

I think that the provision that time should be "the essence" applies not only to the time at which the offer was to be accepted, but also to the time at which the offer so accepted was to be carried out.

Had plaintiff been ready to carry out the purchase on 10th October, and had tendered a conveyance for execution, accompanying this with the \$1,400 and the second mortgage called for by the contract, I have no doubt that the transaction would have been closed, and that, though defendant's solicitor had no express instructions to receive money on behalf of his client, such a tender to him would have resulted in the completion of the purchase.

It is quite clear that the purchaser did not intend that the purchase should be completed on 10th October; he upon that day sent a draft conveyance to the solicitor for defendant to be executed by defendant, and said in the letter: "Immediately you notify me that the same is executed, I am prepared to pay over the purchase money at once. I understand that Mrs. Anderson at present resides in Austin, Texas, and I tender this to you as her solicitor and agent in this province." It was apparently intended by plaintiff that the deed should be sent for execution to Texas, and upon the notification to him that the deed had been executed he would then pay over the purchase money. This could not be until 2 or 3 days at least after 10th October.

Not to labour the point that no second mortgage had been furnished, it seems to me that the delay of plaintiff is sufficient to enable defendant to succeed.

However a court of equity would have looked upon a stipulation that time should be of the essence of the contract in the time of Lord Thurlow (*Gregson v. Riddle*, cited by Romilly in 7 Ves. 268), it is clear that such a clause is now as binding in equity as in law: *Fry on Specific Performance*, 3rd ed., sec. 1076.

Cases as to the necessity of a tender have little bearing upon the matter here under discussion. No doubt it has been held that if a tender would have been a mere formality, and would have been refused, it may well be dispensed with. Such are the cases of *Cudney v. Gives*, 20 O. R. 500, and the like. Here it was not merely an omission to tender, but there was the intention not to complete, and I have found the fact to be that a tender made upon 10th October would have been effective.