

Apart from and in addition to the action brought by plaintiffs against defendant upon the note, they commenced another action by writ issued on 27th January, 1904, for damages for breach of contract. This, so far as appears, went no farther than the writ — at all events it was not brought to trial.

Defendant now contends that plaintiffs, by bringing that action for damages by reason of defendant's default, treated the contract as at an end, and defendant invokes the provision in the contract that "upon default the contract shall be null and void." If plaintiffs had proceeded with their action and had been defeated, or had recovered damages, the matter would have been different, but not having done so, defendant never having given up possession of the land, and having regard to the agreement of 10th March, 1905, I must treat the former agreement as in force as of that date.

It is contended that, as there was no conveyance of the lands to defendant, no part of the purchase price agreed upon can be recovered from him. In the absence of special agreement, the actual conveyance of the land delivered or ready for delivery is a condition precedent to the recovery of purchase money, but here by express agreement the conveyance was not to be made until payment of 3-5 of the purchase money, together with all interest, had been made.

I find that defendant is liable for the instalment which fell due on 23rd June, 1904.

The rights of the parties must now be determined as they stood on 10th March, 1905. At that time plaintiffs could not have successfully sued for the instalment falling due on 23rd June, 1905. That agreement does not provide for future instalments. After that agreement was executed, plaintiffs were not at any time able to convey to the defendant from whom they were demanding payment. They were demanding payment of something of right theirs, and as to which their right was protected and continued by the agreement, and they were demanding a further sum not recoverable by plaintiffs from defendant on 10th March, 1905, and so not recoverable now. Plaintiffs as to anything maturing after the date of the last agreement are in the same position as if they had taken possession by reason of defendant's default and sold the property to another. To entitle plaintiffs to sue now, apart from what the agreement permits, they would have to be in readiness to do their part. See