in store, and gave the purchaser a warehouseman's receipt under the statute, acknowledging that he had received from him that quantity of wheat to be delivered pursuant to his order to be indorsed on the receipt:

*Held*—(MOWAT, N. C., dissenting)—that, the 8,500 bushels not having been separated from the other wheat of the seller, no property therein passed.—*Box* v. *The Provincial Insurance Co.*, 15 Chan. Rep. 552.

## ONTARIO REPORTS.

### COMMON PLEAS.

*(Reported by* S. J. VAN KOUGHNET, Esq., *Reporter to the Court.)*

#### IN RE THE JUDGE OF THE COUNTY COURT OF THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

*Division Court—Unsettled account over $300—Prohibition.*

In a suit in the Division Court the plaintiff claimed $94.88, annexing to his summons particulars of claim, shewing an account for goods for $384 23, on which he gave certain credits, which reduced the amount to the sum sued for; but nothing had been done by the parties to liquidate the account, or ascertain what the balance really due was, with the exception of a small amount admitted to have been paid, and a credit of $33, given for some returned barrels, but which still left an unsettled balance of upwards of $300:

*Held*, that the claim was not within the jurisdiction of the Division Court, and a prohibition was therefore ordered.

[19 U. C. C. P. 299.]

*N. Kingsmill* obtained a rule calling on the junior Judge of the United Counties of Northumberland and Durham to shew cause why a writ of prohibition should not issue to prohibit him from further proceeding on a plaint, in the First Division Court, of *Simpson* v. *Keys*, on the ground of want of jurisdiction.

On the summons there was a claim at the foot for £23 14*s*. 5*d*. and costs 9*s*. A particular of claim was annexed, shewing an unliquidated account for goods, $384 23.

Then came a credit, for cash and barrels returned, of $252 50, and a balance struck of $131 75, and again another sum of like nature $36 85; and a balance, $94 88 This account was produced at the trial, the defendant objecting to the jurisdiction.

*H. Cameron* shewed cause, citing *Myron* v. *McCabe*, 4 Pr. R. 171; *Saunders* v. *Furnivall*, 26 U. C. Q. B. 119; *Higginbotham* v. *Moore*, 21 U. C. Q. B. 326.

*Loscombe* supported the rule.

HAGARTY, C. J., delivered the judgment of the Court.

The jurisdiction of the Division Court is limited to one hundred dollars, and the sum now claimed is under that amount. It is admitted that no act had been done by the parties to liquidate the amount ascertained, or settle any balance as the account really due. The plaintiff admits that he has been paid a certain amount in cash, and about $33 is credited for returned barrels. The account is chiefly for liquor sold, and the barrels, if returned, were to be allowed for at a fixed rate. No difficulty arises as to this part of the case. It is conceded that such amount might be properly applied at once in reduction of the gross amount, and leaving the whole claim as if originally so much less.

If this amount be deducted, there would still be an account considerably over $300.

This, as already remarked, has never been reduced to any ascertained balance by act of the parties.

The 59th section of the Division Court Act enacts that "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 one hundred dollars 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 two hundred dollars.*"

In *Higginbotham* v. *Moore*. 21 U. C. Q. B. 326, the debit side of the plaintiff's claim, as first delivered exceeded £73. In the account the plaintiff, as here, gave credit for £46 15*s*., leaving a balance of £26 8*s*. 8*d*., and he abandoned the excess of £1 8*s*. 8*d*. and claimed to recover the £25. The Judge of the Court had given permission to amend this statement of claim, and it was accordingly so amended as not to appear to shew an excess of jurisdiction; but, with reference to the claim, as first delivered, Robinson, C. J., at p. 329, says: "The plaintiff's claim, as first delivered, in stating an account of which the debit side exceeded £73, stated a case not within the jurisdiction of the Court, according to the 59th section, although the balance claimed was only £25; that is, if the *whole* account is to be taken as an account unsettled, notwithstanding there were among the items two notes which in themselves were liquidated demands."

This we take to be an authority to govern this case, in which there is not any item on the debit of the nature of a liquidated demand in itself. The whole account shews an unliquidated account, and an unsettled account exceeding two hundred dollars, in the terms of the Act, which, as we think, clearly excludes the jurisdiction of the Division Court over the claim.

We have been referred to *Myron* v. *McCabe*, 4 Prac. Rep. 171, before Mr. Justice Adam Wilson, in Chambers, in which case the clause of the Statute is not referred to. If the learned Judge arrived at the conclusion which he did with this clause of the Statute before him, we are unable, upon the best consideration, to concur with him: we think the case comes within the Statute, which is imperative.

The cases which have arisen as to the jurisdiction of County Courts, upon the question whether Superior Court or County Court costs should be granted, do not, as it appears to us, affect this case; for the County Court jurisdiction is not limited by any clause similar by the 59th section of the Division Court Act. The County Court jurisdiction is only restricted by the amount sought to be recovered. Such was the case also with the Division Court Act of 1841 (4 & 5 Vic. ch. 3), referred to by Burns, J., in *McMurtry* v. *Munroe*, 14 U. Q. B. at p. 171.

The case before us appears to come within the very words of the Statute: "the unsettled account in the whole exceeds two hundred dollars," and this appears to us to conclude the matter.

*Rule absolute.*