with all the cases, and that the appeal should be dismissed. The case of *Chatfield* v. *Berchtoldt* (1) cited by Mr. Mackey in which *James* V.C. applied the principle of *Bryan* v. *Twigg* (2), appears to be absolutely indistinguishable from the present case.

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As to costs we think that the appellant and respondents should each pay their own costs. Those of the trustees as between solicitor and client should be paid in the same manner and out of the same fund as was directed in the order of the learned Judge of the Supreme Court.

Appeal dismissed.

Solicitors, for appellant, *Major & Armstrong*, Melbourne.

Solicitors, for respondents, *Gibbs, Heales & Davidson*, Melbourne; *Braham & Pirani*, Melbourne.

B. L.

Appx Burns, Re Ex parte National Mutual Life Assoc v Burns (1992) 117 ALR 174

[HIGH COURT OF AUSTRALIA.]

CANNING . . . . . APPELLANT;
PLAINTIFF,

AND

TEMBY AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1905. PERTH, *Oct.* 18, 19, 26. Griffith C.J., Barton and O'Connor JJ.

Contract—Sale of land — Performance — Reasonable time — Breach — Concurrent conditions—Payment on transfer and delivery of title deeds—Waiver.

On 19th August, 1902, the appellant made the following offer:—" . . . I hereby place under offer to J. T. 'Canning Park West' freehold property, title under Land Transfer Act . . . at £10 per acre." This offer was accepted by T., who further stipulated in his acceptance that payment was to be made on delivery of title deeds and transfer. Before the appellant

(1) 18 W.R., 387. (2) L.R. 3 Ch., 183.

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could transfer the property, it was necessary for her to register a conveyance made to her by her husband some time before. At the time the contract was made the purchaser was aware that the property in question was subject to a mortgage, and that the date of its redemption under a decree for foreclosure was fixed for 1st September. No definite time was fixed in the contract for payment of the purchase money, but the appellant was aware when the contract was made that the purchaser could not pay it until receipt by him of a remittance which might or might not arrive before 1st September. In an action for damages by the appellant for breach of contract by failure to pay the purchase money on or before 1st September:

Held, affirming the decision of the Supreme Court of Western Australia, that under the contract T. was entitled to a reasonable time for its performance: and that under the circumstances no liability for breach arose from his failure to pay the purchase money before 1st September.

Held, further, that the terms in the contract as to payment and delivery of title-deeds and transfer were concurrent conditions; and that, as the time when such delivery and transfer could be made was a matter peculiarly within the knowledge of the appellant, notice by her that she was ready and willing to deliver the deeds and transfer was necessary before the purchaser could be guilty of a breach by non-payment: *Vyse* v. *Wakefield*, 6 M. & W., 442; and *Makin* v. *Watkinson*, L.R. 6 Ex., 25, followed.

On 26th August T. wrote to the appellant to the effect that he could not complete the purchase till he received advices from England. After this date negotiations were continued, as upon the footing of an existing contract, until it became impossible for the appellant to perform it.

Held: That the appellant had lost any right to treat the letter of 26th August as a definite breach of contract.

Principles acted upon by Courts of Law and Equity respectively, in determining the time for the performance of contracts, considered.

APPEAL from the Supreme Court of Western Australia.

Part of the following statement of the facts is taken from the judgment of *Griffith* C.J.:—

This was an appeal from a judgment of the Supreme Court of Western Australia dismissing an appeal from a decision of *McMillan* J. An action for damages for breach of a contract for the sale of real property was brought by the vendor against the executors of the purchaser. The contract was in writing, consisting of an offer and acceptance, as follows: "19th August, 1902. In consideration of 10/- now paid to me, I hereby place under offer to John Temby 'Canning Park West' freehold property, title under Land Transfer Act . . . at £10 an acre." This was signed by the plaintiff, and underneath it, on the same page, was

written, "I agree to purchase the above described property at the price specified above, payment to be made on delivery of title deeds and transfer. J. Temby." The statement of claim alleged an agreement that the plaintiff should sell and that Temby should purchase the land at the price of £10 per acre cash, and that upon payment of the purchase money the plaintiff should execute to Temby a proper conveyance or transfer of the land. It also contained an allegation that Temby specially agreed with the plaintiff on the same day that the purchase money should be paid by him to the plaintiff on or before 1st September, 1902, so that the plaintiff might prevent foreclosure of a mortgage of the land being made on that day. The statement of claim also set out that an order for foreclosure of a mortgage had been made in an action by the mortgagee against the plaintiff, the date for redemption being fixed on 1st September, upon which date the foreclosure was to become absolute. It appeared from the evidence that the purchaser was aware of this order for foreclosure, and was aware, therefore, that, unless the mortgage debt was paid off by that date, the vendor's title might come to an end. It was known also to the parties that the purchase money, which was £10,000, was not at the immediate command of the purchaser in Australia, but that he expected to get it from England, the time when it would be received being uncertain.

