

publick by Action of Error, was never pursued against particular Voters, except where the pannel was spoiled by the Voices of the Major part *McKenzie ibid.* And a writ of error are allowed only where the persons indicted are shewed before the Assize Act 64 Parl. 3 J. 3. Which is understood only of a showing their Names and Designation and not of their persons 25 July 1681 Blair Botwell & others *McKenzie ibid.* For else there could be no Assize of error in the case of forfeiture in Absence.

It hath been doubted, if the King's Advocate can pursue an Assize of Error, altho he neglected to protest for the same before finalising of the Inquest: Because a qualified oath is not allowed without protesting for it, and protestation is a solemn Act required by law in such a case, which were superfluous and unnecessary, if what is protested for could be allowed notwithstanding the omission of that Ceremony; Besides that neglecting to protest, seems to be a tacit passing from the Privilege of protesting. But Sir George McKenzie (*Crim. part 2 tit. 23 § 12*) is of opinion, that altho it be more formal and safe to protest for an Assize of error, yet Action of error might be raised upon a wrong Verdict, without a previous protest for it.

Altho tenore Jurantes super assize are liable to the Assize of Error; Yet the spoiled Criminal had such a Jus questionis by the Verdict, that he goes free without any farther question *McKenzie ibid.*

It had been doubted if by Argument a Contrario, those who are unjustly condemned may be restored against the unjust Verdict: for solving this Difficulty Sir George McKenzie (*Crim. part 2 tit. 6 § 6*) seems to think, that if the Assize found that proved which was not libelled or Remitted to them, the Verdict is liable to a Review, but that it cannot be quarrelled as not founded on sufficient proof. V. G. That a person pursued for theft might be restored against a Verdict finding him guilty of Receipt of Stollen goods, as well for being Discomfited

the libel: But a Verdict finding one guilty of Murder upon the testimony of one witness, could not be reviewed as the warrantable.

But Assizes of error were Declared Agrievous by the Convention of Estates 1649: and no Action of Error hath ever been pursued since that time.

Having thus far spoke of process before the Lords of Justiciary in their ordinary Capacity of a Collegiate body of Judges in the Justice Court at Edinburgh: I proceed to set forth the order of trial of Criminals before them in their Divided Capacity in Circuit courts.

Tit. 3.

The order of Judicial proceedings against Criminals before the Circuit courts.

Sec. 1

Preliminaries to ordinary trials before the Circuit Courts.

Formerly a Briev or precept was issued out of the Justice Court to each Sheriff of the several Shires, where the Circuit courts were to be held, charging him to cite persons from whom the best Intelligence of Crimes and Delicts committed in the County might be expected, particularly a Miller, a Wright, a Mallman and a Smith, out of each parish within his bounds to appear, each under the pain of ten pounes, at the head burgh of the Shire the day mentioned in the Briev, to give up upon Oath to a Clerk appointed by the Lord Justice Clerk, tidty or Information of persons guilty of Crimes or Delicts in use to be tried before the Circuit Courts: such as treason, Murder, Manslaughter, bloodwit, batterers, wilful fire raising, ravishing of women, Robbery, theft, adultery, fornication, forging or venting false Coin, Making or using false Weights or Measures, raising of Mob and tumults, Riots, Blasphemy, beating and