BETWEEN: 1925

HIS MAJESTY THE KING.....PLAINTIFF; Jan. 13.

AND

ROLAND STUART ET AL.....DEFENDANTS.

Expropriation—Compensation—Market value—Prospective value—Mortgage

The Crown expropriated lots A, B, C, D, and E, the property of the defendant *S.*, and tendered the sum of $22,000 in full compensation therefor. Defendant *M.* held a mortgage on lots A, B, C, and D, amounting with interest to $22,000, the amount of the tender, which the crown paid off. Defendant *S.* claimed that as there was on lot *E.* a hot spring, the whole property being worked together had special value by reason of its prospective advantages and its special adaptability as a health and pleasure resort, when developed and conducted on a commercial basis; and further contended, that in paying the whole amount of the tender to *M.*, in discharge of his mortgage, which had no relation to lot E., no consideration was given to the said lot in reaching the amount tendered. The evidence showed that it would take a very large capital to so develop the property and that the results were problematical. That the amount tendered covered $10,000 for certain of the lots and another $10,000 for defendant's interests in the hot spring.

Held: That although *S.*, was entitled to compensation not only upon the present market or intrinsic value of the property, but also to any advantage which the property might possess prospectively, or with reference to the probable use which would give him the best return possible, such further advantage must be calculable and calculated at the time of the expropriation. The proper basis of compensation is the amount which a prudent man would be willing to pay for it at that time.

2. That, upon the facts, the Crown in fixing the tender having considered all the properties expropriated including the lot not covered by *M's.* mortgage, the Crown was justified in paying the amount of such tender to *M.* to discharge part of the property expropriated from such mortgage.

INFORMATION by the Attorney General of Canada to have the compensation for certain properties expropriated from the defendants fixed by the court.

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Victoria, September 22; Vancouver, September 24, and Banff, October 4, 1924.

Action now tried before the Honourable the President.

A. B. Macdonald, K.C., and *R. V. Prenter* for plaintiff.

R. Cassidy, K.C., and *F. Higgins* for defendants.

MACLEAN J., now this 13th day of January, 1925, delivered judgment (1).

The plaintiff expropriated certain lands of the defendant Roland Stuart, under the provisions of Chap. 17, sec. 3, of the Statutes of Canada, The Dominion Forest Reserves and Public Parks Act, 1919, and the Expropriation Act, Chapter 143 of the Revised Statutes of Canada, for the purpose of extending the Dominion Parks system. The property expropriated known as lots 149, 9011, 9565, 9565A and 9566, is situated in the Columbia River Valley, in Kootenay District, in the province of British Columbia. The first mentioned lot 149 was acquired by the defendant in 1887 by grant, at a nominal figure, from the Government of British Columbia and contains about 160 acres. The remaining lots were acquired by the defendant by purchase in 1912, from one Malcolm, the defendant at the same time mortgaging this property to the said Malcolm in the principal sum of $16,000, on account of the major portion of the purchase price. The plaintiff tendered the defendant the sum of $22,000 for the whole of the property so taken. The defendant claims a sum very much in excess of the amount so tendered, and in the evidence produced at the trial he sought to establish a value of from $200,000 to $300,000.

It is admitted that the value of the property *qua* land is not the basis of the defendant's claim for compensation in excess of the amount tendered. From this viewpoint alone the property has little present value. Upon the expropriated lot 149, is a hot spring, known as Sinclair Springs, which, in the company of counsel for the respective parties to the action, I had the privilege of viewing, and the other lots of land as well. The temperature of the

(1) An appeal was taken from this judgment to the Supreme Court of Canada and judgment was rendered on the 5th day of February, A.D. 1926. The reasons of the Honourable Mr. Justice Mignault who gave the judgment for the court will be found printed at the end of this report.

