every word of testimony on the subject—that no change in the character of the relation between the parties ever occurred. That they continued the same from their inception to their close. Nothing to strengthen Plaintiff in Error's cause is obtainable from that source.

Fifth. The knowledge that Eli Keen and Phoebe must have possessed, precludes the idea that they could have entered into any *bona fide* agreement to become husband and wife. They knew the facts. They are conclusively presumed to have known the law.

Now in order to constitute a common law or any other marriage under Missouri law, the parties must enter into an agreement by which they assume the relation of husband and

wife, for their joint lives, upon the understanding that neither one, nor both, can rescind the contract or dissolve the relation.

State vs. Cooper 103 Mo. 273, 274.

Banks vs. Galbraith 149 Mo. 536.

Adair vs. Mette 156 Mo. 511.

State vs. Bittick 103 Mo. 191.

An arrangement for cohabitation upon any other understanding, would be a contract for concubinage pure and simple.

(a) Now Eli Keen and Phoebe both knew that he was a white and she was a negro, and that no lawful marriage could be had between them in Missouri.

(b) They both knew that any marriage between them in the State would be a criminal offense.

(c) They both knew that either one, or both could dissolve the relation at any time.

It is impossible to believe that they could have in good faith entered into a marriage agreement.

It would be absurd in the extreme to presume from the fact of cohabitation, that they had entered into a *fraudulent*, *void* and *unlawful* marriage arrangement.

Sixth. Counsel for Plaintiff in Error wholly misunderstands the ruling of the State Supreme Court of Missouri. He appears to have gotten the idea in some way that the State Courts have adopted strained and unlawful constructions of the Statute, for the purpose of defeating a recovery by his client, for the reason that his client has negro blood in him. And seems also to imagine that the Court holds that a *void marriage* between a white and negro could not occur in Missouri, and that in no case would the off-spring of relations between a negro and a white be legitimate under the Statute.

There is no justification for any such views.

What the State Supreme Court did decide—and its decision is in entire harmony with all previous interpretations of the same Statute—is, that in order to establish the legitimacy of a party under this Statute, it must be shown that he is the *issue of a marriage* decreed null in law. That the fact of marriage must be shown.

It also decides that as no ceremonial or statutory marriage was shown, and no direct proof of an actual marriage agreement between Eli Keen and Phoebe was produced, the *facts* established by the evidence and found by the trial court, were insufficient to justify the *presumption* of marriage between the parties.

That when it was *conclusively* shown that no lawful marriage could have occurred or existed, the law would not, upon proof of cohabitation and acknowledgement, *presume* the existence of a *void common law marriage*.

It denied the legitimacy of the Plaintiff in Error under this Statute upon the sole ground that no marriage in fact was shown to have existed between his parents.

Keen vs. Keen 184 Mo. 375, 376.

The Court did not hold that no void marriage could occur between a white and negro. Nor did it hold that the fact that one of the parties was a slave at the inception of the cohabitation rendered it impossible for a *void marriage* in fact to have occurred between them. But it held that those facts showed that no lawful marriage between them could have occurred in Missouri, and that any actual marriage in fact between them would have been void. And that the Court would refuse, upon proof of cohabitation and acknowledgement, to *presume* the existence of a *void common law* marriage between these parties.

Keen vs. Keen 184 Mo. 373, 374.

The Court decided this case upon the distinct ground that no marriage ceremonial or statutory or common law existed between Keen and Phoebe.

Keen vs. Keen 184 Mo. 375, 376.

There is nothing whatever in the suggestion that the decision of the State Supreme Court in the case at bar is in conflict with its previous decisions interpreting the same statute.

He cites:

Lincecum vs. Lincecum 3 Mo. 441.

Lee vs. Lee 161 Mo. 52, 56, 57.

Green vs. Green 126 Mo. 17, 23.

