

[Co. Ct.]

MCCLURE V. FARLEY.—GHENT V. TREMAIN.

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REPORTS.

ONTARIO.

COUNTY COURT OF THE COUNTY OF GREY.

MCCLURE V. FARLEY, *et al.**Division Court transcript—Setting aside execution—Execution not following judgment.*

A Division Court transcript set out the proceedings and judgment against two defendants, the issue of execution in the Division Court, return of execution, money made partly of the goods of one defendant and partly of goods of the other, and alleged that one defendant was surety for the other, and that plaintiff had assigned the judgment to the alleged surety. The executions in the County Court were against one defendant only, the alleged principal.

Held, that the transcript and executions were irregular, and should be set aside.

[Owen Sound, January,

In this case, plaintiff sued the two defendants in the 6th Division Court, Grey, and recovered judgment against both. Execution was issued against both defendants in the Division Court, and the whole amount was made, partly of the goods of Farley, and partly of the goods of Cooke. Cooke, alleging that he was surety for Farley, issued a transcript to the County Court, the transcript stating that he was surety and that he had obtained an assignment of the judgment from plaintiff. The County Court executions were against Farley only.

A summons was obtained to set aside the transcript and executions on the grounds:—

1. That the transcript was not a transcript of the Division Court judgment.
2. That there was no return of "*nulla bona*" to the Division Court executions—that a transcript could not issue from the Division Court after the judgment therein had been satisfied.
3. That the transcript was not in the form required, as it showed that the judgment had been satisfied.
4. That the execution in the County Court did not follow the judgment, the judgment being against defendants jointly, and the executions being against one defendant only.

Frost showed cause, and contended that the execution was authorized by the transcript and the Act R. S. O., cap. 116, secs. 2 and 3. The executions may be amended.

Lane and *Rowe*, in support of the summons, contended that the remedy of the defendant Cooke was by action against Farley, and that the transcript was irregular in form, and cited *Farr v. Robins*, 12 C. P. 35; *Jacomb v. Henry*, 13 C. P. 377; *Hope v. Graves*, 14 C. P. 393; *In re McLean & Jones*, 2 C. L. J. N. S. 206; *Scripture v. Gordon*, 7 Prac. R. 164. The execution should follow the judgment: Arch. Prac. 554; *Clarke v. Clement*, 6 T. R. 525.

MACPHERSON CO. J., held that the transcript was not in the form authorized by the Division Court Act, sec. 165; and the executions were irregular in form, as they did not follow the judgment, and made an order setting aside the transcript and executions with costs.

(Note by Editors.)

[The whole proceedings were clearly bad. There was nothing upon which to base an execution against lands. The return to the execution in the Court below showed that the judgment was satisfied. The first words of the section (165), "In case an execution is returned *nulla bona* limit the using of the transcript to cases where there is such a return (either as to the whole or in part). Even if the execution had been returned, as to Farley only, part made, and *nulla bona*, as to the residue, it would have been improper to issue a transcript, unless it was shown that Cooke also had no goods.

GHENT V. TREMAIN.

Division Court transcript—Omission of proceedings—Setting aside transcript.

A Division Court Transcript to the County Court should set out all the proceedings in the Division Court—under R. S. O. cap. 47, sec. 165.

Quære if it is necessary to set out garnishee proceedings taken after judgment.

[Owen Sound, January.]

A judgment had been obtained in a Division Court, and an execution issued and returned *nulla bona*; an *alias* execution was afterwards issued, and returned *nulla bona*. The plaintiff had also taken certain garnishee pro-