PEDDIE, ... APPELLANT.
BROWN ET AL., ... RESPONDENTS.

1857.
June 9th.

Res inter alios.—Circumstances under which it was held, (affirming the decision of the Court of Session,) that where a tenant had received a sum of money as compensation for damage done by a railway company, he was not bound to account to his landlord for such sum, or any part of it.

Jus quæsitum tertio:—*Semble*, that this *jus* may be asserted and established, although the *tertius* be not named in the agreement.

THE Appellant on the 18th January 1840 entered into an agreement with the Respondents to grant to them a lease of the Halbeath Colliery and Halbeath Railway, with certain other premises attached thereto, for nineteen years from Whitsunday 1840 to Whitsunday 1859, at an annual rent of 700*l.*

The Edinburgh, Perth, and Dundee Railway Company, during the currency of the above agreement or lease, proposed the formation of a branch line of railway to Dunfermline, crossing the Halbeath Railway, and intersecting the Home Farm, occupied by the Respondents.

The Respondents opposed the scheme of the Railway Company; but on the 15th February 1849 made an agreement with them that, on condition of their receiving 5,000*l.* from the Company, they (the Respondents) would withdraw their opposition, and, moreover, make within a year a branch railway from the colliery to the Dunfermline Railway, for the benefit of the colliery.

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In the agreement or lease (for the document of 18th January 1840 is designated by both names in the pleadings) there was a clause providing "that the "lease should terminate at the tenants' option, when-"ever it should be ascertained by the inspection and "report of two professional men mutually chosen, or "oversman to be named by them, on six months' "notice by the tenants, that the colliery was not "workable to such a profit as would pay the rents "provided, and leave a sufficient return to the tenants "for the capital and skill employed by them."

Under this clause the Respondents gave notice, and on the report of an oversman determined their tenancy on the 3rd April 1852.

The Appellant (*i. e.*, the lessor), deeming that he was entitled to a proportion of the 5,000*l.* which the Respondents had received from the Railway Company, brought his action in the Court of Session, calling on the Respondents to account for so much of the 5,000*l.* as was fairly applicable to the period then unexpired of the lease, which the summons estimated at 4,000*l.*

The Respondents put in a defence.

The following were the pleas in law on both sides:—

PLEAS IN LAW FOR THE APPELLANT.

I. The Defenders having, as tenants of the colliery and farm of Halbeath, received a sum of money from the Railway Company as compensation for the injury which they should sustain during the remainder of their lease from the construction of the railway, and having given up the lease before the term of its natural expiry, are bound to pay over to the Pursuer, as proprietor in trust of the colliery and principal lessee of the farm, such part of the sum so received as is proportional to the unexpired portion of the lease posterior to the date of their giving up possession.

II. At all events, the Defenders having received from the Railway Company, as part of the amount paid to them, a sum of money for the construction of a connecting line between the Halbeath Colliery and the Dunfermline Branch of the Edinburgh and

Northern Railway, which was not only to be for their own use during their tenancy, but for the permanent benefit of the property, are bound to pay over to the Pursuer, as the proprietor in trust of the colliery, such portion of the sum received by them as may be necessary for the construction of this connecting line.

PLEAS IN LAW FOR THE RESPONDENTS.

I. The allegations of the Pursuer are irrelevant and insufficient to support the conclusions of the action.

II. As the sum of money in question received by the Defenders from the Railway Company had no reference to the Pursuer, or his rights and interests, but related to the Defenders, and their rights and interests exclusively, there is no call or obligation on the Defenders to account for any part thereof to the Pursuer.

On the 5th July 1854 the First Division of the Court of Session (confirming the Interlocutor of Lord *Handyside*) gave judgment against the Appellant and assoilzied the Respondents, with costs. Hence the present Appeal.

Mr. *Rolt* and Mr. *Anderson* appeared for the Appellant. This case raises a question somewhat similar to that which the House had recently to consider in *Synot* v. *Simpson* (*a*).

Under the Scotch Law (following the Roman) the rule as to the *jus tertii* is well established. Lord *Stair* (*b*) and *Erskine* (*c*) recognize and expound it. We are entitled here to have the benefit of the *actio in rem versam*, under the familiar and rational principle of the *jus quæsitum tertio*, so beneficially and so anciently known and constantly acted upon in Scotland; as appears by a case, *Wood* v. *Montcur* (*d*), decided nearly three centuries ago, and never called in question.

(*a*) 5 H. of L. Ca. 121.
(*b*) B. 1. t. 10. s. 5.
(*c*) B. 3. t. 1. s. 11.
(*d*) Morr. 7719.

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The *Attorney General* (*a*) and the *Lord Advocate* (*b*) were not called upon to address the House, their Lordships, on the Appellants' own showing, holding the case to be too clear to require further consideration. The following were the opinions delivered in moving for judgment.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*c*):

My Lords, 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 to day from Mr. *Anderson*, and what we heard on Tuesday last from Mr. *Rolt*, it does not appear to me that there is the least foundation for this Appeal.

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

(*a*) Sir R. Bethell. (*b*) Mr. Moncreiff.
(*c*) Lord Cranworth.

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 5,000*l.*; 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 taking by the Railway Company you have received a compensation of 5,000*l.*; now I ought to have a proportion of that 5,000*l.*, 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 to-day by Mr. *Anderson*, not only that the landlord is entitled by virtue of the doctrine of *jus tertii*, but

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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 accouut and on their 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 in Scotland, as laid down in the case of *Synot* v. *Simpson*, to which allusion has been, 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 he *Lord Ordinary*, for I think they were not happily selected, but in the principle that he meant to enunciate I entirely concur (*a*). He says the *jus tertii* is only where the *tertius* is named. I think that that is

(*a*) The language of the Lord Ordinary (Lord Handyside) was as follows:—"That the Defenders had a sufficient legal interest, and in their own right as tenants, to enter into arrangements with the Railway Company cannot be denied; and having entered into a contract to their mutual satisfaction and benefit, it does not seem apparent how a third party, whose interests are unprovided for, can claim any part or share in it. The Pursuer said there might be *jus quæsitum tertio*, but no decision was cited to bring the present case under that title; and it is thought it will be found, that in all the cases where rights were held to be so acquired, the parties were named and their interests expressly provided for."

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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 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 twenty-one years engages with a builder to build certain cottages upon the farm, and afterwards he is minded not to build them, can the landlord, years afterwards, 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 those cottages built?

In this place 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.

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The view I take of this case quite gives the go-bye to one or two questions which have some difficulty attending them. If this was not something which could be enforced upon the tenant, 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 not become liable to the landlord in the sense in which the doctrine of the *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 interest. In respect to the tenants' interest, they entered into a negotiation which prevented the necessity of their applying to Parliament. If the landlord has entered into a similar arrangement his contract with the Railway Company will protect his rights; 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 it with costs.

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Lord Wensleydale's opinion.

Lord WENSLEYDALE:

My Lords, I entirely concur in the view which my noble and learned friend has taken of this 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 Company, and the Railway Company, with a view to the interest 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 but for 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

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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 to 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.

MAITLAND AND GRAHAM.