Company, without, in the first instance, under and in terms of the 11th sect. of the said Statute 7 Geo. IV. c. 103, giving good and sufficient security to the defenders for all damages, interruption of traffic, and other injury which may thence in any way result to the railway in question, or to the defenders, as proprietors thereof." That was the question which the Lord Ordinary decided.

From that there was a reclaiming note to the Court of Session. The decision of the Lord Ordinary was reversed by that Court, and the judgment of the Court of Session was again reversed by your Lordships' House; and the Lord Chancellor, in pronouncing judgment, said, "as to the 11th sect. of the original act, whereby the owner of the reserved mines under the land conveyed is restrained from working at all until he has given security to the company, I see nothing in the act of 1844 to prejudice that right." Ultimately the House of Lords decided that the interlocutor of the Lord Ordinary was right, and that the decree of the Court of Session was wrong, and they reversed that decision. It appears to me that that case is exactly in point with this case. This exact point was there decided, and there is no substantial distinction which can be pointed out between the two cases. The only distinction is, that in the one case there was a declarator which declares what the law is, and in the other there is an interdict which is grounded upon that law. The law has been laid down by this House, and therefore it is impossible for us to depart from it.

I concur, therefore, in the opinion of my noble and learned friend, that the judgment of the Court below should be reversed.

Sir Fitzroy Kelly.—In this case your Lordships will perhaps follow the course adopted in *Sprot's case*, of reversing the interlocutor, with the expenses below.

Mr. Attorney-General.—That is a matter entirely for the Court below; but there are no expenses in a matter of this description. It comes again before the Court. The declarator in *Sprot's case* necessarily involved the decision of the action, and therefore the question of expenses arose; but that is not the practice in a case of suspension and interdict.

Sir Fitzroy Kelly.—My learned friend says it is not the practice in a case of suspension and interdict. We conceive, my Lord, that in this case the Caledonian Railway Company are entitled to the expenses of seeking to obtain the interdict, without which these mines would have been worked, as we contend, to the irreparable prejudice of the company.

Mr. Attorney-General.—That should be left to the Court below.

Sir Fitzroy Kelly.—It was not so in *Sprot's case;* but there my learned friend the Solicitor-General said, "Your order will begin by stating—Refuse the reclaiming note of the pursuer against the interlocutor of the Lord Ordinary, with expenses, and affirm the interlocutor of the Lord Ordinary." The expenses are given there, and I trust your Lordships will give them here.

LORD CHANCELLOR.—In *Sprot's case* we confirmed the interlocutor of the Lord Ordinary, but here it is reversed.

Mr. Attorney-General.—In *Sprot's case* you dismissed the action with expenses.

LORD CHANCELLOR.—I think before we can make any order on the subject, we must know, as a fact, whether any expenses have been paid.

Mr. Attorney-General.—No, my Lords, they have not paid any.

Sir Fitzroy Kelly.—There have been no expenses paid. All that we ask your Lordships to do, is to remit the case to the Court below, with a direction to them to do what your Lordships now say the Court below ought to have done.

LORD CHANCELLOR.—We reverse the interlocutor of the Court below, and remit the case to the Court of Session, with a declaration as to what the interlocutor ought to be, and leave them to deal with the costs as they think fit.

Sir Fitzroy Kelly.—I am quite content with that, my Lords.

Interlocutors reversed, and cause remitted, with a declaration.

Appellants' Agents, Grahame, Weems, and Grahame; and Hope and Mackay, W.S.—*Respondents' Agents*, Richardson, Loch, and Maclaurin; and Dundas and Wilson, C.S.

JUNE 11, 1857.

