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*Mar. 18.

*Dec. 10.

JOHN ROLAND HETT (DEFENDANT)...APPELLANT;

AND

PUN PONG (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Solicitor—Negligence—Failure to register judgment—Retainer.

A solicitor is liable in damages to his client for neglecting to obey instructions to register a judgment and thereby precluding the client from recovering the amount of his judgment debt.

Per Strong J.—A retainer to prosecute an action does not terminate when the judgment is obtained but makes it the duty of the attorney or solicitor without further instruction to proceed after judgment and endeavor to obtain the fruits of the recovery including the making it by registration a charge on the lands of the judgment debtor.

APPEAL from a decision of the Supreme Court of British Columbia affirming the verdict for the plaintiff at the trial.

The plaintiff, a merchant of Hong Kong, retained the defendant, a solicitor of the Supreme Court of British Columbia, to recover a sum of money from Kwong, Lee & Co., a Chinese firm in Victoria. Judgment was obtained against the said firm but was not registered so as to bind their real estate, and other creditors having also obtained, and registered, judgments against the same parties the real estate was all taken to satisfy them and the plaintiff was unable to obtain his money, and he brought an action against the solicitor to recover the amount of his judgment as damages for negligence in not registering.

On the trial the issue mainly turned upon whether

*PRESENT: Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

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or not the solicitor had received special instructions to register. The plaintiff's agent, who had originally instructed the defendant, swore that when told by the defendant that judgment had been signed he asked if he could get the money and was told that he could not, that nothing could be done except register the judgment against the property. He asked if that made any difference and was told that if he did not register he could not get the money after the property was sold, whereupon he said "if that's the case have it registered." A few days after he saw the defendant again and asked if the judgment was registered and the defendant said that it was.

The defendant did not deny the truth of this statement by the agent but thought that the first conversation took place after the other judgments had been registered against the firm of Kwong Lee & Co. and, therefore, too late to carry out the instructions. The agent, on the other hand, swore positively that it was in time.

The trial judge, in his charge to the jury, stated as his opinion that the original retainer of the defendant made it his duty to take the necessary steps to obtain the fruits of it, but he left to them the question whether or not special instructions had been given with respect to it. The jury found for the plaintiff with damages to the amount of the judgment debt. The defendant appealed to the Supreme Court of Canada.

Prior to the obtaining of the plaintiff's judgment a receiver had been appointed to the estate of Kwong, Lee & Co. in a suit between two of the partners. The defendant contended before the court below that as the assets would have to be distributed ratably by the receiver the omission to register the judgment was immaterial.

Chrysler for the appellant. The registration of the

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judgment could not affect the duties of the receiver. Beech on receivers (1); *Hallon* v. *Haywood* (2); *Anglo-Italian Bank* v. *Davies* (3); *Ex parte Evans. In re Watkins* (4).

As to the duty of an attorney see *Darling* v. *Miller* (5); *Searson* v. *Small* (6); *James* v. *Ricknell* (7).

As to burden of proof see *Re Kerr* (8).

Christopher Robinson Q.C. for the respondent cited *Plant* v. *Pearman* (9), and *Harrington* v. *Binns* (10).

SIR W. J. RITCHIE C. J.—There can be no doubt that an attorney is liable for negligence in the discharge of his duty whereby his client has sustained damage, and I think an attorney is bound to bring to the exercise of his profession a reasonable amount of knowledge, skill and care in connection with the business of his client. It is quite clear in this case that there was no want of knowledge, because it is equally clear that the attorney well understood the necessity and value of the registration of this judgment and undertook to have it done, and lulled the client into a false security by telling him that he had done it, whereas, in fact, he most negligently and carelessly, without any apparent excuse, has failed to do what he had undertaken, whereby the client has lost the amount of his judgment which the evidence clearly shows would have been secured to him if the attorney had done his duty and registered the judgment as he was instructed and undertook to do.

No question arises in this case as to the retainer ceasing with the judgment. I think the question necessary to establish the defendant's liability was

(1) P. 586.
(2) 9 Ch. App. 229.
(3) 9 Ch. D. 275.
(4) 11 Ch. D. 691; 13 Ch. D. 252.
(5) 22 U.C.Q.B. 363.
(6) 5 U.C.Q.B. 259.
(7) 20 Q.B.D. 164.
(8) 29 Gr. 188.
(9) 26 L.T.N.S. 313.
(10) 3 F. & F. 942.

substantially left to the jury; the jury were fully justified in arriving at the conclusion that the attorney distinctly undertook to register the judgment and that he stated that he believed this had been done when, in point of fact, he had entirely neglected to do so. He had registered a judgment for another client after the date of the Pun Pong judgment, which registration secured the payment of the former judgment, showing conclusively that the loss of the amount of the Pun Pong judgment resulted from his omission and negligence.