spring is about 112 degrees, and has quite a considerable flow. The chemical constituents of the water are not claimed to be unusual, except that it is free from sulphur which is said to be a favourable condition, and the water is radio active. A report of Professor Boyle of Alberta University upon the radio activity of the spring is in evidence as an exhibit. In addition, it is claimed that by reason of the scenic qualities of the whole property, the altitude and climate, a special value attaches to the property as one particularly suitable for development as a health and pleasure resort. It is also claimed that the possibility of development has been accelerated by the construction of the Banff-Windermere highway recently completed by the Dominion Parks, administered by the Department of the Interior. This very splendid and creditable highway is fully constructed between Banff, Alberta, and the Columbia River Valley in British Columbia, and passes through lot 149, immediately by the hot springs, thus rendering it accessible to motor tourists particularly. The construction in recent years, of the Kootenay Central Railway, by the Canadian Pacific Railway Company also makes the hot springs more accessible than formerly. I might here say that lot 149 is about two and a half miles distant by road from the other four lots, and the defendant claims they were purchased as part of the same scheme whereon might be erected hotels, camps, golf course, etc., lot 149 not being suitable for such purposes owing to its mountainous nature.

On the other hand, the plaintiff asserts that there is no evidence of the hot spring possessing any therapeutic value, or that by reason of any radio activity of the water, the spring has any proved therapeutic value. That the climate and location combine to render the property available as a health or pleasure resort for only about four months of the year, that the Banff-Windermere highway is only open for traffic for about four months a year, and that altogether it is not possible by any expenditure of capital to develop a profitable enterprise of the character suggested by the defendant, and that the sum tendered the defendant is sufficient compensation for any value the property possesses for any purposes whatever.

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There is no doubt but that the hot spring on lot 149 is located amidst beautiful mountain scenery, the entrance to the property at Sinclair Pass is most striking indeed. The waters of the spring are undoubtedly hot and the flow very considerable, but it is to be observed that the defendant is not entitled to the exclusive use of the flow of water. There is no evidence whatever that the constituent qualities of the water, or that the spring itself, differs much from other hot springs in Canada, and in fact from that of Fairmont some few miles distant, except that the temperature is somewhat higher, and there is an absence of sulphur. This hot spring is, however, probably greater in radio emanation content than other known hot springs in Canada, but not so great as is to be found in many hot springs in the United States and Europe. All hot springs are, however, usually radio-active. It has not, however, in my opinion, been established that the waters by reason of being radio-active thereby enhance the value of the waters for therapeutic purposes. I am disposed to accept the evidence of Prof. Frederick Sody, Professor of Chemistry at the University of Oxford, upon this point. He states in effect that the hot spring waters might be recommended by physicians empirically, but not with any conviction that they possessed any positive therapeutic or curative values. I understand him to mean that hot springs at health resorts are an added attraction to engage the interest of persons of impaired health, and if patrons think the waters are conducive to the restoration of impaired health, it is a psychological condition not undesirable in the treatment of certain patients, but that any improvement in health would be purely psychological. There is no clear or affirmative evidence that the springs are of any therapeutic value beyond this. It is not established that there is any connection between the therapeutic properties of the spring and the radio activity of its water. If the water, for this or any other reason, possesses any therapeutic value, there is no reliable evidence of it. The water coming from the spring is hot which is always a novel condition attractive to many people, and may be utilized to attract tourists and persons in ill health. In this sense only do I think the waters of the spring possess any special value.

I am also disposed to accept the evidence of Dr. Robert Fortesque Fox, who gave evidence before a commissioner in London, England, as true of all hot springs operating for commercial gain, which was to the effect that establishments do not as a general rule pay. There are, of course, exceptions. There is a hot spring at Fairmont twenty miles distant from Sinclair Springs and this apparently is not profitable. The well known Banff Springs, readily accessible by the Canadian Pacific Railway, and situated within the Dominion Parks amidst unrivalled mountain scenery, advertised very freely, and operated and conducted by the Dominion Parks, are not self sustaining. Apparently the same is true of the hot springs at Harrison, B.C., where a hotel operated in connection with the hot spring was burnt down in 1920 and has not since been rebuilt.

