

20/ No person would be found to go upon Affidavits, or a Justice would never condemn, if they were punishable for Condemning: and since they get no salaries, they should be left pun-
 21/ by a salt with 30/ the Penalty of temerarious Supra Affidavits, it only Consideration of Misfeasance; whereas the punishment of Condemning Unjustly, if punishable, could be no less than death in cases where the Unjust Sentence hath been put to Execution. But the we have no Express law for Affidavits of Error Against such as Condemn, Sir George Mackenzie (On m. part 2 Jul. 23 1712 6. off. on cl. Act 64) is of opinion, that Affidavits Condemning an Innocent by palpable Guilt, without any shadow of Evidence, are punishable. Because Affidavits being both Judges and Witnesses in some respects, must be Accountable for the like errors as the Judge Condemning Unjustly, or a Witness charging an Innocent falsely with a Capital Crime; is liable to Capital punishment. Nor is it more presumable, that a Judge or Witness would by their Sentence or Deposition take Innocent Blood upon their head, than that an Affidavit would Condemn Unjustly: and the truth is, people were in a hard state, did their lives lie at the Mercy of an Arbitrary Inquest, that might Condemn without Evidence or Contradiction. Nor is it of any Weight, that punishing Affidavits for Condemning, would scare men from passing upon Affidavits in respect they are forced to be Affidavits upon their peril, tho they run a clear hazard by their Acquitting the person Unjustly; and others are Compelled to bear witness, tho by saying falsely they are obnoxious to the punishment of perjury. Again, there was no particular Statute for punishing Affidavits Condemning Unjustly, seeing those are punishable by the Common law: whereas a Statute was necessary to punish for absolving Unjustly, as not being a Crime so hearily within the Force of that law, but a fact more might be apt to Consider as not very Dangerous.

Error

Error is pursued by a summons of error in Latin writ Upon parchment and Directed out of the Chancery, and tried by a great Assize of 25 Noble persons act 64 Part. 8. J. 3 i. e. Land's Gentleman Whose office on cl. Act 64. This Error of Affidavits must be found to have been wilful, upon principles and grounds represented and produced to the Assize at the time of Giving their Verdict d. Act 64. And as qualitas probabili causa Innocentie occidit: so any Evidence may be produced in fortification of the Verdict quarrelled. Affidavits having come in the Kings will for ignorant error Committed by them in Acquitting a woman of witchcraft and treason, his Majesty Understanding that they had not been guilty of wilful error, ordained them to be Absolved from all penalty, goods gear or body 7 June 1591; John Mowbray, Robert Cunningham, Adam Fairlie & others. As Matters are overruled and Determined in our Affidavits by the plurality: so those only who Voted wrong are liable to an Action of error. And to the end they may be known, the Chancellor of the Assize should Mark upon the paper containing the Verdict, how every individual Affidavit Voted, Act of Regule of the Justice Court 1672 Art. 9 and the paper is kept sealed till a summons of Error be made.

A Verdict bearing only in General, that the Major part of the Assize had absolved, was found to make all Criminals except such as could prove their Innocence: because it were impossible for the Kings Advocate in such a case to point out or instruct other ways who were the persons guilty; and the Affidavits might blame themselves who did not prevent this Inconveniency, by Marking the Names of such as Absolved, and of those that Condemned. And the error being clear, was necessarily presumed to be wilful; it being impossible to prove such an Overt quality other ways than a posteriori by the effect 25 July 1681 Blair, Bothwell, Binning, Baillie & others Mackenzie off. on cl. Act 64 Part. 8. J. 3. About any Affidavits Voting unjustly to absolve against his Conviction, he guilty of perjury: yet this Verdict