D. S. PEDDIE, *Appellant*, *v.* Messrs. BROWN, GORDON, and Co., *Respondents.*

Lease—Colliery—Railway—Jus Quæsitum Tertio—*B. was lessee of a colliery, the lease stipulating that where the coal was no longer workable at a profit, the lease was to be given up. During the lease B. obtained from a proposed Railway Co., a sum of £5000, for withdrawing opposition to a bill in parliament, and compensation for injury to the lease. The bill passed, and the railway was made. Afterwards B. surrendered the lease as unworkable.*

HELD (affirming judgment), *That B.'s landlord was not entitled to recover from B. the £5000 or part of it, as no privity of contract existed between them as to that.*[1]

The appellant is trustee for the proprietors of Halbeath Colliery, in the county of Fife, and he is also trustee for them in a lease of the home farm of Halbeath, belonging to Lieutenant Colonel Martin Lindsay. The appellant brought an action against the respondents, who were tenants under the appellant of the colliery and farm of Halbeath above mentioned, concluding for payment of "the sum of £4000 sterling, or of such other sum as shall appear and be found by our said Lords to be the proportion due to the pursuer of the sum of £5000 paid to the said defenders, as tenants of the Halbeath Colliery, and of the home farm of Halbeath, held in lease of the pursuer by the Edinburgh and Northern, (now the Edinburgh, Perth, and Dundee Railway Company,) as compensation for injury done to their lease till its expiry, including the amount necessary for the construction of a branch line of railway from the said colliery to the Dunfermline branch of the said railway, as provided for in the arrangement under which the said sum was paid, or at least of such part of said sum of £5000 as shall appear and be found by our said Lords to be the amount necessary for the construction of said branch line." The Lord Ordinary sustained the plea of the defenders that the allegations were irrelevant, and that the money was received for injury to their own rights exclusively, and assoilzied them from the conclusions of the action. The Inner House adhered to the Lord Ordinary's judgment.

The pursuer appealed.

Rolt Q.C., and *Anderson* Q.C., for the appellant.—It is clear that, in a case like this, we are entitled to some relief. The company has taken away part of our land. The tenant has got the price of that land in his pocket, and we must have a part of that money, for it is the equivalent for our land.

[LORD WENSLEYDALE.—What privity is there between you and the railway company?]

Privity is not necessary, except it be privity of estate, and that we have, as the land was ours. Suppose the tenant, instead of getting money from the railway company, had got a piece of other land, could he at the end of the term refuse to give it up to us?

[LORD WENSLEYDALE.—If the company had given the tenant 10 acres of land instead of £1000, the land would have been entirely his.]

Surely if a tenant claim £1000 for future injury to his interest, on the footing that he is to continue in the occupation, but he next day gives notice to quit, he must account for this money to the landlord. But if there is no privity of estate, there is sufficient privity of contract. If A enter into a contract with B, the consideration of which contract is some benefit to C, a third party, then C can claim the fulfilment of that contract. It is so in England.—*Tomlinson* v. *Gill*, Ambler 330; *Synnot* v. *Simpson*, 5 H. L. Cas. 121. That is the law also in Scotland. And, indeed, the law seems to have been much earlier developed in Scotland on that head than it has been in England.—See Stair, 1, 10, 5; Ersk. 3, 1, 8; *Wood* v. *Moncur*, M. 7719; *Renton*, M. 7721; *Ogilvy*, M. 7740; *Nimmo*, M. 7740; *Carmichael*, M. 7741. It was wrongly stated by the Lord Ordinary, that the doctrine of *jus quæsitum tertio* did not apply, unless the third party was specially named in the contract. That is not the law of Scotland. The party need not be named at all, for he may be identified in other ways. Here the tenant got £1000 to make a railway, and he has not made it.

[LORD WENSLEYDALE. — Does this contract give you anything more than a right to enforce the contract? You say the company gave £1000 to make a railway, can you ask a part of that money, or do you merely claim that the tenant shall spend it in that way?]

The summons asks for the money.

[LORD WENSLEYDALE.—So I see, but you don't ask that this contract be performed. Now all you can do here at the outside is, to ask, that the contract should be performed. You have nothing to do with this particular money. The tenant may take another £1000 to make the railway with. The money is not earmarked.]

What the Court of Session does is substantial justice, and it does not go on mere special pleading. We claim relief generally.

Attorney-General (Bethell), and *Lord Advocate* (Moncreiff), for the respondent, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, I agree in the observation which has just been made by Mr. Anderson as a general proposition, that it is not generally safe for Courts to decide upon the opening of a case without hearing the other side, but a case may be so clear, that it would be mere waste of time to hear what is to be said upon the other side; and, I confess, with all respect for what we have heard in support of this appeal, that it does not appear to me that there is the least foundation for the appeal.

