1918
April 30.

THE BRITISH AMERICAN FISH CORPORATION, LIMITED,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Crown lands—Lease—Order-in-Council—Lease containing clause for renewal—Ultra vires—Void—Whether renewal clause severable.

In 1904, pursuant to an Order-in-Council recommending the granting of a lease for 21 years to the suppliant of certain fishery privileges in waters described in the Order-in-Council, the Minister of Marine and Fisheries executed a lease to the suppliant for the said term, the lease contained a provision that, upon complying with certain terms and conditions, the suppliants would be entitled to have the option of renewing the lease for a future period of 21 years.

In 1913 the Deputy Minister notified the suppliants that the lease was *ultra vires*, as not being in virtue of any Statute of Canada, and as being repugnant to the common law and that the lease was *ab initio* void. *Held* on a stated case to determine the rights of the suppliants under said lease that the provision for the renewal of the lease was void and inoperative, and beyond the power of the Minister under said Order-in-Council, but that the clause as to the renewal could be severed, and while that clause was void the lease itself for the term of 21 years was valid and binding.

Pickering v. Ilfracombe R. Co., (1868), L. R. 3, C. P. 235, 250; *In re Burdett* (1888), 20 Q. B. D. 310, followed.

ACTION claiming a declaration that a lease granted by the respondent to the suppliant is a good, valid and subsisting lease.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, April 18, 1918.

A. W. Anglin, K.C., for suppliant.

Christopher C. Robinson, for Crown.

CASSELS, J. (April 30, 1918) rendered judgment.

The argument before me was on a special case, the facts having been agreed to by counsel for the suppliant and respondent.

On July 12, 1915, the suppliant brought this action claiming a declaration that the document mentioned in paragraph 2 of the special case is a good, valid and subsisting lease.

It appears that on April 11, 1904, an Order-in-Council was passed recommending the granting of the lease in question for a period of 21 years, of fishery privileges in the waters described in the Order-in-Council. In apparent pursuance of this Order-in-Council, the lease which is set out in full in the special case was executed on April 19, 1904.

The lease provides as follows:

"To have and to hold unto the said lessee, subject "as aforesaid, for and during the term of twenty-"one years, to be computed from the 1st day of "May, A.D., 1904, and thenceforth next ensuing "and fully to be complete and ended, yielding and "paying therefor to His Majesty or his successors "yearly and every year during the said term the "certain rent and sum of ten dollars to be paid an-"nually and in advance."

The lease then contains a provision which, it is argued, is contrary to the provisions of the Order-in-Council. It provides as follows:

"Should the said lessee conform to all the terms "and conditions of the present lease, and should "establish at the termination of the said period of "twenty-one years that he, or the company herein-"after mentioned, has expended in exploring, de-"veloping, equipment and improvement of the said

"territory hereby leased, the sum of at least one "hundred thousand dollars, then he or the said "company shall have the option of renewing the "present lease, subject to the same terms and condi-"tions, for a further period of twenty-one years."

It is agreed between the parties that the suppliant has complied with all the provisions of the lease, and that the rents payable by the terms of the said document were duly paid, and that if and so far as the said document was ever valid and binding upon the respondent, it has not ceased to be binding or become subject to invalidation by reason of the non-fulfilment or breach by the suppliant of any of the covenants, provisions, terms or conditions therein mentioned.

The 7th clause of the special case reads as follows:

"The suppliant has been, and now is, willing to "accept the rights and premises in the said docu-"ment mentioned for any part of the period or "periods therein mentioned in respect of which the "said document may be held to be binding upon the "respondent, and, nevertheless, to pay the whole "rent and to comply with and fulfil all the cove-"nants, provisions, terms or conditions contained in "the said document, and to fulfil all obligations "thereby imposed upon the suppliant."

Paragraph 8 of the special case reads as follows:

"8. The question for the opinion of the Court "is: Is the said document, dated the 19th April, "1904, binding upon the respondent in respect of "the period or periods therein mentioned, or any "part thereof?"

Paragraph 9 is as follows:

"9. If the answer to the foregoing question be in "the affirmative, judgment is to be entered for the "suppliant for $15,000 by way of damages with "costs, and any rights and privileges or obligations "conferred or imposed upon the suppliant by the "said document shall thereupon cease and deter-"mine, and the judgment shall so declare; if in the "negative, the petition of right is to be dismissed "with costs."

