COCHRAN V. BOUCHER.

Absence of Judge when judgment delivered—Subsequent delivery of judgment.

In this case judgment given by Wilson, C. J., and Galt, J., Osler, J., not being present, being engaged with assizes, was declared invalid in consequence of Wilson, C. J., having delivered the judgment at the trial. Subsequently Osler, J. delivered judgment concurring that the order should be discharged, and the other Judges affirmed their judgments previously delivered.

Lash, Q. C., for the plaintiff.

Moss, Q. C., for the defendant.

CHANCERY DIVISION.

Boyd, C.] [Dec. 12, 1883.

HAMILTON PROVIDENT LOAN CO. V. CORNELL.

Action of deceit against personal representative.

G. & M. were partners, and by the terms of their dissolution G. held the lands in question as security for a lien of $525. He with others entered into a scheme to defraud any company who would lend $1125 on the security of the land, by getting a deed (shewing the consideration money at $2250) executed by G. to C. and taking a receipt from G. for $1125 in part payment. The receipt was drawn up by M. but no evidence was given to shew that G. knew of M.'s fraudulent scheme, and the deed as executed was left in G.'s solicitor's hands as an *escrow* awaiting the payment of the $525. G. then died, plaintiffs becoming aware of his death a few days afterwards. Subsequently to their becoming aware of his death, on the recommendation of their own valuator, they lent $1125 on the property, (the actual value of which was perhaps $250). The receipt being sent to the plaintiffs' solicitors about the time the advance was made, S., who was G.'s administrator, knew nothing of the receipt or of the facts, except that he had a lien for the $525. The $525 was paid out of the proceeds of the loan.

Held, that an action of deceit would not lie against G.'s personal representative whose assets had not been increased by the fraud, as the receipt or representation had not been acted upon until after the plaintiffs had knowledge of G.'s death.

Idington, Q. C., for administrator.

Muir, for plaintiffs.

Boyd, C.] [November 21.

MCKAY V. HOWARD.

Short form mortgage — Added provisions—construction R. S. O. c. 104.

This was an action for wrongful distress under the following circumstances. A mortgage was made by the plaintiff to one Taylor to secure $3 600 and interest. It was in the statutory short form, except that immediately after the printed covenant for payment the following words were inserted: "it being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause was printed in its usual place, viz., after the covenants. The defendant to whom this mortgage was assigned, when an instalment of interest fell due, distrained for it. The plaintiff, to prevent their goods being taken away, paid the interest to the bailiff under protest, and then brought this action.

Held, that the plaintiff was entitled to judgment for a return of the amount levied by distress and paid under protest, with interest and costs, for the earlier provision of the mortgage controlled the subsequent ones, both because first in the deed, and because it was in writing, whereas the others were the usual printed provisions, for the words superadded in writing were entitled to have a greater effect attributed to them than the printed.

Principle of construction laid down in *Robertson* v. *French*, 4 East, 136, and *Gunn* v. *Tyrie*, 4 B. & S. 713 followed.

W. Cassels, Q. C., and *Gregory Cox* for the plaintiffs.

John McKeown for the defendant.
