1945

*Feb. 26, 27, 28
*Mar. 1
*May 15

HIS MAJESTY THE KING (RESPONDENT) ..... } APPELLANT;

AND

NORTHUMBERLAND FERRIES LIMITED (CLAIMANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Compensation—Appropriation of ships by the Crown for naval services—Reference to Exchequer Court under s. 7 of War Measures Act, R.S.C. 1927, c. 206, to determine compensation—Principles applicable in determining compensation—"Value of the vessel" in s. 5 (1) of The Compensation (Defence) Act, 1940 (c. 28).

Appeal—Jurisdiction—Award on reference to Exchequer Court under s. 7 of War Measures Act—Whether appeal lies to Supreme Court of Canada—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19, 37, 82—Supreme Court Act, R.S.C. 1927, c. 35, ss. 35, 44—Contention that Exchequer Court was curia designata—Effect of provision for choice of court, etc., in making reference under s. 7 of War Measures Act.

Under s. 7 of the *War Measures Act*, R.S.C. 1927, c. 206, the Minister of Justice referred to the Exchequer Court respondent's claim for compensation in respect of two ships, the *Seaborn* and the *Sankaty*, appropriated and acquired for naval services by the Crown. In the Exchequer Court ([1944] Ex. C.R. 123) Angers J. awarded $100,000 for the *Seaborn* and $205,000 for the *Sankaty*. Against the amounts of such awards the Crown appealed to this Court. Respondent moved to quash the appeal for want of jurisdiction, mainly on the ground that the Exchequer Court was *curia designata* and, no appeal being provided by the *War Measures Act*, there was no right of appeal. Argument was heard both on the motion to quash and on the merits of the appeal.

Under said s. 7, if the compensation is not 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".

Under s. 5 (1) of *The Compensation (Defence) Act, 1940* (c. 28), the compensation shall be "a sum equal to the value of the vessel * * * no account being taken of any appreciation due to the war".

Held: (1) This Court had jurisdiction to hear the appeal. (Cases discussed.)

Per the Chief Justice: It is to be noted that, along with the authority or jurisdiction to each of the courts enumerated in s. 7 of the *War Measures Act* or to a judge thereof, there is not given special and independent powers. When once the reference is made, the court or

*PRESENT: Rinfret C.J. and Kerwin, Hudson, Taschereau, Rand, Kellock and Estey JJ.

the judge is to deal with the matter in the ordinary way and according to the powers vested in the court by the general Act and the inherent powers already possessed. Parliament's intention was clearly that the Exchequer Court, in a reference to it as in the present case, should act as a court in accordance with the provisions of the *Exchequer Court Act* and that all the provisions of that Act should apply to the reference. The jurisdiction of the Exchequer Court, through the reference, was one "in any manner vested in the Court" within s. 82 of the *Exchequer Court Act,* and under said s. 82, read in connection with s. 44 of the *Supreme Court Act,* there was a right of appeal to the Supreme Court of Canada.

Per Kerwin J.: S. 82 (1) of the *Exchequer Court Act,* taken in conjunction with ss. 35 and 44 of the *Supreme Court Act,* conclusively gives a right of appeal in this case. The words "in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court" in said s. 82(1) are broad enough to include the present reference. S. 7 of the *War Measures Act* provides for the very vesting required by said s. 82(1). The option given to the Minister in making the reference under said s. 7 is not a ground for holding against a right of appeal in the present case. If a reference were made to a provincial superior or county court or a judge thereof, then whether any appeal would lie from the ensuing judgment would depend upon the ordinary jurisdiction of such court and the provisions made as to appeals from judgments thereof.

Per Hudson, Taschereau and Kellock JJ.: The option given under s. 7 of the *War Measures Act* as to the court or judge to whom the reference shall be made, is not a ground for holding against a right of appeal in the present case (*James Bay Ry. Co.* v. *Armstrong,* [1909] A.C. 624, at 630).

