1903
*Dec. 4.
1904
*Feb. 16.

ARTHUR DRYSDALE (DEFENDANT).....APPELLANT

AND

THE DOMINION COAL COMPANY (PLAINTIFFS) .... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Commissioner of mines—Appeal from decision—Quashing appeal—Final judgment—Estoppel—Mandamus.

Where an appeal from a decision of the Commissioner of Mines for Nova Scotia on an application for a lease of mining land is quashed by the Supreme Court of the province on the ground that it was not a decision from which an appeal could be asserted the judgment of the Supreme Court is final and binding on the applicant and also on the commissioner even if he is not a party to it.

The quashing of the appeal would not, necessarily, be a determination that the decision was not appealable if the grounds stated had not shewn it to be so.

In the present case the quashing of the appeal precluded the commissioner or his successor in office from afterwards claiming that the decision was appealable.

If the commissioner, after such appeal is quashed, refuses to decide upon the application for a lease the applicant may compel him to do so by writ of mandamus.

APPEAL from an order of the Supreme Court of Nova Scotia, dismissing an appeal from the judgment of Mr. Justice Ritchie ordering the issue of a writ of mandamus commanding the Commissioner of Public Works and Mines of the Province to "take into consideration" an application of the respondent company for a lease of certain lands for mining purposes.

In October, 1893, a lease of certain lands for coal mining purposes was granted by the province to one

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

John Murray. In October, 1894, a license to search for minerals was granted to the Dominion Coal Co. over lands in the neighbourhood of those leased to Murray and was alleged by the appellant to include a portion of such leased lands. In July, 1897, the company applied for a lease for coal mining of a portion of the lands covered by its license to search, including the parts said to have been leased to Murray. The contention on the part of the company was that the commissioner had never given any decision upon this application, and that he was bound by law to do so. It was this application which the court in Nova Scotia had commanded the commissioner to "take into consideration."

The proceedings on the application of the respondent company are fully set out in the judgment of Mr. Justice Davies.

W. B. A. Ritchie K C. and *Mackay* for the appellant. The appellant decided that the application had been disposed of and could not be re-opened. Such decision could have been appealed from and such decision as the commissioner should have given obtained. No appeal having been taken, mandamus will not lie. See *Rex* v. *Justices of Midalesex* (1).

Mandamus sets the machinery of the courts in motion but will not direct the performance of any judicial act. High on Extraordinary Legal Remedies, sec. 152. *The Queen* v. *Justices of Middlesex* (2).

The following cases were also cited. *Mott* v. *Lockhart* (3); *Williamson* v. *Bryans* (4); *Meyers* v. *Baker* (5); *Fielding* v. *Mott* (6).

(1) 4 B. & Ald. 298.
(2) 9 A. & E. 540.
(3) 8 App. Cas. 568.
(4) 12 U. C. C. P. 275.
(5) 26 U. C. Q. B. 16.
(6) 18 N. S. Rep. 339; 14 Can. S. C. R. 254.

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Lovett for the respondents. Mandamus is the proper remedy. *The Queen* v. *Adamson* (1); *The Queen* v. *Boteler* (2).

The decision of the commissioner must not be uncertain nor doubtful. *The King* v. *Archbishop of Canterbury* (3).

THE CHIEF JUSTICE.—I am of opinion that the appeal should be dismissed with costs.

SEDGEWICK J.—I concur in the opinion of Mr. Justice Killam.

DAVIES J.—I reluctantly yield to the conclusion that this appeal must be dismissed. I do so reluctantly because, in my opinion, while the decision given by the commissioner in the first instance was defective and uncertain in neglecting to decide expressly upon the application of the respondents for a lease it was rendered certain by the commissioner's second decision of the 21st April, 1900. In this latter decision he affirmed the validity of the lease to Rev. Mr. Murray, and the fact that it was considered by him as the evidence of the contract made by the department with Murray leasing to the latter a piece of land described in the lease. It further decided that the coal company's application could not be granted in its entirely but that the department was

prepared to grant to the Dominion Coal Company a lease of so much or the ground described in said application, dated as above (meaning respondent's application), as is not covered by the lease granted to said John Murray.