On 26th August, a week after the date of the contract, the purchaser wrote to the vendor saying: "I am very sorry my cables have not come from England, and until they come it is impossible to do anything. If I do not get them before I leave here I will get them in Adelaide, if so will do as agreed." The last passage was thought by the learned Judge who heard the evidence to refer to some arrangement made verbally on that day between the vendor's husband and the purchaser that he would, if possible, pay off the mortgage which was due on the 1st of September, but had no reference to the payment of the balance of the purchase money. On the same day Temby went away from Western Australia, and on 2nd September he wired to the plaintiff from Melbourne, saying that he had no news from London but would wire as soon as it came. On September 5th, the plaintiff wrote to Temby as follows:—"If I can save the property now and

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with your help I hope I shall do so, I am certain that in a few months we shall be able to sell the property for a good sum."

The action was tried before *McMillan* J., who gave judgment for the defendants.

Haynes K.C. (with him *Foster*), for the appellant. The contract was complete on 19th August, and the cause of action arose on 1st September. The tendency of modern decisions is to hold persons concerned in contracts relating to land, bound, as in other contracts, to regard time as material. Time was of the essence of this contract in the sense that it was be performed within a reasonable time. The correspondence between the appellant and Temby showed that the latter knew of the existence of a mortgage over the property in question, and that, before a transfer could be effected, it was necessary for the appellant to pay off the mortgage. This could not be done before receipt of the purchase money. Temby was aware that the period of redemption of the mortgage was to expire on 1st September. There was no definite agreement proved at the trial for payment of the purchase money before 1st September, but, under the circumstances, that must be taken to have been a reasonable time. It was not necessary to show that the original contract in writing was varied, and therefore *Noble* v. *Ward* (1) does not apply. [He also cited *Hickman* v. *Haynes* (2) and *Goss* v. *Lord Nugent* (3).]

[GRIFFITH C.J. referred to *Johnstone* v. *Milling* (4).]

Unless the cause of action was complete on 1st September, it could never arise at all, as Temby in effect purchased a title which was only open up till that date.

[GRIFFITH C.J.—The plaintiff did not treat the contract as at an end on 1st September.]

No, she tried to keep the foreclosure open, but without prejudice to her rights. In contracts of this kind, there are implied undertakings on the one hand to deliver within a reasonable time, and on the other to pay the charges upon the property in question: *Buddle* v. *Green* (5). [He also cited *Anonymous* (6).]

(1) L.R., 2 Ex., 135.
(2) L.R., 10 C.P., 598.
(3) 5 B. & Ad., 58.
(4) 16 Q.B.D., 460.
(5) 27 L.J., Exch., 33.
(6) Barn. C., 221.

[GRIFFITH C.J. referred to *Hick* v. *Raymond and Reid* (1).]

Northmore, for the respondents. As there was no time specified in the contract and as no notice was given, the appeal cannot be sustained. Assuming the contract had to be performed within a reasonable time, appellant must show that she gave notice that in default she would treat the contract as broken. There was no evidence that Temby was informed that, unless he found the money by the 1st September, the contract would be at an end: *Macbryde* v. *Weekes* (2).

[GRIFFITH C.J.—None of the cases require notice to be given except where the contract is intended to be rescinded.]

If it was intended to fix a time certain for performance, it should have been in the contract. All the cases show either that a time is specified or else that one party is given the right to fix a time.

[GRIFFITH C.J.—Could not the circumstances of the case determine what is a reasonable time ?]

The time for the performance of the contract must be reasonable having regard to the circumstances of both parties. The appellant knew that Temby could not complete until the arrival of the money from London and was therefore bound to regard that circumstance in estimating what was a reasonable time. The plaintiff had also to show she was ready and willing to perform the contract, and should have given notice to Temby to complete on a certain date. Tremby was not responsible for delay arising from causes beyond his control: *Taylor* v. *Great Northern Railway Co.* (3), so long as the circumstances were within the knowledge of both parties: *De Waal* v. *Adler* (4). The evidence does not show that it was agreed that the contract was to be completed on 1st September, or even that Temby knew that was the date of the foreclosure. Assuming that a term must be imported into the contract for performance on 1st September, even then the plaintiff must show she was ready and willing to carry it out on that date. Temby's letter of 26th August to the

(1) (1893) A.C., 22, at p. 29, *per* Lord *Herschell* L.C.
(2) 22 Beav., 533, at p. 539, *per* *Romilly* M.R.
(3) L.R. 1, C.P., 385.
(4) 12 App. C., 141.