Per Hudson J.: S. 44 of the *Supreme Court Act,* read with s. 82 of the *Exchequer Court Act,* is ample to vest jurisdiction in this Court in this appeal. The matters referred to the Exchequer Court fell well within those comprised in its ordinary jurisdiction; and the procedure followed in that Court was in accordance with the normal practice of a suit carried on therein.

Per Taschereau J.: The trial Judge did not exercise any special jurisdiction with an appropriate machinery for that particular purpose, but dealt with the matter as a judge of the Court in the discharge of his ordinary judicial functions.

Per Rand J.: A reference to the Exchequer Court under s. 7 of the *War Measures Act* is not to be taken in any other sense than a reference by a departmental head (as under s. 37 of the *Exchequer Court Act*) and the effect of the reference is to place the claim within the ordinary procedure of the Court. (Whether a similar reference allowed to a provincial county or superior court carries with it the ordinary rights of appeal under provincial law, it is not necessary to decide. The language "or to a judge of any such court" in said s. 7 contemplates a judge exercising the original jurisdiction of his court). The present proceeding was in the Exchequer Court as such, and therefore an appeal lies under s. 82 of the *Exchequer Court Act.*

Per Kellock J.: S. 7 of the *War Measures Act* vests jurisdiction in the Exchequer Court within the meaning of s. 82 of the *Exchequer Court*

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Act, conditional only upon the exercise by the Minister of the power of reference given him by the *War Measures Act*; and the combined effect of s. 82 of the *Exchequer Court Act* and s. 44 of the *Supreme Court Act* is to authorize an appeal to this Court.

(2) On the merits of the appeal: As to the *Seaborn*, the compensation should be reduced to $92,764.93 (the amount tendered by the Crown) (The Chief Justice and Kerwin and Taschereau JJ., dissenting, would have affirmed the judgment at the trial, except as to the rate of interest allowed). As to the *Sankaty*, the case should be sent back to the Exchequer Court for re-assessment.

The meaning of "value of the vessel" within s. 5(1) of *The Compensation (Defence) Act, 1940*, and the principles to be applied and factors to be considered in determining that value, discussed, and cases referred to.

As to the *Seaborn*:

Per Hudson J.: The award below failed to give due weight to the cost of the vessel to respondent, which, though not necessarily evidence of value, was, under the circumstances, practically the only evidence of value before the Court within the prescription of s. 5 of *The Compensation (Defence) Act, 1940*. Also there were errors in amounts in items considered in reaching the award. It is a case where this Court is justified in modifying the award and it should be reduced as aforesaid.

Per Rand J.: The purchase by respondent of the *Sankaty*, admittedly much more suitable than the *Seaborn* for respondent's service, excludes any special value of the *Seaborn* to respondent as of the time of acquisition. In all the circumstances, the general market value must govern the determination of the value of the *Seaborn*. But the trial Judge, in reaching his award, included items irrelevant to market value; and also indicated a regard to considerations of realized special adaptability, and no such element was admissible. There was not in the evidence sufficient to bring the market value to more than the sum tendered by the Crown, which, though relatively not much less than that awarded below, was so generous as to prevent this Court from exceeding it.

Per Kellock J.: There was no evidence which enabled the trial judge, consistently with the proper principles to be applied, to assess the value of the *Seaborn* at any amount beyond that tendered by the Crown.

Estey J. agreed in the conclusion of Rand and Kellock JJ.

Per the Chief Justice (dissenting): There was evidence upon which the trial judge could make the award he made; and, even though this Court might, in its own view, think there was possibly a small error of valuation, this Court should not, under the circumstances, interfere.

Per Kerwin J. (dissenting): It does not appear that the trial judge failed to observe the applicable principles and it cannot be said that the sum awarded was excessive so as to justify alteration of it.

Per Taschereau J. (dissenting): The trial judge did not misdirect himself on the principles to be applied and took into account the proper elements in reaching his award, which was not clearly excessive; and therefore this Court should not interfere with his finding.

