Queen's demise, the said writs were abated (*b*); and new writs were awarded under the [2] name of the now King, returnable the same *tres Paschæ*. And three other writs were afterward directed to the said Shirley, Snig, and Hutton, returnable the same day, who appeared in Chancery the Tuesday following, *post tres Paschæ*.

A Case of Precedency.

If a barrister be Speaker of the House of Commons, and be made a serjeant, yet he shall only have precedence from the time of his admission; *sed quære*.

The same day the said John Croke, because he had been Speaker of the Parliament (and thereby had gained place of all other counsellors, not being serjeants before), by direction from the Lord-Keeper, appeared as antient, although he was puisne in admittance to five of them; and he made a speech in all their names, and delivered to the Lord-Keeper a ring for the King.

And then they there severally took their oaths; after which a day was prefixed them, viz. upon Tuesday, *post mensem Paschæ*, to be at the Common Pleas, to have the solemnity of the degree there performed; at which day, Philips, because he had received the King's patent to be of his serjeants, came first, as antient serjeant.

And the said John Croke (notwithstanding he had been Speaker of the Parliament, and notwithstanding he was knighted the Sunday before), by the appointment of Popham, Chief Justice, with the assent of the greater part of the justices and Barons (against the opinion of the Lord-Keeper, and twelve of the Privy-Council, who writ their letters, that he ought to have precedence before the other serjeants, notwithstanding their antiquity of admittance; and the opinion of Anderson, Gawdy, Fenner, and Yelverton, who concurred with the Lord-Keeper); was brought to the Bar after the said five new serjeants, who were his antients in admittance, and so to hold his place.

And every of them, after they came to the Bar, had several writs and counts, which counts they recited; there then being the Lord-Keeper, Lord-Treasurer, and all the justices of both Benches, and Barons of the Exchequer; and after their count recited, and writs read by the prothonotary, one of the antient serjeants imparled thereto, and then placed them in their places; one of their friends being a bencher, delivers in Court the rings for them to all the Judges, serjeants, and officers there.

[3] Case 2. Weaver *versus* Francis Clifford.

Easter Term, 44 Eliz. Roll .

Qu. If debt lies against a sheriff for the escape of a prisoner taken upon a *capias*, after *scire facias*, &c. upon a recognizance in Chancery.—*Post.* 280. 289. 450.

S. C. Yelv. 42. 1 Roll Ab. 809. Cro. Eliz. 188. 164. 578. Cro. Car. 528. Dyer, 67. Hob. 202. 6 Co. 54. 8 Co. 142. 2 Bac. Ab. 234. Salk. 273. 2 Stra. 873.

Debt, upon an escape against the defendant, as Sheriff of Yorkshire; and demands two hundred and forty pounds, for that one William Carr and others were indebted to him by a recognizance acknowledged in Chancery, in two hundred and forty pounds; whereupon he sued a special *scire facias* in Chancery, and had judgment by default, after two *nihils* returned, and an *elegit* sued; which being returned *nihil*, he pursued a *capias ad satisfaciendum*, and thereupon the said William Carr was taken in

(*b*) But now by 7 Will. 3. c. 27. no commission either civil or military, which by 1 Anne, st. 1. c. 8. is explained to mean no patent, or commission of any office or employment, either civil or military, shall determine by the demise of the Crown, but shall continue in full force for six months next after such demise, unless made void, in the mean time, by the next and immediate successor. See 2 Hawk. P. C. 4. 1 Com. Dig. 58.

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

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.

had the seal of that Court, refused to seal it.—But they held it to be good enough, for that it is not examinable under what seal this writ issued. Wherefore the issue being found for the plaintiff in the writ of error, that the plaintiff in the first action was within age at the time of the bill exhibited, they reversed the judgment, and remanded the record.

It was afterward moved in the King's Bench, that they had proceeded in the Exchequer-Chamber, without warrant of the statute, to try error *in fait*; for the statute doth impower them only to examine errors in the record.—And of that opinion were all the justices. Wherefore, for this cause, they would not regrant restitution upon this judgment to the defendant, who was put out by the first judgment.

CASE 6. COXE *against* CROPWELL.

Hilary Term, 44 Eliz. Roll 709. In the Exchequer Chamber.

In trover, upon the conversion of the wife, if husband and wife plead *quòd ipsi non sunt culpabiles*, it is bad. *Post.* 530. 661.

Cro. Eliz. 883. Cro. Car. 254. 495. Hob. 126. 1 Brownl. 7. 1 Burr. 300.

Where an issue is joined on an immaterial point, a repleader shall be awarded. *Post.* 239. 288.

22 Hen. 6. pl. 18. 4 Leon. 19. Skin. 570. Cro. Car. 417. Hob. 126. 1 Leon. 312. Palm. 343. Dougl. 396. 747. Cowper, 510. Dougl. 380. 719. Ld. Ray. 170. Stra. 994. Burr. 292.

The form of awarding a repleader. *Post.* 386.

1 Leon. 312. 4 Leon. 19. Skin. 570. Lutw. 1622. 4 Bac. Abr. 126, 127. Cowp. 510.

After *in nullo est erratum* pleaded, the Court, to inform their consciences, may award a *certiorari*. *Post.* 141. 277. 445. 542. Cro. Eliz. 153. Cro. Car. 351. 1 Roll. Ab. 289. Salk. 270. 2 Bac. Abr. 206. Stra. 536.

Error of a judgment in the King's Bench, in an action of trover against husband and wife, because the wife after coverture found goods, and converted them to her use. They pleaded *quòd ipsi non sunt culpabiles*.—And for this cause it was ruled to be ill; for that no tort is supposed in the baron, and so ought to have pleaded *quòd ipsa non est inde culpabilis*. Wherefore, after verdict for the plaintiff, a repleader was awarded.

Whereupon they repleaded and traversed the conversion; and it was found for the plaintiff, and judgment accordingly: and error assigned, that the first issue was well joined, and there ought not to have been a repleader.—*Sed non allocatur:* for the tort being alledged to be in the wife, and none in the husband, the issue shall be only that she is not guilty. And so the prothonotaries of the Common Pleas certified to be their course.

Another error was assigned *ore tenus*, that the judgment to replead was not good; for it is *quia videtur curiæ quòd placitum prædictum, et exitum superinde junctum, est minus sufficiens in lege, ideo dictum est partibus quòd replacitent*, which is not any judgment; for it ought to have been, *ideo consideratum est, &c. Sed non allocatur:* for it is a sufficient award to replead, and the course is so altogether. Wherefore rule was given to affirm the judgment.

It was afterward informed to the justices and Barons, that there was not any bail entered for the wife, and the action was princi-**[6]**-pally against her; wherefore the judgment was erroneous, and a *certiorari* prayed to certify it.—But it was moved, that in regard he had assigned his errors, and had not assigned that for error, and the defendant had pleaded *in nullo est erratum*, and the record is examined, he may not now alledge it; for then it would be infinite, especially to reverse a record: but peradventure to help a record, in affirmance of a judgment, they may award a *certiorari*