SWANSTON v. MORNING STAR MINING CO.

(*Circuit Court, D. Colorado.* June 19, 1882.)

1. ACTION—SETTLEMENT BY CLIENT—DISMISSAL.
   Plaintiff has the right to settle a suit brought to recover damages for a personal injury without the consent of his attorneys, and where he does so the controversy must be regarded as at an end, and the suit must be dismissed.
2. SAME—CONTRACT BETWEEN ATTORNEY AND CLIENT—CONTINGENT FEE.
   Whether a contract between attorneys and the client, whereby, in the event of their success in an action for the recovery of damages, they are to receive, as compensation for their services, one-third of the amount which may be recovered, is champertous, not decided.

D. J. Haynes and *Wells, Smith & Macon*, for plaintiff.

L. C. Rockwell and *J. B. Bissell*, for defendant.

MCCRARY, C. J., (*orally.*) This is an action to recover damages for a personal injury. Since the institution of the suit, the plaintiff has, without the knowledge of his counsel, settled it, and the following writing has been filed, upon which the court is now asked to dismiss the case:

[Title of case.] "Having received eighteen hundred dollars from defendant, in full for all claims, demands, and causes of action sued for in this case, I hereby authorize and direct the clerk of this court, or the court itself, to dismiss this action at my own cost, and I agree not to further prosecute the same, and that defendant is authorized to file this order of dismissal, or use it as it deems proper." Signed by plaintiff and sworn to.

The motion to dismiss upon this agreement is resisted, not by the plaintiff himself, but by his attorneys, who say that they had a contract with the plaintiff, whereby, in the event of their success in this suit, they were to receive as their compensation for services one-third of the amount which might be recovered. The question is made as to whether this is a champertous agreement, but we are not disposed to go into that question. It is one, perhaps, of some difficulty, and about which there is a considerable conflict of authority. It would undoubtedly be champertous if either of the attorneys had agreed to pay the costs of the proceeding; but whether a mere contract for a contingent fee of one-third of the amount recovered is champertous, is a question not entirely settled. We do not think it necessary, at all events, to pass upon it in this case.

It is, perhaps, not improper to remark, however, that it is not a contract which commends itself very much to the favor of the courts, and this court would not be disposed to go any further than the law

requires to uphold it. But even assuming that it is a valid contract as between the plaintiff and his attorneys, the question arises, how can we, by any order of ours, continue this case and carry it on to judgment, after the plaintiff himself has sold the cause of action and received a sum which, he says, is in full satisfaction. The attorneys are not parties to the record; no judgment could be rendered in their favor, and, if we were to go on to trial, I do not see how it is possible that any judgment at all could be rendered upon the record in the face of this dismissal, this acknowledgment of payment in full by the plaintiff himself. If the counsel for the plaintiff had any lien upon anything, the court would protect them, perhaps, by some form of proceeding in this case; that is to say, the counsel might, perhaps, be allowed under your statute to intervene, if you have a statute authorizing such a proceeding as that, and to assert their rights in this suit. But it is very clear that the attorneys of the plaintiff have no lien upon anything in a case of this character. I believe it is well settled that an attorney has no lien, even upon a judgment recovered by him for his client in an action, unless the statute gives it. It has never been claimed that an attorney would have a lien upon a claim for unliquidated damages, and there can be no foundation for a lien of any kind or description upon anything in controversy here.

If the attorneys had in their hands a contract, a promissory note, or instrument of any description that could be called property, and had rendered services in prosecuting a suit upon it, perhaps they might, by proper proceeding, be allowed to enforce a claim or lien upon it.

It is enough to say that there is no doubt of the right of the plaintiff to settle the suit without the consent of his attorneys, and having done so the controversy must be regarded as at an end, and the suit must be dismissed. If the attorneys have any claim against the parties who have made the settlement, they must assert it in some other mode of proceeding. It is not open for consideration here.

The doctrine I have announced is supported by the case of *Coughlin* v. *Railroad Co.* 71 N. Y. 443, and *Hooper* v. *Welch*, 43 Vt. 269.

HAYNER *v.* STANLY and others.

(*Circuit Court, D. California.* July 31, 1882.)

1. MEXICAN LAND GRANT—RES ADJUDICATA.

Prior to the acquisition of California by the United States, the Mexican government granted a tract of land therein to one H. In 1857, S., claiming to be the owner of a part of the land so granted under title derived from H., (the claim for which part had been confirmed to the grantor of S., but no patent therefor issued,) commenced an action of ejectment against G. and others, who were in possession of the lands, also claiming to own the same under title derived from H., and who had also obtained a confirmation of their claim to the premises, but no patent. On the trial of the action the principal question litigated was whether the premises in controversy had been conveyed by a deed made by H. to one F., under whom S. claimed, and it was determined that said deed did convey the lands, and judgment was rendered in favor of S. On appeal to the state supreme court this judgment was affirmed. Pending the litigation a patent for the lands was issued to the grantor of S., and some 20 years later patents were issued to G. *et al.* for the same lands. The grantees of G. *et al.*, after the issue of the latter patents, brought ejectment against the grantee of S. for the lands, and on the trial of that action offered to prove that the premises in controversy were not within the premises conveyed by the deed from H. to F. *Held*, that by the trial and judgment in the former action that point was determined in favor of S. and became *res adjudicata*, and the grantee of G. *et al.* was estopped from again litigating the question as against S. or his grantee, and that the issue of the patents on the claims of G. *et al.* did not, as to the question so determined, create any new title or right to again litigate the question determined by the former judgment, and that such question is not open to further litigation.

2. PATENT FOR LAND—LEGAL TITLE—DERIVATIVE TITLES.

M., a claimant under title derived from the original grantee of a part of the lands embraced in a Mexican grant, obtained a decree of confirmation, on which a patent was issued, and other claimants of the same land, under title also claimed to have been derived from the same original grantee, and whose claim had been confirmed prior to the issue of the patent to M., obtained patents for the same land some years subsequent to the issue of the patent to M. *Held*—

(1) That the issue of the patent to M. vested the entire legal title in him, and left nothing in the United States upon which the subsequent patents could operate, and consequently nothing passed by them. With the issue and delivery of the senior patent all authority or control of the executive department over the land passed away.

(2) That under such circumstances, in an action at law, the senior patent is conclusive as to the title, and cannot be assailed by the holders of the junior patent.

(3) The only remedy of the junior patentees is in equity, to charge the holder of the senior patent, if there are equitable grounds for so doing, with a trust for their benefit.

(4) While, in a proper sense, it may be true that in acting on a claim for land based on a Mexican grant, the United States has no interest in the derivative title from the original grantee of the Mexican government, yet where one held such a derivative title prior to the transfer of California to the United States,