

1893

## BOULTON v. SHEA.

\*Nov. 7, 8. *Lessor and lessee—Crown lands—Arbitration and award—Use and occupation—Action for possession—Condition precedent.*

1894

\*Mar. 13. **APPEAL** from a decision of the Court of Appeal for Ontario affirming the judgment of the Queen's Bench Division which dismissed the appellant's action.

The Algoma Trading Co., one of the appellants and plaintiffs, leased certain crown lands to the respondent Shea, the lease containing a covenant by Shea not to remove gravel or sand from the premises. Shea afterwards ascertained that no patent for the land had been issued to the company and applied to the Crown Lands Department for a patent thereof to himself and also sold gravel off the premises to the Canadian Pacific Railway Co. The plaintiff Co. then pressed the claim they had previously made to the Department and the Commissioner of Crown Lands ruled that it should issue to them on payment to Shea for his improvements. Shea refusing to agree to any terms of compensation the company served him with a notice of arbitration and an award was eventually made which was not taken up as Shea refused to pay his share of the arbitrators' fees. The company having assigned their patent to the plaintiff Boulton, an action was brought by him and the company against Shea claiming arrears of rent, payment for use and occupation, damages for breach of the covenant not to remove gravel and delivery of possession.

The Supreme Court, Gwynne J. dissenting, affirmed the decision of the Court of Appeal that plaintiffs were not in a position to bring the action until Shea had been paid for his improvements.

*Appeal dismissed with costs.*

*MacGregor* for the appellants.

*Watson Q. C.*, for the respondents.

\*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.