BETWEEN:

NORTHUMBERLAND FERRIES LIMITED ..... } CLAIMANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1942
June 10, 11, 24 & 25.
1943
Nov. 24.

*Appropriation—War Measures Act, R.S.C., 1927, c. 206—The Compensation (Defence) Act, 1940, 4 Geo. VI, c. 28—Compensation payable for ships appropriated—"The value of the vessel * * *, no account being taken of any appreciation due to the war"—The doctrine of reinstatement discussed—"Compensation" and "value" distinguished.*

Under the War Measures Act, R.S.C., 1927, c. 206, the Crown appropriated two ships owned by the claimant. The action comes before the Court by way of reference by the Minister of Justice to have determined the amount of compensation payable to the claimant.

Held: That the compensation to be adjudged for property appropriated under the War Measures Act should be calculated and determined in the same manner as in the case of an expropriation made under the Expropriation Act, and the value to be determined under both Acts is the value to the owner.

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2. That the term "value" used in the Compensation (Defence) Act, 1940, is narrower than the term "compensation" used in the Expropriation Act since it does not comprise injurious affection to the residue.

3. That the doctrine of reinstatement applies to the acquisitioning of a vessel as well as to the expropriation of land.

4. That the "appreciation due to the war" in the Compensation (Defence) Act, 1940, does not refer merely to the value to the taker but means an appreciation in value generally.

REFERENCE by the Minister of Justice under the War Measures Act to have determined the compensation payable for two vessels appropriated by the Crown.

The action was tried before the Honourable Mr. Justice Angers at Charlottetown, P.E.I., and Halifax, N.S.

Hon. Thane A. Campbell, K.C. and *Geo. J. Tweedy, K.C.* for claimant.

J. G. Fogo, K.C. and *C. St. Clair Trainor, K.C.* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J. now (November 24, 1943) delivered the following judgment:

This is a reference by the Minister of Justice under Section 7 of the War Measures Act (R.S.C. 1927, chap. 206) of the claim of Northumberland Ferries Limited for compensation in respect of the ships *Charles A. Dunning* (formerly known as the *Seaborn*) and *Sankaty* appropriated by His Majesty the King for naval services.

The claim is for $298,335.37 as follows:

1941			
March 1.	To value of M.V. *Charles A. Dunning* (*Seaborn*)	$175,000.00	
March 1.	To value of S.S. *Sankaty*	300,000.00	
			$475,000.00
March 8.	By cash amount paid on account		176,664.63
			$298,335.37

Section 7 under which the reference is made reads as follows:

> 7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

A notice of the reference was served on the claimant and its solicitor on June 7, 1941.

A statement of claim on behalf of claimant was filed on June 12, 1941; the material allegations thereof may be briefly summed up as follows:

The claimant is a company incorporated under the laws of the Province of Nova Scotia and authorized to do business in the Province of Prince Edward Island;

The claimant was the owner of the M.V. *Seaborn* (*Charles A. Dunning*) and the S.S. *Sankaty* until they were acquired by His Majesty the King for war purposes, to wit for naval services;

The M.V. *Seaborn* (*Charles A. Dunning*) was acquired by claimant on July 14, 1939, previous to the outbreak of the war, and was requisitioned by the Director of Marine Services, on authority of the Minister of National Defence for Naval Services, for war purposes on December 2, 1939;

Upon the requisitioning of the M.V. *Seaborn* (*Charles A. Dunning*) the claimant acquired another ship the S.S. *Sankaty* on December 12, 1939;

The S.S. *Sankaty* was requisitioned by the Director of Marine Services, on authority of the Minister of National Defence for Naval Services, for war purposes on June 17, 1940;

The claimant before the said 2nd day of December, 1939, had entered into a contract with the Department of Trade and Commerce whereby the claimant is bound to operate a ferry service between Wood Islands, Prince Edward Island, and Caribou, Nova Scotia; the said contract is for a term of 10 years from the 1st day of May, 1940; for performing the terms thereof the claimant was to be paid a subsidy of $28,000 a year by the Department of Trade and Commerce;

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His Majesty the King acting through the Minister of National Defence for Naval Services on March 1, 1941, acquired both the M.V. *Seaborn* (*Charles A. Dunning*) and the S.S. *Sankaty* for war purposes;

His Majesty the King acting through the Minister of National Defence for Naval Services on March 8, 1941, paid the claimant the sum of $176,664.63 on account of compensation for said ships and agreed with the claimant to refer its claim for compensation in respect of the acquisition of said ships to the Exchequer Court for adjudication as to the balance alleged to be payable to claimant upon such claim;

The claimant's claim is for the value of the M.V. *Seaborn* (*Charles A. Dunning*) and the S.S. *Sankaty,* to wit $475,000, less the sum of $176,664.63 paid on account, leaving a balance of $298,335.37 (as hereinabove detailed), with interest at the rate of 4 per cent from March 1, 1941.

In the defence in answer to the statement of claim the Attorney-General of Canada on behalf of His Majesty the King says in substance as follows:

He admits the allegation relating to the status of the claimant;

He admits that the claimant was the owner of the M.V. *Seaborn* and the S.S. *Sankaty* until they were acquired by His Majesty for war purposes;

He admits that upon the requisitioning of the M.V. *Seaborn* the claimant acquired the S.S. *Sankaty* on December 12, 1939;

He admits that before the 2nd of December, 1939, the claimant had entered into a contract with the Department of Trade and Commerce whereby it is bound to operate a ferry service between Wood Islands, P.E.I., and Caribou, N.S.;

He admits that the contract is for a term of 10 years from May, 1940, and provides for a yearly subsidy of $28,000 to be paid by the Department of Trade and Commerce;

He admits that the M.V. *Seaborn* was acquired by the claimant as alleged and was requisitioned for war pur-

poses but says that the requisition order was contained in a telegram from the Director of Marine Services to the claimant on December 2, 1939, and that the said ship was delivered pursuant thereto on December 6, 1939;

He admits that the S.S. *Sankaty* was requisitioned as alleged, but says that the requisition order was contained in a telegram from the Director of Marine Services to the claimant on June 17, 1940, and that the said ship was delivered pursuant thereto on June 24, 1940;

He admits that the M.V. *Seaborn* and the S.S. *Sankaty* were acquired by His Majesty for war purposes, but denies that the date mentioned is the correct date and refers to the dates stated in paragraphs 2 and 3 of the defence;

The amount paid by His Majesty on March 8, 1941, as compensation for the said ships was not $176,664.63 but $196,377.55, which sum was apportioned as follows: $92,764.63 with respect to the acquisition of the M.V. *Seaborn,* $83,900 with respect to the acquisition of the S.S. *Sankaty,* $8,200 with respect to balance Charter Hire of the M.V. *Seaborn* from August 6, 1940, to March 1, 1941, and $11,512.92 with respect to Charter Hire of the S.S. *Sankaty* from June 24, 1940, to March 1, 1941, and the said payment was expressly made without prejudice to the right of the Government to resist payment of any additional amount on any ground which would be otherwise open to it, including the Compensation (Defence) Act 1940;

Before this claim was referred to this Court for adjudication His Majesty had already paid to claimant in respect of the requisition and acquisition of said ships several sums amounting to $205,977.55 which amount was sufficient to satisfy all claims of the claimant in respect of said ships. the particulars of which payments are as follows:

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April 8, 1940, Charter Hire in respect of the M.V. *Seaborn* from December 6, 1939, to April 5, 1940..... $4,000.00

October 6, 1940, Charter Hire in respect of the M.V. *Seaborn* from April 6, 1940, to August 6, 1940..... 5,600.00

March 8, 1941,

Pursuant to Order in Council P.C. 1893, $196,377.55, as follows:

As compensation in respect of acquisition of the M.V. *Seaborn*..... 92,764.63

As compensation in respect of the acquisition of the S.S. *Sankaty*..... 83,900.00

Balance Charter Hire in respect of the M.V. *Seaborn* from August 6, 1940, to March 1, 1941 ..... 8,200.00

As Charter Hire in respect of the S.S. *Sankaty* from June 24, 1940, to March 1, 1941 ..... 11,512.92

$205,977.55

The War Measures Act hereinabove referred to empowers the Governor in Council to appropriate property, a term, needless to say, broad enough to include vessels, during war, invasion or insurrection, real and apprehended.

Section 3 of the Act orders (*inter alia*) that:

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:

(*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof.

2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; * * *

Section 6 enacts:

6. The provisions of the three sections last preceding shall only be in force during war, invasion, or insurrection, real or apprehended.

Section 7 hereinabove reproduced deals, as we have seen, with the fixing of the compensation.

The War Measures Act, obviously found inadequate, was supplemented in 1940 by an Act respecting the payment of compensation for the taking of certain property for war purposes, entitled "The Compensation (Defence) Act, 1940", assented to on August 7, 1940.

Section 2 of this Act contains, among others, the following definitions which are relevant:

(*a*) "acquisition", in relation to any vessel or aircraft, means the appropriation by or on behalf of His Majesty of the title to or property in the vessel or aircraft under the provisions of the War Measures Act;

(*f*) "requisition", in relation to any vessel or aircraft, means the appropriation of the use thereof or requiring it to be placed at the disposal of His Majesty under the provisions of the War Measures Act;

(*g*) "war" means the state of war now existing;

(*h*) "War Measures Act" means the War Measures Act, chapter two hundred and six of the Revised Statutes of Canada, 1927, and includes any order in council, order or regulation made pursuant thereto;

(*j*) "vessel" means any ship or boat or any other description of vessel used or designed to be used in navigation.

