ments made in discharge of specific items, or that the account was not unsettled, within the meaning of the act. Sec. 55 clearly gives jurisdiction, and its operation is not confined by sec. 59, which is intended only to provide against the splitting of demands. This last clause is similar to that in the English Act, 9 & 10 Vic. ch. 95, which is commented upon in *Avards and Rhodes*, 8 Ex. 312. He cited also *Turner* v. *Berry*, 5 Ex. 858; *Walker* v. *Watson*, 8 Bing. 414; *Furinval* v. *Saunders*, 26 U.C.Q B. 119; *Cameron* v. *Thompson*, 1 U. C. L. J. 9; *Halford* v. *Hunt*, 2 U. C. L. J. 89; *Kimpton* v. *Willey*, 1 L. M. & P. 280; *Wallbridge* v. *Brown*, 18 U. C. R. 158.

MORRISON, J.—By the 55th section of the Division Courts Act the judge of any division court may hold plea of, and may hear and determine, &c., all claims and demands of debt, &c., where the amount or balance claimed does not exceed $100. By the 59th section it is enacted "A cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction of a division court, and no greater sum than $100 shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds $200."

If the 55th section stood alone, the judge would have jurisdiction in every case where the balance claimed did not exceed $100. The applicant's counsel contended that such was the meaning of the whole act, and that the intention of the 59th section was not to limit the jurisdiction, but merely to prevent the splitting of suits. I cannot adopt that view, for I think it is quite clear that the legislature intended to limit the jurisdiction first to a balance of $100 in the case of an unsettled account above that sum, and then it declared that even in cases where such balance was claimed the plaintiff could not sustain his action in that court if the unsettled account exceeded $200: in other words, a party may recover in that court as high as $100, being the balance of an unsettled account not exceeding $200, but where the balance claimed is of an account unsettled and exceeding the sum of $200, he cannot sustain his action for any balance in that case, while on the other hand, he may recover $100 being the balance of any settled account between the parties to any amount.

What is meant by an unsettled account does not appear very clear, but I think the reasonable interpretation is, an account the amount of which is not adjusted, determined, or admitted by some act of the parties, such as by the giving of a note, a mutual stating or balancing of the account, or fixing the amount due.

In the case we are considering, the particulars of claim endorsed on the summons are for a balance *prima facie* which the plaintiff was entitled to sue for and recover, and within the jurisdiction, viz., $84 69, a balance due for rent after applying payments. Such particulars might refer to an unsettled account under $200, and it is only when the case comes on for trial that the difficulty arises. The plaintiff then says, "I claim this $84 69 as the balance of three years five months and twenty-one days' rent. due on certain premises rented by the defendant at $160 a year, payable monthly;" and in order to establish his claim he states to the judge that he must first prove the tenancy, and that the defendant was indebted to him, the plaintiff, in about $600, and that he intended reducing that amount by payments to less than $100.

Why the plaintiff was compelled to adopt this mode of proof upon his own case one cannot readily see. If the tenancy was admitted by the defendant, and the payments made during the three years were payments made on account of the rent, all that the plaintiff had to do was to sue for the last say seven months' rent; but if the matter in dispute was either the amount of rent payable or the duration of the term, and either of these facts had to be investigated and determined before the balance could be struck, in such a case the judge, I think, would be trying a case beyond the jurisdiction—viz, to recover a balance due of an unsettled account over $200; and we must assume such to be the case here, for neither at the trial nor upon the application for a new trial does it appear that the plaintiff rested his case upon the ground that the balance was due on an account at any time settled or stated between the parties.

And upon this application the plaintiff has not shewn that the account is not an unsettled one, and, for all that appears, the amount of the annual rent, as well as the time charged for, were both in dispute. It was the duty of the plaintiff when the matter was before the court below, both at the trial and upon the motion for a new trial as well as on this application, to have shewn that the case was clearly within the jurisdiction of the learned county court judge, and not to leave him or this court to conjecture what kind of a case the plaintiff intended to make out in the division court. On the whole, as the case appears before us, we think that the learned judge was right in the conclusion he arrived at—viz, that the action was brought to recover the balance of an unsettled account which in the whole exceeded $200, and that the rule should be discharged, as moved, with costs.

ADAM WILSON, J.—As *Miron* v. *McCabe*, (4 P. R. 171) which I decided in chambers, has been referred to, it is proper I should say that on examining again the sections of the Division Courts Act, I am quite satisfied that by the direct language of the 59th section no action for the balance of an account can be brought in the division court, "where the unsettled account in the whole exceeds two hundred dollars."

This section was not sufficiently in my mind when I decided that case. The decision was not warranted by the statute, because the unsettled account in the whole was $236 55. The sooner it is expressly over-ruled the better. The judge of the county court of Wentworth, in *Waugh* v. *Conway* (4 U. C. L J. N S. 228), and the junior judge of Northumberland, in a case which was shewn to me on my last circuit, and which has since been properly affirmed in the Common Pleas (19 C. P. 301), have already pointed out the objection to it.

I quite agree with the opinion expressed in this case, and that *Miron* v. *McCabe* was wrongly decided.

RICHARDS, C. J., concurred.

Rule discharged.