1956
*Mar. 1
*Apr. 24

M. GORDON & SON LIMITED (*Defendant*) ..... APPELLANT;

AND

LOUIS DEBLY (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Judgment—Right of County Court Clerk to enter judgment—Liquidated demand—Clerk was solicitor for plaintiff—County Courts Act, R.S.N.B. 1952, c. 45.

The Clerk of the County Court of New Brunswick, who was solicitor for the plaintiff-respondent, entered judgment in default of appearance and defence in his own action for a liquidated demand. The application of the appellant to set aside the judgment was dismissed by a judge of the County Court and by a majority in the Supreme Court of New Brunswick, Appeal Division.

Held: The appeal should be dismissed.

The signing of judgments by the Clerk on liquidated demands authorized by Order 13 rule 3 of the rules of the Supreme Court, which provides that in default of appearance "the plaintiff may enter final judgment" for the amount claimed, has been for at least since 1915 the procedure of the County Court. With these judgments the judge has nothing to do. That practice has been followed throughout the province and it cannot be seriously questioned.

S. 25 of the *County Courts Act*, R.S.N.B. 1952, c. 45, implies that the Clerk, although interested in the action, can sign judgment for the amount claimed on a liquidated demand. There is in the statute a deliberate abstention from affecting liquidated demands with the restriction imposed in the case of unliquidated damages. Whatever objection there may be in principle to permitting a solicitor to do such

*PRESENT: Rand, Kellock, Locke, Cartwright and Abbott JJ.

a ministerial act as clerk in his own cause must be taken to have been overridden by other considerations. Furthermore, the views of the provincial courts which should be treated with the utmost respect on such a question was well founded in the case at bar: being compatible with a reasonable interpretation of the statutory language given in the light of the principle involved.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), affirming, Hughes J.A. dissenting, the dismissal by the County Court of an application to set aside a default judgment.

I. Mackin for the appellant.

J. F. H. Teed, Q.C. for the respondent.

The judgment of the Court was delivered by:—

RAND J.:—This appeal arises out of an application to set aside a judgment entered in the County Court of Saint John, New Brunswick, in default of appearance and defence in an action brought on a liquidated demand. Two grounds are raised: that the clerk of a county court in New Brunswick has no authority to enter a default judgment, and that in the particular case he was disqualified as being solicitor for the plaintiff.

The judgments in the County Court and the Appeal Division present the legislative history of the County courts. Prior to 1867 their jurisdiction was, in a measure, exercised by the Inferior Courts of Common Pleas held by the justices of the peace of each county in general sessions; but, in anticipation of the Confederation Act, these courts were, by c. 10 of the statutes of that year, abolished and the present organization established. The act provided for a court in each county to be presided over by a judge having the qualification of barrister of the Supreme Court of not less than seven years' standing, who should hold office during good behaviour. Although each county had its court, the same person might be judge of one or more of them. For each court a clerk was provided who must be an attorney of the Supreme Court and would hold office during pleasure. The sittings were to be held at or near the county court house in the shiretown, at which place, also, the clerk was to maintain an office. There was no residence requirement of the judge.

(1) [1955] 4 D.L.R. 636.

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In 1867 the clerical officer of the Supreme Court was the Clerk of the Pleas, an office that goes back into the early days of the Common Law courts. In Tidd's Practice and Chitty's Archbold's Practice there is an account of the internal practice of those courts down to the present time, which shows the evolution of ministerial functions, in some cases originally performed by or under the direction of the judges but now by officers of the court. In the light of the practice in the Supreme Court of 1867 and the enactment by c. 10, s. 18, that

> Every Act of Assembly relating to . . . practice, proceedings and evidence or any other matter or thing whatever connected with the administration of justice in the Supreme Court shall apply to each County Court when not inconsistent with the provisions of this Act.

language in substance continued down to s. 62 of the present Act, the assumption that the office work of the county court should in general be carried on by its officers correspondingly to that in the Supreme Court was inevitable and warranted; and it has been in the presence of this uniform understanding and practice that the county court legislation has been confirmed ever since.

This originating statute, with various modifications, appears now as c. 45, R.S.N.B. 1952. From the beginning it was obvious that the work of the clerk would require only part of his time and the statute recognizes his right to practice in his own as well as in any other court. In the former he is, ordinarily, the prosecutor in criminal matters, although he may defend, and he may act for either party in civil matters.

Certain of his duties are mentioned: he is to provide a seal and necessary books for the records of the court; to sign and seal all writs; to file all writs and papers; to enter in the books of record all causes, rules and orders, and a minute of every judgment rendered in the court, a copy of the latter certified by him being admissible as evidence in all courts of the province. He is to tax costs, but when *solicitor or party,* the bill is to be taxed by the judge. By s. 25, *if not interested in the action,* he may make orders perfecting the service of a writ of summons, and may "assess damages in all personal actions of debt, covenant or assumpsit where there is judgment by default", and make and sign in such cases the assessment docket.