Section 4 refers to the compensation payable in respect of the requisition of a vessel; it offers no interest in the present instance as there is no dispute about the compensation for the use of the claimant's vessels from the time they were requisitioned to the time they were acquired or released.

Section 5 relating to the compensation payable for the acquisition of a vessel is the one on which the present claim is based. I deem it expedient to quote the provisions thereof which have some relevance to the question at issue.

5. (1) The compensation payable in respect of the acquisition of any vessel or aircraft shall be a sum equal to the value of the vessel or aircraft, no account being taken of any appreciation due to the war, and shall, subject to the provisions of this Act, be paid to the person who is then the registered owner of the vessel or aircraft; provided that, for the purpose of assessing any compensation under this section, no account shall be taken of any compensation under paragraph (*a*) or paragraph (*c*) of subsection one of section four hereof which may have become payable in respect of the requisition of that vessel or aircraft.

(2) Where, at any time during the period for which the vessel or aircraft is requisitioned on behalf of His Majesty,—

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(a) a written notice stating that the vessel or aircraft is to be treated as acquired on behalf of His Majesty is served on the registered owner thereof by a person acting on behalf of His Majesty, or

(b) the vessel or aircraft is sold on behalf of His Majesty,

then, for the purposes of this section, the vessel or aircraft shall be deemed to have been acquired on behalf of His Majesty immediately before the day on which the said notice was served or, as the case may be, the day on which the vessel or aircraft was so sold, and the period of requisition shall be deemed to have been ended at the time when the acquisition of the vessel or aircraft as aforesaid is deemed by virtue of this subsection to have been effected * * *

A proclamation declaring that a state of war exists and has existed in Canada as and from September 10, 1939, was published in *The Canada Gazette* of September 30, 1939, a copy whereof was filed as exhibit H.

The M.V. *Seaborn,* later known as the *Charles A. Dunning,* was first requisitioned by the respondent by telegram from the Director of Marine Services, Department of Transport, addressed to R. E. Mutch, president of Northumberland Ferries Limited, dated September 4, 1939, reading as follows (exhibit 5):

Confidential by authority of the Honourable the Minister of National Defence I have to inform you that the S.S. *Seaborn* of which your company is understood to be the present owner is hereby requisitioned in the interests of public safety and is to be handed over on the morning of Tuesday September fifth ninteeen hundred and thirty nine to the Commanding Officer Atlantic Coast Royal Canadian Navy His Majestys dockyard Halifax NS Stop Apply immediately to Registrar of Shipping to have vessel properly registered with present name also apply immediately for change of name and submit three names by order of choice you wish to give the vessel Stop Hire will be determined on a bare bottom basis and documents accordingly will be forwarded in a day or two for signature Stop Inventory of stores retained will be made by naval authorities Stop It is understood that master and members of the crew who are physically fit of military age and with qualifications of a satisfactory nature may volunteer for service Stop Officers will be given rank corresponding to their sea going qualifications in the RCNR temporary if accepted Stop Please confirm receipt and your understanding of this instruction.

The M.V. *Seaborn* or *Charles A. Dunning* was released temporarily. The release was conditional, the claimant being forbidden to make alterations on the vessel, as she might be requisitioned anew.

In fact by telegram sent by the Director of Marine Services to Northumberland Ferries Limited on December 2, 1939, the M.V. *Seaborn* or *Charles A. Dunning* was again requisitioned; the telegram (exhibit 6) is in the following terms:

By authority of Minister of National Defence *Charles A. Dunning* formerly *Seaborn* is requisitioned for naval service and should be delivered as soon as possible to flag officer commanding third battle squadron HM dockyard Halifax Stop Cancel all marine insurance policies from time vessel handed over Stop Report here day and hour handed over.

Between the date of the purchase of the *Seaborn* by claimant and the date on which she was first requisitioned, repairs were made to her and material supplied for her use to the extent of $1,992.42, as shown by invoices filed as exhibit 8.

The respondent having expressed his intention of acquiring the vessel a bill of sale was executed by claimant in favour of respondent on October 11, 1940; a duplicate of this bill of sale was filed as exhibit C. The price stipulated was $70,705.

In order to replace the M.V. *Seaborn* or *Charles A. Dunning,* the claimant purchased another vessel, called the *Sankaty.* This vessel in her turn was requisitioned by the respondent, as appears from a telegram addressed by the Director of Marine Services to claimant on June 17, 1940, a duplicate whereof was produced as exhibit 7. This telegram is worded thus:

By authority of power delegated to me by Minister of National Defence under Defence of Canada Regulations vessel *Sankaty* is hereby requisitioned for naval service to be delivered without delay to commanding officer Atlantic coast HM dockyard Halifax Stop Vessel requisitioned for hire on bare boat basis and terms of charter hire will be determined later Stop Cancel all marine insurance policies from time vessel handed over Stop Advise date and hour handed over.

Both vessels were definitely acquired by the respondent on March 1, 1941. The claim, as previously indicated, relates to compensation for these vessels which were successively requisitioned and later acquired by His Majesty for war purposes. The amount of the claim ($298,335.37) represents the balance outstanding on the alleged value of the vessels, the first one the M.V. *Charles A. Dunning* (formerly the M.V. *Seaborn*) estimated at $175,000, and the other one the S.S. *Sankaty* estimated at $300,000, after payment by the respondent of a sum of $176,664.63.

The M.V. *Seaborn,* later rechristened *Charles A. Dunning,* was purchased by the claimant in the United States on or about July 14, 1939, previous to the outbreak of the war, from Goldie Archanna Morrison, as appears

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from a bill of sale filed as exhibit B. The bill of sale states that the sale was made for and in consideration of the sum of one dollar and other valuable considerations paid in lawful money of the United States. It stipulates that the delivery of the vessel is to be made at the port of New London, State of Connecticut, U.S.A.

(The learned Judge reviews the oral and documentary evidence and continues.)

The War Measures Act, as we have seen, empowers the Governor in Council to appropriate property, real and personal, of any description whatsoever, which, by reason of the existence of real or apprehended war, he may deem necessary or advisable for the security and defence of Canada. The power thus conferred upon the Governor in Council shall, in virtue of section 6 of the Act, hold "during war, invasion or insurrection, real or apprehended". Its duration is not explicitly definite. The question of determining when war is apprehended is evidently left to the discretion of the Governor in Council; it has no materiality in the present case inasmuch as the proof discloses that a state of war with the German Reich existed in Canada as and from the 10th of September, 1939.

The Act is rather reticent with regard to compensation. Section 7, hereinabove reproduced, provides that "whenever any property * * * has been appropriated by His Majesty under the provisions of this Act, * * * and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, * * *".

Section 7 of the War Measures Act contains the word "compensation", which is also used in the Expropriation Act (R.S.C. 1927, chap. 64), particularly in section 23 thereof. I think it may be assumed that the legislators in enacting the War Measures Act had in view the compensation to be adjudged for the property appropriated should be calculated and determined in the same manner as in the case of an expropriation made under the Expropriation Act.

I feel that, if the legislators had intended to have the compensation determined differently they would have said so and indicated the manner in which it should be calculated. Their silence induces me to believe that they were

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satisfied that the general principles of the law of compensation should apply. The main difference between the Expropriation Act and the War Measures Act, in so far as expropriation is concerned, is that the former only deals with land as described in paragraph (*d*) of section 2 thereof or, in brief, real estate, and the latter deals with property in general, real and personal.

The Compensation (Defence) Act, 1940, relates (*inter alia*) to the requisition and acquisition of vessels or aircraft. We are only concerned in the present instance with acquisition, the question of requisition having been settled by agreement.

The relevant provisions of section 5 of the Act reproduced at greater length hereinbefore state:

> (1) The compensation payable in respect of the acquisition of any vessel or aircraft shall be a sum equal to the value of the vessel or aircraft, no account being taken of any appreciation due to the war, and shall, subject to the provisions of this Act, be paid to the person who is then the registered owner of the vessel or aircraft;

The main object of the litigation is the meaning and exact scope of the words "the value of the vessel or aircraft, no account being taken of any appreciation due to the war".

It was submitted on behalf of claimant that the value of the vessel to the owner must be taken into account as is usually done in cases of expropriation and that, if the vessel appropriated by the respondent cannot be replaced by another one of about the same size and capacity and the same age and value, the doctrine of reinstatement is applicable. It was contended on the other hand on behalf of respondent that the compensation provided by the Compensation (Defence) Act, 1940, is exclusively the market value of the vessels appropriated as it was immediately before the declaration of war and that consequently the doctrine of reinstatement does not apply.

It seems apposite to point out at the outset that up to a year or so before the outbreak of the war requisitioning and acquisitioning proceedings dealt almost exclusively with land and appurtenances. In fact the Expropriation Act concerns only lands and real rights. Consequently there is not a great deal of specific connection between the facts herein and those of the various cases relied upon.

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The principles involved however are similar and this, in my view, is sufficient to allow the court to draw some assistance from the decisions hereinafter referred to.

