execution at York, and afterward let at large at London, the plaintiff not being satisfied, *per quod actio accrevit.*

Upon this declaration the defendant demurred in law.

Godfrey for the plaintiff moved, that this execution is good by a *capias ad satisfaciendum*, although it be in Chancery upon a recognizance, where no *capias* lies at the first; and so it hath been the course always there used, which is to be allowed: for the course of every Court is to be observed, 11 Hen. 7. pl. 15. 48 Edw. 3. pl. 13. Dyer 306. And although the granting of the *capias* be error, yet the sheriff is not to take advantage thereof, but it is good against him, and he is chargeable for the escape: for he shall be excused by reason thereof in false imprisonment, although the process were erroneous; for he is not to examine it, 21 Edw. 4. pl. 27. 3 Edw. 6. pl. 67. 36 Hen. 8. Dyer 60. 14 Hen. 4. pl. 34. 20 Hen. 6. pl. 36.; and upon this reason it was adjudged accordingly in the Exchequer-Chamber, in *Ognel* v. *Paston* (*a*), that debt lies upon such an escape, the party being arrested by *capias* upon a recognizance, admitting the process to be erroneous.

The Court here were of that opinion, but gave day over to be advised (*b*).

CASE 3. YARE *versus* GOUGH.

An administrator *de bonis non* cannot bring a *scire facias* upon a judgment obtained by a first administrator, for a debt due to the intestate.—*Post.* 394.

Moor, 680. Yelv. 33. 5 Co. 9. Cro. Car. 227. 2 Ld. Ray. 1072. 11 Mod. 34. 4 Bac. Ab. 417.

Upon demurrer. The case was, that the defendant being indebted to Cooper, who died intestate, administration of his goods was committed to J. S. who brought debt and had judgment, and died before execution; and the administration of the goods of Cooper, the first intestate, was committed to the plaintiff, who took a *scire facias* upon that judgment comprehending all this matter.—It was thereupon demurred, whether it lay or no.

Gawdy, Justice, held, that it well lay; for the duty remaining is as a debt to the intestate, and, being recovered, continued with him in that nature: and being turned into a judgment, the second administrator shall have a special *scire facias* to execute it.

But the other three justices held, that the action was determined, and he cannot have a *scire facias* for default of privity, **[4]** and therefore is put to begin again. Wherefore it was adjudged accordingly, unless, &c. 26 Hen. 8. pl. 7.

But now by 17 Car. 2. c. 8. made perpetual by 1 Jac. 2. c. 17. an administrator *de bonis non, &c.* may sue a *scire facias*, and take execution on such judgment after verdict. 6 Mod. 295. See also 8 & 9 Will. 3. c. 10.

CASE 4. CHANDELOR *against* LOPUS.

In the Exchequer-Chamber.

[See *Smith* v. *Chadwick*, 1884, 9 App. Cas. 195; *Derry* v. *Peek*, 1889, 14 App. Cas. 356.]

Trespass on the case for selling a jewel, affirming it to be a bezar-stone, *ubi revera* it was not a bezar-stone, will not lie unless it be alledged that the defendant knew it was not a bezar, or that he warranted it was a bezar.—*Post.* 196. 469.

S. C. Dyer, 75. in marg. S. C. 2 Roll. Rep. 5. Yelv. 20. 1 Sid. 146. 1 Stra. 653. Salk. 289. 3 Bl. Com. 159. Dougl. 158.

Action upon the case. Whereas the defendant being a goldsmith, and having

(*a*) Cro. Eliz. 164.

(*b*) In the report of this case in Yelverton 42. it is said, that three of the Judges, viz. Yelverton, Gawdy, and Popham, were of opinion that the action would not lie,

skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezar-stone, and sold it to him for one hundred pounds; *ubi revera* it was not a bezar-stone: the defendant pleaded not guilty, and verdict was given and judgment entered for the plaintiff in the King's Bench.

But error was thereof brought in the Exchequer-Chamber; because the declaration contains not matter sufficient to charge the defendant, viz. that he warranted it to be a bezar-stone, or that he knew that it was not a bezar-stone; for it may be, he himself was ignorant whether it were a bezar-stone or not.

And all the justices and Barons (except Anderson) held, that for this cause it was error: for the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action: and although he knew it to be no bezar-stone, it is not material; for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action, and the warranty ought to be made at the same time of the sale; as F. N. B. 94. c. & 98. b. 5 Hen. 7. pl. 41. 9 Hen. 6. pl. 53. 12 Hen. 4. pl. 1. 42 Ass. 8. 7 Hen. 4. pl. 15. Wherefore, forasmuch as no warrant is alledged, they held the declaration to be ill.

Anderson to the contrary; for the deceit in selling it for a bezar, whereas it was not so, is cause of action.—But, notwithstanding, it was adjudged to be no cause, and the judgment was reversed.

CASE 5. REW *against* LONG.

Michaelmas Term, 42 & 43 Eliz. Roll 335. In the Exchequer Chamber.

In ejectment, an infant must sue by guardian and not by attorney; and this, altho' an error *in fait*, is triable in the Exchequer-Chamber. *Post.* 10. 250. 640.

Cro. Car. 514. Hob. 5. Cro. Eliz. 424. 2 Saund. 213. 1 Vent. 103. Cowp. 128.

Error in fact is not the error of the Judges, and therefore they may try it on their own judgment. 3 Salk. 146. Stra. 144. 127.

It is not examinable under what seal a writ of *nisi prius* issues.

The 27 Eliz. c. 8. does not extend to errors *in fait*.

Vent. 207.

Error in the Exchequer-Chamber of a judgment in an ejectment. The error assigned, that the plaintiff was an infant at the time of the bill purchased, and sued by attorney, where he could not make an attorney, but ought to have sued by guardian (*a*). And all the justices and Barons held it to be erroneous for this cause, and to be an error *in fait*, and might be well assigned for error in this Court; although it were alledged, that the authority given them by the statute 27 Eliz. c. 8. was not to examine matters *in fait*, but only errors in law, which appeared of record, and to affirm or reverse the judgment. But, notwithstanding, they all, except Anderson, held that it might be assigned.

[5] The defendant in the writ of error then said, that he was of full age at the time of the bill brought, and thereupon they were at issue, and a writ of *nisi prius* awarded for the trial thereof before Periam, Chief Baron, and Fenner, one of the Justices of the King's Bench. And it was moved to be ill for this cause.—But they held it to be well enough, and that he might be Justice of Nisi Prius to try the error *in fait* of his own judgment.

It was also moved, that this trial was ill, because this writ of *nisi prius* issued under the Exchequer seal, in regard that Anderson, Chief Justice of the Common Pleas, who

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because a *capias* cannot issue upon a recognizance; but Fenner, because, although the process be erroneous, it was not void.—And see 2 Leon. 89. 4 Leon. 78. 2 Mod. 196. Strange, 509. Ld. Raym. 230.

(*a*) See 21 Jac. 1. c. 13. which aids a suit by an infant by attorney after verdict; and by 4 & 5 Ann. c. 16. after judgment by confession, *nihil dicit*, *non sum informatus*, or writ of enquiry executed.