This decision seems to me to have covered everything which, on the application before him, the commissioner was called upon to decide. Of course it might have been couched in more formal language

(1) 1 Q. B. D. 201. (2) 4 B. & S. 950.
(3) [1902] 2 K. B. 503.

but in view of the questions of overlapping as between Murray's existing lease and respondents' application for one, which were raised on the investigation hold by the commissioner, and of the definite and emphatic statement made in his evidence by Dr. Gilpin, the deputy-commissioner, that the only objection to granting the application was the one of its overlapping Murray's lease, I think it was quite clear and definite. I am not therefore surprised that with the evidence of this decision of his predecessor standing as part of the records of his department the present commissioner should have declined re-opening a case which as far as his records shewed he was quite justified in considering as closed and settled by his predecessor. I am quite at a loss to understand how this decision came to be set aside by the Supreme Court of Nova Scotia. Of course its validity depends upon the conclusion being reached that the first attempted decision of the commissioner was invalid for uncertainty and a nullity. That being conceded I do not understand the grounds upon which the court acted in setting aside the decision of the 21st April. No reasons were given by the learned judges and the assumption in the formal rule quashing the appeal of the Dominion Coal Company on the ground that the decision

> was signed by the deputy-commissioner and is not a decision of said commissioner from which an appeal can be asserted

was, as I understand, admitted in the argument at Bar to be a mistake as the document in question was signed by the commissioner's own name and by himself. Of course the holding of the Supreme Court of Nova Scotia that the decision of the commissioner of the 21st of April, 1900, "was not one from which an appeal could be asserted," could be supported on the ground that the commissioner

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was at the time *functus officio*, having already given his decision. But I do not understand this reason is advanced by either of the litigants or by the court itself and in the absence of any reasons for the judgment we are left in the dark as to the grounds on which it was based. I gather from the judgment of Mr. Justice Townshend in the present appeal that the court looked upon the decision in question merely as an explanation of his first attempted decision and not as a substantive decision. But in view of the fact that the second decision incorporated the first one in its very words and then went on to supply its deficiencies I cannot think that the suggested reason would be held a good one. However the decision setting aside this last decision of the commissioner is final and I feel myself bound by it as did the trial judge in this action. I do not agree with either the trial judge or with Mr. Justice Townshend, who delivered the judgment of the court *in banco*, that the commissioner was to say yes or no to the application simply. From the evidence before the commissioner it appeared that Murray's lease granted some years before the Dominion Coal Company's application was made might overlap the lands applied for in the latter. Whether it would do so or not depended largely upon the construction of the lease and other facts to be determined. Were the posts and specific distances in the description of the lands leased to control and the reference to the original application for a license to search to be treated as *falsa demonstratio*, or was the latter line to control the specific distances? These were legal questions on which the commissioner I think had no right to pass. What lands were legally covered by Murray's lease was a question to be determined afterwards by the court in a proper action. No decision of the commissioner could either contract or expand the legal

boundaries of Murray's lease. But a simple affirmative answer might well land the department in the position of having granted the same lands to different parties and possibly involve it in an expensive litigation. I conceive therefore that the commissioner might well grant the Dominion Coal Company's application subject to and excepting thereout such lands as might be found and determined to be included in the Murray lease; in other words, bounding it by the lands, whatever they were, described in the Murray lease. Such a decision would leave the respective claims of the parties for adjudication by the proper tribunals and such a decision I would have supposed but for the judgment of the Supreme Court of Nova Scotia had been reached and expressed in the document signed by Mr. Commissioner Church of the 21st April, 1900.

I was at first inclined to adopt the appellant's contention that the respondents in applying for a madamus had mistaken their remedy which was by way of writ of *scire facias*. But further consideration has convinced me that this is not so. The questions to be determined between the parties here, as I understand them, depend not so much upon whether Murray's lease should have been granted or not as upon the meaning of the description in the lease. What respondents want is a determination of their application for a lease. That they are entitled to have. We are all of opinion that what is called the first decision of Commissioner Church was void for uncertainty. The Supreme Court of Nova Scotia has held, and its decision on the point is final and binding, that the second decision of the commissioner was "not one from which an appeal would lie" and therefore was not a decision at all. There is no other remedy is it appears to me open to the respondents under the circumstances than the one they have taken, and that being the controlling test as to whether an

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action for a mandamus will lie the question must, I think, be decided in favour of the action lying.

NESBITT J.—I agree with Mr. Justice Killam.

