

C. L. Cham.]

HARRIS V. PECK—MCBRIDE V. HOWARD.

[Ontario.]

Mr. Cowper (Mowat, Maclellan, and Downey), contra, cited *Lesson v. Higgins*, 4 Prac. R. 340 as shewing that the Ejectment Act being now separate from the C. L. P. Act is not subject to sec. 333, subsec 3, of the latter Act, under which the judges are empowered to make rules.

MR. DALTON.—This is a motion to set aside the notice of trial, this being an action of ejectment, on the ground that no issue book has been delivered, and is founded upon the opinion that the Rule of Court of last Hilary Term, by which the practice of delivering issue books is discontinued, does not apply to an action of ejectment. I think that it does apply and that this summons must be discharged.

When the rule of Trinity Term, 1856, (No. 33) which established the practice of delivering issue books, was adopted in this country, the Ejectment Act was incorporated in the Common Law Procedure Act, so that that rule applied to ejectment. There is nothing therefore in the recitals of the rule of Hilary Term last to indicate that it was not meant to apply to ejectment, and the words of that rule comprehend ejectment.

But the power of the Court to make such a rule as that of Hilary Term last is questioned, and it is pointed out that in the Consolidation of the Statutes, the Ejectment Act is dis severed from the C. L. P. Act, and placed in a chapter by itself, and that the powers to make rules given by the C. L. P. Act, are for the effectual execution "of this Act."

Suppose it is to be so—the power to make rules for the practice of the Court when not contrary to any provision of express law, is in the Court and is incidental to its general authority—see sec. 337 of the C. L. P. Act where this power is expressly reserved. More particularly is this so with reference to the action of ejectment which is said to be a creature of the Court, and again this power is expressly reserved by the 77th section of the Ejectment Act.

But then it is urged that the 35 Vict. cap. 19, sec. 1, enacts that the plaintiff may claim a jury, and "shall annex to his issue book, and on the day of service of the same file in the office from which the writ of summons issued" a notice for jury. Certainly the Rule of Court does not repeal the Act, and was not intended to do so, and cannot by implication or otherwise take away the plaintiff's right to a jury. Then if the practice of delivering issue books is dis used by competent authority, what must follow? I may suggest that either the service of the notice may possibly be dispensed with, the plaintiff having filed it, or as the requirement of

the statute that it should be served with the issue book is merely intended to mark the stage of the cause in which the plaintiff should serve the notice, more probably that it would be held that the service of the notice may be made at any time when the plaintiff could, under the old practice, have served the issue book.

I must discharge the summons with costs.

Order accordingly.

IN THE COUNTY COURT OF THE COUNTY OF YORK.

MCBRIDE V. HOWARD.

Clerk of the Division Court—Action against.

Held, that it is not necessary in action against a Clerk of a Division Court which charges, that he, "as such Clerk, maliciously, &c., issued a warrant of commitment," to allege that it was so issued without the order of the judge.

This was an action brought against a clerk of a Division Court, the material averment in the declaration being, "that the defendant as such clerk as aforesaid, maliciously, and without reasonable or probable cause, issued a warrant of commitment," (which was set out), and the plaintiff was arrested thereon.

The defendant demurred because the declaration did not aver that the defendant issued the warrant "without the order of the Judge of the said Division Court."

DARTNELL, J. J. I think the declaration shews a good cause of action without these latter words.

The duty of the Clerk of the Courts is ministerial. He is a public officer, and the provisions of the Con. Stat. U. C., apply to him. The Act requires the declaration to state that the act complained of was committed "maliciously and without reasonable or probable cause." The issuing of a warrant without Judge's order, would probably be *prima facie* evidence of malice. There was nothing to prevent the defendant from pleading the Judge's order as a justification; or to plead not guilty by statute. In *Dewe v. Riley* 20 L. J. Rep. N.S. C.P. 264, 15 Jur. 1159 and 11 C. B., 434, it was held, that the clerk is a mere ministerial officer, and was not liable in trespass for imprisonment under a warrant reciting a bad order, and that he could plead not guilty by statute, and give the special matter in evidence.

In that case Jervis, C. J., was of the opinion, that the Judge's order was obligatory upon