[HIGH COURT OF AUSTRALIA.]

TOOTH . . . . . APPELLANT;
PLAINTIFF,

AND

BRISBANE CITY COUNCIL . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1928.

BRISBANE, *June* 21, 22.

SYDNEY, *Aug.* 8.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Equitable Assignment—Lease—Land and buildings—Resumption by local authority—Lessor and lessee—Compensation—Provision for apportionment of compensation—City of Brisbane Improvement Act 1916 (Q.) (7 *Geo. V. No.* 24), *sec.* 8.

By a clause in a lease it was provided that in case the demised premises should be resumed by any authority, then out of the compensation moneys payable to the lessor and lessee the lessor shall be entitled to receive £8,440 and in addition £300 per annum or a proportionate part thereof for the unexpired term of the lease and the lessee shall be entitled to the balance. The premises were resumed by a local authority acting under statutory powers, and express notice in writing of the provisions of the lease was given to such authority. An amount of £8,190 was awarded as compensation, £7,190 for the lessor and £1,000 for the lessee. The lessor, who had received £7,190 from the local authority, brought an action against it for £1,000 awarded to the lessee.

Held, by *Knox* C.J., *Higgins* and *Gavan Duffy* JJ. (*Isaacs* and *Starke* JJ. dissenting), that the clause in the lease did not operate as an equitable assignment.

Decision of the Supreme Court of Queensland (*Macrossan* J.): *Tooth* v. *Hill and Brisbane City Council*, (1928) S.R. (Q.) 113, affirmed.

APPEAL from the Supreme Court of Queensland.

By an agreement in writing dated 11th April 1923, Robert Ernest Tooth leased to Johnstone Hill certain lands together with the

buildings thereon, in Wickham Street, Brisbane. The term of the lease was for five years from 9th April 1923. The rental varied from year to year. Hill paid £1,000 to Tooth by way of premium, and had an option of purchasing the property at the end of any year at a price varying from year to year. Clause 9 of this agreement was as follows: "In case the said land and buildings thereon shall be resumed by any authority then out of the compensation moneys payable to the lessor and lessee in respect of the same the lessor shall be entitled to receive eight thousand four hundred and forty pounds and in addition three hundred pounds a year or proportionate part thereof for the unexpired term of the lease and the lessee shall be entitled to the balance." The said lands and buildings were resumed by the Brisbane City Council in the exercise of its powers under the *City of Brisbane Improvement Act* 1916 (Q.), the resumption taking effect from 4th July 1925. The unexpired term of the lease was then about three years. On 13th July 1925 Tooth, through his solicitors, informed the Brisbane City Council by letter of his intention to claim compensation, forwarding a copy of the agreement of 11th April 1923 made between himself and Hill. Both Tooth and Hill lodged in the Land Court of Queensland separate claims for compensation.

At the hearing of Tooth's claim in the Land Court, Tooth agreed to accept and the City Council agreed to pay £7,450 as compensation for the land and buildings resumed. The Land Court valued Hill's option to purchase at £259 13s. and deducted this amount from the £7,450, awarding Tooth £7,190 7s. On Hill's claim the Land Court awarded Hill £259 13s. for his option to purchase and a further sum for electric light fittings, advertising in new premises, removal of stock, value of guarantee of being secured suitable premises, dislocation of business, and goodwill attached to premises resumed, bringing the whole amount awarded to Hill to £1,000. The Brisbane City Council appealed against the award in favour of Hill, and a settlement was arrived at, Hill receiving £200, making allowance for being permitted to continue in occupation as tenant of the City Council and setting off the amount due by him to the City Council for rates.

The awards of the Land Court were made on 12th November 1926, and on 16th November 1926 Tooth by his solicitors sent a letter to

H. C. OF A. 1928.

TOOTH v. BRISBANE CITY COUNCIL.

the Brisbane City Council pointing out that under clause 9 of the lease Tooth was entitled to receive £8,440 at least out of the compensation moneys.

Tooth was paid £7,190 7s. by the Brisbane City Council, and commenced an action against the Council and Hill claiming £1,000. Hill counterclaimed for £551, which he alleged was due to him as portion of the premium for the unexpired term of the lease. At the hearing Tooth did not proceed against Hill, whilst the latter abandoned his counterclaim against Tooth. Judgment was given for the defendant the Brisbane City Council by *Macrossan* J., who held that clause 9 of the lease did not operate as an equitable assignment: *Tooth* v. *Hill and Brisbane City Council* (1).

