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ROLAND STUART (DEFENDANT) APPELLANT;
 AND
 HIS MAJESTY THE KING (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Crown—Public work—Payment of mortgage on part of land as full compensation—New trial—Expropriation Act, R.S.C., 1906, c. 143, ss. 22, 26, 29, 33.

The Federal Government expropriated in 1923 five parcels of land, being lots 149, 9011, 9565, 9565a and 9566 in Kootenay district, B.C., belonging to the appellant, for the purpose of a public park. A mortgage in favour of M. upon the four last mentioned lots had been discharged by the Crown in 1922 by the payment to M. of the sum of \$22,000. It was alleged by the Crown in its information exhibited in the Exchequer Court that it was willing to pay as compensation for the five lots "the sum of \$22,000, including thereon the said sum of \$22,000," paid to M. in advance and without reference to the appellant.

Held that the payment to M. of the mortgage, although satisfying any claim in respect of the four lots covered by the mortgage, could not be applied towards compensation for lot 149, and that the case should be remitted to the Exchequer Court to determine the amount of compensation for that lot.

APPEAL from a decision of the Exchequer Court of Canada maintaining the respondent's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

R. Cassidy K.C. for the appellant.

Geoffrion K.C. and *A. B. Macdonald K.C.* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—On the 29th of May, 1923, the Attorney General of Canada, on behalf of His Majesty the King, exhibited in the Exchequer Court an information to which Roland Stuart and John Roper Hull and the Royal Trust Company, executors of the estate of William James Roper, deceased, were made defendants. This information was exhibited under s. 26 of the *Expropriation Act* (R.S.C., c. 143) in the matter of the expropriation of five parcels of land, to wit: lots 149, 9011, 9565, 9565A and 9566 in group one, Kootenay district, British Columbia, containing an area of 615.97 acres, more or less. It alleged that these

*PRESENT:—Anglin C.J.C. and Duff, Mignault and Rinfret JJ. and Smith J. *ad hoc*.

lands were taken for the purpose of a public work of Canada, a public park, and that, on the 4th of April, 1922, a plan and description of the land was deposited of record in the land registry office of the Nelson Land Registration District. Information also states that the defendant Roland Stuart claims to have been the owner in fee simple of the lands at the time of filing the plan and description, subject however to the following registered mortgages: (a) a mortgage, dated 11th of December, 1911, over lot 149, in favour of one William J. Roper for \$10,000, the full amount whereof had been paid to the trustees of the Roper's estate, but a final discharge of the mortgage had not yet been registered; (b) a mortgage dated the 11th of February, 1912, over lots 9011, 9565, 9565A and 9566 in favour of William J. Malcolm to secure payment of \$16,230.80, with interest at 7 per cent per annum, which said mortgage was discharged by His Majesty the King, through the Minister of the Interior of the Dominion of Canada on the 5th day of June, 1922, by the payment to the said William J. Malcolm of the sum of \$22,000, and a formal discharge of the said mortgage has been registered in the said land registry office.

It was further alleged that His Majesty the King was willing to pay to whomsoever the court might adjudge to be entitled thereto, in full satisfaction of all estate, right, title and interest, and all claims for damages that may be caused by the expropriation,

the sum of \$22,000, including therein the said sum of \$22,000 paid as aforesaid to discharge the said mortgage held by William J. Malcolm.

The defendant Roland Stuart alone filed a defence to the action. He alleged that the tender of \$22,000 was not a sufficient and just compensation for the lands expropriated and claimed as compensation \$500,000, with interest and costs. No question was raised as to the payment of the Roper mortgage on lot 149.

On lot 149 there is a hot spring known as Sinclair Springs. Its temperature is about 112 degrees and it has a considerable flow. The other lots are about two and a half miles by road from lot 149.

The contention of the defendant Stuart briefly is that all these lots were purchased as parts of one and the same scheme. Lot 149, on which the spring is located, owing to its mountainous character, is not suitable for building purposes, but the other lots it is urged, are an admirable site

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for hotels, camps and a golf course, the whole in beautiful mountain scenery. The Banff-Windermere-Highway passes close to the spring, but is open only for four months of the year. The defendant describes the property as being an ideal pleasure and health resort, and claims that it has a special adaptability as such. He further contends that it is expropriated by the Government for the same purposes as those for which he intended to use it himself.