As to the *Sankaty: Per Curiam:* The trial judge erred in applying the principle of "replacement value" or "reinstatement" in reaching his award, as that was a method not in accordance with the direction in said s. 5 (1) of *The Compensation (Defence) Act, 1940,* on which the award must be based; and, as the evidence was not sufficient to enable this Court to ascertain the value on the proper basis, the case must be returned to the Exchequer Court for that purpose.

APPEAL by the Crown from the judgment of Angers J. in the Exchequer Court of Canada (1) on a reference to that Court by the Minister of Justice under the provisions of s. 7 of the *War Measures Act,* R.S.C. 1927, c. 206, to determine the compensation payable by the Crown to the respondent in respect of the acquisition by the Crown of the title to two ships owned by the respondent and known respectively as the *Seaborn* and the *Sankaty.* The said ships were appropriated by the Crown for naval services. Angers J. determined the compensation payable to be $100,000 for the *Seaborn* and $205,000 for the *Sankaty.* The Crown appealed to this Court against the amounts of such awards.

There was a motion by the respondent to quash the appeal for want of jurisdiction, on the ground that the Exchequer Court was *curia designata,* and, no appeal being provided by the *War Measures Act,* that Court's determination was final and not appealable. Another ground taken was that it was the intention of the parties, as shown by a certain letter from the Minister of National Defence for Naval Services to the respondent's solicitor, that the determination of the amount of the respondent's claim was to be by the Exchequer Court as arbitrator and was to be final and not appealable.

Argument was heard both on the motion to quash and on the merits of the appeal.

By the judgment of this Court now reported, the motion to quash was dismissed with costs; on the merits, the appeal was allowed, with costs in this Court to the appellant; in respect of the *Seaborn,* the judgment of the Exchequer Court was modified and the compensation reduced to $92,764.93, the amount tendered and paid by the appellant (the Chief Justice and Kerwin and Taschereau JJ., dissenting, would have affirmed the judgment at the trial, except that interest should have been

(1) [1944] Ex. C.R. 123; [1944] 4 D.L.R. 449.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

allowed at three instead of four per centum per annum); in respect of the *Sankaty*, the case was to be sent back to the Exchequer Court for the purpose of re-assessment; the costs of all proceedings below to be as directed by the Judge presiding at the re-assessment; such re-assessment to be made by the Exchequer Court in accordance with the principles and directions laid down in the reasons for judgment on the appeal in this Court.

J. G. Fogo K.C. and *C. Stein* for the appellant.

W. F. Schroeder K.C. and *G. J. Tweedy K.C.* for the respondent.

THE CHIEF JUSTICE.—The judgment now submitted to this Court was rendered by the Exchequer Court of Canada on a reference by the Honourable the Minister of Justice under section 7 of the *War Measures Act* (R.S.C. 1927, c. 206). It had to do with a claim of the respondent, Northumberland Ferries Limited, for compensation in respect of the ships *Seaborn* and *Sankaty* appropriated by His Majesty the King, for naval services.

Northumberland Ferries Limited 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. It was organized for the purpose of operating a proposed ferry service for the carriage of passengers, freight and motor cars and trucks, between Woods Island, P.E.I., and Caribou, N.S.

This ferry service was operated by the respondent in the years 1941 and 1942.

The *Seaborn* had been purchased by the respondent on or about July 14th, 1939. The purchase price was stated to be $80,000, made up of $30,000 in cash, $25,000 in second mortgage bonds and the remaining $25,000 by the issue of 500 shares of the company without par value, at $50 per share.

The bonds and shares were subsequently repurchased from the vendor by the group promoting the company for $25,000. It was also subsequently disclosed in the prospectus of the company that Mr. W. MacDonald, through whose agency the purchase was carried out, had made a commission of $15,000 on the transaction.

