

Co. Ct.]

NOTES OF CASES.

[Co. Ct.]

vent Act, or that the debt had been contracted while he was a trader.

This objection is open to him under the amending Statute of 39 Vict. cap. 30, sec. 3, as a "substantial insufficiency in the affidavits," and probably is so independently of that Statute. *McDonald v. Cleland*, 6 Prac. R., at page 290.

Under the Act of 1875, of course, no person can be placed in insolvency unless he is a trader within the meaning of that Statute and the amending Acts. It is admitted by counsel for the attaching creditors that the word "merchant," in the style of the cause or proceeding, is not a fact deposed to in the affidavit, and I imagine the contrary could not be contended for with any show of reason. It is contended, however, that it is a description of the insolvent's business, and coupled with the statement in the third paragraph of Mr. Hebden's affidavit, that the person described as "merchant" is insolvent within the meaning of the Acts, shows sufficient to warrant the issue of the attachment. It appears to me that the word "merchant," as used in this affidavit, is merely descriptive. It forms no part of the facts deposed to. In *Hood v. Cronkite*, 4 Prac. R. 279, Draper, C. J., said, "the statement of addition as to the name of the deponent is merely descriptive. It is not an allegation of fact." I also refer to *Rogers v. Crookshank*, 4 U. C. L. J., O. S., 45. It was mentioned, though not decided, in *McDonald v. Cleland*, that the omission of the place of residence, and addition of the parties, did not invalidate an affidavit for attachment in insolvency. In the third paragraph of the form of affidavit appended to the Act of 1875, appear the words, "state concisely the facts relied upon as rendering the debtor insolvent, and as subjecting his estate to be placed in liquidation."

Is it a fact necessary to be shown that the insolvent is a trader within the meaning of the insolvent laws? Undoubtedly it is so, under the first section of the Act of 1875.

It gives a statutory description of those who are traders under that Act. No doubt a merchant is one who uses "the trade of merchandise by way of bargaining, exchange,

bartering, commission, consignment, or otherwise, in gross or retail," within the meaning of the first section, but the fact that he carries on such business should be distinctly stated. What should be shown by the affidavit is such fact or facts as should reasonably convince the Judge to whom application is made for the order, that the debtor is an insolvent within the meaning of the Act. On the facts being shown, it is for the Judge to draw his conclusions of law, and I do not think a man's estate should be placed in liquidation, unless the affidavit discloses facts clearly establishing insolvency: *Bateman v. Dunn*, 5 Bing. N. C. 49.

This affidavit does not state that Creen is a merchant, from which I might deduce that he was a "trader," nor does it affirm, even in general terms, that he is "a trader" (which latter I think insufficient), but I am asked to say, because the person who drew the affidavit describes the debtor in the style of cause as a "merchant," that I should from that be satisfied he is so. The deponent is studiously made to avoid swearing even to that fact, yet I am asked to presume that that existed which is not sworn to. At page 872 of the third edition of Lush's Practice, it is laid down that to render an affidavit admissible, it must have been made by a person competent in point of law to give testimony, and before a person of competent authority to administer an oath, and its statement must be clear and unambiguous, and nothing left to implication, so that perjury may be assigned thereon if false. See *Classey v. Drayton*, 6 M. & W. 17. If perjury could not be assigned on the affidavit, it is defective: *Watson v. Walker*, 1 M. & W. 437.

What fact is sworn to in this affidavit showing Creen to be a trader? None whatever, and the case of *Hood v. Cronkite*, already cited, is authority for showing how the style of cause at the heading should be viewed. In matters of such serious consequence to debtors, involving, even if an attachment be improperly issued and afterwards set aside, perhaps the total destruction of a man's business and credit, it is all important to see that every necessary fact