From this decision the plaintiff Tooth now appealed to the High Court.

Henchman (with him *Walsh*), for the appellant. Clause 9 of the lease operates as two equitable assignments, one from Hill to Tooth of £8,440 and £900 for the unexpired term of the lease, the other from Tooth to Hill of any compensation over and above £9,340. Under sec. 8 (*b*) of the *City of Brisbane Improvement Act* 1916, the interest in the land is converted into a claim for compensation. Tooth gave the Council notice, and giving notice completed his equitable, if not legal, interest in the compensation moneys receivable by Hill in respect of his interest in the land. There is no prescribed form of notice to be given. The contract in clause 9 of the lease was to assign property when it came into existence. [Counsel referred to *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (2); *Tailby* v. *Official Receiver* (3); *In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (4); *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.* (5); *Liverpool & London & Globe Insurance Co.* v. *Hartley & Ford* (6); *Dawson* v. *Great Northern and City Railway Co.* (7); *Wright* v. *Morgan* (8).]

Wassell, for the respondent. Clause 9 of the lease does not operate as an equitable assignment. It gives a personal right in contract to a

(1) (1928) S.R. (Q.) 113.
(2) (1905) A.C. 454, at p. 462.
(3) (1888) 13 App. Cas. 523, at p. 543.
(4) (1915) 2 Ch. 345.
(5) (1887) 12 App. Cas. 315.
(6) (1927) V.L.R. 523; 49 A.L.T. 70.
(7) (1905) 1 K.B. 260.
(8) (1926) A.C. 788, at p. 796.

sum of money derived from two separate sources. The sum of money is to be apportioned in the way indicated in clause 9. There was no fund in existence on which this clause could operate. Nothing in the clause expressly or by necessary implication gives a charge against the compensation moneys. There is a contract between the parties that when the money is paid it is to be distributed in a particular way. [Counsel referred to *In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (1); *Cary* v. *Palmer* (2); *Palmer* v. *Carey* (3); *Smith* v. *Perpetual Trustee Co.* (4); *Field* v. *Morgan* (5).]

Henchman, in reply. On resumption the assignment took effect, and it was not necessary for Tooth to have any further relations with Hill. Therefore the clause operated as an assignment.

Cur. adv. vult.

Aug. 8.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. In this action the appellant sought to recover from the respondent the sum of £1,000 assessed as compensation payable to one Johnstone Hill in respect of his interest in certain land resumed by the respondent, on the ground that the sum in question has been assigned in writing by the said Johnstone Hill to the appellant and that notice in writing of such assignment had been given to the respondent. It is not disputed that the sum of £1,000 had been assessed as alleged by the appellant, and it is admitted that notice in writing of the alleged assignment was given to the respondent before that amount or any part of it was paid by the respondent to Hill. The question for decision is whether the writing relied on by the appellant constitutes an equitable assignment of the whole or part of the amount which should be assessed as payable by the respondent to Hill in satisfaction of his claim. In the Supreme Court this question was decided in favour of the respondent. The alleged assignment in writing is contained

(1) (1915) 2 Ch., at p. 364.
(2) (1924) 34 C.L.R. 380, at p. 382.
(3) (1926) A.C. 703; 37 C.L.R. 545
(4) (1910) 11 C.L.R. 148
(5) (1869) L.R. 4 C.P. 660.

H. C. OF A. 1928.

TOOTH v. BRISBANE CITY COUNCIL.

Knox C.J. Gavan Duffy J.

in clause 9 of a lease of the resumed premises by the appellant Tooth to Hill. That clause is in the words following: "In case the said land and buildings thereon shall be resumed by any authority then out of the compensation moneys payable to the lessor and lessee in respect of the same the lessor shall be entitled to receive eight thousand four hundred and forty pounds and in addition three hundred pounds a year or proportionate part thereof for the unexpired term of the lease and the lessee shall be entitled to the balance."