Under these circumstances I think the judgment of the court below was quite right, and this appeal must be dismissed with costs.

STRONG J.—I am of opinion that the judgment of the Supreme Court of British Columbia impugned in this appeal was in all respects right and that it must be affirmed.

A good deal was said in the course of the argument in the court below about an order for a receiver granted in a suit of *Fan* v. *Fan*, which was a partnership suit between the partners composing the firm of Kwong, Lee & Co., the defendants in the action which the appellant was retained by the respondent to prosecute, and about the effect of that order for a receiver on the priority of judgment creditors and their right to be paid out of the debtor's lands according to the order in point of date of their registration. It requires no demonstration to show that all this had nothing to do with the matters in dispute. No order or decree in the suit of *Fan* v. *Fan* could possibly affect creditors of Kwong, Lee & Co., who were not parties to the partnership suit, and it is preposterous to talk of the lands of the partnership being made equitable assets as regards judgment creditors of the firm. The court

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below were, therefore, right in disregarding this argument.

The real questions in the case are: First, whether in point of law a retainer of the appellant to bring the action did or did not make it his duty to register the judgment. And if this is to be answered in the negative then: Secondly, did, or did not, Nee Mook, the agent for the respondent, give the appellant the special instructions to register which he swears he did give? It appears to me that both these questions must be answered favorably to the respondent. Upon the evidence of Mr. Prevost there can be no doubt that if the respondent's judgment had been registered prior to the registration of the judgment for $46,214 recovered by Goetz's against Kwong, Lee & Co., and registered on the 21st July, 1886, it would have been paid out of the proceeds of the sale of the lands of the judgment debtors.

It is, however, insisted that a retainer to prosecute the action did not make it the duty of the appellant to register the judgment, and for this the case of *Darling* v. *Webber* (1) is relied on as an authority. That case, however, so far as the point actually decided in it goes, does not support the appellant's contention; the question there was not as to the duty of the attorney who recovered the judgment to register it but as to his duty to re-register at the expiration of the statutory period when the original registration was vacated by the lapse of time. It was held it was not the duty of the attorney so to re-register This may, however, well be consistently with its being the duty of the attorney to effect registration originally on the recovery of the judgment. It is true that there are dicta contained in the judgment of *Darling* v. *Webber* which, emanating from a court of such high authority

(1.) 22 U.C.Q.B. 363.

as that which decided that case, are entitled to the most respectful consideration. I am of opinion, however, that consistently with the authorities it cannot be held that a retainer to prosecute an action to judgment terminates with the recovery of the judgment, nor that such a retainer does not by itself make it the duty of the attorney or solicitor without further instruction to proceed after judgment and endeavor to obtain the fruits of the recovery.

In *Lady de la Pole* v. *Dick* (1) it was held that solicitors continued to represent their client after judgment, without any further retainer, for the purpose of appealing against the judgment, and this decision proceeded upon the principle that the retainer of the solicitor does not terminate with the judgment but continues thereafter, in the case of the solicitor of the party recovering the judgment for the purpose of obtaining the fruits of it, and in the case of the solicitor of the party condemned by it for the purpose of defending him against the execution. The authority on which this decision proceeded seems to have been an old case of *Laurence* v. *Harrison* reported in Styles (2) where Rolle C.J. propounds the law in the terms just stated. In *Bevins* v. *Holme* (3) the law is stated by Parke B. as follows:—

> We think he was right in contending that the original retainer was not determined by the judgment but continued afterwards so as to warrant the attorney in issuing execution within a year and a day or afterwards in continuation of a former writ of execution issued within that time, and also to warrant his receiving the damages without a writ of execution, the weight of prior authority being against the decision of Heath J. in *Tipping* v. *Johnson* (4).

And in two passages in Lush's practice (5) which, as well as the before mentioned authorities, were cited

(1) 29 Ch. D. 351.
(2) Sty. 426.
(3) 15 M. & W. 88.
(4) 2 B. & P. 357.
(5) Ed. 1865, Vol. 1, pp. 251-252.

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by counsel *arguendo* in *De la Pole* v. *Dick* (1), we have the high authority of the late Lord Justice Lush in favor of the view that the retainer continues until the judgment is satisfied, and for holding that the case of *Tipping* v. *Johnson* (2) to the contrary must be considered as no longer of authority. The cases of *Plant* v. *Pearman* (3) and *Harrington* v. *Binns* (4) cited in the respondent's factum also support the same conclusion.

