

Full Court.]

FILLIS v. CONROD.

[Jan. 11.]

County Court—Ex parte judgment set aside—Costs.

S. 26, c. 9, Acts of 1889, enacts that "the pleadings, practice, process, forms and procedure of the Supreme Court for the time being, as embodied in the Judicature Act and amendments thereof, and the orders and rules therein now in force . . . shall apply to and extend to the County Court . . . except as the same may be modified and limited by this Act." S. 54 provides that " . . . if any cause when called is not tried, either party shall be at liberty to move the Court on the last day of said term . . . that the judgment below be affirmed or reversed as the case may be, with costs . . ." On appeal from the decision of the Stipendiary Magistrate in favor of defendant, defendant was not present when the case was called for trial in the County Court, and plaintiff called witnesses and took judgment ex parte.

Held, that the practice of the Supreme Court, which otherwise would have been applicable was modified in this case by the provision contained in s. 54, and that under that section it was the duty of plaintiff to have moved on the last day of term.

The County Court Judge having refused to set aside the judgment for plaintiff,

Held, that he was wrong in doing so, and that the judgment must be set aside, but, as plaintiff undertook to try the cause on the merits, that no costs of the appeal should be allowed except the cost of printing; defendant's costs on the summons to be costs in the cause.

A. R. Rowlings, for appellant. *E. D. King*, Q.C., for respondent.

Full Court.]

WRIGHT v. POLSON.

[Jan. 11.]

Contract—Mutual and independent promises—Non-performance no defence—Remedy in damages.

Plaintiff and defendant entered into a contract in writing, under which plaintiff undertook to excavate a cellar on land owned by defendant, and to do certain other work in connection therewith at prices named in the contract, and defendant, on his part, undertook to pay plaintiff for the work by crediting a small sum of money due him by plaintiff, by delivering to plaintiff two waggons, subject to certain alterations to be made in them, by doing the wood work of a light truck waggon for plaintiff, amounting in all to \$188.75, and by paying the balance, if any, in cash. It was stipulated that the work to be done by plaintiff was to be finished by November 1st, 1896. Plaintiff brought an action for the amount due him according to the prices fixed, alleging that defendant refused to deliver the waggons, or to do the work on his part agreed to be done. The defence was that plaintiff had neglected to complete the work referred to in the contract, and on his part agreed to be done. The evidence showed that the sum of \$15 would remove the defects complained of by defendant, and that in other respects plaintiff had substantially fulfilled his contract.

Held, that the promises made by the parties to the contract were mutual and independent, that it was no defence for defendant to set up non-performance