It is said on behalf of the appellant that this constitutes two assignments the one by Hill to Tooth of so much of the compensation assessed payable by the respondent to Hill as would with the compensation assessed as payable to Tooth make up the sum of £8,440 plus £300 a year for the unexpired term of the lease—which was three years—or £9,340 in all, and the other by Tooth to Hill of portion of the compensation money payable to him. For the respondent it is said that the clause amounts to no more than an agreement between the parties that, after payment by the respondent to the appellant and to Hill of the compensation assessed as payable to them respectively, the total amount so paid should be distributed between the appellant and Hill in the proportion of £9,340 to the appellant and the balance to Hill. It is said further for the respondent that, even if the clause in question constitutes an equitable assignment, it is limited to the amount payable to Hill in respect of the land and buildings resumed and that in fact only £259 13s. was assessed in this respect, the balance being awarded in respect of the damage sustained by Hill personally in consequence of the resumption. In our opinion this latter contention cannot be maintained. The power to award compensation given by the *City of Brisbane Improvement Act* is limited to compensation in respect of the estate, right and interest of the claimant in the land resumed, and, as the award made in favour of Hill is not now open to question, it must be taken that the whole £1,000 was properly assessed in accordance with the provisions of the Act, namely, as compensation for the right or interest of Hill in the land resumed, including the buildings thereon.

The question remains whether on its true construction clause 9 amounts to an equitable assignment by the lessor or the lessee of

the sum assessed as compensation to him or any part of such sum. In our opinion it does not. Reading the words according to their natural meaning, the clause purports to deal not with a fund which either party could dispose of by way of assignment, but with a composite sum made up of the compensation payable to the lessor and that payable to the lessee on resumption by any authority whether such compensation moneys should in law be assignable by the parties entitled to them or not. It provides that out of this aggregate sum so formed, £9,340, in the events which have happened shall be payable to the lessor and the " balance " to the lessee. It is said that the use of the word " payable " instead of " paid " points to an agreement affecting the compensation at a period antecedent to the actual payment of the compensation, but the expression " compensation moneys payable " seems to us to have been used merely to describe and identify the source of the money which is to be pooled and distributed between the parties.

For these reasons we are of the opinion that the appeal should be dismissed.

ISAACS J. It is all-important in this case to distinguish, and to keep unconfused the rights and obligations of the Brisbane Council as a resuming authority and its rights and obligations under the doctrine of equitable charge or assignment. If that be done, there does not appear to me to be any serious difficulty in arriving at the proper conclusion in this appeal, though it may occupy some little space in dealing with the various points raised. This I am bound to do as, with respect, I am differing from the views expressed with great force and clearness by *Macrossan* J. As a resuming authority the Council on the publication of the notice of resumption, that is on 4th July 1915, had *eo instante* certain definite statutory rights and obligations. These are prescribed principally by sec. 8 of the *City of Brisbane Improvement Act*. As to rights, it became the absolute owner of the land, free from all contracts, interests, and all outstanding fragments of ownership, legal or equitable, which any person whatsoever possessed prior to the publication. In other words, all estates and interests in the land, whatever they might have been, of Tooth and of Hill ceased to exist, and by force of

H. C. OF A. 1928.

TOOTH v. BRISBANE CITY COUNCIL.

Isaacs J.

sec. 8 (*a*). As to obligations, it became subject to and was bound to satisfy every "claim for compensation" into which Tooth's and Hill's estates and interests, legal or equitable, were statutorily converted. In other words, from the moment of publication of the notice of resumption the Council owed Tooth and Hill respectively and independently of each other the money compensation provided by the Act for their respective interests. True, the amount of each one's compensation had yet to be ascertained by agreement or award, and the respective interests if not admitted had to be determined by the Supreme Court, but all that was merely making certain what was definitely fixed in law on 4th July 1925, just as a contract of sale for a price to be fixed later by a valuator. As eventually ascertained, it appears that, as on that date, Tooth was entitled to £7,190 7s. by force of the Act, also he became entitled to an allowance equal to 6 per cent from 4th July 1925 to the date of payment, and he also became entitled to costs. In the same way Hill, it must be taken, was as on the said date entitled to £1,000, and he was awarded costs. Those were the statutory rights and obligations of the Council to Tooth and to Hill. There was, so far, no obligation whatever of the Council to Tooth in respect of the compensation to which Hill was statutorily entitled. To all that I have nothing to say, except to accept the position as final and conclusive as a starting-point, in order to apply the equitable doctrines invoked on behalf of Tooth.