The *Seaborn* was a pleasure yacht built in 1925, of 495 tons gross tonnage. Delivery was taken at New London, Connecticut, and certain expenses for fitting out and fuel oil were incurred in bringing the vessel to Halifax, from which she was taken to the Halifax Shipyards Limited with a view to alterations for conversion into a ferry boat.

Before, however, any alterations were commenced, the *Seaborn* was first requisitioned for war purposes by the Director of Marine Services on the authority of the Minister of National Defence for Naval Services, and she was finally acquired by His Majesty the King, acting through the same Minister, for war purposes. In the company's balance sheet as at December, 1939, the cost of that ship was shown as $79,500 to which there are added charges for maintenance ($6,505.14) and other expenses directly applicable ($6,759.49), or a total of $92,764.63.

By Order in Council passed on March 20th, 1941, authority was given to pay to the respondent the sum of $92,-764.63, being the valuation made by the Advisory Board, Atlantic Coast, as compensation for the *Seaborn*.

The payment of that amount was recommended by the Minister and it was made without prejudice to any claims which the respondent might submit to the Exchequer Court for additional compensation in respect of the acquisition of the said vessel, and also without prejudice to the right of the Government to set up any defence including the terms of *The Compensation (Defence) Act, 1940,* against any such claims for additional compensation.

On December 12th, 1939, the respondent purchased the steamer *Sankaty* from Washington Trust Company, for a total of $4,500 American funds, or approximately $4,995 in Canadian money. The *Sankaty* was built in 1911, had a gross tonnage of 677 tons and drew 187 feet in length.

An amount of $6,342.45 had to be expended at Stamford to get the ship ready for the voyage to Halifax. The accounts of the Halifax Shipyards Limited for work done on the vessel after arrival at Halifax, amounted to $56,-736.72. There were certain other expenditures charged to the account of the vessel and the learned trial judge found the cost of it to the respondent to have been then $71,226.14. In addition, it was estimated that a further sum of $20,000 would have had to be spent to complete the repairs and alterations.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

Before the commencement of these proceedings, the appellant paid the company as compensation in respect of the acquisition of the *Sankaty,* $83,900 under the same conditions as the payment made for the *Seaborn.*

Subsequently, the respondent submitted a claim for $475,000 for the two vessels, giving credit for the amounts already received and claiming a balance of $298,335.35.

The claim was referred to the Exchequer Court by the Minister of Justice, under section 7 of the *War Measures Act,* and the reference came on for hearing before the Honourable Mr. Justice Angers at Charlottetown, P.E.I., in June, 1942.

The learned trial judge in his judgment awarded the respondent in respect of the *Seaborn* the sum of $100,000 and in respect of the *Sankaty* the sum of $205,000, or a total of $305,000, from which was to be subtracted the sum of $176,664.63 already paid to the respondent.

He directed that the respondent should recover the balance, $128,335.37, with interest at four per cent. from March 1, 1941, to the date of the judgment with costs.

From the foregoing decision, the appellant now appeals.

The respondent made a motion to quash the appeal apparently based on two grounds: (1) that the Exchequer Court acted as a *curia designata* in this case, under the authority of section 7 of the *War Measures Act,* and that no right of appeal is given by that Act. (2) That there was a binding agreement between the appellant and the respondent to treat the decision of the Exchequer Court as final and conclusive.

The hearing on the motion, when it was presented, was adjourned to be disposed of at the same time as the merits of the appeal; and it was so heard. The points raised by the motion must first be disposed of.

The reference in this case was in these terms:

> Under the powers conferred by section 7 of the War Measures Act, or otherwise existing in this behalf, I hereby refer to the Exchequer Court of Canada for adjudication the annexed claim of Northumberland Ferries Limited for compensation in respect of the ships *Seaborn* ("Charles A. Dunning") and *Sankaty* appropriated for naval services by His Majesty The King.
>
> Dated at Ottawa this 7th day of June, A.D. 1941.
>
> (Signed) ERNEST LAPOINTE,
> Minister of Justice.

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

> 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.

