have insisted for such a verdict as the jury gave, consequently he must be a proper party to appear in support of that verdict, and to justify it now that it is given.

Journal, 12 Feb. 1722-3.

Whereas this day was appointed for hearing counsel upon this petition and appeal; counsel appearing for the appellant, but no counsel for the respondent; and the appellant's counsel being heard and withdrawn, It is ordered and adjudged, that the interlocutory sentences of the 21st and 30th days of June, and the interlocutor of the 1st of December last, complained of in the said appeal be reversed; and that the interlocutor of the 28th of February, last whereby it is decreed, "that the appellant ought to be admitted for his interest" be affirmed.

For Appellant, *Ro. Dundas. Dun. Forbes.*

Case 99. Thomas Rigge, of Mortoun, Esq; - *Appellant;*
Alexander Abercrombie, of Tullibodie, Esq; *Respondent.*

18th March 1722-3.

Negotiorum Gestor.—The respondent having sent money by the appellant, to be by a third person laid out in stock, in his own name; on the death of this third person the appellant could not warrantably lay out the respondent's money in stock, in his the appellant's name.

Proof.—In this case the son of the person deceased, having by letter given the first notice of the transaction to the respondent, and mentioned that the appellant had informed the writer of the letter, that he had given the respondent his option to stand to the bargain or not, this letter is held to be proof of such option tendered.

IN August 1720, some communications took place between the appellant and respondent, relative to the investing of money in the public funds. The appellant being about to set out for London, the respondent delivered to him two York Buildings Co. bonds of 100*l.* each, with an open letter, addressed to William Baird, of Auchmedden, Esq., then in London: This letter was of the following tenor: "Edinburgh, 9th August, 1720. Dear "Cousen, Receive from the bearer Mr. Thomas Rigge of "Mortoun, advocate, two York Buildings bonds of 100*l.* sterling "each, bearing interest since 23d February last, payable 23d "inst.; the interest is 6*l.*; the one is marked letter A. (No. 9.) "the other is marked letter A. (No. 309.) I have filled up your "name in the indorsation (*a*) because I design you should put it "in stocks for me till I raise more. If South Sea subscriptions "can be purchased at 5, or 6, or 7 hundred, for so much ready "money, Mr. Rigge will join the equivalent sum of mine in "ready money; and if you can procure us credit, if he desire "it for the surplus value of a subscription, I shall make the "credit good as you, and he shall adjust the sum, either upon our

(*a*) These bonds were payable to bearer, and needed not indorsement.

"bond

" bond or bill payable in three months. But if you think South " Sea too high, then I desire you may purchase as many shares " in the York Buildings as so much ready money, or, if you get " credit, for as much more as that will purchase; and if Mr. Rigge " join with you for the value of ready money in credit, let us " have as many shares in the York Buildings as can be.

" If Mr. Abercrombie of Glassaugh, or you will take the burden " with him for me, for the said value, or for four or five hundred " pounds, I shall make it good, and nobody needs scruple his se- " curity. What ever stock you put the money in, let me have the " share, or the transfer in my own name, because I resolve to " stand to it, especially if it be York Buildings, whereas those " upon the place may incline to sell frequently; and I am not " sure, but I may come up myself, or at least remit you more " money. Let me have your answer upon receipt hereof." When the appellant arrived in London, he found Mr. Baird, to whom the letter was addressed, at the point of death.

The respondent received a letter from the appellant, dated at London, the 23d of August, 1720, informing him that his friend Mr. Baird was dead, and that he, the appellant had made no bargain for himself, because he thought the stocks would fall lower. And upon the 9th of September the respondent received a letter dated at London the 3d of that month, from Mr. Baird the son of the deceased, acquainting him of his father's death, and that the appellant told him, he had bought South Sea Stock at 780*l.* per cent, and was willing the respondent's money should be in there or not, as he the respondent pleased; and Mr. Baird mentions that he had not called for the respondent's money from the appellant, but that it was safe in the appellant's hands. About this time secured the great fall of South Sea Stock.

