

Some Things are common to all Rights, whether constituted by Word or Writ; some belong only to such as are established by Writ.

Chap. 1.
Of Things common to all Rights.

In all Rights whether real or personal, and whether constituted by Word or Writ, the Parties by and to whom such Rights are granted must know consent and be at Freedom in what they transact. They must know what is necessary to be known in Order to form the Engagement and must consent with Freedom, for Rights granted thro' Mistake or Compulsion are null. l. 57. ff. de oblig. & act. l. 137. s. 1. ff. de verb. oblig. l. 116. ff. de reg. jur. There are two Kinds of Error or Ignorance viz. Error in Fact, and Error in Point of Law. Error of Fact consists in not knowing a thing which is. As if one who is named Executor of a Will knows nothing of the Will, or if he knows the Will is ignorant of the Death of the Testator. l. 1. s. 1. et ult. ff. de jur. et fact. ignor. When it is by the Fraud of one of the contracting Parties, that the other has been cheated by an Error of Fact, as if one conceals a Title or Deed belonging to the other; the Contract is void, and he who has concealed this Title, will be liable to make good all the Loss and Damage that shall have ensued upon the said Fraud. l. 19. C. de transact. If the Error in Fact be such that it is evident, the Error of the Truth of a Fact supposed by him to be true, and afterwards appearing to be false, such an Error is sufficient to annul the Right. Sed Lex Civiles &c. Tom. 1. Part. 1. Liv. 1. Tit. 18. Sect. 2. Art. 7. But an Error in Fact which was not the Cause of the Right, will not hinder the Right from having its full Effect. ff. de. Art. 8. The Influence of Deceit and Force in Deeds is treated of in the proper places. l. 10.

Consent may be either expressed by Word or Writ or tacit by Fact or Deed importing it. Consent tacitly infer'd from Deed is called Homologation which is an Agreeing to some Act done before, that might have been avoided had not such Agreement been. This Word in the Opinion of the Lord Stair (l. 1. s. 1. ff. de. q. 1. s. 2. ff. de legat. 2. Jacin. sup. 477. 19 & 20. July 1625. Malwood contra Tailor & E. Dunfermling. 1 Feb. 1676. Vetch contra Pallet and Ker. No not where the Writ bore the Witness to be Cautions; seeing he subscribed only as Witness 26 July 1672. Gordon contra Menzies. And Persons frequently subscribe to Papers, without considering the Contents. But so v. g. an Heir subscribing Witness to his Predecessor's Deed on Deathbed, could not quarrel the same as capite lecti 25 June 1668 Stewart of Ascog contra Stewart of Arrholm. An eldest Son subscribing Witness to his Sister's Contract of Marriage (wherein she assigns to her Husband nomine dotis a Bond of Trovador granted to her by her Father and Execution was appointed to pass at the Brother's Instance for Implement of Clauses in the said Contract conceiv'd in her Favour) with his Knowledge of the Assignation made by her was found relevant to infer Homologation, so as he could not as Heir to the Father reduce the Bond upon the Heed of Deathbed 15 July 1714 Davidson contra Davidson and Weir. For there being a special Bond assign'd wherein the Brother as Heir to his Father was Debtor, and upon the View of this Assignment the Husband tied to Terms, and Execution to pass at the Brother's Instance for Implement of these Terms, the Brother could not be understood but to have approved of the Cause without which that Contract and said Execution could not be effectual; seeing had not the Bond subsisted, the Husband had the Defence of causa data non secuta against performing his Debt. The confirming a Thing as movable, hinders not

without protesting that it should not prejudice her own Right 19 Feb. 1663 Muir contra Sterling but not drawn from her confirming under such a Protestation 12 July 1671 Murray contra Murray Tho she might have attained her Interest in the Movables by confirming herself Exorice qua Creditrice. A Man having on Death-Bed disposed his Estate heretable and movable to his Daughter; and failing of her by Decease, to be divided betwixt his Relict and his Brother who was his next Heir after his Daughter; the Brother who got to be Heir by the Daughter's Decease, having accepted a Share of the movable Estate, could not quarrel the Disposition as to the Herelage therein provided, ex capite lecti, and so divide his Acceptance, but is understood to have consented to the whole, Stewart's Answers to Dirlet. Doubts Tit. Deathbed. Again has who had some peting Rights to Bonds, having obliged themselves not to quarrel one another's Interests and no one having assign'd his Right to a third Party who had therein an Interest of Community: that third Party cannot question the other Right upon the Cedent's Interest, but is not hindered by his acceptance of the Assignation to question it upon his own separate Right: cum actus agentium no coarctat ultra eorum intentionem; and the Assignee did not intend any Prejudice, but only to secure his Right from the Hazard of a Plea, Dirlet Doubts Tit. Homologation.

But Homologation cannot take place, if it is not proved or presumed that the Homologator knew the Right to which his Deed is said to import a Consent. Thus one's subscribing Witness to a Writ does not import his Knowledge or Acknowledgment of the Contents thereof. l. 37. s. 2. ff. de legat. 2. Jacin. sup. 477. 19 & 20. July 1625. Malwood contra Tailor & E. Dunfermling. 1 Feb. 1676. Vetch contra Pallet and Ker. No not where the Writ bore the Witness to be Cautions; seeing he subscribed only as Witness 26 July 1672. Gordon contra Menzies. And Persons frequently subscribe to Papers, without considering the Contents. But so v. g. an Heir subscribing Witness to his Predecessor's Deed on Deathbed, could not quarrel the same as capite lecti 25 June 1668 Stewart of Ascog contra Stewart of Arrholm. An eldest Son subscribing Witness to his Sister's Contract of Marriage (wherein she assigns to her Husband nomine dotis a Bond of Trovador granted to her by her Father and Execution was appointed to pass at the Brother's Instance for Implement of Clauses in the said Contract conceiv'd in her Favour) with his Knowledge of the Assignation made by her was found relevant to infer Homologation, so as he could not as Heir to the Father reduce the Bond upon the Heed of Deathbed 15 July 1714 Davidson contra Davidson and Weir. For there being a special Bond assign'd wherein the Brother as Heir to his Father was Debtor, and upon the View of this Assignment the Husband tied to Terms, and Execution to pass at the Brother's Instance for Implement of these Terms, the Brother could not be understood but to have approved of the Cause without which that Contract and said Execution could not be effectual; seeing had not the Bond subsisted, the Husband had the Defence of causa data non secuta against performing his Debt. The confirming a Thing as movable, hinders not