

Eng. Rep.]

BRODRICK AND ANOTHER V. SCALE.

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tered the oath, and this defect should escape the Judge's observation, and he should make the order, and after arrest the defendant should apply for his discharge for this defect,—in such a case it may be said that the jurisdiction of the Judge had not attached for want of an affidavit, and that therefore any Judge might properly discharge the prisoner from custody.

Between a cause of action not technically stated in an affidavit, and an affidavit shewing clearly that no cause of action does exist there seems to me to be a marked difference. As to the sufficiency of the statement of the cause of action in this case I express no opinion, but as the averment, the omission of which is insisted upon as vitiating the proceedings, seems supplied in some of the affidavits now filed, if the case should come up before the court, it will be necessary to consider the case of *Stammers v. Hughes* as explained and referred to in *Burns v. Chapman*, as also the case of *Barker v. Lingholt*, and the observations of Rolfe, B., in *Talbot v. Bulkeley*. The summons will be discharged without costs.

Both summonses discharged without costs.

ENGLISH REPORTS.

COMMON PLEAS.

BRODRICK AND ANOTHER V. SCALE.*

Sufficiency of affidavit under 17 & 18 Vict. c. 36 (Bills of Sale Act), as to description of witness.

A bill of sale was attested by one T. S., described as "clerk to W. F.," the affidavit required by the Bills of Sale Act was made by T. S., described as "gentleman." Held, that the affidavit was insufficient, and the bill of sale therefore void as against an execution creditor.

[19 W. R. 386.]

Interpleader issue.

The plaintiffs were grantees of a bill of sale. The defendant was an execution creditor. The bill of sale dated 6th of July, was attested by John Shaw, described as "clerk to William Flavell." The affidavit, dated the 21st of July, began with the words "I, John Shaw, &c., Gentleman," and concluded with the words, "I further say that the name or signature, J. Shaw, subscribed to the said indenture and bill of sale as the attesting witness to the execution thereof, is in my own handwriting, and that I am gentleman, &c."

The case was tried at the Surrey Summer Assizes, and a verdict found for the defendant, with leave reserved to move to enter it for the plaintiff if it should be considered that the affidavit complied with the provision of the statute 17 & 18 Vict. c. 36.

A rule nisi having been obtained,

Day, now (Jan. 11.) showed cause.—The affidavit is insufficient; the description of the witness is inconsistent with that given in the bill of sale; *Foulger v. Taylor*, 8 W. R. 279, 5 H. & N. 202; *Tuton v. Sanoner*, 6 W. R. 545, 27 L. J. Ex. 233; *Allen v. Thompson*, 4 W. R. 506, 1 H. & N. 15.

Ribton and Bromley, in support of the rule.

Jan. 12.—BOVILL, C. J.—I should be very desirous of supporting this bill of sale, as there was clearly no intention to deceive creditors, but the Act requires something definite—viz., the oath of the attesting witness as to his residence and occupation, and we have no power to dispense with this provision. Now, it has been considered that this description must apply to the time of the making of the bill of sale. The question, then, is whether such a description has been verified on oath. The description in the affidavit is in these words "I, John Shaw, Gentleman." In fact he was an attorney's clerk, and, therefore this description is incorrect. In some cases the affidavit has been considered sufficient where there has been clear reference to the description in the bill of sale, but here there is no such reference. The rule, must therefore, be discharged.

WILLES, J.—I am of the same opinion. The case arises upon the validity of a bill of sale which a creditor has taken by way of security upon his debtor's goods, leaving the goods in the apparent possession of the debtor till another creditor comes with an execution, and then the bill is set up. The Legislature having had its attention called to cases of fraud occurring under such circumstances has imposed certain restrictions and conditions upon the making of such bills of sale, and in the event of such conditions not being complied with, a bill of sale is declared to be void. I take the language of the Legislature and put upon it a natural meaning, not dispensing with what it considers necessary, and agreeing with what Williams, J., said in *London and Westminster Discount Company v. Chace*, 10 W. R. 698, 31 L. J. C. P. 314. The 1st section enacts (His Lordship read 1st section of 17 & 18 Vict. c. 36).

The question, then, is whether the description there required was well given by the bill, and it was insisted that that was sufficient; but it was decided in *Hatton v. English*, 7 E. & B. 94 that it is the affidavit which must contain the description of residence and occupation of the grantor, and not the bill only, and on that point no doubt was entertained. The question whether the attesting witness is to be also so described, depends on whether the words in the section just read, applying to bills given under execution, are to be read parenthetically or not. It is clear that these words exhaust themselves upon the case of bills given under execution, and that they must be read parenthetically. The words following, then, "and of every attesting witness," must be applied to bills of sale of all sorts. It is, therefore, obvious, that according to the conclusion first come to, the description of the witness also must be given in the affidavit. Then was the description so given? The cases show that it must be true, and the case of *The London and Westminster Discount Company v. Chace* decides that the description must be true of the witness at the time of the making of the bill. This affidavit describes the witness as "Gentleman." That was not true; the term meaning a person of no particular occupation, whereas, this person had a distinct occupation; and he does not say that the description of him contained in the affidavit is true. As to the case in the Exchequer, *Banbury v. White*, 11 W. R. 785, 32 L.

* *Coram*—BOVILL, C. J., WILLES, SMITH and BRETT, JJ.