I think, therefore, the appeal should be allowed and the plaintiffs declared entitled to the relief which they seek, with costs.

OSLER, J.A., for reasons stated in writing, agreed that the plaintiffs were entitled to succeed, and that the defendants' claim for specific performance should be dismissed.

GARROW, J.A.:—. . . The learned trial Judge construed the agreement as creating an option only, and the joint letter as extending for sixty days the period within which the option might be exercised. And I entirely agree with his conclusions upon both subjects. Both are questions of construction depending upon the written language which the parties have used. . . .

I have had much more difficulty in dealing with the next step in the inquiry—did the defendant Marshall duly exercise his option within the sixty days, which expired on the 5th July, 1909. . . . The evidence shews that there never was in express terms either a verbal or written acceptance. MacMahon, J., however, held that the tender made on the 5th July, 1909, was in itself sufficient to prove acceptance. . . .

Having regard to all the circumstances . . . it seems to me a fair inference of fact that the defendants Marshall and his assignee did, within the time allowed by the option, as I have construed it, elect to accept the offer contained in it, and did sufficiently inform the plaintiffs of such election.

The effect of such election was to place the defendants Marshall and his assignee in the position of purchasers upon the terms contained in the agreement, one of which was the payment of the first instalment of $37,500 on or before the 5th July, 1909.

On that day the tender . . . was made. . . . There being circumstances in the evidence qualifying the value and effect of the tender, it becomes necessary to inquire whether, under all the circumstances, the plaintiffs are in a position to complain. And, in my opinion, they are not. They had repudiated the agreement, and, as far as they could, cancelled the authority of the defendants the Royal Trust Co. to receive the money. . . . In the absence of any evidence of withdrawal, the repudiation was in itself evidence of a continuing refusal to perform and a waiver of conditions precedent: see Ripley v. McClure, 4 Ex. 344; Cort and Gee v. Andergate, etc., R. W. Co., 17 Q. B. 127. And this conclusion, derived from the cases at common law, is in conformity with the practice in equity upon the question of tender, which is excused if it is clear, as it is here, that to make it would have been a mere form: see