On October 1, 1913, nine years after the execution of the lease in question, during which period the lessee had been in occupation under the terms of the lease and had complied with all the terms thereof, the following letter, dated Ottawa, October 1, 1913, was written by Mr. A. Johnston, the Deputy Minister of Marine and Fisheries:

"Re Lease of Fishing Privileges for Nelson and "other Rivers and Great Slave Lake and a por-"tion of Hudson Bay.

"Sir:

"The above lease being one granted of fishing "privileges in the Nelson and other rivers, and also "the Great Slave Lake and a portion of Hudson "Bay, to you, bearing date of April 19th, 1904, and "issued pursuant to an Order-in-Council of April "11th, 1904, was *ultra vires* of the Governor-Gen-"eral-in-Council to authorize as not being in virtue "of any statute of the Parliament of Canada, and "as being repugnant to the Common Law. The lease "was *ab initio* void, and has never been of any force "or effect, and I have been directed to so inform "you by the Minister."

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Paragraph 4 of the special case, in part, reads as follows:

"It is agreed between the parties for the purpose "of this special case that the right of the Minister "of Marine and Fisheries to issue or authorize to be "issued, fishery leases and licenses for fisheries and "fishing covering the territory described in the said "document is to be assumed . . ."

On the opening of the case I pointed out to Mr. Robinson, counsel for the Crown, that it was open to serious question whether this admission does not in fact admit the validity of the lease. It was not so intended between the parties. It was intended to admit that the Minister has generally the power to issue leases and licenses over this territory, but that it does not follow that he had the power to issue this particular one.

There is no difference of opinion as to what was in contemplation between the parties. I suggested that it had better be made plain.

Mr. Robinson, acting for the Crown, argued the case with ability. His submissions are two in number: First, that the renewal clause in this lease is *ultra vires* as extending beyond the powers conferred on the Minister by the Order-in-Council. Second, that the renewal clause in the lease is not severable from the rest of the lease, and therefore if the clause providing for renewal is *ultra vires*, the whole document falls with it.

These were the two questions argued. All other questions as to the power to grant a lease over part of the territory were eliminated on the argument. As Mr. Robinson states: "There was some doubt as "to his power (that is of the Minister) over part of

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"the territory that is included here. Now that ques-"tion we intend to eliminate. He is assumed to have "power to issue leases over all of this territory."

"HIS LORDSHIP—You assume that this was within "the Dominion's jurisdiction?

"*Mr. Robinson*—Quite so.

"HIS LORDSHIP—And the Dominion statute author-"izing the Deputy is to be assumed. Is that what is "contemplated?

"*Mr. Robinson*—Yes."

So far as the contention put forward that this provision as to the renewal at the expiration of the 21 years is void, I agree with the contention of counsel for the Crown. It is a provision inserted contrary to the provisions of the Order-in-Council.

It is conceded by the Crown that the Governor-in-Council might have granted a lease for 42 years or for any longer period. The Order-in-Council, however, only providing for a lease for 21 years, and not containing any provision entitling the lessee to a further renewal, this provision in my opinion is void and inoperative. Practically the same question arose before me in the case of *The King v. Vancouver Lumber Co.*[1] The case was tried before me, and I rendered judgment on May 30, 1914. It was a case relating to Deadman's Island. The decision was taken by way of appeal to the Supreme Court of Canada, which Court affirmed my judgment. Up to the present neither the judgment in the Exchequer Court nor in the Supreme Court has been reported. (See footnote 1). I understand an application was made to the Board of the Privy Council for leave to appeal from the judgment of the Supreme Court of

[1] (1914), 17 Can. Ex. 329, 41 D.L.R. 617.

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Canada, and that leave to appeal was granted and that the case is now standing before the Board for argument.

At present I see no distinction between the case before me, and the case I have referred to, and I have come to the conclusion that the clause in the lease in question providing for the renewal is void.

The contention raised on the part of the Crown by Mr. Robinson is that the clause as to the renewal, and the lease for 21 years, are 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.*[1] 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 pos-"sessory 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

1 (1910), 15 B.C.R. 432, [1911], A.C. 711.

