

1773. August 9.

His MAJESTY'S ADVOCATE *against* CALLUM MACGREGOR *alias* JOHN GRANT.

No 343.

A trial for murder, brought 25 years after the crime was said to have been committed, found to be barred by prescription.

CALLUM MACGREGOR, *alias* John Grant, was indicted, in the year 1773, for the murder of John Stewart, committed on the 25th of December 1747. His counsel pleaded the defence of prescription, arising from the face of the indictment, the fact being charged as committed no less than twenty-five years and two months prior to his commitment for trial. In support of this plea, they argued, That the Roman law is to be adopted in all questions where our municipal law was silent; and crimes were prescribed by that law in twenty years, l. 12. C. Ad. leg. Cor. de falsis. Querela falsi temporalibus præscriptionibus non excluditur, nisi viginti annorum exceptione, sicut cætera quoque fere crimina. *Answered*, The prescriptions of the civil law were never understood to be held in the law of Scotland, without having been adopted by our legislature itself. But neither is it clear, that a vicennial prescription of crimes was acknowledged by the Roman law. The above text is only incidental upon the question of falsehoods, and is nowhere laid down under a proper title. The word *fere* likewise, in the law referred to, clearly imports that it was by no means a general doctrine. Our law, therefore, whatever deference it may pay to that of the Romans, will never adopt a disputable part of it. Accordingly it has been the general practice to sustain trial for crimes of a very old date; and Mackenzie allows, that even after forty years malefactors have been punished. In July 1629, Alexander Drummond was accused and convicted of being a manifest sorcerer, 'fifty years bygone.' In 1644, Agnes Finnie was brought to trial, for having 'been in continual society and company with the 'devil for twenty-eight years.' In December 1649, James Wilson was condemned to be beheaded for incest committed 'about thirty-five years ago.' And in our criminal records there are various other instances. In England there is no such prescription. William Andrew Horn was convicted in 1759 for the murder of a child in 1724. The law of God, upon which all our indictments for murder are laid, mentions no such prescription. Various authorities were likewise quoted from the laws of other countries, which it is needless here to enumerate. Much likewise was said upon the topic of expediency. The abuse of the power in the hands of a prosecutor, of delaying his complaint till the proof of exculpation shall perish, was contrasted with the powerful effects which the belief, that no length of time could secure the offenders from punishment, must have in the prevention of crimes. A curious argument in favour of the prescription, from the example of the crime of suicide, was added to that founded on the Roman law. That crime, it was said, being triable after the party's death, to the effect of confiscating his moveables, it might be in the power of the public prosecutor to bring a trial of this kind for a fact committed some hundred years ago, in order to forfeit the family of

the supposed delinquent's moveables that belonged to him. The Court, upon advising printed informations, sustained the defence of prescription, and dismissed the indictment. M'Laurin.—Books of Adjournal. (PRESCRIPTION.)

No 343.

Fol. Dic. v. 4. p. 110.

DIVISION XII.

Who Privileged against Prescription?

1590. The Duke of LENNOX *against* the Laird of BALFOUR.

THE Duke of Lennox having right from the King to an obligation made by Cardinal Beaton, *anno* 1545, to the Laird of Grange, treasurer for the time, bearing, That the Cardinal had borrowed 3000 crowns from the Treasurer, and obliged him to repay it; the Duke pursued the Laird of Balfour as only executor living to the Cardinal for the said sum. *Excepted*, That it was prescribed, 40 years bygone. *Replied*, That the act did not militate in this case, because, since the making of the obligation, the princes were almost ever minors, *contra quos non currit præscriptio*. *Duplied*, That this was *præscriptio introducta a lege & statuto Parliamenti*, and so behoved to take effect *contra ipsos minores*, and that they could have no privilege granted to them in this case. The LORDS repelled the exception *in præsentia regis*, 1590.

No 344.

Spottiswood, (PRÆSCRIPTIONE ET USUCAPIONE) p. 236.

1610. February 24.

ALEXANDER CUMMING of Balgray *against* NEILL MONTGOMERY, younger, and Others.

Alleged for the defender, not pursued within three years. *Replied*, The pursuer was minor at the time of the committing, as also at the time of the intenting of this cause, at the least he intended within three years, after he was 21 years, *et contra minorem non currit præscriptio*. Admits the summons and reply to probation.

No 345.

Robert Cockburn, Miller against Learmont

Fol. Dic. v. 2. p. 123. Nicolson, MS. No 443. p. 316.