The respondent on the 12th of September wrote both to the appellant, and to Mr. Baird; he told the appellant that having heard of his friend's death, and the surprising turn of the Stocks, he did not incline to meddle with South Sea Stock; and that he had written to Mr. Baird, jun., not to dispose of his bonds in the South Sea. The respondent afterwards received a letter from Baird, dated 20th of September, acquainting him, that the appellant had got payment of the two bonds from the York Buildings Company. The respondent on the 29th of September, wrote to the appellant requiring his bonds; or his money to be sent back immediately: and soon after he received a letter from the appellant, without date, but appearing to have been written about the end of September, or beginning of October, mentioning another letter formerly written by him to the respondent, but never received, by which letter the appellant said he wrote the respondent, that his money was put in with the appellant's own in South Sea Stock at 780*l.* per cent., including the dividend, by the advice of Alexander Abercombie, of Glassaugh, Esq., and Mr. Baird, jun., on the 31st of August.

The respondent brought his action before the Court of Session against the appellant, to have the money from the sale of the

two bonds, repaid with intereſt from the time they were diſpoſed of by the appellant; *Firſt*, becauſe Mr. Baird being dead the appellant had no commiſſion to diſpoſe of the two bonds: *Secondly*, becauſe the commiſſion was not executed in the terms of his letter to Mr. Baird, for the ſtock bought with his money, was taken in the name of Mr. Rigge. The appellant made defences to this action, and the Court on the 12th of July 1722, "found "that Mr. Baird of Auchmedden, being dead, the appellant had "no power to uplift the money from the York Buildings Com-"pany:" and in purſuance of this interlocutor the Lord Ordinary on the 14th of ſame month, "decerned in terms of the lybel."

The appellant having reclaimed, inſiſting that it was the cuſtom of the York Buildings Company to pay their bonds to the bearer without indorſation, or any other title, and that he according to that cuſtom got payment of the bonds, and diſpoſed of the money for the reſpondent's uſe as *negotiorum geſtor*: after anſwers for the reſpondent the Court on the 24th of November 1722, "found that Mr. Baird of Auchmedden, being dead, the "appellant might warrantably uplift the money, and employ it "for the reſpondent's behoof as a *negotiorum geſtor*; but found "that the documents produced do ſufficiently make it appear, "that he employed the money and made a bargain in his own "name, that he gave the reſpondent an option whether he "would accept of the bargain or not, and that the firſt intima-"tion of the bargain, appears to have been made by a letter from "London (*a*), dated 3d September, and that the reſpondent by "his letter dated from Tullibodie, the 12th of September hav-"ing declined to accept the bargain, he was not *in mora*, nor "bound thereby." The appellant reclaimed againſt the laſt part of this interlocutor, inſiſting that he did not give the reſpondent his option; that this option was only mentioned in the letter from young Baird, and that it could only be proved *ſcripto vel juramento* of the appellant: and the reſpondent having petitioned againſt the firſt part of the interlocutor; after mutual anſwers for the parties, the Court on the 15th of December 1722, "found that the appellant having taken ſtock in his own name, "though for the behoof of the reſpondent, this was not to be "reckoned warrantably done, tanquam *negotiorum geſtor*, in caſe "by the forms the right to the ſtock could have been ſtated in the "reſpondent's perſon, by taking it in his name though abſent "without a letter of attorney; but if it could not be ſo taken, "found in that caſe, ſtock might warrantably be taken in the "appellant's name, for the behoof of the reſpondent; and found "that the letters produced, ſufficiently inſtruct, that the appellant "gave the reſpondent his option, whether he would accept the "bargain as for his behoof or not, and adhere to that part of "their interlocutor, finding that the firſt intimation appears to "have been made by a letter from London, 3d September: and "that the reſpondent by his letter dated at Tullibodie, 12th

(*a*) The letter from Mr. Baird junior.

"September,

" September, having declined to accept the bargain, he was not " *in mora*, or bound thereby." And in purſuance of this interlocutor, the Lord Ordinary on the 19th of December 1722, " decerned for 203*l.* ſterling, of principal and intereſt due 31ſt " Auguſt 1720, contained in the ſaid two York Buildings Bonds, " with the intereſt of the ſaid ſum, ſince the ſaid 31ſt of Auguſt." The appellant having preſented another reclaiming petition after anſwers, the Court on the 9th of January 1723, " adhered " to that part of the interlocutor of the 15th of December, finding the letters produced ſufficiently inſtruct that the appellant " gave the reſpondent his option whether he would accept of the " bargain as for his behoof or not; and adhere to that part of the " ſaid interlocutor, finding that the firſt intimation appears to be " made by a letter from London, dated September 3d, and that " the reſpondent by his letter dated at Tullibodie, the 12th of " September, having declined to accept of the bargain, he was " not *in mora* or bound thereby; and found that this point determining the cauſe, there was no neceſſity to determine how " far the appellant's acting in this affair *tanquam negotiorum geſtor* " was warrantable."