The defendant produced altogether three or four witnesses to establish the value of the property. The first was Mr. Murray, of Victoria, a real estate broker. He expressed the opinion that with an expenditure of $300,000 the property could be made productive. He had no experience whatever in matters of this kind, and his opinion was not convincing nor based, I thought, on any sound business principles. Mr. Rutherford was hardly an unprejudiced witness, having been a bonused shareholder in a company once projected to operate the springs and also intimately associated with the defendant Stuart in the promotion of the property as a going concern. His evidence was not at all helpful. The defendant gave evidence on his own behalf, but I cannot say that he contributed anything which really assisted the court. He early had in mind the development of the property for the purposes and with the objects already outlined. Not having the requisite capital himself, he endeavoured to get it from others. He induced one Harmsworth of London, England, to invest $20,000 in the project, but according to Rutherford only about $7,000 actually went into the project. Later one Alexander organized a company to acquire the property for £58,000, and the defendant as vendor was to accept £41,000 in fully paid shares as part of the consideration, together with some cash payment. This project fell through, and the plaintiff sought to establish that fraud or

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misrepresentation was associated with the attempt to dispose of the company's shares to the public. In this promotion apparently questionable representations were made to the public, and although some shares were sold, the offering of shares to the public was in the end withdrawn, and the property was never even conveyed to the company by the defendant. While some evidence was admitted in this connection, I do not think it relevant, nor do I think that this abortive sale of the property affords the slightest basis whatever for the determination of the present or future value of the property, and I disregard it altogether.

The most important witness on behalf of the defendant was His Honour the Lieutenant-Governor of Alberta, R. G. Brett, M.D. This witness for years conducted a sanitorium and hotel at Banff, in which the thermal waters of Banff were used therapeutically. He was also acquainted with other thermal springs in Canada such as Fairmont and Sinclair, and he thought that the latter were quite as good as any other springs in Canada or any he knew. He was not in a position to say anything as to the radio activity of this or other springs. After reciting the favourable qualities of the property, the springs, etc., he states that if a comfortable hotel and good bath houses were built, golf and tennis facilities afforded, he thought such a project should attract people as other springs do. The development should be progressive, he thought, if and as circumstances justified. He thought the expenditure of a fairly good sum would be justified at once. Having demonstrated that the patronage of such a project was not a transitory thing, he would have in mind a speculative value for the property which he might get from some one more optimistic than himself and who might wish to buy it. He thought that $20,000 might be earned within three years after the start. Questioned by defendant's counsel as to the value of the property this witness gave the following piece of evidence and which rather discloses his method of arriving at the value of the property.

Q. Taking it to-day with the intrinsic qualities of the property. A. I certainly think if I owned those springs and was 40 years younger than I am, and with the faith I have in my own ability to develop them, and the faith I have in the country, of its ability to support them, I certainly would not take two hundred thousand dollars for them—that is the conclusion I have come to. I would take as much over that as I could get. I certainly would not take anything less.

Altogether I construe this witness's evidence to merely mean that in his judgment it is not impossible, that with a proper capital expenditure to provide attractive facilities for patrons, with proper management, advertising, etc., in time a substantial and enduring business might be built up, but that as in most other businesses, in the effort of building up there was the element of speculation and risk. I do not think I should be justified in adopting this line of reasoning in attempting to fix the value of the property here expropriated.