The appellant accepts that position and contends that in the circumstances external to the statute an obligation on the part of the Council arose to pay over to him the £1,000 (less some £90 for rates) which Hill was prima facie entitled to receive. That obligation is said to arise in this way: Tooth, being in 1923 the absolute and complete owner of the land and all interests therein (I omit reference to mortgages), leased it to Hill on the terms of the agreement of 11th April 1923. That contract provided for a term of five years at a progressively increasing rent, and for an option to the lessee to purchase at a progressively diminishing price down to £8,441 1s. 4d. The mutual rights during the five years were thus definitely provided for, if the land were not resumed by some public authority. But what was to happen in case of resumption whereby the lease would

be annihilated? That was specifically provided for by clause 9, which says: "In case the said land and buildings thereon shall be resumed by any authority then *out of the compensation moneys payable* to the lessor and lessee in respect of the same *the lessor shall be entitled to receive* eight thousand four hundred and forty pounds and in addition three hundred pounds a year or proportionate part thereof for the unexpired term of the lease and *the lessee shall be entitled to the balance.*" That clause envisaged a possible resumption and its results, including the dissolution of the lease and the attendant obligations during its currency. The clause regards "the compensation moneys payable to the lessor and the lessee" as one aggregate fund, representing in money the totality of the landed interests taken by the resuming authority, and the *ownership of the fund* was agreed to be determined by its amount in relation to the provisions of clause 9. The compensation to be awarded to the claimants individually was, while "payable," to be bulked. It might be that the lessor would get more than would satisfy the sums mentioned. In that case the lessee would get more than his individual compensation. That might conceivably happen if the value went up. Or it might be the other way, as it actually eventuated. But the clause regulated the ownership of the fund while "payable" and gave to Tooth a first charge on it for the stipulated sums. To the extent that that charge encroached on the Hill compensation, that compensation was equitably assigned. The clause provides, not for any personal obligation on either lessor or lessee to pay anything to the other, but that the lessor is to be "entitled to receive" so much, and the lessee is to be "entitled to the balance." The "balance" is all that Hill is to be "entitled" to. The clause is in itself, in the event contemplated, the creation of a specific fund, for the purposes of the contract and the two parties to it, and at the same time is in itself an appropriation of that fund by giving Tooth a first charge upon it, which has to be satisfied before Hill has any right to any portion of it. Nothing whatever as between the parties was needed to give or was capable of giving vitality to clause 9, except the statutory exercise of the power of resumption of the entire land and interests thereon. On that event, as has been seen, the relation of landlord and lessee

H. C. OF A. 1928.

TOOTH v. BRISBANE CITY COUNCIL.

Isaacs J.

disappears and, nothing of the contract remains except clause 9, which is intended to apply and applies only to the substituted circumstances. It has been argued that clause 9 merely created personal obligations and did not attach to property. That is wholly unsustainable if equitable charges or assignments are to have any recognition. There could hardly be a stronger form of equitable charge and in possible events of equitable assignment. A very few authorities need specific citation. One is *Dawson* v. *Great Northern and City Railway Co.* (1). At the last mentioned page *Stirling* L.J., speaking for *Collins* M.R., *Mathew* L.J. and himself, and referring to compensation for land compulsorily resumed, said: "The payment may be regarded as the price payable for the exercise of the powers, and in our judgment property." Indeed, as stated in *Wright* v. *Morgan* (2) by Viscount *Dunedin* for the Privy Council: "Speaking generally, any vested interest is assignable unless there is something in the nature of the interest, or something in the words of the settlement which creates the interest which contradicts the nature of assignability." Consequently the subject matter of clause 9 is fit matter for equitable charge. That is the first step. The next is well illustrated by another case, also decided by the Privy Council, which makes the present one a fortiori. I refer to *Vatsavaya Venkata Jagapati* v. *Poosapati Venkatapati* (3). Lord *Atkinson*, speaking for a Board including Lord *Shaw* and Lord *Blanesburgh*, delivered the judgment. The material facts for present purposes, when condensed, were these:—A advanced 92,000 rupees for the purpose of conducting a suit claiming an estate. B the plaintiff in that suit agreed with A on 14th August 1907 that in certain events he (B) should compromise the suit, and then, by clause 12, "*out of* the movable and immovable properties that may be obtained by such compromise" &c. "*we shall first pay to you* the principal money advanced by you together with interest at one rupee per cent *per mensem* from the respective dates, and out of the movable and immovable properties that remain after so giving away to you we shall at once execute and give to you a proper sale-deed and place in your possession three thirty seconds

(1) (1905) 1 K.B., at p. 271. (2) (1926) A.C., at p. 796.
(3) (1924) L.R. 52 Ind. App. 1.

