County of Oxford, for the summons in the nature of a *quo warranto* in this cause, should not be set aside with costs, on the grounnd that the said order was granted during last Hilary term, when the said judge had no power or authority to grant the same.

It was sworn that the fiat for the summons was granted by the Judge of the Oxford County Court on the 10th of February last, on which day the writ of summons issued, and which day was the first Saturday in Hilary term. On the same day the judge also granted his fiat for a summons against the returning officer. Both summonses issued and were served, but neither of the defendants appeared, and the judge gave judgment against them *ex parte*.

Hagarty, Q. C., shewed cause.

DRAPER, J., delivered the judgment of the court.

The language of 16 Vic. ch. 181, sec. 27, appears too clear to admit of any argument. This section is substituted for the 146th section of 12 Vic. ch. 81, amended by 13 & 14 Vic. ch. 64, sched. A, number 23. It provides that in certain cases, of which the present is one, a writ of summons in the nature of a *quo warranto* shall lie to try the validity of such election, &c. &c., "which writ shall issue out of either of her Majesty's superior courts of common law at Toronto, *upon an order of such court in term time*, or upon the fiat of either of such courts, or of the judge of the county court having jurisdiction over the municipality within which such election shall have taken place *in vacation*."

Rule absolute.

PERRY *v.* BUCK.

Purchase of growing timber—Right of purchaser to bring trespass qu. cl. fr.

The plaintiff had purchased from the Canada Company all the merchantable timber on a certain lot, and held a letter from them (set out below) authorizing him to enter upon the land and mark whatever trees he might choose, and afterwards to cut and carry them away.

Held, that he had not such a possession as would enable him to bring trespass *quare clausum fregit*.

Quære, what remedy he could have for trespasses on the land:—whether he could support an action on the case against the trespasser for interfering with his privilege; or would be compelled to look to the company, treating their letter as an agreement.

12 U. C. B. R. 451.

Trespass *qu. cl. fr.* to lot No. 11 in the seventh concession in the township of Emily, and there prostrating the trees and underwood—enumerating them. 2nd. count, for seizing and taking a quantity of timber.

Pleas. 1st. Not guilty, to the whole declaration. 2nd. To the first count, that the trees and underwood mentioned were not the plaintiff's property. 3rd. To the last count, plaintiff not possessed.

At the trial before *Richards, J.*, at the last assizes held at Peterborough, it appeared that the plaintiff claimed the right to the timber upon the lot under a letter from the Canada Company, as follows:

Canada Company's Office,
Toronto, 1st Dec. 1853.

SIR,—I hereby acknowledge the receipt, per letter of Samuel Strickland, Esquire, of the 18th ultimo, of sixty-five pounds, for the purchase of the merchantable timber and saw logs you may remove from lots twenty-one in the ninth concession and eleven in the seventh concession of Emily before the first day of November, 1855. You are now at liberty to enter upon the said lots, and also your agent and workmen, and cut the merchantable timber and saw logs thereon till the 1st of November, 1855, and carry away the same, but not after that date. In the meantime, should we dispose of the land, the purchasers or lessees shall have the right (which is hereby reserved specially) of clearing and improving, and using whatever unmarked timber they shall find necessary for fuel, fences and buildings. Any dispute arising between you and him or them must be settled without reference to us. You are therefore requested to mark in a conspicuous manner such trees as you may wish to cut. This license is not transferable. Have the goodness to acknowledge the receipt of this letter."

(Addressed to the plaintiff.)

There was no doubt the defendant did cut a considerable number of trees upon lot No. 11, as ascertained by the surveyor, and it was proved that he offered the plaintiff to pay him $1 per tree for what he had cut.

The lot in question was treated by the agent of the Canada Company in the county of Victoria as belonging to the Company, but their title was not proved. It was proved that the plaintiff's agent had gone upon the lot after obtaining the letter before mentioned from the Canada Company.

The learned judge left to the jury to determine whether the plaintiff was in actual possession of the lot, and if not to find for the defendant.

The charge was objected to on the ground that in consequence of the plaintiff having the lines run by a surveyor, that was a taking of possession, and the judge should have so told the jury.

The jury found for the defendant.

Phillpotts obtained a rule to show cause why the verdict should not be set aside on the ground that it was contrary to law and evidence, and for misdirection, and on the ground of surprise.

Eccles shewed cause.

The authorities referred to are cited in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We think, upon the evidence given, it cannot be held that the plaintiff was by his agreement with the Canada Company placed in exclusive possession of the land in question. He had only acquired a right to enter upon the land and mark whatever trees, fit (in his opinion) for making merchantable timber and saw logs he might choose to take. His entry for that purpose would be no trespass; and he had acquired the further right of going afterward upon the premises at any and all times up to the 1st of November, 1855, for the purpose of felling, and preparing, and carrying away the timber and saw logs which he had so indicated his determination to take.

The defendant in going upon the land was no trespasser as to him, for he might have many lawful occasions for going there, for purposes which would not interfere with the privilege which the plaintiff had acquired; and if he had no such lawful occasion for going there, he would be a trespasser upon the owner of the land, not upon the plaintiff, who had only a limited and qualified right of entry. This applies to the alleged wrongful entry upon the premises.

Then as to the timber cut—whose property was it, as it lay on the ground after being cut? Not, we think, the plaintiff's, for he had not yet made it his timber by marking it as timber which he elected to take. The agreement with the company required that he should do this, besides any legal question that might be raised as to the growing timber being capable of being transferred to the plaintiff otherwise than by deed.

The plaintiff, no doubt, ought to have a remedy for such a wrong as he complains of, and we do not see what should prevent his recovering in a special action on the case against the defendant for wrongfully cutting down and taking away the trees, whereby he was obstructed and prejudiced in the enjoyment of the privilege which he had purchased.

That might still depend, however, on whether the plaintiff had acquired the property in the trees, or whether he would