

of the damages at less than 50*l.*, it is clear that the county court has jurisdiction, although no damages are in fact claimed.

1903

STILES

v.

ECCLESTONE.

WILLS J. I wish to add that I entirely accept the limitation expressed by my brother Channell.

Appeal dismissed.

Solicitors for plaintiff: *Edgar Robins & Clark, for Salmon & Son, Bury St. Edmunds.*

Solicitors for defendant: *Bridges, Sawtell & Co., for Bendall & Sons, Newmarket.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.

BOZSON *v.* ALTRINCHAM URBAN DISTRICT
COUNCIL.

1903

Feb. 20.

Practice—Appeal—Order whether Final or Interlocutory—Order to try Preliminary Question of Liability—Action dismissed.

An order was made in an action, brought to recover damages for breach of contract, that the questions of liability and breach of contract only were to be tried, and that the rest of the case, if any, was to go to an official referee. At the trial the judge held that there was no binding contract between the parties, and made an order dismissing the action, from which order the plaintiff appealed :—

Held, that the appeal was from a final order.

Shubrook v. Tufnell, (1882) 9 Q. B. D. 621, followed.

APPEAL by the plaintiff from an order of Wills J.

The action was brought to recover damages for breach of contract. An order in the following terms was made in chambers: "It is ordered that the action be transferred to the non-jury list. Questions of liability and breach of contract only to be tried. Rest of case (if any) to go to official referee." The case came on before Wills J. at Manchester on March 6, 1902. The learned judge held that there was no binding contract between the parties, and made an order dismissing the action, upon which order judgment was subsequently

C. A.
1903

BOZSON
v.
ALTRINCHAM
URBAN
COUNCIL.

entered for the defendants. The plaintiff appealed from the order of Wills J. Notice of appeal was given on May 3, 1902.

Pickford, K.C. (Langton with him), for the defendants. There is a preliminary objection to the hearing of this appeal. It is an appeal from an interlocutory order, and the appeal is therefore out of time. The test for ascertaining whether an order is final or interlocutory, as laid down by the Court of Appeal in *Salaman v. Warner* (1), is that an order is not a final order unless it is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. In the present case the decision of Wills J. as given did in fact put an end to the litigation; but it would have been otherwise if the decision had been in favour of the plaintiff, because then the case would have had to go before the official referee. The order of Wills J. was therefore, according to the rule enunciated in *Salaman v. Warner* (1), an interlocutory order. The principle of that case was affirmed in *In re Herbert Reeves & Co.* (2); but there is an earlier decision of the Court of Appeal, *Shubrook v. Tufnell* (3), which was not cited in *Salaman v. Warner* (1), and which appears to be in conflict with it.

Montague Lush, K.C., and M. Macnaghten, for the plaintiff, were not called upon.

THE EARL OF HALSBURY L.C. The learned counsel for the defendants has very properly called our attention to the fact that the authorities on this point are not in harmony. I prefer to follow the earlier decision. I think the order appealed from was a final order, and the appeal is therefore brought within the prescribed time.

LORD ALVERSTONE C.J. I agree. It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as

(1) [1891] 1 Q. B. 734.

(2) [1902] 1 Ch. 29.

(3) 9 Q. B. D. 621.

a final order; but if it does not, it is then, in my opinion, an interlocutory order.

C. A.

1903

SIR F. H. JEUNE P. concurred.

Objection overruled.

BOZSON
v.
ALTRINCHAM
URBAN
COUNCIL.

Solicitor for plaintiff: *C. J. Fowler, for Grundy, Lamb & Grundy, Manchester.*

Solicitors for defendants: *Nicholls, Harris & Lindsell, Manchester.*

F. O. R.

BANKES v. JARVIS.

1903

Jan. 28.

Practice—Plaintiff suing as Trustee—Unliquidated Damages due to Defendant from Cestui que Trust—Equitable Defence—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-ss. 2, 3—Order XIX, r. 3.

In an action to recover a debt due to the plaintiff as a trustee, the defendant is entitled to set up as a defence that the cestui que trust is indebted to him in a sum for unliquidated damages exceeding the amount of the claim.

APPEAL from the county court of Sussex holden at Hastings.

The facts were as follows. In 1895 Vernon Bankes, the plaintiff's son, bought from the defendant a veterinary surgeon's practice at Battle. The defendant was lessee of a house used in connection with the practice, and by an indenture of assignment indorsed on the lease at the time of the sale the defendant assigned the lease to Vernon Bankes, who thereby covenanted to pay the rent and to observe and perform all the covenants in the lease, and to keep the defendant indemnified from and against all claims and demands for or on account thereof.

Vernon Bankes carried on the practice until 1901, when he went to New Zealand. Before leaving he gave to the plaintiff, his mother, authority in writing to sell the veterinary surgeon's practice. In May, 1901, the plaintiff entered into an agreement with the defendant by which, after reciting the written authority to sell given by her son, she agreed to sell the goodwill of the practice, together with the fixtures, fittings,