of a share." Their Lordships say (1): "What the agreement really does is to provide that the fruit" of the suit "which may be either movable or immovable property, shall be divided in certain shares between the parties to the agreement." Their Lordships, after dealing with the matter as affecting prior existing property, say (2): "If even the money given to the plaintiffs in the compromise was a non-existing thing at the date of the agreement, and only came into existence at the date of the compromise decrees, the agreement of 14th August 1907, which is still in existence, . . . *attaches to the things so coming into existence subsequently.*" That is to say, there is thereby an assignment in equity and the interest passes to the assignee. (The italics are mine.) But the reason I say the present case is a fortiori is that in the Indian case the plaintiff in the first action was himself to receive the money and was "to pay" the money advanced. But he was to pay it "out of" a specific fund. In *Durham Bros.* v. *Robertson* (3) *Chitty* L.J. said:— "To operate as an equitable assignment no particular form of words is required in the document; *an engagement or direction to pay, out of a debt or fund, a sum of money constitutes an equitable assignment,* though it does not operate as an assignment of the whole fund or debt. A mere charge on a fund or debt operates as a partial equitable assignment." That is precisely what is stated in *Palmer* v. *Carey* (4). Clause 9, even if read as a personal obligation "to pay," must necessarily be read as an obligation to pay *out of* the total compensation moneys payable to both lessor and lessee. *Brandt's Case* (5) is decisive. Not only the express terms but the practical sense of the clause precludes an obligation on Hill to pay £8,440 and more out of Hill's prospective compensation, and he could not pay it out of Tooth's. The result so far is that the clause, in the event that happened, was an equitable assignment (as that expression is understood) to Tooth by Hill of Hill's compensation under the resumption. It amounts to what, as construed, the Judicial Committee failed to find in the agreement in *Palmer* v. *Carey* (6), namely a "provision creating, contractually," a "right of property" in the fund.

(1) (1924) L.R. 52 Ind. App., at p. 18.
(2) (1924) L.R. 52 Ind. App., at p. 20.
(3) (1898) 1 Q.B. 765, at p. 769.
(4) (1926) A.C., at p. 706; 37 C.L.R., at p. 548.
(5) (1905) A.C., at p. 462.
(6) (1926) A.C., at p. 707; 37 C.L.R., at p. 549.

H. C. OF A. 1928.

TOOTH v. BRISBANE CITY COUNCIL.

Isaacs J.

Notice of the assignment, as I term it, was given to the Council on 13th July 1925 by sending a copy of the lease which supplied clause 9 verbatim, and specifically referred to Tooth's right as against Hill under clause 9 to receive £8,440, together with £300 a year or proportionate part thereof for the unexpired term of the lease. As the actual amount of claim was about £9,343, the statement in the notice of 13th July 1925 was practically accurate in any event. That was only nine days after the publication of the notice of resumption. It bound the conscience of the Council as from that time just as the assignment itself bound the conscience of Hill from the date of his contract. A further notice was given on 16th November, three days after the award; but it was superfluous, though cautionary, and I say nothing further about it. Had the Council not in some way dealt with Hill in relation to his compensation so as to settle accounts between them, it would have been unnecessary to go further. The Council would be bound to pay to Tooth the money awarded to Hill. But transactions took place that require further consideration, since the Council rely upon a right in equity to retain that money notwithstanding the assignment and notice of it. After notice, the Council would pay Hill at its "peril" (*Brandt's Case* (1) and *Roxburghe* v. *Cox* (2)). But it claims immunity on the footing of an agreement made on 11th January 1927 between itself and Hill, whereby Hill agreed to pay the Council £900 by way of deduction from £1,100—representing the £1,000 assigned and £100 costs—in payment for three items of indebtedness claimed by the Council against him. The three items were (1) rent of premises from date of resumption, agreed amount being £766 19s. 10d.; (2) rates due at date of resumption, £92 10s. 11d.; (3) water and sewerage rates on arrears at date of resumption, £40 9s. 3d. Those three items total £900. It will be seen that the amount stated for rent, so called, or, as it was stated at the Bar, for use and occupation, is, roughly speaking, at the rate of £300 a year, the exact figures being arbitrarily taken so as to round off the total amount at £900. For the period subsequent to resumption the lease rent would have been altogether higher. So that there was obviously a new and independent arrangement in fact.

(1) (1905) A.C. 454.

(2) (1881) 17 Ch. D. 520, at p. 526.

