

CAN.
 Ex. C.
 ———
 BRITISH
 AMERICAN
 FISH CO.
 v.
 THE KING.
 ———
 Cassels, J.

not severable; and, therefore, it is argued that not being capable of being severed the whole lease is void. I do not think this point is well taken. I think that the clause as to renewal can be severed, and while it is void, the lease itself for the term of 21 years is valid and binding.

In the case of the *City of Vancouver v. Vancouver Lumber Co.* (1910), 15 B.C.R. 432, [1911] A.C. 711, cited by Mr. Anglin, in rendering the judgment of the Board, Lord Mersey, at p. 720, after setting out the facts, makes these remarks:—

These being the facts, the defendants take up the position that they are in possession, and (as they properly may do) they rely on their possessory title. The question, therefore, turns entirely upon the strength of the plaintiff's title. Is it better than the possessory title of the defendants?

Referring back to the judgments in the courts of British Columbia, the judgment of the trial court is reported in vol. 15 B.C.R. 432. It appears the trial judge was of opinion that the Vancouver Lumber Co., who claimed title under the Ludgate lease, were not entitled to succeed, and the action was dismissed with costs. In the Court of Appeal this judgment was reversed, and it is important to refer to the judgment of Macdonald, C.J.A. In the case in question the objection was raised that the whole lease was invalid by reason of the fact that there was a provision in the lease for a renewal not authorized by the order-in-council. The Chief Justice refers to that contention in the following language (p. 447):—

It is also urged that the plaintiff's lease is not in accord with the order-in-council of February 16, 1899, under which it was authorised. This is true, but the provisions of the lease, which go beyond the terms of the order, are severable, in which case the lease is good for the balance. In *Hervey v. Hervey* (1739), 1 Atk. 561, 26 E.R. 352, Lord Hardwicke, at p. 569, said: "Suppose a power to lease for 21 years, and the person leases for 40, this is void only for the surplus, and good within the limits of the power," and other cases are cited for the same proposition.

The judgment of the Court of Appeal in British Columbia was affirmed by the Board of the Privy Council; and I quote the language of Lord Mersey to show that it could only have been confirmed had the lessee title as against the corporation in possession. This point as to its being severable must necessarily have come up for consideration, although nothing seems to have been said about it in the reasons for judgment.

I do not think the cases cited by Mr. Robinson support his contention. One or two of them are cases under the Bills of Sale