a rule similar to the present—as when the officer went to execute the *fi. fa.* he found the goods already seized under a distress for rent, and after remaining ten days in defendant's house he withdrew. Plaintiff sued out a *ca. sa.* without waiting to have the *fi. fa.* returned. In *Lawes* v. *Codrington* 7s. 6d. was levied under the *fi. fa.* (Not so; Sir *N. Tindal* referred to *Hodgkinson* v. *Whateley.*)

Wilson v. *Kingston,* 2 Chit. 203: *Fi. fa.* issued: the return stated a levy of part, and that goods and a lease of the value of £ remained in the Sheriff's hands unsold. Plaintiff sued out *ca. sa.* for residue, and the Sheriff's return thereto recited the former *fi. fa.* and return, and stated that the goods and lease had been sold for £— less than the debt; but it did not state any return by the Sheriff what had been done with the goods and lease. *Per. Cur.* Recital insufficient—and until Sheriff finally returned what had been done with the property, no *ca. sa.* for the supposed residue could legally be issued.

Blayes v. *Baldwin,* 2 Wils. 82—*Ross* v. *Cameron,* 1 Chamb. Rep. 21: *Fi. fa.* to Sheriff issued 15th of May, 1846, under which he seized divers goods and made £84 15s. 2d. It was returnable on 1st Easter Term then next, but was not in fact returned until 31st August, 1846; and on 18th July, 1846, a *ca. sa.* issued, returnable on the last day of Trinity Term. The defendant was under these circumstances discharged.

Hodgkinson v. *Whateley,* 2 Cr. & J. 86: *Fi. fa.* sued out and levy under it; all of which went to satisfy the landlord's claim for rent, except 17s. 6d., which went towards the expense of the execution. A *ca. sa* was also sued out and defendant was arrested on it before the *fi. fa.* was returned. The Court set aside the arrest. *Bayley, B.,* remarked: "No doubt both "may issue together, because the practice is not to enter them "on the record if nothing is done: but if you execute one, you "must make the entry of the return of that before you can "award the other. Here there has been a seizure under the "*fi. fa.*, and if an action of trespass were brought for the "seizure you would have to justify under the *fi. fa.*"

The numerous cases cited have satisfied me that the second application—made in consequence of the prior one having failed from defects in the affidavits, not merely in the title or jurat, but in substantial parts—should not be entertained. It was attempted to take this case out of the ordinary rule by the statement of the permission of my brother *Hagarty.* A similar suggestion was made in *Todd* v. *Jeffrey,* and was thus replied to by Mr. Justice *Patterson:* "What the Judge may say on "importunity of being content that the matter should be recon- "sidered, is of no consequence."

Independently of this objection, I am of opinion this summons should be discharged on the merits. *Miller* v. *Parnell* shows that though a *fi. fa.* be sued out yet if it be not acted upon, a *ca. sa.* may be executed before the *fi. fa.* is returned or returnable. *Edmunds* v. *Ross,* and *Dean* v. *Warne,* go further and show that an ineffectual attempt to execute the *fi. fa.* on goods already under seizure, as by a distress for rent, does not make it necessary to return the *fi. fa.* before executing the *ca. sa.* And *Knight* v. *Coleby* goes still further, for there a seizure on some goods in defendant's house was actually made, and the Sheriff remained in possession some ten days or more, and then withdrew and arrested defendant, not having returned the *fi. fa.*, and the Court refused to discharge defendant from custody. It is true the goods are stated to have been of very small value; but *Hodgkinson* v. *Whateley* shows that nothing turns upon that, for there only 17s. 6d. was applicable to the *fi. fa.*, but yet that small sum being actually levied, was held sufficient to make a return of the *fi. fa.* necessary. There is another peculiarity in *Knight* v. *Coleby,* namely, defendant's own assertion that he had sold the goods to cheat the plaintiff, and the Court lay some stress on that as disentitling him to set up as a ground for his discharge that any of *his* goods had been levied on. A similar conclusion may be drawn here from the defendants giving the Sheriff notice that the only article seized was not his property. On the whole, I gather from the cases: that the *fi. fa.* and the *ca. sa.* may issue together; that if the *fi. fa.* is inoperative and cannot be and is not executed for want of goods whereon to make a levy, that it is not necessary that it should be returned; that an ineffectual seizure on goods not liable to the execution, although they are defendant's property, does not render it necessary to return the *fi. fa.* before executing the *ca. sa.*; and that where a defendant represents that property seized as his belongs in fact to another person, in consequence of which the seizure is abandoned—he cannot set up that seizure afterwards as rendering it necessary that the *fi. fa.* should be returned before he could be arrested on the *ca. sa.*

I think, therefore, the summons must be discharged with costs.

Ross et al *v.* Bryan et al.

Bail—Allowance of—Insufficiency of affidavit of justification as to amount—Venue.

[In Chambers, April 15, 1856.]

Application by one of the defendants to have the bail to the limits put in allowed.—Summons dated 2nd April, 1856.

Cause shown.

Reserved.

Draper, C. J. C. P.—The affidavit of justification is clearly insufficient. The rule as laid down in the books of Practice is, that the bail must justify in double the sum sworn to, unless that exceeds £1000; and then that they should each justify in £1000 more than the sum sworn to. Bail put in after judgment must justify to double the amount of the sum recovered. (2 Chit. Rep. 73.)

In the present case one of the bail does not justify in as large a sum as that recovered, and the other in a sum much less than double the sum. Indeed adding interest to the *debt,* and the *ca. sa.* is endorsed to take interest, the whole sum sworn to by both bail is less than double the debt and interest, taking no notice of costs.

The bail piece is also defective for want of a County being named in the margin.

Application refused.

Spence *v.* Drake.

Weekly allowance—How to be paid—Suggested fraud.

(In Chambers.)

This was an application on behalf of the defendant, calling on the plaintiff to show cause why he should not be discharged from the custody of the Sheriff of Middlesex (on writ of Capias issued in the cause) for non-payment of weekly allowance, and on grounds disclosed in affidavits and papers filed.

After cause shown and Judgment reserved—

Draper, C. J., C. P.—I think that a payment to the gaoler to bind the debtor in custody must be made on the same day that it would have to have been made to the debtor himself. It is not, in my opinion, the intention of the Statute that the gaoler should be made the depository in advance of any indefinite number of weeks' allowance, and that whether he paid the five shillings on each Monday to the debtor or not, it is to be considered as a weekly payment to the debtor so long as the gaoler has sufficient funds in his hands; for if so, then though the gaoler never paid the insolvent anything, he could not so long as the time for which the sum received by the gaoler would last obtain his discharge. The Statute makes the gaoler the debtor's agent to bind him by the receipt of five shillings on each Monday, but no further.