If the property has any value in excess of the amount so tendered it is by reason of advantages which the property possesses prospectively, by virtue of its special adaptability as a health and pleasure resort, developed and conducted upon a commercial basis. The defendant is entitled to compensation not only upon the present market value or intrinsic value of the property; but it is well settled, he is entitled to any advantage which the property possesses prospectively, or with reference to the probable use which will give him the best return possible. The future advantage must, however, be calculable and calculated at the time of the expropriation, and the proper compensation is the amount which a prudent man would then be willing to pay for it. The value to be paid for it is the value to the owner as it existed at the date of taking. The value to the owner consists in all the advantages which the land possesses present or future, but it is the present value alone of such advantages that must be determined. I would refer to *Cedar Rapids Case* (1); Cripps Law of Compensation, 5th ed., 117, and *Lake Erie Northern Railway Co.* v. *Schooley* (2). In *The King* v. *Wilson* (3), and *The King* v. *MacPherson* (4), will be found a comprehensive review of the law applicable to cases of this kind. The defendant seeks to establish a special value for the property upon the contingency of capital being procurable for the construction of the requisite plant, and following that a profitable patronage by the public. But the condition upon which this method of valuation is based does not exist, and in any event, any attempt to measure the possible profits to ensue from the sale of hotel accommodation, scenery, hot baths,

(1) [1914] A.C. 569.
(2) [1916] 53 S.C.R. 416.
(3) [1914] 15 Ex. C.R. 283.
(4) [1914] 15 Ex. C.R. 215.

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etc., demands the consideration of factors so conjectural and speculative as to make it impossible of calculation.

Having in mind therefore the law applicable to the case, the question is whether $22,000 is a sufficient compensation. I think it is, subject to what I shall hereafter say concerning the defendant's claim for compulsory taking. Lot 149 has no land value whatever, and one of its defects is the lack of building sites which would prohibit any such development as has taken place, say at Banff or Fairmont. In 1909 the defendant offered this lot to the Canadian Pacific Railway for $3,000. The property is, of course, more accessible to-day. It is true also that expenditures were subsequently made on this lot 149, but this has been taken into consideration. The subsequently acquired Malcolm property, consisting of about 450 acres, was probably a necessary expenditure in view of the general project which the defendant had in mind, but its present market value *qua* land is small compared with the purchase price. It must have been purchased in boom days. These lots are unimproved and have no agricultural value unless irrigated, and a very large portion consists of steep slopes. As to the special adaptability of the property for a business such as suggested by the defendant, I have nothing before me but pure conjecture as to the prospective earnings of such a business if developed. Tested in an imaginary market, there is nothing to sustain the defendant's claim as to the value of the property. There is no evidence that this class of business has anywhere in Canada been profitable. The springs have been recently made more accessible to motor tourists by the Banff-Windermere highway, but this traffic is only for four months, and it is not possible to find what degree of patronage would thereby enure to such a business, and the measure of profit, if any. There was always the possibility of course that some person, at some time, might desire to buy this property and engage in the suggested kind of business, but if so, I feel quite certain that no prudent person would entertain the idea of such a capital expenditure as suggested by the defendant for the site or location of a business that is so obviously risky and uncertain. I am of the opinion, therefore, that the sum tendered, $22,000, is sufficient, except that I think there should

be added ten per cent for the compulsory taking, and which the defendant claims.

I was concerned for a time as to another point in the case. The trial of this cause opened at Victoria. At a later date further evidence was heard at Vancouver, and still later at Banff. In the course of the trial many exhibits were filed, and altogether I thought it not inadvisable to suggest to counsel, at the end of the trial, that they each file a brief on the evidence and law which was agreed upon, and accordingly no argument took place upon the conclusion of the trial. The defendant's counsel in his brief raised a point to which my attention had not been directed during the trial, although a careful reading of the plaintiff's information would suggest the point. Subsequently I filed a memorandum covering the fact that this point had been directly raised by defendant's counsel and suggesting a reply thereto from the plaintiff's counsel if he desired, which was done.

The land in question, exclusive of lot 149, as already stated, was subject to a mortgage made by the defendant in favour of one Malcolm in the principal sum of $16,230.80 with interest. On June 5, 1922, and after the expropriation proceedings herein were initiated, the plaintiff through the Minister of the Interior of the Dominion of Canada, discharged this mortgage by payment of the sum of $22,000 to the said Malcolm, and this appears in the plaintiff's information. This amount of $22,000 so paid is the full amount tendered by the plaintiff in full satisfaction of any interest the defendant had in all the property expropriated. The defendant's counsel now raises the point, in the manner already stated, that the payment of the Malcolm mortgage had not any relation to lot 149, and that the $22,000 so paid was not to be regarded as applicable to the whole property or treated as a tender for the whole property. In effect the suggestion is that no consideration was given to lot 149 in reaching the amount tendered.