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effect that, if he did not get his cables before leaving Perth, he would probably get them later and would then do as agreed, cannot be said to be a renunciation of the contract, nor was his conduct such as to show an intention to be no longer bound by the contract: *Freeth* v. *Burr* (1). Even if it were, the renunciation does not by itself amount to a breach of the contract unless acted upon and adopted by the other party as a rescission. The appellant still treated the contract as subsisting by her letter of the 5th September, in which she speaks of "keeping open the foreclosure" and "saving the property," with Temby's assistance. She cannot proceed with the contract on the footing that it still exists for other purposes and also treat the alleged renunciation as an immediate breach: *Johnstone* v. *Milling* (2). The conveyance of the property and the payment of the money were to be concurrent acts, and the conveyance could not be made until the appellant cleared her title: *The Thames Haven Dock & Railway Co.* v. *Brymer* (3); *Webb* v. *Hughes* (4).

Haynes K.C. in reply.

Cur. adv. vult.

Oct. 26.

GRIFFITH C.J. [after stating the facts as previously set out, continued:—] At the trial the plaintiff failed to prove a valid agreement in writing to pay the purchase money on or before 1st September, as alleged in the statement of claim, and plaintiff's counsel then fell back on the doctrine that, where no time for completion is specified in a contract, the law implies that it is to be performed within a reasonable time. That is, no doubt, a sound proposition, and if the first of September was a reasonable time for completion by the purchaser, having regard to all the circumstances of the case, and having regard also to the true meaning of the term, then the plaintiff's cause of action was complete, and it was only a matter of assessment of damages. It is clear that the vendor in the present case cannot maintain a suit for specific performance since she has no longer any title, but that is no answer to an action for damages for a breach of contract by the other party. *McMillan*

(1) L.R. 9 C.P., 208.
(2) 16 Q.B.D., 460, at p. 467, *per* Lord *Esher* M.R.
(3) 5 Exch., 696.
(4) L.R. 10, Eq., 281.

J., who tried the case, was of opinion that, under the circumstances, the first of September was not a reasonable time, so that the contract could not be construed as a contract to pay the purchase money on or before 1st September; he was also of opinion that the contract alleged was not proved, and for these reasons he gave judgment for the defendants. The case was then brought to the Full Court, where judgment was delivered by *Parker* J., with whom *Burnside* J. concurred. *Parker* J. agreed that, under the circumstances, it could not be said that the first of September was a reasonable time in the sense that an action would lie for damages for mere non-payment by that date. He was also of opinion that in this case time was not of the essence of the contract; and he applied the equitable doctrine that, when time is not originally of the essence of a contract, notice must be given by one party to the other fixing a reasonable time for completion, which had not been done. The appeal was therefore dismissed. The equitable doctrine is under the *Judicature Act* to be applied in common law actions as well as in proceedings for equitable relief. At common law it was said that, in the case of the sale of land, time was of the essence of the contract. That doctrine, however, only applied when a date for completion was named in the contract. It was held that when a date is so mentioned, there are mutual promises to complete on the appointed day, and that, on failure of either party to do his part on that day, he lost all rights under the contract, and became himself liable to an action for damages. The Equity Courts, on the other hand, treated a failure to complete on the appointed day as a failure in a collateral matter, analogous to failure to pay off a mortgage upon the due date, in which event the mortgagee's title would at law become absolute. At common law, if an action were brought for damages for failure to complete on the prescribed date, the party in default had no answer to the claim; but it was a complete answer to the action to say that the plaintiff was, himself, not ready and willing to perform the contract upon that date. In equity, however, that would not be an answer to a claim for specific performance by a party who had not been ready to complete on the appointed day, unless it appeared to the Court that it would be unjust not to allow the defendant to take advantage of the plaintiff's