Gates vs. Seibert 157 Mo. 254.
Dyer vs. Brannock 66 Mo. 391.
Johnson vs. Johnson 30 Mo. 72.
Boyer vs. Dively 58 Mo. 510.
Cargile vs. Wood 63 Mo. 501.
Adair vs. Mette 156 Mo. 496.
Ashford vs. Ins. Co. 80 Mo. App. 633.
Johnson vs. Johnson 45 Mo. 595.
Pain vs. Pain 37 Mo. App. 110, 112.

It will require but a casual examination of these various decisions to discover that the decision in the case at bar, is not at variance with the former rulings of the Court.

In Lincecum vs. Lincecum 3 Mo.
Green vs. Green 126 Mo.

The fact of *marriage* was undisputed. Dyer vs. Brannock 66 Mo. was a case where the actual contract or marriage agreement was made in the presence of witnesses.

In *Lee vs. Lee* the legitimacy of the issue of marriage *between two slaves* was in controversy. And they were held legitimate under the express provisions of a different statute. Rev. Stat. Mo. 1899 Sec. 2920. Johnson vs. Johnson 30 Mo. 72. Boyer vs. Dively 58 Mo. 510, were cases where marriages with Indians according to Indian custom were upheld, in which the Courts held the children were issue of lawful wedlock. In simple conformance to an almost universal principle of international law, that a marriage celebrated in other states or countries, if valid by the laws of such countries is valid in Missouri.

Banks vs. Galbraith 149 Mo. 536, 537.

And which marriages were held valid in obedience to an express statute.

Rev. Stat. Mo. 1845 page 729 Sec. 5.

In Johnson vs. Johnson 45 Mo. 595, a suit for divorce between negroes, the court simply decided.

(1). That marriage contracted by a slave was not binding in law.

(2). That marriage between two negroes, though one was a slave, was no violation of legal duty, was not prohibited or forbidden by law.

(3). That the marriage contracted between them while one

was a slave, was ratified and confirmed by cohabitation and acknowledgement of the relation for a term of years after both were free, and the marriage became valid and binding upon them. A *lawful marriage* existed between them.

The construction of the Statute in question in the case at bar was not under consideration—was not in question.

In the case at bar it is *admitted* that *no lawful marriage* existed between Eli Keen and the negro woman Phoebe, because such a marriage was prohibited by express statute, and *any actual marriage in fact* between them would have been *void*.

But it is sought in this appeal to this Court, to compel the courts of Missouri to *presume* the existence of a *void common law marriage* upon mere proof of cohabitation and acknowledgment.

In *Cargile vs. Wood* 63 Mo. 501 to 515, decided 30 years ago, in a case where the legitimacy of the issue of two white persons was in question, and where no impediment to a lawful marriage existed, the Supreme Court of the State laid down the doctrine, that it was essential, to raise a *presumption* of marriage, that *reputation* of marriage existed. That cohabitation and acknowledgement, without *reputation* of marriage was insufficient to justify the presumption of marriage.

Cargile vs. Wood 63 Mo. 512, 513.

It also decided that when the cohabitation was illicit in its inception it was presumed to continue so, and that the party that claimed that the character of the relation had changed must show when and in what the relation had changed.

Cargile vs. Wood 63 Mo. 514.

It also decided that cohabitation, acknowledgment and reputation, at best, was but presumptive proof of marriage and where these *facts* were all proven, and the circumstances would justify, a present contract of marriage might be presumed.

Cargile vs. Wood 63 Mo. 512, 513.

In *Adair vs. Mette* 156 Mo. 512, a case in which a marriage between two whites was in controversy, the Court held that cohabitation, acknowledgment and reputation of marriage, was

but ~~not~~ presumptive evidence or proof of marriage—a rebuttable presumption of fact and not a conclusive presumption of law.

Adair vs. Mette 156 Mo. 512.

In Banks vs. Galbraith 149 Mo., in which the legitimacy of the issue of relations between an Indian woman and a white man—the relations between them taking place in Missouri—it was held, that where it was attempted to show that a marriage had taken place in the State of Missouri, it was necessary to prove a marriage according to Missouri law.

