

MEREDITH, C.J.]

[July 14.

IN RE TORONTO, HAMILTON AND BUFFALO R. W. CO. AND BURKE.

Railways—Arbitration—51 Vict., c. 29, sec. 150 (D.)—"Opposite party"—Mortgagor and mortgagee.

Certain land having been taken by the company for the purposes of the railway, an offer of a sum of money as compensation therefor was made to Burke, the owner of the equity of redemption, and Farr, the mortgagee, jointly. The mortgagee accepted the offer, but the owner of the equity stood out for a larger sum. Thereupon the company gave notice of arbitration under the Dominion Railway Act, and appointed an arbitrator; Burke appointed an arbitrator on his behalf: and the two so appointed named a third. The board thus constituted proceeded to take evidence; but the company, not being satisfied that the proceedings were regular, made a motion for an order appointing a sole arbitrator under the statute as in a case of default of appointment by the land-owner.

Held, that the words "opposite party" in sec. 150 of the Act, 51 Vict., c. 29 (D.), must be read distributively so as to include both mortgagor and mortgagee, and that both not having concurred in the appointment of an arbitrator, the case was in the same position as if no arbitrator had been appointed by the land-owner; and an order was made appointing a sole arbitrator.

D'Arcy Tate, for the company.

Teetzel, Q.C., for Burke.

P. D. Crerar, for Farr.

Province of Manitoba.

QUEEN'S BENCH.

KILLAM, J.]

[July 20.

CLEMONS v. ST. ANDREWS.

Right of action—Declaration of right to compensation—Queen's Bench Act, 1895, sec. 38, s-s. 5—Costs of former action for same relief unpaid.

After the adverse decision against the plaintiff (noted ante, p. 297), and after the Queen's Bench Act, 1895, came into operation, the plaintiff commenced a new action, without payment of the costs of the former action, asking for a declaration of his right to compensation and damages under the same circumstances as before, and basing his claim on sub-section 5 of section 38 of the Act, which says that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or can be claimed, or not.

The referee, on defendants' application, ordered a stay of proceedings until the costs of the former action should be paid.

Plaintiff appealed.