It was urged by counsel for claimant that the principle upon which the compensation payable in respect of the acquisition of a vessel is to be determined is that it must be calculated on the basis of a sum equal to the value thereof to the owner, but that no account is to be taken of any appreciation due to the war.

The value to be paid is the value to the owner as it existed at the time of the appropriation, leaving aside any appreciation due to the war. As to the bearing of the expression "no account being taken of any appreciation due to the war", I shall endeavour to determine it in a moment.

The value consists in all the advantages which the property possesses, present and future, but it is the present value of such advantages which must be considered: *In re Lucas and Chesterfield Gas and Water Board* (1); *Fraser et al.* v. *City of Fraserville* (2); *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (3); *Pastoral Finance Association, Limited* v. *The Minister* (4); *Sidney* v. *North Eastern Railway Co.* (5); *Stebbing* v. *Metropolitan Board of Works* (6); *The King* v. *Wilson* (7), affirmed by the Supreme Court June 14, 1915; *The King* v. *Estate of John Manuel* (8); *The King* v. *Halifax Graving Dock Co. Ltd.* (9); *The King* v. *Quebec Skating Club* (10); *Federal District Commission* v. *Dagenais* (11); *Cripps* on *Compensation,* 8th ed., 174; *Nichols* on *Eminent Domain,* 2nd ed., p. 630, No. 208, and p. 665, No. 219; *Browne and Allan, Law of Compensation,* 2nd ed., 97.

It seems to me apposite to quote a few short excerpts from some of these decisions, which, in my view, are particularly accurate and in point.

Fletcher Moulton L.J., in re *Lucas and Chesterfield Gas and Water Board* (*ubi supra*), made the following observations (p. 29):

(1) (1909) 1 K.B. 16, 29.
(2) (1917) A.C. 187, 194.
(3) (1914) A.C. 569, 576.
(4) (1914) A.C. 1083, 1087.
(5) (1914) 3 K.B. 629, 637.
(6) (1870) L.R., 6 Q.B. 37, 42.
(7) (1914) 15 Ex.C.R. 283.
(8) (1915) 15 Ex.C.R. 381.
(9) (1920) 20 Ex.C.R. 44, 59.
(10) (1931) Ex.C.R. 103.
(11) (1935) Ex.C.R. 25, 31.

The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

In the case of *Cedars Rapids Manufacturing and Power Company and Lacoste* (*ubi supra*) Lord Dunedin, delivering the judgment of the Judicial Committee of the Privy Council, expressed the following opinion (p. 576):

For the present purpose it may be sufficient to state two brief propositions: (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton L.J. in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

Lord Moulton in the case of *Pastoral Finance Association, Limited, and the Minister* (*ubi supra*) said (p. 1087):

The appellants were clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested. The land was their property and, on being dispossessed of it, the appellants were entitled to receive as compensation the value of the land to them whatever that might be. The question whether that value had as yet been developed by the actual erection of the buildings necessary to enable the appellants to realize the special value they thus possessed was no doubt one of the circumstances which was material for guiding the jury to assess its value in the appellants' hands, but it by no means prevented the land having this special value, nor did it interfere with the appellants' right to have that special value duly assessed by the jury, as the amount of the compensation due.

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In the case of *Fraser* v. *City of Fraserville* (*ubi supra*) Lord Buckmaster, speaking for the Judicial Committee of the Privy Council, made the following remarks (p. 194):

> The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In re Lucas and Chesterfield Gas and Water Board* (1909, 1 K.B. 16), *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste* (1914, A.C. 569), and *Sidney* v. *North Eastern Ry. Co.* (1914, 3 K.B. 629). The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.

The late president, Maclean J., adopted the same principle in *Federal District Commission* v. *Dagenais* (1) in which he stated (p. 32):

> The same principle has been affirmed in Canadian courts, on many occasions. That principle is therefore to be applied in this case, and it is the value of the lands to the defendant that must be considered, not its value to the Commission, nor necessarily the amount it would fetch in the market if the owner were desirous of selling it. In all such cases, if compensation is to be a reality, the Court must take into consideration all the circumstances and ascertain what sum of money will place the dispossessed man in a position as nearly similar as possible to that which he was in before. He should not be made poorer by the forcible taking of his property.

Further on the learned judge repeated the same statement in different words (p. 33):

> The principle which seemed to be followed in such case was that the displaced owner should be left as nearly as was possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense, for which compensation was claimed, was directly attributable to the taking of the lands. This would seem to be founded on common sense and reason. The measure of compensation should, in justice, be the loss which the owner has sustained in consequence of his lands being taken, because it could never have been contemplated that the community should benefit at the expense of a few of its members. Compensation should be proportionate to the loss which the owner has sustained, an equivalent of what is taken from him or that which he has given up.

See also *The King* v. *W. D. Morris Realty Limited* (2); *The King* v. *Beech* (3); *The King* v. *Spencer* (4).

(1) (1935) Ex.C.R. 25.
(2) (1943) Ex.C.R. 140, 146.
(3) (1930) Ex.C.R. 133, 142.
(4) (1939) Ex.C.R. 340, 353.

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Counsel for claimant in his argument admitted, rightly so to my mind, that, in connection with the *Seaborn*, the question of reinstatement did not arise. The only question at stake was the value of the vessel to the owner.

In endeavouring to determine the value of a property, real or personal, the cost to the owner may be taken into account; it may be an element of estimation but it is not always decisive. The circumstances surrounding the purchase must be looked into carefully.

The purchase price of the *Seaborn* was $80,000, of which $30,000 was paid in cash, $25,000 by shares and $25,000 by second mortgage bonds of the company. The vessel was in exceptionally good condition. Her cost was estimated at from $306,000 to $750,000.

The proof shows that the cost of overhauling her and bringing her from New London, Conn., to Halifax, and the cost of her maintenance until she was requisitioned totalled $16,651.94. It is also established that the structural changes, which were effected on her but were not completed on account of her being taken over by the respondent, cost $2,181.73. These various items form a total of $98,833.67.

Jagle and Strang, as previously noted, valued the *Seaborn* at the time immediately preceding the outbreak of the war at $175,000. The evidence discloses that they did not act in concert and did not compare notes.

Taking into consideration the drop in the market of high-priced yachts in the few years previous to the war and the possible lack of stability of the *Seaborn* if converted into a ferry boat—the evidence relating thereto, I may say, is not absolutely conclusive—make me feel somewhat hesitant as to her value to the claimant. From the evidence adduced I am inclined to think that the *Seaborn* was not the right kind of vessel to use for the carrying of trucks and automobiles, at least to carry the quantity which she was expected to carry. She was a beautiful yacht with first-class fittings, kept in excellent condition by her owner; she could unquestionably have loaded safely a certain number of cars, but perhaps not the quantity which she was expected to carry. This decreased to a certain extent her value to claimant. It may be that the latter, as intimated by counsel for respondent, was

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endeavouring to acquire another vessel before the *Seaborn* was definitively acquired by the Crown, because it felt that, as a ferry boat she might possibly not have the stability required. In fact the evidence discloses that the claimant was looking for another boat before the respondent, after having requisitioned and later conditionally released her, finally decided to acquire the *Seaborn*. On the other hand this may well have been necessitated by the notification given to claimant by the respondent not to make any alteration to the vessel as she might possibly be again requisitioned. The evidence on this point, I may note, is not very categorical.

The offer of $92,764.63 made by the respondent is, in my opinion, too low. The cost of the *Seaborn* to claimant, including the purchase price, the cost of overhauling and bringing her to Halifax, the cost of maintenance before the requisitioning and the cost of structural changes commenced but not completed due to the requisitioning amounted to $93,264.63. The cost, if it is an element of estimation in some cases, is seldom decisive, particularly in a case like the present one where the owner, grown old and unable to use his yacht, had no other alternative but to put her up for sale at whatever price she could fetch.

After taking into consideration the various elements hereinabove referred to, I have reached the conclusion that the value of the *Seaborn,* rechristened the *Charles A. Dunning,* to her owner, Northumberland Ferries Limited, during the summer of 1939, before the declaration of war, was $100,000.

Great stress was laid by counsel for respondent on the fact that the purchase price of the vessel was only $55,000, made up of $30,000 in cash and $25,000 in second mortgage bonds, since the additional sum of $25,000, consisting of common shares of the claimant company, which completes the price of $80,000 mentioned by McKay and Mutch and shown in the books of the company, must not be taken into account seeing that the said shares were redeemed from the vendor Miss Goldie Archanna Morrison for $25,000. According to counsel for respondent the actual cash outlay for the *Seaborn* would have been $55,000. The evidence on this point is not very satisfactory. Be that as it may, I do not think that the price or cost of a property,

real or personal, to its owner is a definite criterion for determining its value, although it may be a relevant consideration: *Streatham and General Estates Co. Ltd.* v. *Commissioners of Works and Public Buildings* (1); *Federal District Commission* v. *Dagenais* (2).

There are various reasons which they may induce an owner to sell at a sacrifice, such as illness, old age, distress, etc. Unless one knows the circumstances in which a property was acquired it is somewhat hazardous to place much reliance upon the purchase price.