The case after a somewhat lengthy trial, and production of evidence taken in England under a commission in which the spring and its surroundings were compared to other hot springs in America and Europe, was submitted to the learned President of the Exchequer Court, who also, in company with counsel for the respective parties, visited the property. By his judgment, the learned President declared the lands vested in the Crown, and adding ten per cent for compulsory taking to the \$22,000 tendered, awarded \$24,200 as compensation for the lands and for all damages resulting from the expropriation. He further declared that the defendant Stuart was entitled to recover from the Crown \$2,200, together with interest on \$24,200 from April 4, 1922, to June 5, 1922, and interest on \$2,200 from the last mentioned date to the date of the judgment, the Crown having paid the balance of the damages to the mortgagee on account of the defendant.

From this judgment the defendant Stuart appeals.

The appellant at the trial relied on some highly speculative features in connection with the expropriated lots, but it appeared to us, after the very full argument submitted on his behalf, that the learned President had duly considered all the elements which can appropriately enter into the valuation of such a property, and that he had placed a value on the lands with any potentialities or special adaptability which they possessed at the date of the expropriation. The defendant's grievance, as alleged, is that this valuation is inadequate, but after considering all the evidence to which we were referred, we do not think we would be justified in disturbing the learned President's estimate of value.

A difficulty however arises in connection with the course adopted by the Crown in paying to the mortgagee Malcolm the \$22,000 it tendered as compensation. Malcolm had a

mortgage on lots 9011, 9565, 9565A and 9566. He had no interest in lot 149, and under his mortgage could claim no part of the compensation granted for that lot. Undoubtedly Stuart was entitled to compensation for the compulsory taking of lot 149.

It may be observed that under the *Expropriation Act*, the compensation money stands in the stead of the land or property expropriated, and any claim to or encumbrance on such land or property is as respects His Majesty converted into a claim to the compensation money, or to a proportionate share thereof, and is void as respects the land or property taken (s. 22). The information which is exhibited by the Attorney General should set forth, *inter alia*, the persons who, at the date of the deposit of the plan and description of the land or property, had any estate or interest in such land or property and the particulars of such estate or interest, and any charge, lien or encumbrance to which the land was subject, so far as it can be ascertained, and also the sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance (s. 26). The expropriation proceedings, as far as the parties thereto are concerned, bar all claims to the compensation money or any part thereof, including any claim in respect of all mortgages, hypothecs or encumbrances upon the land or property, and the court makes

such order for the distribution, payment or investment of the compensation money, and for the securing of the rights of all persons interested, as to right and justice, and according to the provisions of this Act, and to law appertain (s. 29).

S. 33 adds that the Minister of Finance may pay to any person, out of any unappropriated moneys forming part of the consolidated revenue fund, any sum of money to which under the judgment of the Exchequer Court he is entitled as compensation money or costs.

If the course mapped out by the statute had been followed, the Exchequer Court would have made an order indicating the persons (owners or mortgagees) entitled to the compensation money, or to a proportionate share thereof, and these persons in due course would have been paid by the Minister of Finance. The Crown however paid to Malcolm in advance, and without reference to Stuart, the whole amount which it tendered to the latter as compensa-

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tion for the expropriation of the five lots. The sum it paid on the Malcolm mortgage no doubt satisfied any claim for compensation in respect of the property covered by that mortgage, to wit lots 9011, 9565, 9565A and 9566, but that payment cannot be applied towards compensation for lot 149. We think therefore that the action should be remitted to the Exchequer Court to determine the amount of compensation payable in respect of lot no. 149.

Under all the circumstances, and as the appellant fails with respect to the greater part of his claim, we think that there should be no order as to the costs of this appeal. The costs of all proceedings in the Exchequer Court will be in the discretion of the judge when disposing of the matter referred back.

Appeal allowed, no costs.

Solicitor for the appellant: *Robert Cassidy.*

Solicitor for the respondent: *W. S. Edwards.*