Default judgments in the Inferior Courts of Common Pleas were to be entered at the next succeeding terms and the court was to "assess the damages as has been heretofore accustomed": 35 Geo. III, c. 2, s. 6. Judgments given in all causes determined in a summary way were to be entered in the minutes of the court by the presiding justice. By s. 15 of the act of 1867 where the defendant failed to enter an appearance and plea within the time prescribed, the judgment could be entered against him and twenty days thereafter the judge was to assess the damages and the clerk sign final judgment for the sum assessed and costs. This provision was continued, with the time reduced to ten days, until 1915. By c. 25 of the statutes of that year, s. 41 of c. 116, C.S.N.B. 1903 was amended to the following form:

41. In all actions in the said Court, the statement of claim, conforming in substance to that in use in the Supreme Court in like cases, shall be inserted in, or endorsed upon, the writ, and a copy thereof with a copy of the particulars of the plaintiff's demand in cases where, by the practice of the Supreme Court, the defendant would be entitled thereto, shall be served on him, and he shall, within ten days thereafter enter an appearance in the said action and file a statement of defence conforming in substance to that in use in the Supreme Court in like cases, and give a copy thereof to the plaintiff or his solicitor. The rules of pleading of the Supreme Court shall apply to County Courts, but there shall be no summons or order for directions in any action. Demurrer is hereby abolished and the rules for proceedings in lieu of demurrer shall apply. Each party shall be entitled to ten days for each step in pleading, but the Judge may enlarge the time.

This language omits the following words contained in c. 116,

and in case the defendant shall fail to enter his appearance and plead within the time aforesaid, then judgment by default may be entered against him in the said cause, and in ten days thereafter the Judge may assess the damages and the Clerk sign final judgment for the sum assessed and costs to be taxed.

The Judicature Act with its rules had been adopted in 1909 following closely the law and practice in England, and its application to the county courts is seen in the new nomenclature of pleading. By the same act, s. 78 R.S. 1903 was amended to read:

78. All laws of this Province relating to the examination or depositions of witnesses before trial, to proceedings in replevin, to actions by or against executors or administrators, to evidence, to the service of processes, to tenders, to judgments, to interest on judgments, to set off and to counter claims, and for the amendment of the law, in any way as to practice, proceedings, or evidence, or any other matter or thing whatever connected with the administration of justice in the Supreme Court, when applicable and not inconsistent with the provisions of this Chapter, shall

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apply to each County Court; and the mode of proceeding in all cases not herein provided for shall be according to the present practice of the Supreme Court. The decisions of the Supreme Court shall be binding on the County Courts.

The duties and authority of a clerk are to be determined, then, in the light of this legislation, the inherent relation of the office to the inside work of the court, and the special conditions and exigencies of the administration of justice in the province. I think it incontestable that, whatever may have been the law prior to 1915, the signing of judgments on liquidated demands authorized by Order 13 rule 3 of the rules of the Supreme Court, which provides that in default of appearance "the plaintiff may enter final judgment" for the amount claimed, is and has since that time been the procedure of the County Court. These judgments are entered by the clerk of the court and with them the judge has nothing to do. This is the practice that has been followed for at least 40 years throughout the province and it cannot, in my opinion, be seriously questioned.

But when the clerk is solicitor for the plaintiff, what is the position? The answer is I think given by the implication of s. 25 of the present statute already in part quoted: the clerk, *if not interested in the action,* is authorized to "assess damages" and make and sign the assessment docket. That can only mean, unliquidated damages; there is no assessment on a liquidated demand: the right given the plaintiff in that case is to sign judgment for the amount claimed. If "assessment" included a direction of the amount in all cases, the controversy would disappear, but its restriction to unliquidated damages has been assumed by the courts below as well as by counsel on both sides. Dealing as it does with default judgments, those for liquidated demands, probably the greater in number, could not have been overlooked. Yet they are omitted and the restriction confined to unliquidated claims. I can only take this to be a deliberate abstention from affecting them by the qualification mentioned. Were it not so, other language must have been used. The matter of the interested solicitor as clerk is expressly evidenced as being before the mind of the draftsman from the original to the present statute, and the situations dealt with imply that the disabilities of the clerk as solicitor which are declared were intended to be exclusive.

Whatever objection there may be in principle to permitting a solicitor to do a ministerial act as clerk in his own cause must be taken to have been overridden by other considerations.

That the act is ministerial is I think equally clear. Summarizing the practice in the Supreme Court, the solicitor presents to the clerk of the court two copies of the form of judgment made out as prescribed, accompanied by the writ and affidavit of service. The clerk files one copy properly stamped and returns the other, marked, to the solicitor. No judgment or discretion of any sort is called for. In the assessment of damages judicial power is exercised and the contrast in character between that and the filing and entering of what the rule declares the plaintiff entitled to is patent.

On such a question the utmost respect should be paid to the views of the provincial courts; they know the local conditions and how the actual practice has worked out; and only when it is clear that those views are incompatible with any reasonable interpretation of the statutory language given in the light of the principle involved, should they be rejected. So far from that, they appear to me to be well founded and should be maintained.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Ian P. Mackin.*

Solicitors for the respondent: *Teed & Teed.*