If the rule to be deduced from these cases and authorities is now the law in England I think it ought, *a fortiori*, to be considered as applicable here. When a client retains a solicitor to collect a debt he makes no distinction between the services required for that end before judgment and those to be rendered after judgment; the retainer is, in the view of the client, not merely to establish the right by bringing the action and recovering the judgment, stopping there, but to get the money. What is expected of the solicitor is that he should do just what the witness (Nee Mook) says he told Mr. Hett, the appellant, he wanted him to do in the present instance, viz., in the words of the witness, "attend to the case." And attending to the case, in my opinion, would, even if the English authorities were not as decisive as they are, include the perfecting of the judgment as a charge on the judgment debtor's lands by registering it in any county or other division for registration purposes in which there might be reasonable grounds for presuming that the judgment debtor had lands,

But even if the original retainer had not made it the duty of the appellant to register the respondent would still have been entitled to retain the judgment in his favor now impeached, inasmuch as it is plain from

(1) 29 Ch. D. 351.
(2) 2 B. & P. 357.
(3) 26 L. T. N.S. 313.
(4) 3 F. & F. 942.

the evidence upon which the jury, under the direction of the learned judge who presided at the trial, found for the respondent that the appellant received special instructions from Nee Mook, the respondent's agent, to register the judgment. The witness, Nee Mook, says that this was soon after the judgment was recovered and, therefore, sometime anterior to registering Goetz's judgment. Mr. Hett, the appellant, cannot fix the date of these instructions but thinks it was too late. It is clear, however, that any presumption as regards the date must be against the appellant. It was his duty as a solicitor to keep proper books containing regular records of the proceedings in cases which he was conducting as a solicitor, and as the agent representing the client swears to a particular date it does not lie in the mouth of the solicitor to say he cannot recollect the date of the instructions and that he has no entry to refer to from which it can be accurately ascertained. The appeal must be dismissed with costs.

FOURNIER J.—I am of opinion that the appeal should be dismissed for the reasons given by His Lordship the Chief Justice.

GWYNNE J.—It is to be regretted that any question as to whether the original retainer of a solicitor by a client to commence an action for the recovery of a debt involves an undertaking by the solicitor to register the judgment when recovered in the office for registration of titles affecting lands for the purpose of charging the judgment upon the lands if any there be, of the judgment debtor, was ever introduced into this case for, as pointed out by Mr. Justice Gray in the Supreme Court of British Columbia, that question was not raised upon the record. The allegation of the plaintiff in his state-

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ment of claim was that after the recovery of the judgment the plaintiff gave his solicitor express instructions to register the judgment, and that the solicitor in disregard of such instructions neglected to do so whereby the plaintiff suffered damage. The defendant, in his statement of defence, expressly denied that allegation, and he denied that he ever was instructed to register the judgment. He denied also that the plaintiff had, by any negligence of the defendant, lost the fruits of his judgment, or that if the judgment had been registered the plaintiff would have recovered the amount, or that the plaintiff had suffered any damage from the non-registration thereof. Upon issue joined on these points the case went down to trial, and the whole of the evidence offered by the plaintiff thereat was addressed to the establishment of this special instruction alleged to have been given to the solicitor after the recovery of the judgment, and of his undertaking to comply with such instruction and his subsequent assurance that he had, in fact, done so. That the learned judge who tried the case was of opinion that the original retainer to bring the action did involve an undertaking by the solicitor, and did impose upon him the duty to register the judgment when obtained, appears clearly from his judgment pronounced upon the plaintiff's motion for judgment after verdict; and that he expressed that opinion in his charge to the jury also abundantly appears, I think, from that charge as reported on the appeal case before us; but that the case was not left to the jury as resting upon that expression of the learned judge's view of the law appears also from the remainder of the charge. If the case had been rested upon the learned judge's opinion of the law upon that point there would have been nothing to leave to the jury but the question of damages, if any, which may have been sustained by the plaintiff,

whereas it appears, by the report of what took place at the trial, that the whole contention was as to the truth of the allegation of the plaintiff in his statement of claim that the defendant had been specially instructed, after the judgment had been obtained, to register it, and upon this point the learned judge charged the jury as follows:—

It strikes me, if you believe the evidence of the Chinaman, that he did get the suggestion to register from Mr. Hett. Mr. Hett confirms this as far as his memory goes, though it appears to be very unsettled upon some points, except as to the general idea, so forcibly pressed on us by his counsel, as to the necessity of doing what was expected of him.