Apparently that took place on 16th November 1927. With respect to the two other items no difficulty exists. The general rates £92 10s. 11d. were properly deductible as they attached to the property and were a charge thereon. As to the water and sewerage rates, they were already paid by Tooth and should not have been deducted, and must now be disregarded. The balance of the £1,100, namely £200, was paid by the Council to Hill. Of that sum £100 costs was rightly paid, for, with that, Tooth has no concern. But, except the sum of £92 10s. 11d., the £900 deducted and retained by the Council and therefore still in its hands was wrongfully, as against Tooth, so deducted and retained. And the £100—not costs—paid over to Hill was wrongfully paid. That is, £917 9s. 1d. was wrongfully not paid to Tooth and at the Council's "peril." Now, as to the use and occupation or rent—there being no evidence of anything more than permissive occupancy—it is obvious that the relation of owner-occupier began not earlier than the resumption. The resumption vested in the Council not only the landlord's reversion, but the lessee's interest, and that interest at all times remained in the Council and compensation for the transfer of that interest as on 4th July 1925 has been awarded to Hill. It necessarily follows therefore that Hill's subsequent occupation rests for its legality on an entirely new arrangement beginning not earlier than 4th July 1925, and at most could entitle the Council to remuneration for occupation to 13th July, the date of the notice of assignment. But there is no suggestion that even as to this insignificant period he was allowed to remain on the faith of setting off the amount against the compensation money. Subsequently the Council had no right whatever as against Tooth to set off the £766 19s. 10d. The debt arose entirely after the resumption, and almost wholly after notice of assignment. It was under "a new contract" made with the Council (see *Parsons* v. *Sovereign Bank of Canada* (1)). It was not "flowing out of and inseparably connected with" any dealings or transactions previously existing between the Council and Hill (*Government of Newfoundland* v. *Newfoundland Railway Co.* (2)). As Lord *Wrenbury* (then *Buckley* L.J.) said in *Stoddart* v. *Union*

(1) (1913) A.C. 160, at p. 166.

(2) (1888) 13 App. Cas. 199, at p. 213.

H. C. OF A. 1928.

TOOTH v. BRISBANE CITY COUNCIL.

Isaacs J.

Trust Ltd. (1), the *Newfoundland Case* was one where the amount set off was for breach of the very contract out of which the debt arose, and therefore one which would affect the amount due under and in respect of the contract. (See, also, per *Vaughan Williams* L.J. at p. 189 and per *Kennedy* L.J. at p. 193 of the same case.) Indeed the case of *Watson* v. *Mid Wales Railway Co.* (2) is a distinct authority with very similar facts and altogether negativing the Council's right as against Tooth. That case was expressly approved in the *Newfoundland Case* (3) and I would only add to what is there said, that *Willes* J. pointed out (4) that mere cross-claims cannot suffice for the purpose, there must be "some equitable ground for protection" such as inseparability, which it is impossible to assert in this case. The matter is clear in any event but its clarity is emphasized by sec. 16 of the Act, which says: "No compensation shall be payable to any person who is lessee, tenant, or licensee of any land taken if the Council is willing and upon written application agrees to allow his estate or interest to continue uninterrupted." That is to say, if notwithstanding actual resumption of the "estate or interest" the lessee, &c., applies in writing to the Council to abandon its resumption *pro tanto*, and the Council agrees, then no compensation is payable for what in effect is not taken or is restored. But nothing is said about "occupation." It is "estate and interest" that is spoken of, and apart from sec. 16 the resumption of a lessee's interest necessarily connotes in law the termination of his right of occupancy, and any subsequent occupancy must arise not out of prior relations, but out of new and independent relations between the lessee and the Council, not as resuming authority but as proprietor. More particularly is that so where the rental is different. The arrangement was not merely new: it was different both as to tenure and amount. It was as if the resuming authority took land owned and occupied by the same person, and then allowed him tacitly or expressly to remain for a time. There would manifestly be no inseparable tie between the resumption and the new relationship. And so here.

In my opinion the appeal should be allowed and judgment entered for the appellant for £917 9s. 1d. and costs in both Courts.

(1) (1912) 1 K.B. 181, at p. 185.
(2) (1867) L.R. 2 C.P. 593.
(3) (1888) 13 App. Cas. 199.
(4) (1867) L.R. 2 C.P., at p. 599.