With regard to the *Sankaty,* counsel for claimant submitted that the doctrine of reinstatement applies. In support of his submission, he relied particularly on the following decisions: *Toronto City Corporation and Toronto Railway Corporation* (3); *A and B Taxis, Limited* v. *The Secretary of State for Air* (4).

It will suffice to quote a portion of the head-note in the case of *Toronto City Corporation* and *Toronto Railway Corporation,* which gives a substantial résumé of the notes of Viscount Cave who delivered the judgment of the Judicial Committee (p. 177):

> By contract and under a special Act of Ontario the appellant city corporation had the right, which they exercised, to take over the respondent company's street railways in Toronto at a price to be determined by arbitration. * * *
>
> The arbitrators based their reasoned award as to the value of the railway tracks, rolling-stock, and buildings (including plant and machinery therein) primarily upon the cost of reproduction less depreciation. * * *
>
> Held, (1) that the arbitrators had rightly taken the cost of reproduction less depreciation as a guide in making their award; and that as they had also taken into account obsolescence, comparative utility, and other relevant considerations, the above contention by the city failed.
>
> (2) That the cost of reproduction had rightly been based upon prices generally current at the date of the arbitration, even if the hypothetical work of reproduction would have taken three years to carry out. * * *

In the case of *A and B Taxis, Limited* v. *The Secretary of State for Air,* the report shows that the claimants carried on business as garage proprietors in Dublin and that they owned and occupied premises well suited to their purposes. These premises were taken by the Government. The claimants, having tried without success to

(1) (1888) 52 J.P. 615.
(2) (1935) Ex.C.R. 25, at 29.
(3) (1925) A.C. 177.
(4) (1922) 2 K.B.D. 328.

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acquire premises temporarily, bought other premises, fitted them for use as a garage and transferred to them the appliances of their business which they continued to carry on as well as they could. When the Government gave up possession of the original premises the claimants sold the substituted premises. They claimed that the difference between the amount expended in acquiring the substituted premises and fitting them for use as a garage and the sum received on the sale of the substituted premises amounted to £3429. They claimed this sum as an item of "direct loss or damage incurred or sustained by reason of interference with" their "property or business" within the meaning of section 2, subsection 1 (*b*) of the Indemnity Act, 1920.

It was held that "direct loss or damage" may include consequential damage and that the item claimed could not be entirely excluded as indirect loss, but that the amount to which claimants might be entitled in respect thereof must be assessed by the War Compensation Court.

Bankes L.J., dealing with the question of reinstatement, expressed the following opinion (p. 336):

> It is well recognized that there are claims for compensation in which the principle of reinstatement affords the only proper basis of compensation. I would refer to this passage from Cripps on Compensation, 5th ed. (1905), p. 118; 6th ed. (1922), p. 114: "There are some cases in which the income derived or probably to be derived, from land would not constitute a fair basis in assessing the value to the owner, and then the principle of reinstatement should be applied. This principle is that the owner cannot be placed in as favourable a position as he was in before the exercise of compulsory powers, unless such a sum is assessed as will enable him to replace the premises or lands taken by premises or lands which would be to him of the same value. It is not possible to give an exhaustive catalogue of all cases to which the principle of reinstatement is applicable. But we may instance churches, schools, hospitals, houses of an exceptional character, and business premises in which the business can only be carried on under special conditions or by means of special licences." It must depend on the facts whether in a particular case the principle of reinstatement so stated applies; and the material considerations would seem to be, first, the nature of the business which is to be displaced; it would be unreasonable to incur great expense in reinstating a business which could only be carried on at a loss; secondly, the time during which the business is to be displaced; if the time was very short it might be unreasonable to incur any expense in reinstating it. But if it were not reasonable to shut up the business and claim compensation on the footing of its total destruction—if the reasonable course were to keep it alive by transplanting it elsewhere—then the next question would be, was it reasonable for the proprietor to take the premises he took and incur the expense he incurred in adapting them to the requirements of the business.

The passage from Cripps on Compensation cited by Bankes L.J. appears in the eighth edition of his work at page 180. The opinion of Bankes L.J. seems to me well founded and relevant.

Reference may also be had to the case of *Metropolitan Railway Company and Metropolitan District Railway Company* v. *Burrow;* the text of the judgments of the Divisional Court and of the Court of Appeal will be found in the appendix to the eighth edition of Cripps on Compensation at pages 906 to 916. According to a note on page 906, the company appealed to the House of Lords which dismissed the appeal. The following statements of the Lord Chief Justice of the Divisional Court are particularly interesting (p. 907):

> But the company, in its own best judgment, did not controvert the evidence that to carry on that business in that neighbourhood in an equally advantageous way—I use the word "way" on purpose—it was, under the circumstances, necessary to get premises costing so much more than the premises which the man occupied and to fit them up in a certain way. If the only way in which he could equally advantageously carry on the business which the company destroyed was by taking premises worth so much more and that was anticipated, I cannot myself see that there was anything wrong in leaving to the jury the value of the sum of money which it would so cost to replace the claimant in the same position from which they had turned him out. It may be said he was placed in a better position; but his answer is: "I cannot help that. I do not want to be in a better position; I am willing to stay where I am. You are not willing I should stay; you turn me out. The only place that you can put me into is a place that will cost me so much more, and I do not want to pay it." Why is not that the damage he has sustained by their action? I confess I am unable to see what other is the fair estimate of that damage. That the damage may have been over-estimated is quite another matter.

The judgments of the Divisional Court and of the Court of Appeal also appear in Appendix C in volume 2 of Hudson on Compensation.

In *Re Lennox and Toronto Board of Education* (1), the Appellate Division of the Supreme Court of Ontario adopted the rule laid down by the Privy Council in *Fraser* v. *City of Fraserville* that "the value to be ascertained is the value to the seller of the property in its actual condition at the time of the expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired". The exclusion

(1) (1926) 58 O.L.R. 427.

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hereinabove stipulated, needless to say, has no application in the case of the appropriation of a vessel. In the reasons of Mr. Justice Middleton there are, among others, certain pertinent remarks which I think advisable to cite (p. 441):

> I agree with them (the arbitrators) that the evidence by which the value is sought to be established by ascertaining what it would cost to reconstruct the buildings to-day, when the cost of building is greatly advanced, and then by abating that sum by some arbitrary figure to indicate the proportion which the original value has lost by reason of this incidental decay, cannot here be relied upon as any safe guide; it is too uncertain; there are too many contingencies; too many factors to be considered, all of which rest on opinion, or, in other words, mere guessing. Reconstruction cost is a proper method to be considered where the property taken is one which must be replaced by the landowner. A factory is taken; the owner must re-build. The result of the taking is that he is forced, presumably, to re-build a similar structure on a similar site. He is out of pocket what this costs, but he has a new building, and so the cost must be abated to meet this. But here the property was merely an investment.

See also *The School Board for London* v. *The South-Eastern Railway Company* (1); *Bidder and others and The North Staffordshire Railway Company* (2); *Nichols on Eminent Domain*, 2nd ed., vol. I, page 667, paragraph 222.

The cost of the *Sankaty* to claimant, including the purchase price, the outlay for temporary repairs in the United States necessary to bring her to Halifax and the expense of reconditioning her at Halifax, was $71,226.14. I do not think that this figure can be taken as representing the value of the vessel to the claimant at the time of her appropriation by the respondent; it is greatly inferior to such value. The *Sankaty* was purchased from the Washington Trust Company, at Westerly, Rhode Island, for a trifle, presumably at a judicial sale; the evidence on this point is not categorical.

From the time the *Sankaty* was taken over by the Crown, claimant made numerous endeavours to find a ship to replace her. The only ships which it found were the *Fishers Island*, the *Red Star* and the *Erie Isle*. The latter is the one which claimant purchased and rechristened the *Prince Nova*.

The price paid for the *Prince Nova* was $74,000, delivered at Amherstburg, Ont., but the original quotation by her owner was $110,000 (dep. McKay, p. 58, and Mutch, p. 95).

(1) (1886-7) 3 T.L.R. 710. (2) (1878-9) 4 Q.B.D. 412, 432.

She was not then in a state to go on the run at once; she needed reconditioning. Repairs and alterations were made to her amounting to $9,319.68, as shown by the invoices exhibits 14, 15, 16, 17, 18 and 19. Work for a further sum of $8,000 or $9,000 was required to complete the repairs and alterations (dep. McKay, p. 58). These various amounts bring the total cost of the *Prince Nova* when converted into a ferry boat to a sum varying between $91,319.68 and $92,319.68. Now the *Prince Nova* can only carry 16 or 17 cars, depending on their size, and she does not accordingly replace adequately the *Sankaty,* whose carrying capacity was from 30 to 34 automobiles. In order to be placed in as favourable a condition as it was in before the appropriation by the Crown of the *Sankaty* the claimant would have to acquire another vessel of the same capacity as the *Prince Nova* for a price, in round figures, of $92,000. Even then the claimant would not have been in as good a position since the operation of two ships entails higher overhead expenses.