Well, this Chinaman learned from Mr. Hett, when the judgment was obtained, he could not get the amount of his judgment until after the property had been sold, and then, he swears distinctly, registration was mentioned. Mr. Hett himself says he mentioned registration to him. If this did take place at that time then clearly there was a dereliction of duty on Mr. Hett's part for which he is liable in damages; but if you find that the evidence does not amount to that, though it appears to me to do so, you are sole judges of the fact. Though I give you an impression of my opinion, if it does not coincide with your own judgment you are to pay no attention to mine, but your duty in such case is to act entirely on your own conviction. A man ought not, in that view, to undertake the work if he can see that it would not succeed, or if he does not see some reasonable chance of its succeeding. Nor does the evidence show you whether if the judgment had been registered at that time it would have succeeded or not. Are you or are you not satisfied, from the receiver's evidence, that if he had registered it, when it was got, against the real estate he would have got the money? That is before you, mind, for the purpose of ascertaining your conclusion. If upon the evidence you are of that opinion then I think it was a dereliction of duty not to have registered the judgment.

And again:

The defendant must have thought that there was some advantage in registering the judgment in the Law Registry office which would ensue to the benefit of his client from his having told Nee Mook he had done so. If he really did so at the time he is said to have done so, he must have thought there was an advantage in it that would accrue to the benefit of his client. I can easily imagine, and I should wish no word I say to carry more weight than it deserves, but it is very conceiv-

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able and easy to imagine that a gentleman of the occupation and business of the defendant in this case, not having been in the habit of keeping a diary, might easily not be able to charge his memory specially with the dates and times at which these important conversations are stated to have taken place.

That they did take place at the times stated, it is for you to say ; but if they did take place at the time, then the obligation he was under to see after the registration of this judgment was binding at that time upon him. The learned counsel for the defence says it could only have been after notice of the sale, and several other things, that registration was suggested, and that it was then too late. Is that reasonable ? Does it strike you in the face of the evidence as a proper point to take ?

Now there can, I think, be no doubt that the case was thus distinctly left to the jury as resting upon the truth or falsity of the evidence of the Chinaman, Nee Mook, who had sworn very distinctly as to the time, and as to the conversations between him and the defendant when the special and precise instructions to register the judgment were given by Nee Mook as agent of the plaintiff to the defendant, and the performance of the instructions was undertaken by him. As to the evidence of this Chinaman the defendant himself said that he would not swear that it was incorrect, although he had no recollection of it. And again he said :

I do not think I told him anything but that I would register, or told him I had registered.

And again he said :

I keep no diary as to interviews or attendances ; nothing to refresh my memory as to this case.

And again :

I speak only from recollection.

Now, upon this evidence there cannot be any doubt that the jury had sufficient to justify their adopting the evidence of the Chinaman, nor do I think there can be any doubt that it was upon his evidence they rendered their verdict, and I cannot think that the

expression of opinion by the learned judge of the extent of the first retainer to bring the action operated to induce them to render their verdict as founded upon that opinion, and not upon the evidence of the Chinaman, to which their attention was so directly drawn both during the whole progress of the taking of the evidence and by the charge of the learned judge. It would, I think, have been better that no expression of opinion upon the point had been given, as it was quite unnecessary in the case, for although it be admitted that the original retainer is not exhausted by entering judgment it may well be still a question whether it involves the duty of registering the judgment in the land registry office, which, if it be a duty, might result in involving the client in great and unnecessary expense, as for example if it should appear that the judgment debtor had no lands to be affected by such registration. However, I express no opinion upon the point, as it is not necessary that I should—it must still remain an open question. All that it is necessary to decide in the present case is, that I do not think there is shown any such probability of the jury's attention having been withdrawn from the real point in issue, or that in rendering their verdict they were influenced by the judge's expression of opinion instead of by the evidence upon the point which was actually in issue to call for a new trial.

That the damage was sufficiently proved, there can be no doubt, if the special retainer to register was established, as I think we must, upon the evidence, hold that it was. The case will be a warning to the defendant not to act in the future so loosely as he admits he has been in the habit of doing in matters of such importance, not only to his clients, but to himself.

I think the appeal must be dismissed, and with costs.

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PATTERSON J.—I also am of opinion that the appeal should be dismissed.

SIR W. J. RITCHIE C. J.—I wish to make an observation in respect to the duty of solicitors to register judgments independent of instructions, having had a large experience in New Brunswick, and knowing that in that province there are certain expenses connected with such registration as a judgment would have to be registered in every county. In my office a judgment was never registered unless information was given by the client that there was property in a particular county, but execution was issued within a year and a day.

In this case I think the solicitor had special instructions to register the judgment which was the reason I did not make these observations before.

Appeal dismissed with costs.

Solicitor for Appellant: *J. P. Walls.*

Solicitor for Respondent: *Robert E. Jackson.*