HIGGINS J. The Land Court decided that the compensation to be paid to the landlord, Tooth, was £7,190 7s.; and that the compensation to be paid to the tenant, Hill, was £1,000. Whatever we may think of the reasons given by the Land Court for deducting £259 13s. from the agreed value to Tooth of the land and buildings, these decisions are not before us on appeal, and are final as regards the compensation (*City of Brisbane Improvement Act of* 1916, sec. 22).

In the lease, Tooth to Hill, there is a clause, 9, which has given rise to controversy: "In case the said land and buildings thereon shall be resumed by any authority then out of the compensation moneys payable to the lessor and lessee in respect of the same the lessor shall be entitled to receive eight thousand four hundred and forty pounds and in addition three hundred pounds a year or proportionate part thereof for the unexpired term of the lease and the lessee shall be entitled to the balance." Now, this clause undoubtedly entitled Tooth to claim from Hill out of the compensation payable to landlord and tenant the difference between the £7,190 7s. which the Council had to pay him and the £8,440, with, as an addition to the £8,440, the proportionate part of £300 per annum attributable to the unexpired term of the lease. In effect, this clause is like a limited guarantee given to Tooth by Hill—a guarantee limited to the total sum of the compensations—that Tooth would be awarded at least £8,440 with the addition aforesaid. The Land Court thought that the object of the clause was "to inflate the value for compensation purposes"; but this inference cannot affect our duty under this statement of claim which claims "payment by the defendants" (both the defendants) "of the sum of £1,000." Tooth now claims this difference, not from Hill (for according to the record of the judgment Tooth by his counsel intimated at the commencement of the hearing that he was not proceeding with his claim against Hill, and Hill therefore abandoned his counterclaim against Tooth and withdrew from the hearing): Tooth now claims the £1,000 compensation from the City Council. Before action, the Council made a settlement with Hill of their mutual claims, Hill agreeing that £900 should be deducted by the Council from his compensation, and the Council agreeing to pay Hill £200, and

H. C. OF A. 1928.

TOOTH v. BRISBANE CITY COUNCIL.

Higgins J.

withdrawing its notice of appeal from the Land Court's decision. But it is urged for the plaintiff that the Council should pay to him the £1,000 which was discharged already as between the Council and Hill; and the plaintiff's argument is that the £1,000 had been equitably assigned to him by Hill, and that the Council had notice of the assignment.

The Council certainly had notice of clause 9, for what the notice is worth. The lease was forwarded to the Council on 13th July 1925, a few days after the notice of resumption appeared in the *Government Gazette*, and attention was specifically directed to clause 9. Notice of clause 9 was also given by letter of 16th November 1926, four days after the decision of the Land Court. But where is the equitable assignment? We are familiar with assignments of choses in action; no one denies that the compensation may be validly assigned; but I confess that I have never known of an equitable assignment of a right given to one of the contracting parties by one clause in a contract without regard to the cross-rights given by other clauses to the other contracting party. If A and B enter into partnership by deed, and under the deed B is entitled to £500 a year as salary, that salary cannot be assigned to C, a stranger, so as to entitle C to take it without partnership accounts. There can be an assignment of a lease to a stranger with all its benefits and burdens; but the benefit of one clause cannot be assigned to a stranger so as to entitle the stranger to take the benefit, ignoring the burdens. Clause 9 is not separable from the rest of the lease. Under the lease clause 9 is one of the " conditions and restrictions " to which the lease is subject. In adjusting accounts as between Tooth and Hill, as to the £1,000 payable for a five years' lease (interrupted by the resumption), as to the rent paid and payable, as to the rates and taxes, as to the covenant for quiet enjoyment, as to the duty to obey sanitation laws, to pay insurance moneys, to reinstate on a fire, to pay purchase-money if the option to purchase be exercised, &c., all liabilities on each side have to be taken into account; and the duty of Hill to make up the difference between the £7,190 7s. and £8,448 is merely one of the items in that account. Hill actually claimed in his defence (pars. 15 and 16) that Tooth

owed him £551 17s. 7d. of the £1,000 premium in respect of the unexpired term of the lease; and, so far as the Council knew, the accounts might show that Tooth was in debt to Hill.

