

contract in this case ought in my opinion, according to its terms, to have been performed within the jurisdiction."

A distinction was sought to be drawn by defendant's counsel between a contract to transfer shares and a contract to convey lands, his contention being that in the latter case, it would be the duty of the purchaser to tender a transfer for execution before seeking specific performance of the contract, and the transfer in this case would have to be tendered to the defendant at Hamilton.

*Mooney v. Prevost*, 20 Grant 418, seems to imply that the omission to tender the transfer before action would at most be merely a question of costs of the action. But apart from that the plaintiff in his statement of claim alleges that the defendant refused to perform the contract and has since conveyed away the lands. Also the correspondence put in by the defendant on this application shews that he did so refuse. It appears to me that under these circumstances the tender of a transfer to the defendant would have been an entirely useless and unnecessary proceeding.

It was also contended by defendant that the correspondence shews that there was no completed contract between the parties and there being no contract there was not one which ought to be performed within the jurisdiction. The ground of this contention is that plaintiff's acceptance of defendant's offer was conditional, viz.: that the construction which must be placed upon the portion of the letter which I have quoted is that the acceptance was subject to the defendant entering into the agreement for sale which plaintiff said he would forward, and that the agreement when forwarded contained conditions other than those stated in defendant's offer. A number of authorities were cited in support of this contention. Reference to them shews that the question is not free from doubt. Such being the case, and as the question is one which goes to the root of the action I think I ought not to dispose of it on this application.

I dismiss the application with costs to the plaintiff in any event on final taxation.

*C. F. Newell*, for the motion. *J. R. Boyle*, contra.