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failure. The doctrine, therefore, that time is not of the essence of a contract is a doctrine applied in relief of a party who is himself technically, but not substantially, in default, so as to allow him to claim specific performance in a proper case, although at law he could not maintain an action. The Courts of Equity never held that a party who had made default in performance of his contract was not liable for damages for the breach, but they treated the stipulation as to time not as a condition, but as an independent term of the contract, the breach of which might be compensated for by damages. Of course, a party asking specific performance of a contract, notwithstanding that he was himself in default, could only obtain that relief on doing what was fair to compensate the other party for any loss by reason of his default. When time was not originally of the essence of the contract, either party desiring to fix a definite time for completion, so as to entitle himself to rescind the contract on failure to complete within the time, was required to give notice to the other party to complete by a named day, which was required to be reasonable, *i.e.*, at not too short an interval. The effect of this notice, however, was not to confer an offensive right or complete a cause of action, but to confer a defensive right in equity as well as at law to take advantage of the other party's default. I do not think, therefore, that the plaintiff's failure to give a notice appointing a day for payment of the purchase money is material to her claim for damages for breach of contract except so far as such a notice, if given and not attended to, would have been an element in considering whether the purchaser had failed to perform his contract within a reasonable time. In one sense, of course, time is always of the essence of a contract to be performed within a reasonable time. But that is not the sense in which the term "of the essence" is used. In my opinion the only question in this case is whether the plaintiff has made out a case at law. The learned Judges were, as I have already said, of opinion that, under the circumstances, it could not be said that the 1st of September was a reasonable time for completion in the sense that the defendants by mere non-payment upon that date committed a breach of contract. What is a "reasonable time" must depend upon circumstances. In the case of a contract for the sale of mining shares of

uncertain value, where no time for completion is specified, it would clearly be necessary that the purchaser should be ready and willing to complete and pay within a tolerably short time, and that the vendor should be ready and willing to transfer within a similar time. So, in the case of the purchase of an option, if both parties knew that the option would only last for a few days, and no time was specified, it must be taken that it was in the contemplation of the parties that a reasonable time was a period not later than the expiration of the option. From the point of view of rescission of a contract "reasonable time" has a somewhat different meaning, as I have shown, but that is only relevant to specific performance. Can it then be said in this case that the first of September was a reasonable time in the sense that either party failing to complete by that date would commit a breach of contract? It is very difficult to say that it was. The money, as both parties knew, was to come from London, and might or might not be here at the time appointed for redemption of the mortgage. Again, the title of the plaintiff was incomplete; she was not the registered proprietor of the land, and it was necessary before she could transfer to register a conveyance from her husband to her, which had been made some time before. It appears also that there was a second mortgage upon the property, of which she at that time was ignorant. Under these circumstances I agree with the learned Judges in the Supreme Court that it cannot be said that there was an absolute breach of contract by the mere failure to pay upon the 1st of September.

There is another answer to the plaintiff's claim arising upon the terms of the contract itself. By the acceptance of the offer it was made a term that payment was to be made "on delivery of title deeds and transfer." I take that to mean that payment was to be made as soon as the vendor was ready to deliver the title deeds and transfer. When that time would be was a matter within the knowledge of the plaintiff and not of the defendant. The law as to the construction of a stipulation as to a matter of that sort was thus declared by Lord *Abinger* C.B. in the case of *Vyse* v. *Wakefield* (1): "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with

(1) 6 M. & W., 442, at p. 452.

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which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given to him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle, it is quite time that they should be overruled." In the later case of *Makin* v. *Watkinson* (1), *Bramwell* B. referred to that rule, and showed that it was derived from very ancient authority, the earliest of which was in the time of James I. He said: "If we look to the reason of the rule, it is, that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary."

Applying the rule formulated in those cases to this particular contract, I think that the statement of claim is defective (and the defect could not be cured), in not averring that notice was given to the defendants that the plaintiff was ready and willing to execute a conveyance upon a date mentioned in the notice, and that such time was a reasonable time to enable the defendants to find the money. For these reasons I am of opinion that the plaintiff's claim fails, both as a matter of pleading and upon the evidence.

It was further contended that, under the circumstances of the case, the statement made by the purchaser on 26th August, to the effect that he had not received the money and could not do anything until he did, may be treated as an absolute refusal to perform the contract. If it could have been so treated, the plaintiff had the option to treat it accordingly and bring her action forthwith. She did not, however, do so, and it appears that she still continued negotiations with the purchaser up to the middle of September, having apparently arranged with the mortgageee that, if the money should be paid before the end of September, he would not enforce the foreclosure. In *Johnstone* v. *Milling* (2), the Court of Appeal dealt with this doctrine. I will read a passage from the judgment of Lord *Esher* M.R. (3):—"When one party assumes to renounce the contract, that is, by anticipation

(1) L.R. 6 Ex., 25, at p. 30.
(2) 16 Q.B.D., 460.
(3) 16 Q.B.D., 460, at p. 467.

refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."

