

S E C T. VII.

Diligence Prestable by Factors and Mandataries.

1672. July 17. EARL of WEMYSS against SIR WILLIAM THOMSON.

DAVID WEMYSS as having sold victual to the Scots army in Ireland, for the price thereof, got a precept from General Lesly upon the Commissioners of both nations then at London, to pay to the said David L. 500 Sterling, out of the first and readiest of the sums due to that army. Sir William Thomson being then a commissary in the army, David gave him a precept, with a commission to receive the money, whereof Sir William gave a receipt, bearing the receipt of a commission for receiving the said money. The said David having made the Earl of Wemyss his assignee, he pursues Sir William for payment of the sum, as he who by accepting of the commission and precept was mandatar, and thereby of law liable in diligence. It was *alleged* for the defender, That albeit mandatars are liable in diligence, yet that is only such as accept of a mandate requiring diligence, as a factory, or the like; but a power to receive money to a friend, not to a factor, doth not import that he should do any diligence, but only present his commission, and receive the money; and the defender did present the commission, but did not receive the money, and therefore for the pursuer's advantage did leave it at London, with Mr Johnston, a Scots factor of great credit there; neither can the defender be liable for not restoring the precept, it being miscarried in the troubles amongst Mr Johnston's papers, because *locus facti impræstabilis subit locum damni et interesse*, and the pursuer can condescend upon no damage, for the English having become jealous of the Scots army in Ireland, did never advance any money to the defender, or to any other for the payment of that army after the precept, nor was there any hope that any use could be made of it.

THE LORDS found the commission to receive the money to import no diligence, but to present the precept, and receive the money, if it had been given; and found the defender not liable for any damage for not delivery of the precept, unless it was proven that the defender had received the money, or at least others had received sums upon that account, after this precept; so that the pursuer, if his precept had been delivered, could have recovered it, which they found relevant *scripto vel juramento*, and ordained the defender to depone what count-books he had of his intromissions at that time, and to produce the same.

Fol. Dic. v. 1. p. 242. Stair, v. 2. p. 105.

No 51.
Mandatars are liable in diligence, when the mandate requires diligence, as a factory, but a power to receive money, given to one as a friend, does not import diligence.