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 learned 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 the "16th of February, 1899, under which it was author-"ized. This is true, but the provisions of the lease, "which go beyond the terms of the order, are sever-"able, in which case the lease is good for the bal-"ance. In *Hervey v. Hervey,*[1] 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 Act,* and were determined purely upon the construction of the statute, as, for instance, *Davies v. Rees,*[2] and the other cases under the *Bills of Sale Act.*

[1] (1739), 1 Atk. 561, 26 E. R. 352.
[2] (1886), 17 Q.B.D. 408.

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The facts in the case of *The Queen v. Hughes*[1] and *The Queen v. Clarke*,[2] are entirely different from the case before me. In the first case authority was conferred by statute to grant lands to the extent of 2,560 acres. In direct violation of the terms of the statute, a grant of land to the amount of 4,000 acres was executed. It was held it would be impossible to separate the lands as to which there was power out of the whole quantity granted. The case in my judgment is entirely different from the case in point.

Pickering v. Ilfracombe Ry. Co.[3] At p. 250 the judgment, in part, reads as follows:

"In *Maleverer v. Redshaw*,[4] a sheriff's bond hav-"ing been taken in a form other than that prescribed "by the 23 H. 6, c. 9, it was objected that it was "altogether void, the statute enacting 'that bonds "taken in any other form should be void,' but Twis-"den, J. said, 'I have heard Lord Hobart say upon "this occasion, that, because the statute would make "sure work, and not leave it to exposition what "bonds should be taken, therefore it was added that "bonds taken in any other form should be void; for, "said he, the statute is like a tyrant; where he comes "he makes all void; but the common law is like a "nursing father, makes void only that part where "the fault is, and preserves the rest.' But, after "the long series of decisions on the subject, it is "too late to make that distinction now. In truth, "as was said by Wilmot, C.J., in *Collins v. Blan-"tern*,[5] 'the common law is nothing else but statutes

[1] (1865), L.R. 1, P.C. 81, 92.
[2] (1851), 7 Moo. P. C. 77, 13 E.R. 808.
[3] (1868), L.R. 3, C.P. 235.
[4] (1670), 1 Mod. 35, 86, E.R. 712.
[5] (1767), 2 Wils. K. B. 341, 95 E.R. 847, 1 Smith's L.C. 6th Ed. 325, 334.

"worn out.' The distinction now applies only where "the statute makes the deed void altogether. The "general rule is that, where you cannot sever the "illegal from the legal part of a covenant, the con-"tract is altogether void; but, where you can sever "them, whether the illegality be created by statute "or by the common law, you may reject the bad part "and retain the good."

I have perused all the other cases cited by Mr. Anglin, *viz., Isaacson ex parte Mason.*[1]

In *Re Burdett,*[2] in the Court of Appeal, at p. 314, Fry, L.J., states as follows: "We will first consider "the question upon principle. In our judgment, "clauses in statutes avoiding transactions or instru-"ments are to be interpreted with reference to the "purpose for which they are inserted, and, when open "to question, are to receive a wide or a limited con-"struction according as the one or the other will "best effectuate the purpose of the statute (per "Turner, L.J., in *Jortin v. South Eastern Ry. Co.*[3]) Furthermore, we adopt the language of Willes, J., in *Pickering v. Ilfracombe Ry. Co.,*[4] where he said: " 'The general rule is, that where you cannot sever "the illegal from the legal part of a covenant, the "contract is altogether void; but, where you can "sever them, whether the illegality be created by "statute or by the common law, you may reject the "bad part and retain the good.' "

I fail to appreciate the argument pressed upon me that in the case before me the Crown was induced to grant the lease at a small rental based upon a hope that the lessee might expend a further sum than

[1] [1895], 1 Q.B.D. 33, etc.
[2] (1888), 20 Q.B.D. 310.
[3] (1855), 6 DeG. M. & G. 270 at p. 275, 43 E.R. 1237.
[4] L.R. 3, C.P. 235, at p. 250.

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$50,000 in the development of the territory. There is no evidence whatever adduced showing any attempt to impose upon the Crown.

I answer the question set out in paragraph 8 of the special case, by stating that the document dated April 19, 1904, was binding upon the respondent in respect of a part of the period therein mentioned, that the said lease is now terminated, and I direct judgment to be entered for the suppliant for the sum of fifteen thousand dollars, with costs to be taxed.

Judgment accordingly.

Solicitors for suppliant: *Osler, Hoskin & Harcourt.*

Solicitor for rèspondent: *E. L. Newcombe.*