KILLAM J.—The principal contention on the part of the commissioner is that his predecessor in office, long ago, considered the company's application and gave his decision with reference thereto, and that another commissioner is not bound to re-open the matter and decide upon it anew.

Three written documents are relied upon as constituting the decision of the former commissioner.

The document of the 7th April, 1899, purported to express a decision upon a dispute between the Dominion Coal Co. and the Rev. John Murray, relative to the overlapping of Murray's lease by the company's application for a lease. The decision was that Murray's lease was not void or uncertain, and that it be and remain the evidence of the contract between Murray and the Crown.

This did not, upon its face, determine anything regarding the company's application. A reference to the notice of investigation and to the full record does not seem to extend its effect in this respect. It is argued that the necessary result of adjudging Murray's lease good was to preclude the commissioner from granting a lease to the company of the common ground. But it does not appear whether the commissioner found that there was any overlapping, or what he considered he ought to do with reference to the company's application.

The second document was a copy of a letter signed by the deputy-commissioner and sent by him to the company's solicitor, purporting to express what the ommissioner considered to be the effect of the prior

decision. The company's appeal from a decision of the commissioner as of the date of that letter was quashed, on Murray's motion, upon the ground, as stated in the rule or order of the court, that

the letter of February 1st, 1900, signed by the deputy-commissioner is not a decision of said commissioner from which an appeal can be asserted.

The third document was also made the subject of an appeal, which, again, was quashed, on Murray's motion, upon the ground, as set out in the rule or order of the court,

that the document of April 21st, 1900, signed by the deputy-commissioner, is not a decision of said commissioner from which an appeal can be asserted.

The appellant, in his factum, states that the reference to the document as signed by the deputy commissioner was an error.

The service upon the commissioner of the statutory notice required for the purpose of initiating the appeal does not appear to me to have the effect of making the commissioner a party to the appeal. It is a notice to the tribunal being appealed from for the purpose of informing it of the appeal and of procuring the transmission of the requisite material. It is a step in carrying the matter from the original tribunal to the appellate court.

But it appears to me that the inferior tribunal must be bound by the judgment of the appellate court in the matter, without being a party thereto.

The quashing of the appeals would not necessarily have determined that there was no appealable decision, were it not for the statement of the grounds. This statement, however, is a binding adjudication which works an estoppel between the parties. See *Alison's Case* (1).

(1) 9 Ch. App. 1.

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It was adjudged by the Supreme Court of Nova Scotia, as between the parties to the appeal, that the commissioner had not given an appealable decision in the matter. On this ground the company was precluded from exercising its statutory right to appeal from what the commissioner's successor now says was an appealable decision. In that matter, and as between those parties, he should not be permitted to take that position.

The statute did not, in express terms, command the commissioner to give an appealable decision. But it appears to me to have given to the holder of a license to search a right to acquire a lease of a portion of the area covered by the license, upon duly making his application to the commissioner. The commissioner is given jurisdiction to inquire into and decide upon the application, and his decision is subject to appeal to the highest legal tribunal of the province.

It was imperative upon him to exercise the jurisdiction when called upon to do so by a party interested and having the right to make the application. *Rex* v. *Havering Atte Bower* (1); *Macdougall* v. *Paterson* (2); *Julius* v. *The Lord Bishop of Oxford* (3).

Although the Commissioner is a member of the Executive Council of the Province the Act gave him jurisdiction to decide upon a question of right, and made his decision subject to review by a legal tribunal. It appears to me that, in such a matter, he was not to act as a member of the executive or as the agent of the Crown, but he was given jurisdiction to exercise a judicial function, which a party in the position of the respondent company had a right to call upon him, and the court the power to command him, to exercise.

(1) 5 B. & Ald. 691. (2) 11 C. B., 755; 2 L. M. & P. 681.
(3) 5 App. Cas. 214.

It is true that, when the decision is given, the remedy is by way of appeal. But until there is a decision there can be no appeal.

I express no opinion upon the questions of the correctness of the decisions in the Nova Scotia court that the documents mentioned were not appealable decisions.

By virtue of the conclusions of the court, the company was not allowed to appeal from them and could not now do so if we considered that the conclusions upon this point were erroneous.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. A. Mackay.*

Solicitor for the respondents: *W. B. Ross.*