So in the present case, if the letter of 26th of August could be, and had been, treated as an unequivocal renunciation of the contract, the plaintiff might at once have brought an action upon it. But I cannot see that that letter can be construed as such a renunciation. On the contrary, it was, to my mind, an expression of intention to carry out the contract if the money came, and not a refusal to carry out the contract in any event. The words are "If I do not get the money before leaving here, will probably get it in Adelaide, and if so will do as agreed." That, so far from being a renunciation, is an expression of intention to perform the contract, if possible. Further, in my opinion, the conduct of the plaintiff is inconsistent with the idea of her treating the latter as a refusal. On 5th September, in reply to the wire from Melbourne, she wrote: "If I can save the property now (and with your kind help I hope I shall do so) I am certain that we shall be able to sell the property within a few months for a good sum." On both grounds therefore this point fails, and the plaintiff is thrown back upon the terms of the original contract. For the reasons which I

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have given, I think that she could not sue for damages upon that contract until after the refusal of the defendant to pay the purchase money within a reasonable time after notification by her that she was ready to complete the transfer. At common law I think the plaintiff has not made out any case, and, in my opinion, the doctrines of equity do not come into the matter.

BARTON J. I am of the same opinion. The doctrine which guides the Court in decreeing specific performance, where time is not of the essence of the contract, has no application in a case like this, where the contract can be enforced only on common law principles. It is clear that the plaintiff has altogether failed to establish a right to succeed. Whether the 1st September was a reasonable time or not for the performance of this contract it is unnecessary in my judgment to consider, because the contract contains a condition precedent to completion that there should be a delivery of title deeds and transfer by the plaintiff before payment. Not only is the statement of claim defective in failing to allege the performance of this condition, but, passing that over, there is no evidence of its performance. In view of the surrounding circumstances this is perhaps a case of great hardship upon the plaintiff, who has made an abortive contract, and has thus failed to save a valuable property. The plaintiff, however, was bound to deliver title deeds and transfer in order to become entitled to payment, and also on the authority of *Rippingall* v. *Lloyd* (1), she was, at any rate, bound to notify the purchaser of her readiness and ability to do so. That was a case in which it was held that, where a vendor covenanted to deduce a good title at A, B, or C, on or before a certain date, a plea that he was ready to deduce a good title at that time was held bad for want of an averment of notice to the covenantee of the place at which he would be ready to deduce title. So here, before the plaintiff could establish a claim to damages for non-payment, she was bound to show that she had given the purchaser the proper opportunity to make it by notifying him of her readiness to deliver the title deeds and transfer, being then able so to do. This she has failed to show.

(1) 2 N. & M., 410.

In my opinion therefore the action fails, and the appeal must be dismissed.

O'CONNOR J. I also am of opinion that the Supreme Court of Western Australia arrived at a right conclusion in this matter. The plaintiff in stating her cause of action alleges that John Temby specially agreed with her that the purchase money should be paid on or before the 1st of September, 1902, so that the plaintiff could prevent an order for foreclosure over the land in question being made absolute. The plaintiff on that statement of claim cannot succeed unless she proves that such a contract was entered into by John Temby. The contract is in writing, and the only reference to payment are these words: "Payment to be made on delivery of title deeds and transfer." Although the time mentioned by the plaintiff, the 1st September, was not specified in the contract, she endeavours to maintain that it was a term of the contract by showing that it is an implied term of the contract that payment should be made within a reasonable time, and she contends that, under the circumstances proved, the 1st September was a reasonable time; in other words, that there could be no completion within a reasonable time, unless on or before the 1st September. As it is admitted there was no completion on or before the 1st September, she insists therefore that the defendant has failed to carry out the contract. Before I refer to the expression "reasonable time" I wish to make some observations as to the contention that time was of the essence of this contract. There are only two sets of circumstances in which that doctrine can be applied; one, where a specific date for completion is stated in the contract; the other, where, although no specific date is mentioned in the contract, a notice has been given by the party who wishes to insure completion within a specified time that the completion must take place within the period notified otherwise the contract will be rescinded. In *Macbryde* v. *Weekes* (1) there was a contract of the latter kind under the consideration of the Court, and it was there held that, although there was no time for completion stated in the contract, it would be taken that the completion must be within a reasonable time, and that it was open to the

(1) 22 Beav., 533.