The proof shows that the *Red Star* could have been bought for the sum of $52,500 payable in United States currency, equivalent to $58,275 in Canadian money, but that repairs to her engines amounting to about $12,000 would have been needed (Jagle, p. 20). By making various alterations to her she could have carried 14 automobiles. The cost of these alterations was not disclosed. Smaller than the *Prince Nova* and having a lesser capacity, the *Red Star* could obviously not replace the *Sankaty.*

The only vessel found by claimant which could have replaced the *Sankaty* almost satisfactorily, though not adequately, was the *Fishers Island,* which was about 35 feet shorter and 7 feet narrower than the *Sankaty* and could only carry from 20 to 25 automobiles according to their size. The price asked by her owner in February, 1941, was $285,000 in United States currency, for delivery at New London, Conn., the duty being at the expense of the purchaser (Jagle, p. 18). The rate of exchange being then 11 per cent the price in Canadian funds would have been $316,350. The proof shows that in 1941 the prices of vessels had increased materially over the pre-war prices. Strang estimated this increase at 50 per cent (p. 43). Roue declared that the cost of construction of ships in

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1941-1942 was 10 to 15 per cent higher than in 1938-1939 (p. 34). I am inclined to fix this increase at 33⅓ per cent, the proportion suggested by counsel for respondent. One-third of $316,350 is $105,450; subtracting this amount from the price of $316,350 we have a balance of $210,900. Unfortunately the claimant could not finance the deal.

To build a ship of the size and capacity of the *Sankaty* in 1938 would have cost between $196,000 and $200,000, exclusive of the machinery, which would have meant an expenditure of $115,000 or $150,000, according to the type of engine and power used (Roue, p. 31). In taking the lowest figures, viz., $196,000 and $115,000, the cost of the vessel would have been $311,000. Of course depreciation must be allowed, notwithstanding Jagle's assertion that "age does not mean anything if a boat has been given proper care". However it may be, I am satisfied that a vessel 14 or 15 years old, even if kept in very good condition, is not worth as much as new. I would estimate her depreciation at 30 per cent at the utmost. Deducting 30 per cent from $311,000 leaves a value of $217,700.

The evidence discloses that the *Prince Nova* has not an adequate capacity for the purpose for which she is being used; in 1941, between the middle of June to the opening of the schools, about one-third of the traffic offering had to be turned away (Roberts, p. 53). The witness added that the vessel was not large enough and that in his estimation "she should be as large again".

Counsel for claimant contended that his client is entitled to replace the *Sankaty* with a ship having the same capacity. This contention seems fair and reasonable. The *Sankaty,* after her conversion into a ferry boat, could have carried between 30 and 34 cars depending on their size, while the *Prince Nova* can only accommodate a maximum of 16 or 17. Another difference is that the space for trucks on the *Prince Nova* is limited to 3 or 4 as compared with the *Sankaty* on which the automobile space could be used for trucks if necessary.

Counsel for respondent laid stress on the difference in the wording of the Expropriation Act and the Compensation (Defence) Act, the first one using the term "compensation" and the second the more restrictive expression "value" and he concluded that the decisions rendered

under the former and relied upon by counsel for claimant have no application in the present case. This contention is too broad and a distinction is appropriate. The compensation provided for by the Expropriation Act comprises not only the value to the owner of the land taken but also the injurious affection to the residue in case a portion only of the property is expropriated. The Expropriation Act, which by the way is not drawn up on a very logical plan, contains no definition of the word "compensation". In order to find a summary outline of a definition we must refer to section 23 which stipulates that the compensation money is to stand in the stead of the land or property; the provision thereof relevant to the point in question reads thus:

> 23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; * * *

The word "value" is not included in section 23 nor in fact in any part of the Expropriation Act. But as previously stated, the word "compensation" has been accepted by the jurisprudence and the doctrine as meaning the value of the land to the owner at the date of the taking, with all its advantages, present and future, the present value alone of the latter having to be considered. After giving the matter full consideration I am satisfied that the interpretation of the word "value" adopted by the Courts and the authors in connection with the Expropriation Act is applicable in cases under the Compensation (Defence) Act, 1940.

I may note in passing that counsel for respondent in his argument remarked that there was something significant about the figure of $175,000 adopted by Jagle and by Strang as the value of the *Seaborn* in that it coincides exactly with the amount of the claim. Counsel for claimant offered the explanation, which seems to me quite reasonable, that the amount of the claim was based on the figure which the claimant obtained from its valuators.

The fact that Jagle and Strang both arrived at the same figure may appear to be an extraordinary coincidence. It certainly is as these two men did not know one another before the trial, had not compared notes and had met for the first

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time in Court. I am inclined to believe that their estimate is too high but I am satisfied that it was made in good faith and is based on serious reasons.

On the other hand the figure of $60,000 mentioned by Fletcher and Riddell is, in my judgment, much too low.

Counsel for respondent noted that a suggestion had been made that the payment by the Crown to claimant of the sum of $83,900 with respect to the *Sankaty* was based on the cost of the ship, including the purchase price and the amounts expended for repairs and reconditioning. He added that the evidence on this point is most satisfactory and that the claimant should have kept some record of the amounts paid to carpenters and engineers and to the crew. There is no doubt that the books of the company were not kept very carefully and that the information which they supply is incomplete. Be that as it may, I am satisfied that the *Sankaty* had, up to the time of her acquisition by the respondent, cost the claimant at least $71,090.48. As previously stated, the cost of the vessel to claimant is only one of the elements available to determine her value. It is not in itself decisive, particularly in a case of reinstatement as the one with which I have to deal.

It was further submitted on behalf of respondent that there is no proof of the value of the *Sankaty* on the part of claimant and that the only evidence in that respect was supplied by Fletcher and Riddell, the first placing a value of $68,000 on the ship and the second a value of $66,000. As I have previously said, these figures are too low, particularly if one takes into consideration that it is the value to the owner which is material and not the value to the taker.

It was urged on behalf of respondent that if the replacement of the *Sankaty* is to be taken into consideration one must not overlook the fact that, as admitted by Strang, one of claimant's witnesses, values have been inflated 50 per cent by the war. Fletcher and Riddell also referred to inflation but did not state any figure. The inflation is indisputable, but the figure mentioned by Strang seems to me excessive; as already said, I am inclined to assess it in the case of vessels at 33⅓ per cent, which is the proportion adopted by counsel in his argument.

Counsel for respondent invoked regulation 48 of the Defence of Canada Regulations which authorizes the Minister of National Defence to requisition, if it appears to him necessary or expedient in the interests of public safety, the safety of the State or the efficient prosecution of the war or for maintaining supplies and services necessary to the life of the community, *any chattel* in Canada (including any vessel or aircraft or any article on board a vessel or aircraft) and to give such directions as appear to him necessary or expedient in connection with the requisition.

Regulation 48 was replaced by an Order in Council passed on February 9, 1942 (P.C. 995). The new regulation gives the Minister of Munitions and Supply the same requisitioning powers previously vested in the Minister of National Defence.

This regulation, as I think, adds nothing to the Compensation (Defence) Act in so far as vessels are concerned and it contains no reference to the matter of payment. It enacts however that the Minister of National Defence and, since the passage of Order in Council P.C. 995, the Minister of Munitions and Supply may requisition *any chattel* in Canada of any nature whatsoever, provided it appears to him to be necessary or expedient in the interests of the public safety, the safety of the State or the efficient prosecution of the war or for maintaining supplies and services necessary to the life of the community. His power has no limitation other than his discretion; but with this aspect of the question we are not concerned.

Counsel for respondent pointed out that section 7 of the War Measures Act does not create the authority for payment of compensation but merely indicates how the matter is to be dealt with by the Court failing an agreement, which seems obvious; the text of section 7 is clear. Counsel said that before the Compensation (Defence) Act, 1940, was enacted the situation in so far as land was concerned was set out in *Warner Quinlan Asphalt Company* v. *The King* (1), where Audette J. at p. 199 said:

> In the construction of statutes, the principle is recognized that an intent to alter the common law beyond the evident purpose of the Act is not to be presumed, and it has been expressly laid down that statutes are not presumed to make any alteration in the common law beyond

(1) (1923) Ex.C.R. 195.

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what the enactment explicitly declares, either in express terms or by unmistakable implication. In all general matters beyond, the law remains undisturbed. It is not to be assumed that the legislature would overthrow fundamental principles, infringe rights, or depart from, or alter the general principles of law, without expressing itself with irresistible clearness.

Maxwell, Interpretation of Statutes, 6th ed., 149 and 235; Craies, Statute Law, 2nd ed. 126 and 188; Endlich, Interpretation of Statutes, 95, 153 and 173.

The learned judge cites section 7 and continues:

In the present case the Crown did not appropriate in the sense of expropriating and acquiring the ownership of the vessel in question; but it appropriated the use of the property, i.e. the "use of" the vessel and accounted to the owners thereof for the same.

* * *

In other words the true intent, meaning and spirit of the section—relied upon at bar—is to maintain and preserve to the subject any right possessed by him at common law, and which he previously had, notwithstanding the Act. The section does not confer upon him any new right to compensation in addition to those which he theretofore had and enjoyed at common law. It recognized liabilities *in esse*—already existing—but does not create any new ones.

The Act did not alter the law, but merely maintained it as it stood at the time of the passing of the statute, in respect of all maters therein referred to.

Since the enactment of the "Compensation (Defence) Act, 1940", this question does not arise.

Counsel for respondent, as his opponent, relied upon section 5 (1) of the said Act which is indeed the one applicable in the present instance.