Then *The Compensation (Defence) Act, 1940,* section 5, relating to the compensation payable for the acquisition of a vessel (on which the present claim is based) is as follows:—

> 5. (1) The compensation payable in respect of the acquisition of any vessel or air-craft shall be a sum equal to the value of the vessel or air-craft, 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 air-craft; 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 air-craft.

It was argued on behalf of the respondent, that the Exchequer Court or the Superior or County Court, or the Judge of any such Court, acting under the provisions of section 7 above quoted, act as *persona designata* and that therefore there exists no right of appeal from the decision rendered by either of them.

In support of that contention, the respondent referred to a number of decided cases which are later examined; but it relied primarily on section 82 of the *Exchequer Court Act* and section 44 of the *Supreme Court Act.*

Section 44 states that the Supreme Court of Canada shall have jurisdiction as provided in any other Act confering jurisdiction.

Section 82 of the *Exchequer Court Act* reads as follows:—

> Any party to any action, suit, cause, matter or other judicial proceeding in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as a judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

The respondent laid emphasis on the word "vested" in the above section.

It contended that the jurisdiction exercised in the premises by the Exchequer Court was not "vested in the Court" under the provisions of the *Exchequer Court Act;* that it was conferred upon the Court by force of section 7 of the *War Measures Act* and as a consequence of the reference made by the Minister of Justice; that therefore the present proceedings did not come within section 82 of the Act, and that accordingly there was no right of appeal, since the Court did not decide the matter in virtue of its ordinary jurisdiction but acted as *curia designata.*

I do not think the argument is well founded.

When all is said and considered, the question of whether a court or judge indicated in a statute is intended as a *persona designata* depends upon the construction to be given to the statute wherein the said court or judge is indicated; and, in the present instance, there is a strong presumption that Parliament meant the appointed court or judge to act in its judicial capacity.

It is to be noticed that the statute giving the authority or jurisdiction to each of the courts enumerated in section 7 or to a judge thereof, does not purport to grant or to give special and independent powers either to the court or to the judge to whom the reference is made. It says that the Minister of Justice should refer the matter of compensation to the court or to a judge thereof, without more.

When once the reference is made, the court or the judge is to deal with the matter in the ordinary way and according to the powers vested in it by the general Act and the inherent powers which it already possesses. Indeed, if the court or judge chosen by the Minister of Justice were not to resort to the powers vested in them by the general Act and in the ordinary way, it would seem that the exercise of its jurisdiction would be practically unworkable.

The intention of Parliament was clearly, in this instance, that the Exchequer Court to which the reference has been made, should act as a Court in accordance with the provisions of the *Exchequer Court Act* and that all the provisions of that Act should apply to the reference thus made by the Minister of Justice.

Now, section 82 of the *Exchequer Court Act* read in connection with section 44 of the *Supreme Court Act,* is to the effect that any final judgment given by the Exchequer Court "in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court" is appealable to the Supreme Court of Canada.

Even if, as contended by the respondent, the jurisdiction herein exercised is not to be held "vested in the Court" under sections 18 and following of the *Exchequer Court Act,* it is not to be doubted that, upon any view of the matter, the jurisdiction here is given to the Exchequer Court by force of section 7 of the *War Measures Act,* through the reference made to that Court by the Minister of Justice. It is a jurisdiction "in any manner vested in the Court" at least as a result of the application of the *War Measures Act* and therefore "vested" within the meaning of section 82.

The consequence is unavoidable that the latter section applies to the reference and that a right of appeal is thereby given to the Supreme Court of Canada.

A great number of judgments were referred to by counsel of both parties in this case; but, as usual, very few of them have real application to the question now under discussion, because these judgments dealt with questions different from those which are raised in the motion to quash, and statutes differently worded. In the cases referred to, the courts were called upon to interpret statutes differing in language or in aim from the Acts now before this Court. (See Lord Davey in *Commissioners of Taxation* v. *Kirk* (1)).