Banks vs. Galbraith 149 Mo. 537.

The case at bar is the first instance in the history of Missouri in which it was sought to establish, by mere *presumptive* evidence, the existence of a *void common law marriage*, between parties who were forbidden by express statute to intermarry, between whom any marriage in fact would have been *null and void*, and between whom any marriage in fact would have been a criminal offense, and subjected the parties to punishment by fine and imprisonment.

The decision in this case is in consistent harmony with all the previous rulings of the Court on the subject.

II.

But we submit, that the writ of error should be dismissed because the record fails to show jurisdiction in this Court. It fails to show that any federal question was raised or at issue in the case. It fails to show that the State Court passed upon any question involving the construction of the Federal Constitution.

The only suggestion to be found in the record anywhere that a question involving the construction of the constitution of the United States—the only suggestion of the presence of a Federal question in the case, is found in the 12th and 13th paragraphs of Plaintiff in Error's motion for a new trial, filed in the State Circuit Court, in which it is charged that the verdict and judgment deprived him of property without due process of law, and denied him the equal protection of the laws.

Transcript of Record pages 134, 135.

It is true that in the record filed in the Supreme Court of

Missouri, a copy of this motion for a new trial was embodied.

But it is also a fact that in the brief and argument filed in the State Supreme Court, not a suggestion was made that the verdict and judgment was in violation of any provision of the Federal Constitution.

The State Supreme Court was not asked to pass upon any such question, and in fact it did not pass upon any such question.

In its opinion filed in the cause, the State Supreme Court made no allusion whatever to the constitutional questions, by which jurisdiction is sought to be invested in this Court, simply because in the brief and argument filed it was not asked to decide any such issue.

In the assignment of errors filed by Plaintiff in Error in this Court, there is not a word or a suggestion to be found that the judgment of the State Court deprived him of property without due process of law or denied him the equal protection of the laws.

Transcript of the Record pages 144, 145.

Not only this, but the record plainly shows, that Plaintiff was not deprived of property without due process of law and was not denied the equal protection of the laws by the finding and the judgment of the State Court. It clearly discloses the fact, that the judgment of the State Court simply settled a controversy between its citizens involving the construction a perfectly valid state law—that the whole proceeding was regular and in strict conformity to the laws and rules of procedure in force in the State, the validity of all of which is conceded.

We submit that in order to bring before this Court for review the solemn adjudications of the Court of last resort in a sovereign state in the union, something more than the mere insertion of a clause in a motion for a new trial filed in a State *nisi prius* Court, that the judgment is in violation of the Federal Constitution should be required.

We readily concede that a State can no more deprive a citizen of the United States, of the rights, privileges and immunities guaranteed to him by the Federal Constitution, by the judgments of its Courts than it can by an act of its legislature.

But the fourteenth amendment to the Federal Constitution, invoked here, created no new rights, privileges or immunities. It simply guarantees to the citizens of the United States the enjoyment of those fundamental rights that inhere in them as citizens of the United States. It was never designed to deprive the States of the right, by law, to regulate the domestic relations of its citizens or to subject all its laws and regulations for the government of its own citizens to the review and control of the Federal Government or Courts.

Maxwell vs Dow 176 U. S. 588, 589, 590.

Slaughter House cases 16 Wall 36.

Duncan vs. Missouri 152 U. S. 383.

The State of Missouri had a perfect right to adopt a law providing that, "the, issue of all marriages decreed null in law "or dissolved by divorce shall be legitimate."

Rev. Stat. Mo. 1899 Sec. 2918.

It has a perfect right when its citizens seek to avail themselves of the benefits of that statutory provision, to insist that he must at least show that he is the *issue* of a marriage decreed null in law or dissolved by divorce.

It has a perfect right to say what proof shall be required to show that one of its citizens is the issue of a void marriage and legitimated by this Statute.

It has a perfect right in the application of this statute to refuse to *infer* or *presume* the existence of *a void common law marriage*.