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party seeking completion to give notice that there must be completion on or before a certain date. Under such circumstances it was for the Court to say whether the date mentioned in the notice was a reasonable date for completion; and if the Court held that it was a reasonable date, then that date became the date for the completion of the contract, and the Court would hold, if the other circumstances so justified, that there must be a completion on that date, and that time in respect of that date became of the essence of the contract. As neither of these sets of circumstances arise here, the doctrine is inapplicable. The case then is that of a contract which must be completed within a reasonable time, and in the construction of contracts of that kind there is no difference in rules of construction at law or in equity. *Sir John Romilly* M.R., in the case of *Parkin* v. *Thorold* (1), states very concisely the view which the Court of Equity takes of the interpretation of contracts. He says, "A contract is undoubtedly construed alike both in equity and at law; nay more, a Court of law is the proper tribunal for the determining a construction of it; and if a serious doubt should arise as to the effect of the words contained in a contract, a case would be directed to a Court of law for its opinion" (this practice has been altered) "as to the true construction to be put upon the words, which construction would be adopted in equity. But Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find, that by insisting on the form, the substance may be defeated, it holds it to be inequitable to allow a person to insist upon such form, and thereby defeat the substance."

It was upon that ground that the Court of Equity took upon itself to examine a stipulation as to time of completion and to determine whether it was a matter of form and substance. The doctrine can have no application here because, as I have said, there is no time fixed for completion in the contract, nor has a notice been given fixing the time for completion within the doctrine of the case I have mentioned. Now, a Court of Equity and a Court of Law look at a contract to be completed within a reasonable time in exactly the same way. The Court of Equity will no more

(1) 16 Beav., 59, at p. 66.

permit an unreasonable delay in carrying out the contract than will a Court of Law; the case therefore stands in the same position as if this were an action at common law for failing to complete a contract within a reasonable time. The plaintiff has failed, in my opinion, to establish that, under all the circumstances of the case, a reasonable time for completion means on or before the 1st September. Both parties no doubt were aware of the vital importance of completing the matter by the 1st September, but both parties also knew that the money had to be arranged for in England, and that the payment was to come from England, and they must have been aware that the time of the remittance of that money was uncertain, and the evidence taken altogether would appear to show that, although it was of the utmost importance that this purchase should if possible be completed on the 1st September, both parties were aware of circumstances which might, without default on either side, make the completion on the exact date impossible. Then again, look at the conduct of the parties—and we may look at their conduct after the making of the contract as well as before in order to determine what was in their minds as to date of completion when the contract was made, and what was their view at that time of completion by the 1st September being essential to a reasonable compliance with the contract. We find, all through from the time of the making of the contract, Temby indicating by correspondence and conduct that he was doing his best to get the money by the 1st September, and that he would complete by that date if possible, whilst on the part of the plaintiff there was no expression of surprise or protest as to delay in completion, nor did she at any time in the correspondence after that date take up the position that the contract had been broken by failure to complete on the 1st September. She seemed rather to hope and expect that the money would arrive, although after that date, in time to save the property from the threatened foreclosure. Indeed, when we look at the plaintiff's letter of the 5th September, it is quite evident that, so far from insisting that the purchase should have been completed on the 1st of September, she was expecting relief under some different arrangement which was then guiding the actions of both parties. The plaintiff then writes: "If I can save the property now . . .

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O'Connor J.

I am certain we shall be able to sell the property within a few months for a good sum. As you are aware it is a valuable estate and your principal and interest will be paid you in full." That was written only four days after the date upon which it is alleged Temby was bound to complete the contract. I need not refer in more detail to the written words or conduct of the parties. The whole correspondence and actions of the parties prove conclusively to my mind that there was no understanding that the 1st September was to be the date of completion, or that it was ever within their contemplation that completion by that date was the only reasonable compliance with the contract. *McMillan* J. who had the advantage of hearing the evidence has given strong reasons, in which I entirely agree, for his decision upon the facts. With regard to the second point mentioned by my learned brother the Chief Justice, that under the terms of this contract the plaintiff could not succeed, whether completion by the 1st September was reasonable or not, without notifying that she was ready and willing upon that date to carry out her part of the contract, I entirely concur with his reasons and his conclusions. I agree that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitor, for appellant, *W. T. Forster.*

Solicitors, for respondent, *Northmore, Lukin & Hale.*

H. E. M.