With the object of defining the words "compensation" and "value" in section 5 (1) counsel for respondent referred to the following observations of Mr. Justice Maclean in the case of *Federal District Commission* v. *Dagenais* (*ubi supra*) at page 33:

The Expropriation Act, section 23, speaks of "the compensation money * * * adjudged for any land or property acquired or taken"; the "compensation money" does not appear to be limited by the statute to the "value" of the lands taken, in fact, I think, the word "value" is not once mentioned in the Act. The "compensation money", it seems to me, is to be the equivalent of the loss which the owner has suffered for any land "taken", and is not to be ascertained only by considering the "value" of the land. I think, it must have been within the contemplation of the Act, that "compensation money" should include any loss or damage suffered by the owner, and which was incidental to, or flowed from, the taking of lands.

As previously stated, the term "compensation" used in the Expropriation Act does not include only the value of

the land taken but also the injurious affection caused to the residue of the property. As suggested by counsel for respondent I believe that the term "value" used in the Compensation (Defence) Act, 1940, is narrower: it does not and indeed cannot comprise injurious affection to the residue, since in the case of a vessel or aircraft there is no residue. But the value to be determined under both acts is the value to the owner. As acknowledged by the doctrine and the jurisprudence there are certain cases in which the income derivable from the thing expropriated would not constitute a fair basis in assessing the value to the owner; then the principle of reinstatement ought to be applied. As observed by Cripps (*op. cit.*, p. 180 *in fine*), "this principle is that the owner cannot be placed in as favourable a position as he was in before the exercise of compulsory powers, unless such a sum is assessed as will enable him to replace the premises or lands taken by premises or lands which would be to him of the same value". Notwithstanding counsel's argument to the contrary I believe that the doctrine of reinstatement applies to the acquisitioning of a vessel as well as to the expropriation of land and that the decisions governing the latter are relevant and applicable.

It was urged by counsel for respondent that a ship is a peculiar type of property which depreciates in value and in that respect is quite different from land. I think this statement is too broad. Land, as defined in the Expropriation Act, comprises not only lands of every description but also real property in general, including messuages and tenements, which are liable to depreciation. Needless to say depreciation must be taken into account.

Counsel for respondent drew the attention of the Court to the fact that the term "value", relating to a ship, is found in the Merchant Shipping Act, 1854 (17 & 18 Vict., chap. 104), s. 504, which fixes the limitation of the shipowners' liability; the section reads as follows:

504. No owner of any sea-going ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity (that is to say),

(1) Where any loss of life or personal injury is caused to any person being carried in such ship;

(2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;

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(3) Where any loss of life or personal injury is by reason of the improper navigation of such sea-going ship as aforesaid caused to any person carried in any other ship or boat;

(4) Where any loss or damage is by reason of any such improper navigation of such sea-going ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat;

Be answerable in damages to an extent beyond the value of his ship and the freight due or to grow due in respect of such ship during the voyage which at the time of the happening of any such events as aforesaid is in prosecution or contracted for, subject to the following proviso (that is to say), that in no case where any such liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than fifteen pounds per registered ton.

As indicated by counsel, a history of the legislation concerning the limitation of the owner's liability is related in *Maclachlan* on *Merchant Shipping,* 7th ed., p. 92. This history may be and is indeed interesting but it has no materiality herein.

An interpretation of the meaning of the term "value" in section 504 was given by Sir W. Page Wood, V.-C. in the case of *The African Steam Ship Company* v. *Swanzy and Kennedy* (1) where he said (p. 663):

The only question of which I have to dispose is, what is to be taken to be the value of this ship within the meaning of the term "value" in the 504th section of the Act.

The natural and obvious meaning of the term in question, and that which under ordinary circumstances the Court would attribute to it, is what the ship would have fetched had she been sold immediately before her loss.

It was contended, that this would lead to too low an estimate, and that the Court ought to inquire what, at the time when the ship was lost, was her peculiar value to the Plaintiffs, having regard to the business in which she was employed, and the growing nature of that business. But to adopt the peculiar value which the owner would have set upon his ship as the criterion of her value within the meaning of the Act, would be to open too large a field of inquiry.

It is true, that the sum which the ship would have sold for, cannot, in all cases, be a true criterion of its value. Cases might arise, in which to adopt that criterion would lead to undue depreciation. A particular class of ships might be adapted for one particular description of traffic, and for that alone; and that description of traffic might be entirely occupied by one company, with which it might be hopeless to compete, so that there would be no market for a ship of that particular description. If such a case should ever occur, it would be necessary for the Court to adopt some other criterion. One I venture to suggest might be, to ascertain the price given for the ship, and the subsequent deterioration. Some such criterion would have to be adopted; for otherwise the value of the ship would be what the ship would sell for to be broken up.

(1) (1856) 2 Kay & Johnson's Rep., 660.

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Counsel intimated that the decision in this case is an authority on "the very phrase" with which we are confronted. I may first observe that the Merchant Shipping Act has an entirely different object from that of the Compensation (Defence) Act, 1940. It may be that in determining under section 504 of the Merchant Shipping Act, 1854, the value of a ship for the purposes of the limitation of her liability it must be assessed at the current market value, assuming that such value exists. The sole object of section 504 is to limit the responsibility of the owner of a sea-going ship or of a share therein for loss of life or injury to passengers or damage to or loss of goods occurring without his fault or privity. The compass of the Expropriation Act and of the Compensation (Defence) Act, 1940, is much broader and consequential; their effect is to deprive the owner of a property, real or personal as the case may be, of his right of ownership against his will and quite often contrary to his interests. I do not think that, in such a case, the price which the property could fetch if put on the market and sold forthwith would be a fair and reasonable compensation to the owner.

With due deference I must say that I cannot share the view of the Vice-Chancellor when he says that "to adopt the peculiar value which the owner would have set upon his ship as the criterion of her value within the meaning of the Act would be to open too large a field of inquiry". One must not shun too readily the work involved in an extensive inquiry, provided it be pertinent and material.

Another statement of the Vice-Chancellor with which I may say with respect I cannot agree unreservedly is that a criterion of value might be "to ascertain the price given for the ship and the subsequent deterioration". As previously noted, the cost of a property, real or personal, to its owner is not necessarily a criterion in assessing its value, although it may sometimes be an important element.

Counsel for respondent finally relied upon the doctrine of contribution for the purposes of general average where it is necessary to determine the value of the ship in relation to the value of the cargo in order to establish what amounts each of the contributing parties should bear to take care of the damage which is a general average loss. In this

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connection counsel referred to *Lowndes' General Average,* 5th edition, page 351; not having this edition at my disposal, I consulted the 6th edition (1922).

I think it may be useful to cite two brief extracts from this work. First, at page 358, the author defines the principle regulating the basis of contribution thus:

> The general principle of contribution may be summed up in one sentence: it must be determined how much better off, in a pecuniary sense, each owner of property exposed to hazard on shipboard would be in the event of a safe arrival than in the event of a total loss: and on this amount, which represents the benefit derived by each from the sacrifice which has saved the ship, each must contribute.

Lowndes then says that the first contributing interest is the ship and adds (p. 359):

> This must contribute upon its actual value to the owner, at that point of time which, according to the rules already laid down, is to form the basis of adjustment, and in the actual condition, whether sound or damaged, in which the ship was at that time.

And further he goes on to say:

> To determine the actual value of a ship is not always very easy. On principle, a merchant-ship being simply a machine for earning freights, the real value of a ship to her owner is, the present capitalized value of all her future earnings, so long as she can be used as a ship, after deduction of her working expenses; to which must be added, the present value of the sum for which she may eventually be sold to be broken up. But, as the data for such a calculation do not exist, we have to adopt other tests, in the way of approximation. One such test is the value in the market, which represents the current opinions of shipowners on the point. This test can be adopted when there is a market for ships of the kind, sufficiently extensive to give a fair approximation to the ship's real value. In the case of ships of a peculiar build, or exceptional size, or having qualities which specially adapt them to some one limited trade, the value in the market may not come near to the real value. In such a case it may be necessary to take account of the first cost; to make a deduction for age and wear and tear; to allow, likewise, for changes that may have taken place, since the ship was built, in the cost of materials or the price of labour, or for later improvements in construction which may diminish her relative value. In short, no inflexible rule can be laid down beyond this: the principle is, the ship is to be valued at that sum for which the owner as a reasonable man would be willing to sell her: and this sum must be ascertained by the adjuster as well as he can (See *African Steamship Co.* v. *Swanzy* (1); *Grainger* v. *Martin* (2). See also The Marmonides, 1903, p. 1).

The same doctrine is expounded in *Arnould* on *Marine Insurance,* 12th edition, vol. 2, at page 1321, where he says:

(1) (1856) 2 K. & J. 660.

(2) (1862) 4 B. & S. 9.

There is no dispute about the general principle: but there has been great difficulty in adopting any practical rule of valuation, a difficulty arising principally from the fact that the ship, generally speaking, is not, like the goods, actually sold at the port of destination. The method of valuation, in the absence of a sale, has been very generally, but very variously, fixed by the positive laws of almost all mercantile States, but in our own country we have no fixed rule upon the subject. The adjuster must ascertain the figure as well as he can—either, where there is a market for similar vessels, by estimation of her market value, or, where there is not, by considering her first cost, and then making proper allowances for wear and tear, changes in the cost of construction, materials and the like, which might either enhance or diminish her value at the date of adjustment.