The respondents Messrs. Brown, Gordon and Co., were the tenants of a mine, and farm connected with it. The farm, it is true, they held upon a different interest from the person whom

[1] S.C. 3 Macq. Ap. 65 : 29 Sc. Jur. 288.

we may call the landlord, but that does not make the least difference in this case. They were in fact the occupiers both of the mine and of the farm.

There was a railway about to be made, which it was thought would in some way interfere with their interests as tenants of this colliery. What the previous negotiations between the parties were does not distinctly appear, but negotiations had been entered into between the railway company and these tenants, over whose land the railway was to pass—some stipulations had been made, but, however, eventually they ended in nothing—and finally an agreement was come to between the company forming the railway then in progress and the tenants, that, with a view to stop all further discussion, and to prevent the tenants raising any further difficulty, the railway company would pay the tenants, as a compensation for all their damage, a sum of £5000; and then the tenants further say—"We will agree to make a branch railway, which shall be sufficient in our estimation for the use of the colliery, to run from the colliery to join the line." That agreement is entered into, and the railway is accordingly made.

I have said that that was the agreement entered into with the tenants, but they were tenants under a lease, in which there was a stipulation, that, when the coals should be exhausted, which fact was to be ascertained in a particular mode pointed out, they were to be at liberty to surrender the residue of their term. The circumstances which enabled them to make such a surrender did arise. It was reported, that the coal was exhausted, and they accordingly surrendered the term.

But then the landlord says—"What you are surrendering to me is not what you ought to have surrendered; you should have surrendered the whole property of which you were tenants, whereas you are surrendering to me some ten acres less, that have been taken by the railway company; and in respect of that taken by the railway company, you have received a compensation of £5000. Now I ought to have a proportion of that £5000, as having been received on my account."

I do not think that Mr. Rolt at all confidently argued, that any claim could be established by the landlord except by the application of the doctrine of *jus tertii*. It has, however, been argued by Mr. Anderson, not only that the landlord is entitled by virtue of the doctrine of *jus tertii*, but also that this is a contract that enures for his benefit. The answer is, that it is nothing of the sort. It is a contract between the tenants and the railway company, under which one is to pay and the other to receive a certain sum of money; and in consideration of the tenants doing something for the company, which the company thought it desirable they should do, (whether the tenants have done it or not is a matter with which your Lordships have no concern,) that money was paid, and that money was put into the pockets of the tenants, and they had a perfect right to put it into their pockets; for it is quite clear, that they were stipulating on their own account, and on their own account only.

But then it is said, that, by the law of Scotland, there may be a right acquired by a third person who is not a party to the contract. No doubt that is so in some obligations, and that may be taken to be a doctrine of equity in the Courts of England, as laid down in the case of *Synnot* v. *Simpson*, to which allusion has been made, and in many other cases where the point has been considered, and the same doctrine recognized.

I entirely concur, not, perhaps, in the words used by the Lord Ordinary, for I think they were not happily selected, but in the principle that he meant to enunciate I entirely concur. He says the *jus tertii* is only where the *tertius* is named. I think that is wrong. To take the case which has been alluded to by Mr. Anderson, where the person is clearly designated though not named, I think, in that case, to restrict the *jus tertii* to the person named would be wrong. But it must be not only a *jus tertii*, but a *jus quæsitum tertio;* it must be something that was intended to enure to the benefit of the third person. Those words are all appropriate, and are all necessary in order to enunciate correctly the principle; and that, I have no doubt, was what the Lord Ordinary meant to say. And taking that to have been said by him, it entirely disposes of this case, because here there was no privity of contract with the landlord; the tenants were not authorized by the landlord to negotiate anything for him, and the right which is said to have accrued to the landlord is a right which was merely accidental. It might have been an important right, or it might not; but did anybody ever hear a proposition so startling as this:—Supposing the tenant of a farm, held for 21 years, engaged with a builder to build certain cottages upon the farm, and afterwards he is minded not to build them, can the landlord, years after, say, "There was this agreement entered into by you to build cottages on the farm; I should have been benefited if that agreement had been carried out, and therefore I claim it as my right to have these cottages built?"

