

relevant to the action. It therefore follows that the plaintiff is attempting to do indirectly what he has bound himself not to attempt to do directly, under an agreement which is still in force.

The motion of the defendant is therefore entitled to succeed, and the appointments and orders should be set aside and discharged, with costs in the cause.

The motion by the counterclaiming plaintiffs to have judgment on the counterclaim for default of defence thereto I have not overlooked. It does not, however, seem to be of any assistance to plaintiff on this motion. It was necessary that the counterclaim should be disposed of by being at issue or otherwise. That this must be so before a copy of the pleadings can be certified seems to shew that there can be only one record, and therefore only one trial; except where a trial of a separate issue has been ordered. After some difficulty I have found the case referred to by Mr. Hodgins of which he could not give the name. It is *Alcoy v. Greenhill*, 74 L. T. R. 345. It is on the question as to rights of discovery where the defendants were bringing in alleged guarantors as third parties. It deals rather with the rights arising from this than from the fact that the defendants had counterclaimed.

APRIL 5TH, 1909.

C.A.

ROYAL ELECTRIC CO. v. HAMILTON ELECTRIC
LIGHT AND CATARACT POWER CO.

Sale of Goods—Action for Price—Contract—Failure to Fill Requirements of—Tests—Evidence—Acceptance of Goods by Conduct—Retention—Failure to Notify Vendors—Defects in Goods—Right to Deduction from Price—Counterclaim for Damages—Measure of Damages—Property not Passing—Construction of Contract—Special Terms—Judgment—Reference—Scope of—Interest.

Appeal by defendants and cross-appeal by plaintiffs from judgment of ANGLIN, J., 9 O. W. R. 437.