terms; but on the summons the learned Judge had endorsed—"I discharge this summons without costs—the affidavits are too vague; so far as I have power so to do, I am willing to allow a second application on better materials."

On the 7th March Sir *J. B. Robinson*, C. J. issued a summons on reading among other things "the permission granted by the Hon. Mr. Justice *Hagarty*" calling on the plaintiffs to show cause why the *ca. sa.* issued in this cause should not be set aside, and the arrest of the defendant *Benjamin Bryan* on the ground that the said writ was issued before the writ of *fi. fa.*, also issued in this cause, was returned, and while the said writ was still in force, and whilst property was under the seizure of the Sheriff of the County of Ontario under said *fi. fa.*

Two affidavits were filed: 1st, that of defendant *Benjamin Bryan*, stating that judgment was entered on the 24th January last in the suit, and on the same day a *fi. fa.* against goods was issued for £603 16s. directed to the Sheriff of Ontario, endorsed, to levy £595 10s. 10d. with interest, &c., and costs; under which writ Sheriff, on the said 24th January, took in execution "as the goods of the said defendants" one piano-forte, which remained in the hands of the Sheriff, as deponent is informed and believes, until the 3rd of March, when deponent was informed the writ was returned *nulla bona*; that on the 9th of February a *ca. sa.* was issued in this cause against deponent, endorsed, for the same debt, &c., and that deponent was arrested on the 11th February, while the *fi. fa.* was in force, and while the said goods were in the Sheriff's hands; that deponent is still in custody. 2nd, that of *Norman J. Ham*—that on the 3rd March the Sheriff told him he had on that day returned the *fi. fa.* in this cause "no goods"; that on the 11th February both writs, the *fi. fa.* and the *ca. sa.* were in the Sheriff's hands, and that the Sheriff's Bailiff on that day told deponent that the *fi. fa.* was still in force, and the piano in his hands under the *fi. fa.*; and that defendant, *Benjamin Bryan*, was "while the writ of *fi. fa.* and the goods thereunder seized and under execution in his hands" taken, and then in custody under the *ca. sa.*; that both writs are issued upon the judgment mentioned in *Benjamin Bryan's* affidavit.

On showing cause the order of Mr. Justice *Hagarty* of the 1st March was put in with an affidavit that the defects in the affidavit alluded to in that order were not formal defects in the entitling of such affidavits, or in the jurat; and an affidavit of plaintiffs' attorney was filed, stating that after the seizure of the piano and before the issuing of the *ca. sa.*, the defendant, *Benjamin Bryan*, caused a notice to be served on the Sheriff on behalf of one *Fanny Bryan*, claiming the piano as the property of *Fanny Bryan*, and disclaiming property therein on behalf of *Benjamin Bryan*; that deponent also received notice of the claim of the said *Fanny Bryan*; that no other goods of the defendants in this cause were seized under the *fi. fa.*; that after these notices deponent caused the *ca. sa.* to be issued, and defendant *Benjamin Bryan* to be arrested; that the other defendant, *Abraham Bryan*, has absconded from the Province; that nothing, as he believes, was done on the *fi. fa.* after the seizing of the piano, and that before the present application the *fi. fa.* was returned "no goods," and is filed in the proper office.

Cases cited for defendants:—

Ross et al v. *Cameron*, 1 Chamber Reports 21.
Miller v. *Parnell*, 2 Mans. 78, 6 Taunt. 370.
Hodgkinson v. *Whateley*, 2 Cr. & J. 86, 2 Tyr. 174.
Wilson v. *Kingston*, 2 Chit. 203.

Cases cited for plaintiffs:—

Levi v. *Coyle*, 2 Dow. N. S. 932, 2nd appl'n.
Reg. v. *Pickles*, 12 L. J. 40, do.
Reg. v. *Barton*, 9 Dow. 1021, do.
Reg. v. *Leeds & Manchester Ry. Co.* 8 A. & E. 413—do.
Joynes v. *Collinson*, 13 M. & W. 558.
Withers v. *Spooner*, 6 Scott N. R. 165—2nd appl'n.
Reg. v. *Harland*, 8 Dow. 323, do.
Sanders v. *Westley*, 8 Dow. 652, do.
See also, *Bodfield* v. *Padmore*, 5 A. & E. 785, notes.