Let us take, for example, *Valin* v. *Langlois* (2). In that case, Parliament had conferred upon provincial judges in Dominion Controverted Elections cases an exceptional jurisdiction with a special procedure and with all powers material for exercising such jurisdiction and having nothing in common with the provincial courts. It was held that these judges and courts were merely utilized outside their respective jurisdiction to deal with this purely Dominion matter.

(1) [1900] A.C. 588 at 593. (2) (1879) 3 Can. S.C.R. 1.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

Again in *Canadian Northern Ontario Railway Company* v. *Smith* (1) it was pointed out that the judge to whom the application was made under the Dominion *Railway Act* was, it is true, a judge of the Superior Court of the Province, but, for the purposes of that application, his jurisdiction was "special and peculiar, distinct from, and independent of any power or authority with which he is clothed as a judge of that court"; the Act conferring jurisdiction upon him provides all necessary material for the full and complete exercise of such jurisdiction in a very special manner, wholly independent of, and distinct from, and at variance with, the jurisdiction and procedure of the court to which he belongs.

Duff J. (as he then was), at page 480, expresses the view that the jurisdiction created by section 196 of the *Railway Act* (c. 37, R.S.C., 1906) was not "a jurisdiction given to the Superior Court or County Court as the case may be, but to the judge or judges of those courts"; and he added, "in other words, when acting under that section the judge does not exercise the powers of the court as such but the special powers given by the Act".

Of all the other cases relied on by the respondent, in his motion to quash, I find it necessary to refer only to the following:

Warner Quinlan Asphalt Company v. *The King* (2). This was a case initiated under section 7 of the *War Measures Act*. The judgment of the Exchequer Court was affirmed and the decision of this Court was rendered on the merits of the case.

Idington J. questioned whether any right of appeal existed and he referred to *Gosnell* v. *Minister of Mines* (3) and *Wigle* v. *The Corporation of the Township of Gosfield* (4). He declined, however, to dispose of the case on the question of jurisdiction and he said that, after hearing a very elaborate argument on the merits of the case, he had come to the conclusion, for the reasons assigned by the learned trial judge with which he agreed, that his judgment was right and that the appeal should be accordingly dismissed.

(1) (1914) 50 Can. S.C.R. 476.
(2) [1924] S.C.R. 236. (3) (1913) 2 Cameron S.C. Practice, p. 21.
(4) (1913) 2 Cameron S.C. Practice, p. 23.

Duff J. (as he then was), with whom Sir Louis Davies, C.J., Mignault and Malouin JJ. concurred, after stating that the question whether section 7 of the *War Measures Act* contemplated "a determination by the court to which the claim is referred to be final and non-appealable" was one "of some little difficulty", said that he had come to a clear opinion upon the merits of the claim advanced by the appellant and that therefore he did not propose to consider the question of jurisdiction.

The question was therefore left undecided.

Consolidated Wafer Company Limited v. *International Cone Company Limited* (1). The judgment of the Exchequer Court had ordered, under section 40 of the *Patent Act,* on appeal from the Commissioner of Patents, the Consolidated Wafer Company Limited to grant a licence to the International Cone Company to make and use a machine covered by the Wafer Company's patent at a licence fee fixed by the judgment. It was held that the Supreme Court of Canada had jurisdiction to hear the appeal and the judgment was affirmed.

His Majesty the King v. *MacKay* (2). The Crown, in April, 1918, pursuant to Order in Council passed under the *War Measures Act, 1914,* requisitioned the respondent's ship. The Exchequer Court of Canada fixed the compensation at $11,000 as being the ship's value at time of requisition, with interest thereon from the date of the requisition to the date of the judgment. The Crown appealed against the allowance of interest. The case was heard on its merits in this Court and the appeal allowed without any question being raised on the jurisdiction of this Court.

