

Co. Ct.]

GHENT V. TREMAIN.

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ceedings in the Division Court. At the judgment upon which a small sum had been realized, and sums of money had been paid plaintiff, for which it was contended defendant had not got credit.

The proceedings were removed by transcript to the County Court. This transcript set out the first execution, and the return, but omitted to mention the second execution, and also omitted reference to the garnishee proceedings.

A summons was taken out to set aside the transcript and executions issued from the County Court, on the ground that the transcript did not set out the proceedings in the case, in that the second execution, and the garnishee proceedings were not mentioned; and on the ground that the true amount due was not stated in the transcript.

*Lane* and *Rowe* showed cause. If the correct amount due is not stated, this is only ground for amending, not for setting the proceedings aside. [MACPHERSON, Co. J., thought that an amendment might be made in this particular if the other objections could be got over.] It is not necessary to set out all the proceedings in the Division Court. Sec. 165 of the Division Court Act, cap. 47, R. S. O., says the transcript is to set out (1) the proceedings in the cause; (2) the date of the execution; (3) the bailiff's return of *nulla bona*. The general words of the first sub-section are cut down by the second and third sub-sections, which only require one execution and the return to be set out. The transcript being regular on its face, and showing that plaintiff was entitled to it, should not be set aside, but the parties should be left to contest it in an action of ejectment if a sale was had. The garnishee proceedings are collateral, not proceedings in the cause.

*Creasor* and *Morrison*, in support of the summons, contended that all the proceedings in the Division Court must be set out in the transcript—the section 165 requires all the proceedings to be set out: *Farr v. Robins*, 12 C. P., 377; *Hope v. Graves*, 14 C. P., 393; *Jacomb v. Henry*, 14 C. P., 377. The omission of the garnishee proceedings is fatal also. They argued that if the transcript was irregular the Judge had power to set it aside, and that they were not obliged to wait for a sale and then bring an action or defend one.

MACPHERSON, Co. J., held the omission of the second execution fatal to the transcript, and made an order setting aside the transcript and the executions thereunder with costs. Without deciding the point he thought the garnishee proceedings need not be mentioned, as they constituted another cause.

(Note by Editors.)

[We are not prepared to say that we altogether agree with the learned Judge in the view he has taken. One would suppose that a strict compliance with the section in question (sec. 165 of R. S. O., chap. 47) both as to the letter and the spirit was not required. We must examine into the reasons which dictated these requirements. Division Court process never included a writ against lands, such a writ only issuing out of a Court of Record; and it was reasonable that a party to a suit in a Division Court, instituted expressly in order to afford a cheap and easy recovery of small debts, should be required to exhaust all the means and ends for doing so, provided for in that Court. Again, the statute of Geo. III. c. 1, (that in force when the old D. C. Act was passed), partly re-enacted by the C. S. U. C., forbade the issuing of an execution against lands, till after the return of a writ against goods, so that it became necessary to have something for the Clerk of the County Court to go by, before he could issue a *fi. fa.* lands upon a transcript from a Division Court. That something was the statement in the transcript that a *fi. fa.* goods had issued in the Court below and had been returned *nulla bona* as to the whole or part.

If, however, in addition to the first execution, an *alias*, a *pluries*, an *alias pluries* etc., had subsequently in proper order been issued, and each successively returned *nulla bona* and each leaving the judgment and the parties to it relatively in the same position, it might be doubted whether there was any necessity for reciting all these writs in the transcript; the omission of them would not prejudice the defendant nor deceive any one, and the insertion of them would not benefit him.

The same holds good as to garnishee proceedings and judgment summons process. If anything had been made in either of these ways, so as to alter the amount of the judgment as originally recovered, it ought, no doubt, to so appear in the transcript, and these proceedings recited therein.]