The general rule is, that when a rule is discharged on the ground of the inefficiency of the materials brought before the Court, there being other materials in existence not brought before it, but on the ground of defects in the title of the affidavits the Court will not allow the application to be renewed. "Without departing from the general rule not to open matters "which have been once disposed of on account of substantially "defective affidavits, when the defects in the affidavits might "have been supplied at the time, it is impossible to grant the "application." *Sanderson* v. *Westley* shows that this rule applies to the case of a prisoner on a *ca. sa.*, even where the ground of application is that the *ca. sa.* is a nullity.

Miller v. *Parnell*, 6 Taunt. 370: the Sheriff made a seizure under a *fi. fa.* of goods of greater value than the amount of the judgment. No sale took place, the plaintiff abandoning the *fi. fa.*, but before it was returned he issued a *ca. sa.*, on which the defendant was arrested. The Court set the arrest aside. The Court said a plaintiff having sued out a *fi. fa.* may if he pleases omit to execute it, and may take out a writ of *ca. sa.* and execute that before the *fi. fa.* is returned or returnable, and the judgment concludes thus. We think the writ of *ca. sa.*, being sued out after the *fi. fa.* issued, and after the Sheriff had taken the goods under it, cannot be supported.

Edmunds v. *Ross*, 9 Price 5: a *fi. fa.* was sued out, endorsed, to levy the full amount of the debt and costs, which was executed on defendant's goods in his house; but there was a distress for rent on the goods, which it seemed the goods were insufficient to satisfy, and the *fi. fa.* was withdrawn and a *ca. sa.* issued. It seems from the argument of Counsel, p. 12, that the *fi. fa.* was not returnable and had not been returned; the Court discharged a rule with costs which had been obtained to set aside the *ca. sa.* and discharge the defendant from custody.

Diles v. *Warne*, 10 Bing. 341: a *fi. fa.* was sued out against defendants goods, returnable 2nd of November, 1833; under which the Sheriff entered defendant's premises on the 5th June, and remained till the 20th. During all that time defendant's goods were in *custodia legis*, under a distress for taxes, and defendant then exhibiting a bil of sale under which they had been previously assigned to another creditor. Plaintiff on the 20th of June sued out a *ca. sa.*—the *fi. fa.* was not returned. The Court discharged a rule to set aside this *ca. sa.*, and the arrest, sustaining *Edmunds* v. *Ross*. *Tindal, C.J.*, says, "if the first writ were inoperative, the plaintiff was entitled to have recourse to a second."

Knight v. *Coleby*, 5 M. & W. 274: a *fi. fa.* and a *ca. sa.* were both put into the Sheriff's hands against defendant. The Sheriff went to execute *fi. fa.*, but found defendant had absconded, and that there was nothing to levy on except some articles of trifling value which he seized. Next day he was instructed only to execute the *ca. sa.* Within a fortnight he saw defendant, who told him he had sold his goods in order to cheat the plaintiff. The Sheriff thereupon said he would have nothing to do with the goods—withdrew from the possession, and took the defendant under the *ca. sa.* The Court approved of *Edmunds* v. *Ross*, and *Dean* v. *Warne*; and while holding the general rule to be that the Sheriff cannot execute the *ca. sa.* until after the return of the *fi. fa.*, held this case was like the others, an exception.

Lawes v. *Codrington*, 1 Dow. 30: *Parke, J.*, says,—"If you "execute the *fi. fa.* you cannot take another step till the "following term, for that writ cannot be returned into Court "until the Court is, in contemplation of law, sitting."

1 Gale 47, *Drew* v. *Warne*, 2 Dow. 762,—*Miller* v. *Parnell*, 6 Taunt. 370, 2 March 78, overruled—and the Court discharged