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Statement of the Case.

DOEPEL ET AL., HEIRS AT LAW OF FEARNOW, *v.*
JONES ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 571. Argued May 8, 1917.—Decided June 4, 1917.

A preliminary homestead entry, made in the Territory of Oklahoma under agreement between the applicant and his mother that he would make the entry, pay rent for the land while the entry was being completed and deed the land to her upon the issuance of patent, is absolutely void under § 24 of the act providing a temporary government for that Territory, etc. (Act of May 2, 1890, c. 182, 26 Stat. 81), and confers no rights upon the applicant or his heirs.

When such an entry, because of the illegal agreement, has been provisionally cancelled by the Land Department during the entryman's lifetime, and, after his death, one claiming to be his widow has relinquished her rights therein and made a new entry independently, in her own right, the original entry can afford no basis for the entryman's heirs to contest the widow's entry before the Department upon the ground that her marriage was void, if they do not deny the illegal agreement or seek to have the original entry re-instated on its merits.

The first entry, being a nullity, could beget no equity entitling the heirs to affix a trust to the land when patented to the widow.

156 Pac. Rep. 309, affirmed.

It is sought upon this writ of error to reverse a judgment which sustained the validity of a patent issued by the United States to the defendant in error, Luttie B. Jones, under the homestead laws. The controversy originated in a suit brought by the plaintiffs in error charging that the Land Department had without warrant of law overruled contests which they had filed against the right of the defendant in error to take the land under the homestead law and that therefore she held the patent for the same in trust for their benefit.

The facts stipulated or shown by documentary evidence as to which there is no dispute, are these: Hollen

H. Fearnow being qualified to make a homestead entry, applied in 1899 to make such entry in his own name. Before making the application he had agreed with his mother, for a promised consideration, that he would make the entry, comply with the homestead laws and pay rent for the use of the land in the meanwhile, and that when the patent was issued it would be for her and not for his account and he would deed the land to her. About two years after the entry was made a marriage ceremony was performed between the applicant and Luttie B. Fearnow and they lived together as husband and wife and resided on the land. Some years later after the marriage ceremony and before final proof or patent, Lena Barnes instituted in the local land office a contest against the right of Fearnow to make the homestead entry. This contest was based upon the fact that the agreement which we have stated had been made and upon the charge that under the law of the United States it absolutely disqualified him from making the entry. In December, 1903, after a hearing in the local land office the contest was sustained, the application by Fearnow was cancelled and an entry by Barnes under the homestead law was allowed. This order was taken for review to the Commissioner of the General Land Office and in January, 1905, on the ground of an irregularity or deficiency of notice in the contest proceeding the order was reversed and the local land office was directed "to appoint a day for the hearing of this contest, of which both parties shall have at least thirty days' notice. Upon the final determination of the case, should plaintiff be held to have established the truth of the averments of her affidavit of contest, said H. E. No. 13690 [the Barnes entry] which is hereby suspended, will remain intact; otherwise it will be cancelled and said H. E. 10171 [the Fearnow entry] reinstated."

Ten months after this order the entryman, Fearnow, died, it not appearing that in the intervening time any

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further steps were taken concerning the reinstatement of his homestead entry, and after the elapsing of more than a year from his death the entry-woman, Barnes, dismissed her contest and relinquished her homestead entry. On the same day, November 26, 1906, Luttie B. Fearnow, as the widow of Fearnow, filed a relinquishment of his homestead entry and on that day also made her own application to enter in her own individual right the land as a homestead and this application was allowed. The following month the plaintiffs in error, asserting themselves to be the heirs of Hollen H. Fearnow, and as such entitled under the law to the benefits of his homestead entry and to complete the same, contested the application of Luttie B. Fearnow on the ground that she was not his widow and not entitled to the land as such because she bore such a relation of consanguinity to her alleged deceased husband as to cause the pretended marriage relation between them to be incestuous under the laws of Oklahoma where the land was situated as well as under the laws of Kansas where the marriage between them purported to have been celebrated. The local land office rejected the contest following previous decisions of the Land Department holding that the question of the existence of a marriage was one for judicial cognizance and until its nullity was declared or found by a competent court the marriage was binding on the Land Department. The Commissioner of the General Land Office in reviewing, recited the previous facts as to the Barnes contest, the action taken upon it, the cancellation of the Fearnow homestead entry, the setting aside of the contest proceeding and the order made in it and affirmed the action on the authorities which the local land office had relied upon. In reviewing and sustaining this action on appeal the Secretary of the Interior decided that the subject matter of the marriage and its nullity was not primarily cognizable in the Interior Department. Independently of this, however, his

action was placed in addition on distinct and different grounds, as follows:

“But independent of this contestants have presented no grounds upon which their contest can be sustained. They do not allege a priority of right to make entry or that the entryman has not complied with the law. Their claim rests upon their relationship to Hollen H. Fearnow and if they have any right whatever by virtue of their heirship to Hollen H. Fearnow it is a right to perfect his entry, not to make entry in their own right. To avail themselves of this right it would be necessary to reinstate that entry and to show that it was improperly cancelled not by reason of any technical objection in the procedure, but upon its merits. Furthermore their delay in not presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry.”

The consequence was to definitely reject the contest and affirm the right to enter of Luttie B. Jones, she having in the meantime remarried, and on the making of final proof and compliance with the legal requirements a patent for the land to her issued in March, 1909. This suit, as we have said, was then begun for the purpose previously stated, the basis of the relief being substantially the claim which had been pressed in the controversy in the Department.

Mr. Samuel Herrick, with whom *Mr. Milton Brown*, *Mr. L. A. Maris* and *Mr. Cody Fowler* were on the briefs, for plaintiffs in error.

Mr. J. F. King, with whom *Mr. W. P. Hackney* and *Mr. L. D. Moore* were on the brief, for defendants in error.

MR. CHIEF JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

It cannot be seriously disputed that if the agreement was made by Fearnow, the original applicant, that he

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would make the homestead entry not for himself but for the benefit of another, would during the time that he was apparently taking the steps to complete the entry pay rent for the land to such other person and when the patent was issued deed the land to such person, such agreement caused that entry to be absolutely void for repugnancy to § 24 of the Act of Congress of May 2, 1890, c. 182, 26 Stat. 81. But as it was expressly stipulated that the facts as to such agreement were true, it must follow necessarily that the entryman derived no right from his entry and transmitted none to his heirs and vested them with no right after his death to complete that which was not susceptible of being completed.

Moreover as it is not disputable that the Land Department in its final ruling against the contestants placed its action upon the prior cancellation of the homestead entry because of the particular agreement referred to which was the basis of the Barnes contest, it must necessarily result that there is an absence of the essential foundation upon which alone the asserted rights of the plaintiffs in error could possibly rest. But putting this latter view aside, we are of opinion that the court below was clearly right in holding that as the facts were admitted which absolutely destroyed the effect of the original Fearnow homestead entry and therefore caused it to be impossible for that entry to be the generating source of rights in favor of the plaintiffs in error, no equitable rights arose in their favor growing out of the cancellation of that entry and the issue of the patent to the defendant in error. It seems superfluous to reason to demonstrate that no equitable right to hold the patentee as a trustee could possibly arise in favor of the plaintiffs in error since the application to enter upon which they rely was in legal contemplation non-existent and hence could afford no basis for equitable rights of any character.

Affirmed.