My point is that clause 9 of the lease did not entitle Tooth to claim the full £1,000 *simpliciter* the day after the decisions of the Land Court (12th November 1926); and that the Council would not have been safe in paying Tooth the £1,000 without ascertaining the state of the accounts between Tooth and Hill. It will be said that there is no evidence of any cross-accounts that Hill may now effectually claim against Tooth; but we must look at the effect of the lease as a whole in 1923, when the lease was given; and whatever effect it had then it still has. Subsequent results do not alter the construction of an instrument. What was assigned—if "assigned" is the fit word—was a right to have the difference between the amount awarded to Tooth on the one side and the £8,440 (with a certain addition) on the other side made good by Hill out of the amount awarded to himself, but subject to mutual rights of the parties under the lease as a whole. A particular benefit conferred by one clause of such an instrument cannot well be separated and assigned without regard to all the clauses in the instrument, just as one cannot well assign the sherry in a tureen of soup without the stock. To say the very least, the presumption will be, in the absence of clear words to the contrary, in favour of the construction that clause 9 was not assigned separately to Tooth irrespective of the total obligations under the lease. As was said by Lord *Hobhouse*, speaking for the Judicial Committee of the Privy Council in *Government of Newfoundland* v. *Newfoundland Railway Co.* (1): "It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counterclaim by the other party in respect of the rest of the contract, which may be burdensome." (See also *Bergmann* v. *Macmillan* (2); *Young* v. *Kitchin* (3).)

In my opinion, the appeal should be dismissed. Although I am unable to accept the full reasons of the learned Judge of first

(1) (1888) 13 App. Cas., at p. 212. (2) (1881) 17 Ch. D. 423.
(3) (1878) 3 Ex. D. 127.

H. C. OF A. 1928.

TOOTH v. BRISBANE CITY COUNCIL.

Higgins J.

instance I concur with him in thinking that whatever claim might have been enforced against Hill, the claim against the City Council is not justified.

I ought to add, indeed, that I find it difficult to reconcile Tooth's abandonment at the Bar of his claim against Hill under clause 9 of the lease with Tooth's persistence in this claim against the City Council: Hill was the principal debtor. But the point is not raised by the pleadings or even referred to in argument.

STARKE J. The plaintiff, Tooth, sues the Brisbane City Council for the sum of £1,000 which, on 12th November 1926, the Land Court determined was the compensation payable by the Brisbane City Council to one Johnstone Hill in respect of his estate or interest in certain lands taken by the Council of the City of Brisbane under the *City of Brisbane Improvement Act* 1916. On 16th November 1926 the Land Court determined also the compensation payable to Tooth in respect of his estate or interest in the same lands at the sum of £7,190 7s. Hill's estate or interest arose under a lease dated 11th April 1923 whereby Tooth had leased the lands to Hill for a term of five years with the option of purchase. Clause 9 of the lease provided: "In case the said land and building thereon shall be resumed by any authority then out of the compensation moneys payable to the lessor and lessee in respect of the same the lessor shall be entitled to receive eight thousand four hundred and forty pounds and in addition three hundred pounds a year or proportionate part thereof for the unexpired term of the lease and the lessee shall be entitled to the balance." The plaintiff, Tooth, contends that this clause operates as an equitable assignment to him of the sum of £1,000 awarded to Hill in respect of his estate or interest in the lands. Now, I take it that an equitable assignment may take the form of an agreement to transfer a chose in action existing or future (*Tailby* v. *Official Receiver* (1)). The mode or form of the assignment is absolutely immaterial provided the intention of the parties is clear (2). So we must ascertain the true meaning of clause 9. No difficulty arises in ascertaining and identifying the moneys mentioned in the clause: they are the compensation moneys payable to the

(1) (1888) 13 App. Cas. 523.

(2) (1888) 13 App. Cas., at p. 543.

lessor and lessee in respect of the lands. Out of those moneys the parties agree what the lessor and what the lessee shall receive. In my opinion that is a provision creating contractually a right in the parties to the compensation moneys in the agreed amounts (*Palmer* v. *Carey* (1)). So far as any moneys awarded to Hill go over under clause 9 to Tooth that clause operates as an assignment of those moneys to Tooth, and so far as any moneys awarded to Tooth go over under clause 9 to Hill that clause operated as an assignment of those moneys to Hill. On the facts in the present case the £1,000 awarded to Hill go over to Tooth subject, of course, to any equities subsisting between Hill and the Brisbane City Council. But in view of the construction of clause 9 adopted by the majority of the Court I do not discuss those equities, and content myself with expressing my dissent from that construction.

Appeal dismissed with costs.

Solicitors for the appellant, *Stephens & Tozer.*
Solicitor for the respondent, *G. L. Byth.*

B. J. J.

(1) (1926) A.C., at p. 707 ; 37 C.L.R., at p. 549.