Upon a review of the evidence I am quite satisfied that in reaching the sum tendered for the five lots, due consideration was given to the value of lot No. 149 separately, and the sum of $22,000 comprised the estimated value of lot 149, and of all the lands taken. The sum tendered was the result of investigation and estimates made by James

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Wardle, chief engineer of the Dominion Parks system. In his evidence he states that he discussed the land value with local residents, ascertained the prices paid in recent years for actual sales by reference to the district land titles office, measured up and checked the values of buildings and improvements, then allowed something additional over the amount so computed, and altogether this amounted to $10,000; then he allowed $10,000 for any right or interest of the defendant in the hot springs. It was in this way he reached the total sum of $20,000 which he regarded as the value of all the property. There is no evidence explanatory of the additional $2,000, but probably this amount was required to satisfy the mortgagee and thus to end that matter. From this it is clear that the sum tendered comprises an allowance for lot 149 first as to the value of the land and improvements, and then a special amount for the hot springs. While the evidence is not quite clear or precise, I think it may safely be assumed that more than one-half of the total valuation thus arrived at, probably $14,000 or $15,000 of the $20,000 estimated by Mr. Wardle had reference to lot 149, and that chiefly for the water rights and improvements. The land value of all the lots would then be represented by about $5,000 or $6,000. The defendant did not in his defence or at the trial plead that consideration was not given to lot 149 in reaching the sum tendered, nor is there any evidence supporting that theory, in fact the evidence is entirely to the contrary. The defendant regarded the whole five lots as one property, this for the reason that there were no building sites on lot 149 which would permit any building of importance there. Hotels, camps, golf, etc., was only possible on the Malcolm lots. Neither did the defendant in his pleadings, or during the trial, urge the point that the discharge of the Malcolm mortgage by the plaintiff was irregular or that he suffered in any way by the procedure adopted in discharging the mortgage in the manner and at the time stated. I cannot see that he can in law object to the discharge of the mortgage by the plaintiff. There is no evidence that the defendant was not liable on the covenants of the mortgage for the principal and matured interest, but I may assume that he was so liable, and had the amount tendered been paid

into court to await the result of this trial, the same would then have been available to the mortgagee by some legal process if the amount was due, and there is no suggestion to the contrary. However, this question was not in issue, and I have only to determine whether the sum tendered for the property taken is sufficient or otherwise.

Accordingly there will be judgment as follows: the lands expropriated are declared vested in the Crown as from April 4, 1922; the compensation for the land so taken and for all damages resulting from the expropriation is hereby fixed at the sum of $24,200 with interest thereon from April 4, 1922, until June 5, 1922, and interest on $2,200 from that date till the date of this judgment; upon giving to the Crown a good title free from encumbrances, the defendant Stuart is entitled to recover from the plaintiff the sum of $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 this judgment, the plaintiff having paid the balance of the damages to the mortgagee on account of the defendant; the defendant Stuart shall have his costs of trial, and the defendant the Royal Trust Company will have its costs against the plaintiff as intimated at the opening of the trial and which should be agreed upon between counsel of the parties, and in default of them agreeing, to be taxed.

*Judgment accordingly.**

*The following are the reasons for judgment of Mignault J. in the Supreme Court, concurred in by Anglin C.J., Duff, Rinfret and Smith JJ.

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 section 26 of the Expropriation Act (R.S.C., ch. 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 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. The 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

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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 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 (sect. 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 encumbrances (sect. 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 claims 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" (sect. 29). Section 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 compensation 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

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to the Exchequer Court to determine the amount of compensation payable in respect of lot 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.