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*Dec. 9

IN THE MATTER OF LEWIS DUNCAN, Esquire, one of Her Majesty's Counsel, of the City of Toronto, in the Province of Ontario.

Contempt of Court—Committed in the face of the Court—What amounts to contempt—"Scandalizing the Court or a judge"—Jurisdiction of Supreme Court—The Supreme Court Act, R.S.C. 1952, c. 259, as amended.

The Supreme Court of Canada which, by the *Supreme Court Act,* is a common law and equity Court of record, has undoubted power to cite a barrister and to find him guilty of contempt of Court for words uttered in its presence.

There is no doubt that a counsel owes a duty to his client but he also has an obligation to conduct himself properly before any Court in Canada. This is particularly true of one who has been practising for many years and has had extensive experience in the Courts. Judges and Courts are, alike, open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court can or will treat that as contempt; but any act calculated to bring a Court into contempt or to lower its authority is a contempt and punishable as such. *Regina v. Gray,* [1900] 2 Q.B. 36 at 40, applied.

To say to the Court that the administration of justice will not be served if a particular member of the Court sits on an appeal that is about to be argued, without giving any reasonable explanation of the statement, constitutes a punishable contempt of the Court.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Cartwright, Fauteux and Abbott JJ.

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APPEARANCE in answer to an order of the Court calling on a barrister to show cause why he should not be adjudged in contempt.

The judgment of the Court was delivered by

THE CHIEF JUSTICE (orally):—In pursuance of an order of December 2, 1957, the above-named Lewis Duncan appeared to show cause why he should not be adjudged in contempt of this Court for a certain statement attributed to him on November 18, 1957. On that date Mr. Duncan appeared as counsel for the appellant in an appeal before this Court of *Lahay v. Brown* and when the appeal was called for hearing Mr. Duncan said:

> In my opinion, the administration of justice would not be served by Mr. Justice Locke sitting on this appeal. It is in the interest of my client and in my personal interest that Mr. Justice Locke should withdraw.

To-day Mr. Duncan did not admit that he used those words, but there is no doubt in the minds of those members of the Court who were then present (leaving aside Mr. Justice Locke), and it is made quite clear by the evidence given before us to-day by Mr. W. K. Campbell and Mr. W. Boss, that he did use them. In any event, in our opinion the words which Mr. Duncan to-day asserted that he had used on the previous occasion* do not differ in substance from those set out above.

On November 18, upon that statement having been made, Mr. Justice Locke said: "Why, for what reason?", and Mr. Duncan declined to give any reason. The Chief Justice asked Mr. Duncan: "Is that all you have to say?", to which the reply was "Yes". There was then no suggestion that Mr. Justice Locke was or had been at any time concerned in the appeal of *Lahay v. Brown,* or that he knew either of the parties or any of the witnesses, or that there was any feeling of animosity by him against Mr. Duncan personally.

*These words were as follows:

"With great respect to all members of the Court I object to the proceedings before this panel while Mr. Justice Locke is a member.

"As I understand it, the administration of justice requires that justice be administered in fact, but also that it be so administered that it is patent to all that it is being administered.

"And thirdly, so long as Mr. Justice Locke remains a member of this panel I will not be satisfied nor will my client that justice is being administered."

Upon reconvening after a recess on November 18, the Chief Justice announced:

The Court has considered the unprecedented situation which has arisen. None of us knows of any reason for the remarkable statement earlier this morning and no reason has been advanced. The Court, therefore, proposes to continue.

Mr. Justice Locke then said:

I have something to say, however. I do not know you, Mr. Duncan. I have never had anything to do with you in my life. I have no feeling of any kind towards you. I know nothing about the case we are about to hear, but, since you have chosen to take this stand, I decline to sit in this case. I withdraw.

The Court deemed it advisable that the parties to the appeal should not suffer in any way by reason of what had occurred and, accordingly, the hearing of the appeal was commenced and completed with another member of the Court replacing Mr. Justice Locke.

The objection taken by Mr. Duncan to our jurisdiction to cite him for contempt has no foundation. By the provisions of the *Supreme Court Act*, R.S.C. 1952, c. 259, this Court is a common law and equity Court of record and its power to cite and, in proper circumstances, find a barrister guilty of contempt of Court for words uttered in its presence is beyond question. That power has been exercised for many years and it is not necessary that steps be taken immediately.