What right, privilege or immunity that is guaranteed to the Plaintiff in Error by the Fourteenth Amendment to the Constitution of the United States, or what fundamental right that belongs to him as a citizen of the United States, is he deprived of or denied, by the judgment of the State Court in this case?

Is there any provision in the Federal Constitution that requires the State to provide that the issue of marriages decreed null in law shall be legitimate?

Is it not true that the State may or may not adopt such a law as it chooses? And is it not the unquestioned right of the

State, if it adopts such a law, to say in general what measure of proof shall be required to establish the right of its citizens to the benefits of the provisions of that law in proceedings in its own courts? Would not the Missouri Statute in question be a perfectly constitutional and valid law, if the State legislature had added to it the express provision that in cases in which it was sought to show legitimacy under the Statute, a ceremonial marriage must be shown or else direct proof of a *marriage in fact* must be presented, thus preventing the *presumption* of a *void common law marriage*?

If an express statutory enactment of this character by the State would not deprive the Plaintiff in Error of any right guaranteed to him by the Federal Constitution, how is it possible that the decision of the State Supreme Court which so construes the law, can be held to do so?

What the State Supreme Court in its decision has declared to be the law on this subject, *is the law in Missouri* on the question at issue.

Howard vs. Kentucky, unreported case recently decided by this court.

Leeper vs. Texas 139 U. S. 463.

It is clear, from an examination of this record, that no real federal question was ever present in this case.

The State Court simply construed and applied a valid statute of the State in a controversy between its citizens in strict conformity to the law of the land.

It must be clear from a most casual consideration of the matter, that to sustain the contention of the Plaintiff in Error, it must be held that, to be declared the issue of a marriage decreed null in law and legitimate, is a right guaranteed to him by the Federal Constitution, that may not be denied him, except in violation of the Constitution of the United States. Or else this Court must substitute its construction, its declaration of what the law of Missouri is, for that of the solemn adjudication of the Court of last resort in the State.

The fourteenth amendment to the Federal Constitution never contemplated or intended any such result.

Slaughter House Cases 83 U. S. 77, 78, 79.

The sole issue presented by this record is:

Does the mere refusal of the State, through its Court of last resort, to *presume* the existence of a *void common law marriage*, upon mere proof of cohabitation and acknowledgement, deny Plaintiff in Error *the equal protection of the laws*, or *deprive him of property without due process of law*?

This is the whole contention of Plaintiff in Error in this case.

The Missouri Statute providing that the issue of marriages decreed null in law shall be legitimate is a humane provision.

It was designed to meet cases where the parents were actually *married in fact*, the relation contracted in entire good faith on the part of one of the parties at least, and it is afterwards discovered from some cause to be void. It was designed to legitimate the issue of such unions.

“(1) The policy of the law is to make legitimate the issue “of all marriages contracted honestly and in good faith by one “of the parties. The children of such marriages when entered “into in good faith by one or both of the parties, should not in “right be stigmatized as bastards, and disinherited on account “of the fraud of one, or the honest misapprehension of both of “the parents.”

Green vs. Green 126 Mo. 22.

It was not intended by that Statute to legitimate the issue of all illicit intercourse between men and women in the State.

There is absolutely nothing in the application of the law in this case that deprives the Plaintiff in Error of any constitutional right, and the judgment of the State Court should not be disturbed. We believe that this Court will conclude, upon a full examination of the record, that it cannot be fairly claimed that there is, or that there ever was at any stage of the proceeding, any real federal question present in the case, and it will accordingly dismiss the writ of error.

But if it should conclude that technical jurisdiction is conferred by the record it will promptly affirm the judgment, on the ground that it does not violate or deprive Plaintiff in Error of any right guaranteed to him by the constitution of the United States.

All of which is respectfully submitted.

C. W. BATES,
Attorney for Defendant in Error.

JNO. F. MCGINNIS,
AND C. W. WILSON,

Attorneys for Defendant in Error in State Courts.