As stated in connection with the Merchant Shipping Act, I may say here that the object of the law of general average is materially different from that of the Expropriation Act and the Compensation (Defence) Act, 1940, and the value of a ship under the Merchant Shipping Act or the Marine Insurance Act cannot, in my opinion, be determined in the same manner and with the same measure as under the two former acts. However it may be, Lowndes acknowledges that, in the case of a ship of a peculiar build or of an exceptional size or having qualities which make her specially adaptable to a limited trade, the market value may not come near to the real value.

Counsel for respondent intimated that the market value of ships is something liable to fluctuate rapidly, particularly that of freighters which depends largely on the fluctuation in freights. He admitted however that when the owner of a ship operates her on a regular service her value to him is not to the same degree open to fluctuation as the market value.

Regarding the decision in *A and B Taxis Limited* v. *The Secretary of State for Air,* counsel submitted that this was a case under a special act, the Indemnity Act, 1920, which indicates clearly what can be claimed, namely, the "direct loss or damage incurred or sustained by reason of interference of the Crown" and that it cannot be helpful in the present instance owing to its particular phraseology. The Indemnity Act, 1920, is undoubtedly more precise and definite than the Compensation (Defence) Act, 1940. It nevertheless remains that it is the value to the owner which must be assessed and that the principle of reinstatement must be applied if the owner cannot otherwise be placed in as favourable a position as he was in before the taking over of his property by the Crown.

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Dealing with the phrase "no account being taken of any appreciation due to the war" in section 5 (1) of the Compensation (Defence) Act, 1940, counsel for respondent argued that it should not be interpreted narrowly as suggested by counsel for claimant but should be given the same weight as any other part of the definition. In his view the difficulty in this case is not to understand the phrase which is unambiguous but lies in the application of it. In this connection counsel expressed his wish to refer to the experience in the United States arising out of the last war, where according to him something very akin to the question at issue arose. Counsel submitted that under the constitution of the United States a person whose property is taken by eminent domain is entitled to just compensation but that there grew on the law of just compensation a theory that one should not recover for what is known as an artificial enhancement or a boom value. He intimated that it was held that, if the taking by the State occurred at some moment when the market for the particular thing wanted was abnormally high, this constituted an artificial enhancement of the value and that it should not be taken into consideration; that however there was some doubt about this and that after the last war a number of actions were instituted in which owners of property taken had applied for compensation; that the Government of the United States took the position that the prevailing war-time prices at the time of the taking did not represent the fair market value and that the measure of compensation in such cases was the cost of production plus a just and reasonable profit. Counsel in this respect referred to the following decisions: *C. G. Blake Co.* v. *United States* (1); *National City Bank of New York* v. *United States* (2); *Prince Line Ltd.* v. *United States* (3).

The head-note of the report of the judgment of the District Court, which was affirmed in appeal, in the case of *C. G. Blake Co.* v. *United States,* contains a fair summary of the judgment and I deem it appropriate to quote an extract (p. 861):

(1) (1921) 275 Fed. Rep. 861; 279 Fed. Rep. 71.
(2) (1921) 275 Fed. Rep. 855; (1922) 281 Fed. Rep. 754.
(3) (1922) 283 Fed. Rep. 535.

(1) Where one is entitled to compensation based on the value of property, the measure of recovery, where such property can be procured in the market, is its market value, even though such market value is affected by laws and governmental regulations affecting the sale of such property, droughts, floods, commercial panics, crop failures, labour difficulties, or other similar causes; the true value being otherwise determined only where there is no market value.

4. Owner of coal requisitioned for the maintenance of the United States Navy under National Defence Act, par. 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, par. 3115 1/8 ii), suing the government for "just compensation" under such statute, was entitled to the market value, notwithstanding abnormal condition of market resulting from the war and governmental regulations, and was not limited to the cost of production plus a reasonable profit.

Reference may be had to the notes of Peck, District Judge, at page 863, *in fine*, and page 864. The judgment of the Circuit Court of Appeals affirming the judgment of the District Court contains no reasons of particular interest.

In the case of *National City Bank of New York* v. *United States*, paragraphs 4 and 5 of the head-note are interesting; they contain an accurate résumé of the part of the judgment defining the "just compensation". I may quote a passage from the judgment of Mayer, District Judge, on this subject (p. 859):

(4) It is the rule of law in condemnation cases that the just compensation guaranteed by the Constitution is the fair market value of the property taken (Lewis on Eminent Domain, 2d Ed., par. 706, p. 1048, and other authorities cited). * * * The Chandler-Dunbar case is a helpful illustration of the principle because the rule was applied in order to prevent the owner from recovering more than the fair market value. There it was contended that the parcel taken possessed "strategic value" with reference to a general scheme of water-front development, such as that for which the property was taken. The court, in disallowing this item of value, said (Mr. Justice Lurton, at 229 U.S. 81, 33 Sup. Ct. 679, 57 L. Ed. 1063):

"The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes."

Not only is market value the measure of just compensation, but it must be the value in a free market. Prices prevailing in a market which is not free are not the measure of just compensation (authorities cited).

It is well settled that a person whose property is taken is entitled to its market value for the most valuable use, although as matter of fact he did not devote it to that use, and for some reason or other could not do so. In such case, however, he would be free to sell it to a person who could so use it (authorities cited).

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court contains no material observations.

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In the case of *Prince Line Limited* v. *United States* it will suffice to quote a brief excerpt from the reasons of Chatfield, District Judge, relating to compensation (p. 540):

> (3) As was said in cases cited *supra*, the government cannot take private property without making just compensation, and just compensation is to be estimated by the value to the person at the time of the taking. Unless the government could properly say that all persons in the United States were to furnish the government property, supplies, and services at a pre-war price, and unless the government could constitutionally stamp as illegal all prices which, due to competition caused by the war, had increased in value, then just compensation would be a fair price in accordance with the laws of supply and demand at the time. From this standpoint, the demands of the plaintiffs in each of these cases are not only fair and just, but within the limits which have easily been established as fair market value. It has been shown that there was a market, and the plaintiffs should revover the amount asked.

As it was held in these three cases that the compensation was to be calculated on the abnormal condition of the market which existed during the war, counsel for respondent submitted that there was no statute in the United States at the time these cases arose similar to our Compensation (Defence) Act, 1940, that consequently appreciation due to the war entered the picture and that the claimants were entitled to be paid on the basis of the war prices. In this respect Orgel's recent work "Valuation under the Law of Eminent Domain" may be beneficially consulted, particularly at pages 84 to 88 where the author deals with the matter of war-time prices and discusses the decisions above referred to.

It was argued on behalf of respondent that the words "no account being taken of any appreciation due to the war" in the Compensation (Defence) Act, 1940, do not refer merely to the value to the taker, as hinted by counsel for claimant, but mean an appreciation in the value generally. I believe that this interpretation is correct; what I have to consider in this case is the appreciation of vessels attributable to war conditions.

Counsel for both parties have stated that they could not find any decision concerning the assessment of value of a vessel in a case of acquisition by the Crown and particularly the meaning of the phrase "no account being taken of any appreciation due to the war". I may say that, notwithstanding extensive search, I have been unable to find any precedent.

Counsel for respondent pointed out that the cases relied upon by his opponent were largely decisions under the Expropriation Act, which must be read in the light of the statute, the wording whereof is different from that of the Compensation (Defence) Act, 1940. This contention seems reasonable. In each case, however, the expressions "consideration" and "value" must be interpreted and, as previously set forth, they have, in my opinion, the same bearing and significance. I do not think that it would be useful to insist any further on this aspect of the question.

Counsel for respondent, before closing his remarks, drew the attention of the Court to four cases, which he said he had through an oversight omitted to cite: *Newcastle Breweries Limited* v. *The King* (1); *Lake Erie and Northern Railway Co.* v. *Brantford Golf and Country Club* (2); *The King* v. *Spencer* (3); *The King* v. *Macpherson et al.* (4).

Counsel suggested that the case of *Newcastle Breweries Limited* v. *The King* may be of interest, although not directly in point, because it deals with the provisions of the Army Act authorizing the taking of chattels by the Crown for the use of the army and providing for His Majesty paying a fair market value therefor.

A brief summary of the facts will be useful. On October 6, 1917, the suppliants, who are brewers and wine and spirit merchants, were the owners of 658 puncheons of rum. By a written notice of November 20, 1917, the Admiralty acquired 239 puncheons of the rum. The suppliants claim the market value of these puncheons and ask that, failing an agreement, the amount of such value be determined by a court of law. The Admiralty rejected both claims, but paid to the suppliants, without prejudice to the position of either party, a certain sum arrived at without reference to market value and being not much more than one-third of such value as set forth by the suppliants. The Admiralty said that no additional sum was payable unless a further payment be advised or determined by the Royal Commission of Inquiry as to compensation in respect of loss or damage to property or business appointed by His Majesty by command dated March 31, 1915.

(1) (1920) 1 K.B.D. 854.
(2) (1916) 32 D.L.R. 219.
(3) (1939) Ex.C.R. 340.
(4) (1914) 15 Ex.C.R. 215.

