

That the omission is an omission of an essential part of a contract I can have no doubt; and if so how can there be specific performance? Specific performance of what? Of what in respect of the mortgage? It must be of something the parties had never agreed upon. It must, in that respect, be a Court made contract not the contract of the parties.

It does not follow that if the plaintiff cannot have specific performance in this case, no one can have specific performance in any case in which the parties have not expressly agreed upon all the details of the sale; that is far from being so; much may be tacitly agreed upon; and the law sometimes covers terms which need not be expressed. But where essential things are not provided for expressly or tacitly or otherwise there is not a completed agreement; there is not an enforceable contract.

The fact that delivery and payment are generally concurrent acts cannot apply, because, expressly, in this case, payment is to be of only about one quarter of the price, the "balance to be arranged by mortgage bearing 6% interest."

It is plain, from that which is expressed, that neither party was to be at liberty to fix the mode and time of payment under the mortgage. That was to be "arranged" by the parties; and was a thing of substance, of very considerable importance, about which there might be wide differences of opinion; even eventually an inability to agree upon them.

The subject was discussed recently in the case of *Reynolds v. Foster*, 23 O. W. R. 933; and so I shall not now say anything more upon the subject which would be but a repetition of that which was in that case said.

On this ground the action will be dismissed, and the defendant may have his costs of it, limited however to such only as relate to this branch of the case and which would have been incurred if the speediest mode of bringing this question alone up for consideration had been taken.

The other branch of the case involves several questions of considerable difficulty such as the relationship of the witness Oates to the parties in the transaction; whether any misrepresentation respecting the land was made by him; and if so what would be the effect of it; questions which need not now, and so, as I think, ought not now, to be considered; nor anything further said upon the subject except this: that there was nothing in the demeanour of any of the witnesses which in itself would incline me to discredit him or her.