The appeal was brought from " an interlocutory ſentence or " decree of the Lords of Seſſion of the 12th of July, and from " part of an interlocutor, of the 24th of November, and from " certain interlocutors of the 15th and 19th of December 1722, " and 9th of January 1723." Entered 18 Jan. 1722-3.

Heads of the Appellant's Argument.

The acting for the behoof of the abſent, and *ejus nomine*, is always reckoned one and the ſame thing; if the *animus* and intention of the mandator are anſwered, it is not material by what perſon. The order was to put the money in South Sea, or York Buildings Stock; this was indiſpenſible, as being the ſubject of the mandate, and it could not warrantably have been put in any other ſtock: but as to the *modus* or taking the ſecurity, that does not alter the caſe unleſs the reſpondent will ſhew any prejudice done him by not taking the Stock in his own name; for it was more convenient to take it in the appellant's name, and ſaved the expence of two transfers and letters of attorney, one to accept, and the other to ſell, before the arrival of which from Scotland the market might have been loſt.

As the perſon to whom the mandate was given, was dead, it could not be executed by him; and the appellant employed his friend's money, as he did his own, with no other view but to ſerve him; and if ſtocks had riſen, then the reſpondent would have had the advantage. But the reſpondent did not anſwer the letters for three poſts waiting to ſee whether ſtocks would riſe or fall; if they had riſen, then no doubt he would have acknowledged the appellant's good offices.

It does not appear by any legal proof, that the appellant gave the reſpondent an option to be concerned in the ſtocks or not; only Mr. Baird wrote to him, that the appellant had ſaid ſo; but this

this is not ſufficient; it can only be proved *ſcripto vel juramento* of this appellant himſelf. Beſides in the ſame letter Mr. Baird ſays "you muſt by firſt poſt let Mr. Regge know which of the "two offers you accept of;" ſo that ſuppoſing ſuch choice had been really given to the reſpondent, yet he was *in mora* in not anſwering Mr. Baird's letter of the 3d till the 12th of September, which came to his hands only on the 17th.

Heads of the Reſpondent's Argument.

The reſpondent never gave any commiſſion to the appellant, either to buy ſtocks for him, or to take up his money from the York Buildings Company; the only perſon he entruſted with the management of his money was the late Mr. Baird of Auchmedden. The only truſt committed to the appellant was to carry up his money to London, to be forthwith delivered to Mr. Baird. And though the interpoſition of a *negotiorum geſtor* may be allowed in ordinary affiairs, yet the reſpondent believes no man will be allowed to *game* or practiſe *ſtock-jobbing* with another perſon's money, without an expreſs commiſſion directly given to him for ſo doing.

Though the reſpondent had expreſsly entruſted the appellant with the management of his money, yet he was not bound to take a ſhare of any bargain made by the appellant, unleſs the appellant had given him immediate notice thereof by ſuch a writing under his hand, as would have obliged the appellant by the laws of Scotland to have given the reſpondent a ſhare of the profits, in caſe any had ariſen from ſuch bargain; and the appellant never having given any ſuch notice to the reſpondent, it would be hard to oblige him to take any ſhare of the loſs, ſince he was no wiſe entitled to any ſhare of the profit in caſe any had ariſen.

As ſoon as the reſpondent had any notice that the appellant pretended he had made any bargain upon the reſpondent's account, though the notice was ſent by a third party, and three days after the pretended bargain was made; yet the reſpondent was ſo diligent as to write by the very next poſt to the appellant, declaring that ſince his friend whom he had entruſted was dead, he would have nothing to do with the ſtocks nor venture any of his money that way.

Judgment, 18 March 1723. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutory ſentences or decrees therein complained of be affirmed: And it is further ordered that the appellant do pay or cauſe to be paid to the reſpondent the ſum of* 20l. *for his coſts by reaſon of the ſaid appeal.*

For Appellant, *Rob. Raymond.* *Sam. Mead.*
For Reſpondents, *Dun. Forbes.* *Will. Hamilton.*