

1856.

Hatch
v.
Fick.

That *Fick* had taken possession of a large quantity of hemlock bark, which had been prepared on the premises, and had also commenced an action of trespass against plaintiff and his workmen for cutting the bark and trees.

The bill prayed a specific performance of the agreement; an injunction to restrain *Fick* from preventing plaintiff from removing the trees and bark; to stay the action at law, and for other relief.

Affidavits were filed on behalf of the plaintiff, clearly establishing the allegations of the bill; and a motion was now made for a decree in the terms of the prayer of the bill.

Argument. Mr. Roaf for the plaintiff.

Mr. Read, contra; admitted that under the facts, as appearing in the evidence, the plaintiff was entitled to the hemlock bark; but contended that the agreement did not give the plaintiff any right to fell the trees for the purpose of obtaining the bark; and asked for time to produce evidence to shew that the bark could be obtained without felling the trees. The cause stood over accordingly, but no evidence having been adduced.

Judgment was now delivered by

Judgment. SPRAGGE, V. C.—The cause has stood over to afford an opportunity for evidence to be given to show that the hemlock bark, which appears to be the main part of the subject of this contract, can be detached from the tree without felling the tree itself; and upon the evidence already before the court, the onus to shew this was upon the defendant. This has not been shewn, and upon the evidence it appears, what indeed was almost self-evident, that the tree must be felled to obtain the bark. Under the contract, therefore, with the defendant *Brown*, the