Although, as has been pointed out, Mr. Duncan made no such suggestions on November 18, to-day he avers that over 30 years ago he was concerned in a certain matter; that another member of the bar took umbrage at a certain action taken by him; that later that member of the bar became a partner of Mr. Locke, as he then was, and that he, Mr. Duncan, felt that the latter, as a result of his association with the other member, had an "antipathy" to him, to use his own words, that he was of opinion that that antipathy was exhibited by Mr. Justice Locke in an appeal of *Lacarte v. Board of Education of Toronto* in 1955[1]. It is to be observed that in that case the five members of the panel including Mr. Justice Locke were unanimous in dismissing the appeal of the appellant, for whom Mr. Duncan appeared. While he did not mention it, it should also be pointed out that in an earlier appeal, *Maynard v. Maynard* in 1951[2], in which Mr. Duncan appeared for the appellant,

[1] [1955] 5 D.L.R. 369.

[2] [1951] S.C.R. 346, [1951] 1 D.L.R. 241.

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the Court, of which Mr. Justice Locke was a member, was unanimous in dismissing that appeal. We consider the suggestions made by Mr. Duncan this morning too preposterous to require elaboration.

Mr. Duncan says finally that in *Kennedy v. The Queen,* which was a motion for leave to appeal to this Court, and on which Mr. Justice Locke was one of a panel of three, he, Mr. Duncan, through an agent had failed to secure leave to appeal. He therefore considered, he said, that this was a confirmation of the feeling he had that Mr. Justice Locke was biased as regards himself. We are all of opinion that this suggestion is too trivial to require further consideration.

There is no doubt that a counsel owes a duty to his client, but he also has an obligation to conduct himself properly before any Court in Canada. That applies particularly to one who, like Mr. Duncan, has been practising for many years and who has had an extensive experience in the Courts of Ontario and in this Court. It has been stated by Lord Russell of Killowen C.J. in *Regina v. Gray*[1], that judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. However, Lord Russell had already pointed out that any act done calculated to bring a Court into contempt or to lower its authority is a contempt of Court and belongs to that category which Lord Chancellor Hardwicke had as early as 1742 characterized as "scandalising a Court or a judge"[2]. The matter is put succintly in the 3rd edition of Halsbury, vol. 8 (1954), at p. 5:

> The power to fine and imprison for a contempt committed in the face of the court is a necessary incident to every court of justice. It is a contempt of any court of justice to disturb and obstruct the court by insulting it in its presence and at a time when it is actually sitting . . . It is not from any exaggerated notion of the dignity of individuals that insults to judges are not allowed, but because there is imposed upon the court the duty of preventing *brevi manu* any attempt to interfere with the administration of justice.

[1] [1900] 2 Q.B. 36 at 40.

[2] *Re Read and Huggonson (The St. James's Evening Post Case)* (1742), 2 Atk. 469, 26 E.R. 683.

We have considered the cases cited by Mr. Duncan but we think it necessary to refer only to *Cottle v. Cottle*[1]. It was there held that it was not necessary to show that a justice of the peace was in fact biased, and there was sufficient evidence upon which the husband there in question might reasonably have formed the impression that that justice could not give the case an unbiased hearing. The case was, therefore, remitted for a new trial before a bench of which that justice was not a member. There, however, it might be pointed out that the husband took a specific objection to Mr. Browning sitting as chairman of the Bath justices. Here there was no suggestion at the time of any specific objection and it was only to-day that the matters referred to above were brought forward by Mr. Duncan and, as to these, we have already expressed our opinion that not only is there no substance to them, but the bringing forward of them at this time is a continuation and an aggravation of the contempt of Court of which we now unanimously find Mr. Duncan guilty.

The members of the Court now available, omitting Mr. Justice Locke, have no doubt that what was said by Mr. Duncan on November 18, 1957, was deliberate and that there is no basis in fact or law for his statements. It was calculated to bring the Court and a member thereof into contempt and to lower its authority and we so find. We, therefore, fine Mr. Duncan the sum of $2,000, to be paid to the Registrar of this Court on or before Friday, December 13, 1957. In default of payment he is to be imprisoned by the Sheriff of the County of Carleton in the common gaol of the said county, to be there confined for a period of 60 days unless the fine be sooner paid. Furthermore, unless and until he personally apologizes unreservedly in open Court for the statements made by him on November 18 of this year he is prohibited from appearing in this Court or in chambers.

Judgment accordingly.

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[1] [1939] 2 All E.R. 535.