when the amount or balance claimed does not exceed £25: but any plaintiff having a cause of action above £25, on which a suit might be brought in the division court, if the demand were not above £25, whenever he shall claim or demand only the balance or sum of £25, may, on proving his case, recover to that amount only

I regard this as a privilege conferred on a plaintiff, and not a right granted to defendant to insist that the plaintiff shall give credit for any set off which the defendant may or may not choose to advance, and to submit to the judgment of the court.

The 78th section of the Division Court Act (13 & 14 Vic. cap 53) enacts that if any action be prosecuted in any county court or superior court for a cause which might have been entered in a division court, and the plaintiff shall obtain judgment for a sum within the jurisdiction of the division court, no more costs shall be taxed against the defendant than would have been incurred in the division court, unless the judge who presides at the trial of such action shall certify in open court, immediately after the verdict is recorded, that it was a fit case to be withdrawn from the division court and commenced in such county court or superior court, with a provision for taxing the costs of defence, and allowing them to be set-off against plaintiff's costs in such cases

This case, from the fact of the reference to arbitration, does not fall within the foregoing section. There has been no trial before any judge of either of the superior courts, in the inferior jurisdiction of one of which this action was brought.

Rule No 115 of Trinity Term, 20 Vic., orders that in any action of the proper competence of the county court, in which final judgment shall be obtained *without a trial*, and in which the papers shall not be marked "inferior jurisdiction," no more than county costs shall be taxed without the special order of the court or a judge.

This rule became necessary in consequence of the statute 13 & 14 Vic. cap. 52, which gave plaintiff a right to institute actions within the jurisdiction of the county court in the superior courts, at the costs allowed in the county court, provided the papers were marked "inferior jurisdiction"

If, therefore, this case be within the jurisdiction of the county court, it is properly brought in the inferior jurisdiction of the Court of Common Pleas; but as the papers are marked "inferior jurisdiction," the order granted is not within the meaning of this rule.

The rule No. 168 of Trinity Term 20 Vic., orders that in all cases unprovided for by statute or rule of court, the practice as it existed in the superior courts before the passing of the C. L. P Act, 1856, shall be followed. But I find no rule of practice as to the allowance or disallowance of division court costs where final judgment is obtained without a trial, and where the action being of the proper competence of the division court, has been brought in the superior court, and the papers marked "inferior jurisdiction" So that as far as I perceive the only rule touching the case is No. 154 of Trinity Term, 20 Vic., which provides that the practice of the courts and the services to be allowed for in all proceedings in the taxation of costs, shall be governed in all cases not otherwise provided for by the established practice of the Court of Queen's Bench in England.

There is, strictly speaking, no established practice in England upon a question like the present; but some analogy may be found to exist in interpreting our own acts. Thus, under the English statute 9 & 10 Vic. cap. 95 sec. 129, by which if any action shall be commenced in any of her Majesty's superior courts of record for any cause other than those lastly hereinbefore specified in sec 128, "*for which a plaint might have been entered under this act*," and the plaintiff shall recover less than, &c., the plaintiff shall recover no costs unless the judge who tries the cause shall certify. Under this section the Court of Common Pleas in *Bailey* v. *Robson* 5 C B 934, held that in order to deprive the plaintiff of costs, the defendant must shew affirmatively that the plaintiff was bound to have recourse to the inferior jurisdiction, and not simply that he might have sued thereon

The words of the Division Court Act are exactly similar depriving the plaintiff of costs in actions brought in the county court or superior courts for a case which might have been entered in a division court: and adopting the decision just referred to as a safe guide, we may ask if the defendant has shewn that in the present case the plaintiff was *bound* to bring his action in the division court? If not, then he certainly *might* bring it in the county court or at his option in the inferior jurisdiction of either of the superior courts

Looking at the affidavits and the evidence given before the arbitrator, I think it does not appear the plaintiff was under any such obligation. Nay, I am not satisfied that if he had so brought it he would not have failed by reason of the necessity of going into an inquiry exceeding the jurisdiction; and I have already said I do not think that if his evidence shewed a claim beyond the jurisdiction of the division court, he was compelled to abandon the excess, or to give credit for a cross demand of the defendant in order to bring the case within the division court.

Admitting, therefore, that it may be doubtful whether, in the first instance an order to tax county court costs could go on an *ex parte* application, for want of a statute or rule of court such as there is in regard to actions apparently of the proper competence of the county court, but brought in the superior court, I think the plaintiff was, on the facts shewn, entitled to have county court costs taxed to him, and therefore that the rule ought to be discharged.

Per cur.—Rule discharged.

McINNES v. HAIGHT.

Assignment for benefit of creditors—Registry—Execution.

Where an execution is placed in the Sheriff's hands against the goods of a debtor after an assignment made by him for the benefit of creditors before its registry, though within five days, the execution is entitled to prevail.

Feehan v. *Bank of Toronto*, 10 U. C. C. P. 32. *Shaw* v. *Gault Ib.* 236; upheld

Where the Court of Common Pleas exercises an appellate jurisdiction it will decide according to its own view of the law, notwithstanding an adverse decision in the Court of Queen's Bench.

This was an appeal from the decision of the Judge of the County of Elgin.

The decision and the facts upon which it is grounded are reported in 8 U. C. L J. 104.

HAGARTY, J.—This case, as far as this Court is concerned, turns on a simple point. If we uphold our own judgment in *Feehan* v. *The Bank of Toronto*, 10 U. C. C. P. 32, the decision in the Court below must be reversed.

Taking secs. 1 & 3 of the Con. Stat. U.C. cap. 45, by themselves alone, they would well warrant the conclusion that the registry of the assignment at any time within the five days allowed by the act would make it valid from the beginning, and would therefore cut out any execution delivered to the Sheriff within the five days.

In deciding what was the intention of the Legislature, we must look at the whole course of legislation on the subject, to the repealed acts as well as to those now in force.

The act of 12 Vic. cap 74, declares these conveyances void against execution creditors, &c, unless registered. No time was fixed for the registry, and the Courts held that if registered before an execution was placed in the Sheriff's hands against the goods of the assignor, the assignment would still be valid.

I do not think there can be any doubt that, under that statute, if the Sheriff received an execution against goods which if the owner had not given a mortgage on them would have been liable to be seized under the writ, they would be held so liable if the mortgagee had not registered his mortgage until after the Sheriff had levied on and taken possession of the goods.

Such a view would be quite consistent with the intention of the legislature, that the mortgage should be void unless registered. Not being registered until a new writ attached by the placing the execution in the Sheriff's hands, it would be void as to such creditor.

Then did the Legislature by the act of 20 Vic. cap. 3, intend to give to the holders of these bills of sale and mortgages any advantages they had not previously possessed. They had before them the experience of several years and the decisions of the courts. The whole scope of that act, so far from facilitating the taking security on or the transfer of property by means of these instruments, was intended to make it more difficult. They were undoubtedly viewed with distavor by the Legislature.

I cannot therefore come to the conclusion that, by requiring it to be registered within five days from the execution thereof, they intended to give an advantage to the holder of such an instru-