

1724. February 26.

No 38.

A party obtained a second decree from a Dean of Guild, upon the ground that a former decree had not been obtempered. This found to be homologation of the first, and to bar a reduction of it.

Dr THOMAS BRISBANE *against* Mr THOMAS HARVEY, Merchant in Glasgow.

MR HARVEY having some ground adjacent to Dr Brisbane's garden-wall in the town of Glasgow, subject to a servitude of receiving the droppings from the wall at the distance of five inches from it, did, in the year 1723, enter upon some verbal treaty with the Doctor for the privilege of building a gabel and some part of a side-wall to a house upon the Doctor's garden-wall, and proceeded so far as to build up a gabel of twenty-two feet wide, and part of a side-wall stretching forty feet in length from the gabel. The Doctor apprehending that the work was carried on beyond what he had agreed to, made his complaint to the Dean of Guild court, where it was found proved, that the Doctor had expressly agreed to the building of the gabel, and thereupon it was decerned to stand; but as to the side-wall, the proof of the agreement being dubious, Harvey was decerned to take it down on the Doctor's charges. The Doctor, *anno* 1724, brought a reduction of the Dean of Guild's decret, upon the head of iniquity and incompetency.

It was *answered* for Mr Harvey; That the Doctor could not be heard on his reasons of reduction, in respect that he had homologated the decret now craved to be reduced, in so far as he had made a second application to the Dean of Guild court, complaining that Mr Harvey had not obtempered the first decret, and upon that got a second order, decerning Mr Harvey to take down some part of his work, as being contrary to the directions of the first decret; and for proof of this allegiance there was produced an extract of the second decret, reciting the Doctor's complaint against Harvey, for having acted contrary to the first decret, and praying that he might be decerned to conform to it.

It was *replied* for the Doctor; That he admitted the defence of homologation was good to exclude his reduction, and allowed that the facts as laid were sufficient to infer homologation, if they were proved; but it was denied that he had made a second application in the terms alleged, and that the decret extracted by the defender could not be admitted as an evidence of it, unless some petition or other writing signed by him were produced, it being a known rule, confirmed by a multiplicity of decisions, that the recital of facts in decreets of inferior courts was no legal evidence; 4th February 1671, Laurie *contra* Gibson, No 5. p. 5622., where the LORDS found "an offer to deliver a disposition, in obedience to a decret, did infer homologation of the decret; but found, that the offer could not be proven by the instrument without the oaths of the instrumentary witnesses." And to the same purpose, 22d January 1635, Bell *contra* Mow, *voce* PROOF; 30th January 1635, Mitchelson against Mowbray, *voce* HUSBAND and WIFE; and 19th July 1665, Ryce Gum against Macewen, *voce* PROOF.

THE LORDS found, That the Doctor had, by a second decret obtained by him, homologated the first decret craved to be reduced; and therefore assoilzied from the reduction.

Act. Ja. Graham, jun.

Alt. Will. Grant.

Clerk, Dalrymple.

Edgar, p. 38.