a publick Mall, or to a mere Accident if that Fact was altogether unknown to him; and if Nothing of Imprudence could be imputed to him who struck the Ball l. 9. §. ult. l. 11. pr. ff. ad L. Aquil. Yea it happens sometimes that a voluntary Fact causes Damage, and yet that he who is the Cause thereof is not answerable for it. Thus for Example, if a sudden Gust of Wind drives a Ship upon the Anchor-Cables of another Ship, or upon the Nets of Fisher Men, and the Master of the Ship that is thus drove by the Wind not being being able to disentangle him any other Way, orders his Men to cut the Cables and the Nets; he will not be answerable for this Damage, which the said Accident rendered necessary l. 29. §. 3. ff. eod. And it is the same Thing with respect to those whom a Fire, not being able to save a House which is just going to take Fire, throw down the said House in Order to preserve the others. For in these Kinds of Events it is the Accident which causes the Loss, and every one bears that Part of it which falls to his Share l. 49. §. 1. ff. ad L. Aquil. Tho it be not allowed in such a Case to a private Person to throw down his Neighbours House adjoining to his own: For Orders are given thereabout by the Magistrates or by the Multitude, who seeing the imminent Danger have a Right to provide against it for the Good of the Publick, of which a private Person ought not to be Judge Les Loix Civiles &c. Tom. 1. Part. 1. Liv. 2. Tit. 8. Sect. 4. Art. 7. A Sheriff Decreet confiscating Wool upon Presumption of a designed Exportation contrary to Law, and upon the Owner's being held as confest for declining to purge himself by [illegible] Oath, being reduced, because the Lords having repone[d] the Owner of the Wool to his Oath, he deponed that he had no formed Design of exporting thereof: The Seizers of the Wool and the Procurator Fiscal of the Court who rouped and disposed thereof were not found liable for Damages to the Owner of the Wool, for that they had acted bona fide upon the Faith of the Sentence of Confiscation; but were decerned to pay to him the prime Cost of the Wool deducting the Expences of the Roup, seeing tho' Fruits bona fide consumpta are not to be [illegible] repeted, the Intrometter must answer for the Stock 19 June 1706 Binning contra woolen Manufactory of Newmills and the Procurator Fiscal of the Sheriff Court of Linlithgow.

When the Questions of Law have been decided and it is determined that Damages are due, and wherein they do consist; it remains to know what they are to be estimated at, which is to be looked upon as a Question of Fact l. 24. ff. de Reg. Jur. For fixing and ascertaining what is the precise Quantity of Damage that is to be repaired, we must distinguish the several Kinds of Damages and the different Qualities of the Facts which have occasioned them 1. Damages and Losses of which Reparation may be demanded are of two Sorts One is of the Losses which are in such a Manner a Consequence of the Deed of the Person from whom Reparation is demanded, that tis evident they ought to be imputed to him, as proceeding from no other Cause. And the other Sort is of those Losses which are only remote Consequences of the said Deed and which visibly proceed from other Causes, and therefore ought not to be imputed to the Person from whom the Reparation is sought, Les Loix Civiles &c. Tom. 1.

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Part. 1. Liv. 3. Tit. 5. Sect. 2. Art. 6. 11 & 12. Again, Damages may be distinguished into Damnum emergens those which consist in an effective Loss and Diminution that one suffers of his present Estate or goods; and Lucrum cessans those which deprive one of some Profit to be made, or which are due on the Account of a gain that ceases 2. As to the Quality of the Fact which has occasioned Damage, it is necessary to distinguish between the Facts in which there is no Fraud or Knavish [illegible] and those in which there is. For according to this Difference, the Damages may be either greater or lesser altho all the other Circumstances should [illegible] to be equal. As to Damages which might [illegible] from those who did not restore a Thing they were bound to restore, if there was no Knavery in the Case, the [illegible] in Damages goes no higher than the Value of the effective Damage which the Persons suffer who had Interest therein. But if the Party was guilty of any Fraud or Contumacy, that is if it was a [illegible] Deed, the Party who was injured thereby is allowed to give in upon Oath an Estimate of the Loss or Damage which he sustained according to his Opinion called Pretium affectionis; and not confined to the intrinsick Value or the common Estimate set thereon by indifferent Persons: Which Oath is called an Oath in Litem. But where such an Oath happens to be exorbitant, tis left to the Discretion of the Judge to limit or modify it to a certain Sum 3. When there is neither any Design to hurt nor Knavery in the Fact which has caused the Damage, it is necessary to enquire in the next Place if the Damage has happened thro any Negligence, or any Fault, or if there was Nothing that can be imputed to the Person who is pretended to be answerable for it. Where Damage was done to a Loading of Wheat in a Freighted Ship by the Fault and Negligence of the Skipper, the Skipper and Owners were found obliged only to satisfy the Merchant to whom the Victual belonged for the Damage done to it, and not bound to take the spoiled Victual and pay the Price of it to him as if it had been sufficient. Because seeing the Victual remained yet in specie and was not wholly corrupted, but appeared still useful for Bisket to Ships or household Servants, the Property thereof continued in the Merchant, and the Skipper and Owners were liable only to him for Damage and Interest 19 Feb. 1670 Leslie contra Guthry. A Merchant was not allowed his Oath in litem for proving the Value of Damage done to his goods by the Fault of a Skipper in whose Ship they were transported 11 Decemb 1672 Carnegy contra Napier.

Having thus far treated of Damage arising from injurious Deeds in General, I shall in the next Place speak of those which are known by special Names, as the Obligation called Assithment, and those springing from Breach of Arrestment, Deforcement, Breach of Lawburrows, Spuilzie, Wrongous Intromission, Ejection, Intrusion, Molestation, Force and Fraud.

Tit. 1.
Of Assithment.

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