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The Solicitor-General, while reserving the matter for consideration elsewhere, did not rely on the Royal Prerogative, but on regulation 2B of the Defence of the Realm regulations.

The head-note contains the material portion of regulation 2B, apart from a summary of the judgment; I think it is expedient to cite it in extenso for the understanding of the question at issue (p. 854).

> Regulation 2B of the Defence of the Realm Regulations made under s. 1 of the Defence of the Realm Consolidation Act, 1914, provides that 'it shall be lawful for the Admiralty, Army Council, or Air Council or the Minister of Munitions to take possession of any war material, food, forage and stores of any description and of any articles required for or in connection with the production thereof. Where any goods, possession of which has been so taken, are acquired by the Admiralty, Army Council, or Air Council or the Minister of Munitions, the price to be paid in respect thereof shall in default of agreement be determined by the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined.
>
> In determining such price regard need not be had to the market price, but shall be had: (*a*) if the goods are acquired from the grower or producer thereof, to the cost of production and to the rate of profit usually earned by him in respect of similar goods before the war and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case; (*b*) if the goods are acquired from any person other than the grower or producer thereof, to the price paid by such person for the goods and to whether such price was unreasonable or excessive, and to the rate of profit usually earned in respect of the sale of similar goods before the war, and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case; * * *
>
> Provided that where, by virtue of these regulations or any order made thereunder the sale of the goods at a price above any price fixed thereunder is prohibited the price assessed under this regulation shall not exceed the price so fixed * * *:"
>
> Held, that the regulation, so far as it purports to deprive persons whose goods are requisitioned by the naval or military authorities of their right to the fair market value and to a judicial decision of the amount, is *ultra vires*.
>
> It is an established rule that a statute will not be read as authorizing the taking of a subject's goods without payment unless an intention to do so be clearly expressed. This rule applies no less to partial than to total confiscation, and it applies *a fortiori* to the construction of a statute delegating legislative powers.

This judgment is interesting in that it decides: (1) that a regulation purporting to take away the right of the subject, whose property is requisitioned, to the fair market value and to a judicial decision of the amount is *ultra vires;* (2) that a regulation, depriving the owner of a property of the statutory right to the fair market value and directing

that the sum payable shall be based on the cost price and not on the market price of the goods acquired, will not be read as authorizing the taking of the subject's property without payment unless an intention so to do be clearly expressed.

In the case of *Lake Erie and Northern Railway Co.* v. *Brantford Golf and Country Club*, it was held primarily by the Supreme Court that "upon an appeal from the award of arbitrators made under the Railway Act, R.S.C. 1906, ch. 37, the Appellate Court may increase the amount of the award". This decision was evidently not cited in connection with this particular aspect of the case which has no relevance whatever to the question at issue. Statements by Fitzpatrick, C.J. and Duff, J. were likely the cause of the citation. At page 221 the Chief Justice says:

> Personally, I am unable to appreciate the views set out by the Judge; it would be difficult as well as unnecessary to consider them in detail. He has a preference for a particular method of ascertaining the compensation which may be called that of "reinstatement"; he cites two cases from which he says it appears that this would afford a fair test of the damage suffered by the appellants. It is rather remarkable that he goes on to say that in the first of these cases Jessel, M.R., denied that the damages were really "reinstatement", and that in the second case Lord Shand decided that the principle of so-called "reinstatement" could not be applied. The Judge adds that "that method is of course not the only way of arriving at the compensation to be paid".

This observation acknowledges implicitly the doctrine of reinstatement.

On the other hand Duff, J. (now Sir Lyman Duff) expressed the following opinion (p. 229):

> It is needless to emphasize perhaps that the phrase does not imply that compensation is to be given for "value" resting on motives and consideration that cannot be measured by any economic standard.
>
> It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on upon it and in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in *Pastoral Finance Ass.* v. *The Minister* ((1914) A.C. 1083 at 1088) has given what he describes a practical formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.

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Further on Duff, J., dealing with the question of reinstatement, to which counsel for respondent particularly referred, made the following observations (p. 232):

> However that may be, two things are quite clear. The respondents are not entitled as a matter of law to take the position: You have prejudiced by your works the utility of our property for the purpose to which we devote it, and consequently we require from you such a sum of money as will enable us by the expenditure of it to procure for ourselves a property equally useful for those purposes. The authority to which Hodgins, J.A., refers, namely, *Queen* v. *Burrow* (Boyle & Waghorn on Compensation, p. 1052), as well as the observation of Lord Shand in the explanation of an award in *Edinburgh* v. *N. British R. Co.* (Hudson on Compensation, p. 1530), are quite sufficient to establish that proposition. It must be shewn, as Bowen, L.J., points out in the *Burrow's* case, that purchase is the reasonable consequence of the taking or the injurious affection of the owner's lands. If I were obliged to answer that question I should infer from all that took place before the arbitrators that it was not the reasonable consequence and indeed that it was not the consequence at all; but I do not think that I am entitled to speculate about a point of that kind on behalf of the parties who did not see fit to bring it forward at the proper time.

These observations imply, as I think, the propriety in certain cases of the principle of reinstatement, although denying its applicability in the case under review.

The case of *The King* v. *Spencer* was cited particularly on account of my statement regarding the cost of replacement of the buildings and the deduction therefrom of the depreciation which the buildings then standing had suffered since their erection. I may say that, on this point, rightly or wrongly, I am still of the same opinion.

The fourth case cited by counsel for respondent was that of *The King* v. *Macpherson et al.*, in which it was held (*inter alia*) that the price paid for the property by the defendant Holland should be taken as its actual market value for the purpose of compensation. Cassels, J., adopted the opinion expressed by the Supreme Court in *Dodge* v. *The King* (1) regarding the basis of valuation of a property expropriated; I deem it convenient to quote a passage from his judgment (p. 217):

> In *Dodge* v. *The King* (38 S.C.R. 155), the following is said in the judgment of the Court:
>
> "The market price of lands taken ought to be the *prima facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance

(1) (1906) 38 S.C.R. 155.

measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession."

I think a careful analysis of the authorities as a whole will show that the above is an accurate and concise statement of the law that should govern.

The learned judge then made a careful review of the doctrine and jurisprudence to which reference may be had with profit.

After mature deliberation I am disposed to conclude that the principle of reinstatement is applicable in the case of the *Sankaty*.

It will be convenient to sum up briefly the evidence relating to the replacement of the *Sankaty*.

According to the testimony of Roue, who prepared plans for a proposed ship for the Wood Islands-Caribou ferry service at the request of claimant's predecessors, the cost of a ship of about the same capacity as the *Sankaty*, although somewhat smaller, towards the end of 1938 or the beginning of 1939 including the machinery would have been $311,000 or $346,000, depending upon the type of engine and power used (p. 31). If we deduct from $311,000, the lower price at which the ship could have been built and equipped, a depreciation of 35 per cent, seeing that the *Sankaty* which was to be replaced was 29 or 30 years old, there remains a value of $202,150.

If, instead, the claimant had decided to purchase the *Fishers Island* at the price of $285,000 in United States currency asked by her owner in February, 1941, this would have represented an expenditure of $316,350, the rate of exchange between United States and Canadian funds being at the time 11 per cent. We must not overlook the fact however that this price of $316,350 was the price claimed in February, 1941, and that since the outbreak of the war there had been a substantial appreciation in vessels generally. As previously mentioned, this appreciation was fixed by Strang at 50 per cent and Roue declared that the cost of construction of vessels in 1941-1942 was 10 to 15 per cent higher than in 1938-1939. The figure mentioned by Strang seems to me too high. On the other hand, the figure stated by Roue applies not to the sale but to the construction of vessels, which explains to a certain extent the large difference between his figure and

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that of Strang. As I have said, I am disposed to assess the appreciation at 33⅓ per cent. If we subtract from the sum of $316,350 one-third thereof, we have a balance of $210,900.

There is a third alternative. The claimant might have purchased another vessel of the type of the *Prince Nova;* this would have meant an expenditure, in round figures, of $92,000. The price of the two vessels purchased to replace the *Sankaty* would thus have amounted to $184,000. With its two vessels the claimant would not have been in as advantageous a position as with the *Sankaty,* seeing that the operation of two vessels would have involved heavier overhead expenses.

After perusing the evidence carefully, listening attentively to and later reading the exhaustive argument of counsel and examining the various acts relied upon and studying the precedents invoked, I have reached the conclusion that in order to put the claimant in as favourable a position financially as it was in before the taking of the *Sankaty* by the respondent and to enable it to obtain a suitable substitute for the said vessel, of approximately the same size and carrying capacity, it must be granted a compensation of $205,000.

The sums of $100,000 for the *Seaborn* or *Charles A. Dunning* and $205,000 for the *Sankaty* form a total of $305,000 from which must be subtracted the sum of $176,664.63 paid to claimant by respondent, leaving a balance of $128,335.37.

The claimant, upon giving to the respondent a good and valid title to the said vessels, namely the M.V. *Seaborn* or *Charles A. Dunning* and the S.S. *Sankaty,* free from all charges and encumbrances whatsoever, will be entitled to be paid and to recover the said sum of $128,335.37, with interest at 4 per cent from March 1, 1941, date of the acquisition of the vessels by the respondent, to the date hereof.

Claimant will also be entitled to its costs.

Judgment accordingly.