In this case there was neither a contract under which the landlord could derive a right, nor was there a *jus quæsitum tertio* in the landlord. There was a stipulation entered into, which, if the parties had carried it into effect, might have been beneficial to the landlord, but that would have been mere accident, and clearly it is something upon which he is not entitled to insist.

The view I take of this case quite gives the go-by to one or two questions, which have some difficulty attending them. If this was not something which could be enforced upon the tenants,

but a mere contract between the tenants and the railway company—if the landlord was no party to that arrangement—I am not quite certain, that the tenants could, in spite of the stipulations of the lease, give up the residue of the term, not giving up the whole. I do not know how that may be. It is open to question. It may depend upon how far the landlord was a party to the arrangement, and how far they were bound by the act of parliament, or what the stipulation between the tenants and the railway company was.

Then it is said, how hard this would be upon the landlord. Not at all. It is quite a fallacy to say that. The tenants have become liable to the landlord in the sense in which the doctrine of *jus quæsitum tertio* is applied. The landlord, under the act of parliament, was entitled to be compensated for injury, if there were any, in respect to his reversionary interest, just as the tenants were entitled to be compensated for injury in respect to their tenant's interest. In respect to the tenant's interest, they entered into a negotiation which prevented the necessity of their applying to the act of parliament. If the landlord has entered into a similar arrangement, his contract with the railway company will protect his rights; and if he has not done so, he must look to the act of parliament, as the only mode by which to be indemnified; and no doubt the act gives him all that he is legally entitled to. It appears to me, therefore, that this appeal is entirely unfounded, and the course I should propose to your Lordships is to dismiss the appeal, with costs.

LORD WENSLEYDALE.—My Lords, I entirely concur in the view which my noble and learned friend has taken of the case. The interlocutor of the Lord Ordinary, with the reasons assigned for it, is perfectly satisfactory to my mind. There may be some parts of that interlocutor, which are not perfectly correct, but in substance it is, I think, perfectly satisfactory.

This is an agreement entered into between the tenants Messrs. Brown, Gordon and Co., and the railway company, with a view to the interests of the tenants. Therefore there is no *jus quæsitum tertio*, and there is no intention to give any compensation to the landlord. That, I take it, is the meaning of the doctrine of *jus quæsitum tertio*, whether the party be named or not; if there is a contract made for his benefit, in that case the contract may be enforced by him. I found my objection in this case to the right of the pursuer to recover upon this, that there is no trace of an intention to benefit any other than the tenants in the contract which they enter into with the railway company. They receive compensation, not for taking away part of the land, but for the interruption caused by the railway, and the consequent injury done to the land, and for losing the proportion of land that is taken and used for the purpose of the railway; and this was compensation given only to the tenants and not to the landlord, and therefore the landlord cannot enforce any part of that contract.

Then it is said, that there is an agreement on the part of the tenants to make the branch railway under their contract with the railway company. The obligation under which the railway company had come by an agreement with the tenants to make the branch railway, they purchase off by the payment of a sum of money. And the railway company may be considered as having given that sum for the purpose of making the railway; and perhaps it may be considered, that this railway was to be for the benefit of the estate, and the owner of the estate might be interested in enforcing the contract; but that would give no right to him for a certain sum of money, but only a right to enforce that part of the contract against the tenants. But the summons in this case only claims a sum of money which has been given to the tenants. That sum was given solely as compensation for injury to them, and not in any way as compensation to the landlord, and therefore the landlord has no interest, in any manner, in that sum, nor can he claim any interest in that portion of the money which was given by the railway company to the tenants for the making of the railway.

It seems to me, therefore, that the case fails entirely, and that the judgment of the Court below must be sustained.

Interlocutors affirmed, and appeal dismissed, with costs.

Appellant's Agents, Maitland and Grahame; and Smith and Kinnear, W.S.—*Respondents' Agents*, Grahame, Weems, and Grahame; and Andrew Howden, W.S.