

No 159. go on against the possessor of the lands, than against him who was denuded both of the right and the possession.

*Fol. Dic. v. 2. p. 189. Fountainhall, v. 1. p. 575. & 577.*

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SECT. VIII.

Incident Diligence.

No 160.

In a process of spuilzie a new diligence was granted against witnesses not mentioned in the first diligence *in utrum atrocis criminis.*

1589. *January.* KARKETTLE *against* DICKSON.

THERE was one Karkettle that had got a libel to his probation against one Dickson, for the destroying, and cutting down, and eating, in time of night, of certain growing corns pertaining to the pursuer, and after that he had led and deduced probation for the three terms which are granted for proving a libel, and produced so many witnesses as use to be granted, he desired to produce some other witnesses that were not examined nor produced before, and offered to make faith, that they were newly come to his knowledge; and because it was *in facto atrocissimo*, and such an extraordinary time, he ought to be admitted to produce the said witnesses, nam de jure prout in Cod. Quando liceat unicunque sine iudice se vindicare, L. 1. Nocturnus agrorum populator sub hac serie comprehenditur; and so, in detestation of such a horrible crime as to destroy growing corns in the night time, albeit it was against the order observed in other causes, the petition ought to be granted, which was so found by the LORDS.

*Fol. Dic. v. 2. p. 190. Colvil, MS. p. 448.*

No 161.

1606. *March 5.* MACKBRAIR *against* CARRUTHERS.

In a reduction pursued by Robert Mackbrair of Almagill against John Carruthers, the LORDS would not grant any incident to the defender for obtaining production of a factory whereupon he had founded his allegiance, because he protested not for his incident, when litiscontestation was made.

*Fol. Dic. v. 2. p. 189. Haddington, MS. No. 1082.*