REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 21, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER, JJ., DUNKIN, J. *ad hoc.*

AITKIN (plff. in the court below), APPELLANT; and THE NATIONAL INSURANCE COMPANY (defts. below), RESPONDENTS.

Insurance—Increase of Risk.

An insurance was effected on a saw-mill, without disclosing the fact that the building contained a planing machine. *Held*, this was a material fact which it was incumbent on the insured to disclose, and the concealment of it rendered the insurance null and void.

The judgment appealed from was rendered on the 7th July, 1877, by the Superior Court, Montreal, Rainville, J., the principal *motif* being as follows :—

"Considering that it is proved there was in the building a planing machine which was in operation before and at the time of the fire, and that this increased considerably the risk and chances of fire."

DORION, C. J., said that the action was brought upon a policy of insurance issued by respondents on a saw mill and machinery, situated at Acton. There were a number of pleas, one of which was that it was not disclosed at the time of the insurance, that the saw mill contained a planing machine, and that this planing machine increased the risk ; that this was a material fact which it was incumbent on the insured to disclose, and that the concealment of it rendered the insurance null and void. Another plea set up that it was one of the conditions of the policy, that the mill, which was a steam saw mill, should not be worked by night without the written permission of the Company being obtained, and that the mill was worked at night without permission. There were also pleas of over valuation, &c. The Court below dismissed the action on the ground that the insured had not disclosed that there was a planing machine in the saw-mill, and that this was a material fact, the risk being thereby increased. It appeared that Mr. Johnson, who owned the mill, had an insurance in the Canadian Mutual, and his agent went to the National, and asked them if they would take it, as the Mutual was giving up business. The National took over the risk, without a new application being filled in. The original application was produced, and the planing machine was there described, but there was no evidence that the Company, defendant, ever saw the application. There was no fraud to be imputed to Mr. Johnson, but where a material fact is not disclosed, the insured could not recover. The Court was of opinion that the risk was materially increased by the fact that the planing machine was in the mill ; and there was also the fact that the mill was worked at night without the consent of the Company. On both grounds the judgment was right, and it must be confirmed.

Doutre & Co. for appellant.
Lunn & Davidson for respondents.

FULTON (plff. below), Appellant; and MCDONNELL et al. (defts. below), Respondents.

Sale—Covenant.

Under a covenant to sell and convey "all the estate right, title, interest, claim or demand" that the vendors had in certain lots specified, an action for damages cannot be maintained against the vendors for failure to deliver the whole of the lots mentioned, where they had included by mistake a lot to which they had no claim.

DORION, C. J., said that the representatives of the late Hon. Alexander Grant, in 1874, agreed by a writing to sell to the appellant, John Fulton, certain lots of land at Cote St. Antoine. The writing was in these terms : "We, the undersigned heirs of the late Hon. Alexander Grant, hereby agree to sell and convey to John Fulton, all the estate, right, title, interest, claim or demand, that we, or either of us have, or may have, as heirs of the late Hon. A. Grant in, to or out of 14 lots of land (numbers of lots mentioned), being part of what is known as the "Fisher Farm." It appeared that when the vendors came to fulfil the contract, it was found that lot No. 16, (one of those enumerated in the agreement) did not belong to the heirs Grant, and that it had been included in the sale by error. The purchaser not being able to get this lot, instituted an action of damages, to which the vendors pleaded that they were not bound to