clear of all incumbrances save and except a mortgage for $1,000, which the plaintiff was to assume and pay off, and commanded that on payment of the said sum of money he would convey and assure to the plaintiff by a good and sufficient deed in fee simple with the usual covenants of warranty the said land freed and discharged from all incumbrances. The breaches relied on were that at the date of the agreement the land was incumbered by arrears of taxes, $50, amount due on the mortgage over and above the $1,000, $170, and by registered judgments to the amount of $2,600. The plaintiff never paid anything under the agreement as the mortgagee had already taken proceedings to sell under the mortgage, and afterwards sold and conveyed the land to another person under the power of sale in the mortgage.

Held, 1. The damages claimed were not a "sum of money secured by any mortgage, judgment or lien or otherwise charged upon or payable out of any land or rent" within the meaning of s. 24 of "The Real Property Limitation Act," R.S.M. 1902, c. 100, and therefore the right of action was not barred under that Act by the lapse of more than ten years.

Sutton v. *Sutton*, 22 Ch. D. 511, and *Fearnside* v. *Flint*, 22 Ch. D. 579, distinguished. *In re Power*, 30 Ch. D. 291, followed.

2. It was not a condition precedent to the plaintiff's right to call upon defendant to fulfil his covenant that the plaintiff should first pay the $1,000 to the mortgagee. The language of the printed part of the agreement would bear out that view, but in that respect it was inconsistent with the written portion from which it was clear that it was not the intention of the parties that the mortgage should be paid off before the defendant should convey.

3. A covenant to convey clear of incumbrances is not the same as a covenant that the land is free of all incumbrances. In the latter case the covenant is broken the moment it is made if there are incumbrances in existence, but in the former there is no breach until the covenantee has suffered damage: Blythewood & Jarmans' Conveyancing, at p. 309. There being no evidence that any of the judgment creditors had attempted to enforce their judgments, the mere existence of them was not a breach of the defendant's, covenant and the plaintiff's right to recover should be limited to the amount by which the mortgagee's claim at the date of the agreement exceeded $1,000.

Wilson, for plaintiff. *Haggart*, K.C., for defendant.