The Sun Life Assurance Company of Canada v. *The Superintendent of Insurance* (3). This was an appeal to the Exchequer Court under the provisions of subsections 5 and 6 of section 68 of the *Insurance Act* from a ruling of the Superintendent of Insurance. The ruling was upheld by the Exchequer Court and then came the appeal to this Court. The appeal was dismissed on its merits, Newcombe J. agreeing with the conclusion of the judgment of Chief Justice Anglin with whom Cannon J. also concurred, while Duff and Smith JJ. dissented.

(1) [1927] S.C.R. 300. (2) [1930] S.C.R. 130.
(3) [1930] S.C.R. 612.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

Chief Justice Anglin and Cannon J. were of the opinion that the Supreme Court of Canada was without jurisdiction to entertain the appeal, as no actual amount was in controversy and no tangible property possessing a money value was at stake in the appeal, nor would the rights of shareholders be legally affected by its determination. (Sections 82 and 83 of the *Exchequer Court Act*). They thought that moreover, by giving under subsection 5 of section 68 of the *Insurance Act* a right of appeal to the Exchequer Court (in a summary manner) from the ruling of the Superintendent of Insurance, the Parliament intended to make that Court *curia designata* for the purpose of supervising acts of an official and the summary jurisdiction to be thus exercised by the Court so designated should be final and conclusive.

On the other hand, Duff and Smith JJ. held that an appeal lay to this Court from the judgment of the Exchequer Court. In their view, the right of appeal from that Court does not exist only when the judicial proceeding involves a pecuniary demand; the construction of section 82 of the Act should be determined by the decisions rendered by this Court under section 46 of the old *Supreme Court Act;* and it has been held that, when the matter in controversy was, for example, the right to pass a by-law and so to nullify a contract, there was jurisdiction if the right immediately involved amounted to $2,000. Moreover, the proceeding in the Exchequer Court was a "judicial proceeding" and the adjudication by that Court was a "judgment within the meaning of sections 82 and 83 of the *Exchequer Court Act*".

Thus, upon the question of jurisdiction, two of the judges of this Court were of opinion that jurisdiction lay, while two other judges held that it did not; and the case was disposed of on its merits, with Newcombe J. concurring in dismissing the appeal.

The *Sun Life* case went to the Judicial Committee of the Privy Council (1). Before the Board, the question of the jurisdiction of the Supreme Court to consider the judgment of the Exchequer Court was given up and the only question argued before the Board was on the merits of the case: the ruling of the Superintendent of Insurance amend-

(1) [1931] 4 D.L.R. 43.

ing the annual company's report under the provisions of the *Insurance Act*; it did not afford any authority on the point we are now discussing, except to the extent that their Lordships agreed with the dissenting judges in the Courts below on the merits of the appeal and they ordered the remittance of the case to the Exchequer Court so that it may direct the Superintendent of Insurance to restore the figure of $4,000,000 in the return by the Sun Life Assurance Company as the authorized capital of the Company.

The only further case to which I care to refer, is that of *The James Bay Railway Company* v. *Armstrong* (1). This was an appeal from a decision of the Chief Justice of the Common Pleas Division of the High Court of Justice for Ontario, increasing the award of arbitrators in proceedings for expropriation of plaintiff's land by the James Bay Railway Company.

Under section 168 of 3 Edward VII, c. 58, amending the *Railway Act*, 1903, if an award by arbitrators on expropriation of land by a railway company exceeded $600, any dissatisfied party could appeal therefrom to a Superior Court, which, in Ontario, meant the Court of Appeal and the High Court of Justice. It was held that if, under that section, an appeal from an award was taken to the High Court, there can be no further appeal to the Supreme Court of Canada, which cannot even give special leave.

Reference was made to *Ottawa Electric Company* v. *Brennan* (2).

The case of *Birely* v. *Toronto, Hamilton and Buffalo Railway Company* (3) was there referred to with approval, in which it was held "that no appeal lay from the judgment of the High Court to the Court of Appeal in such a case, both those courts being designated by the statute as special tribunals, to either of which the appellant might resort".

In the Privy Council (4), the appeal was dismissed. It was held that according to the true construction of section 168 of the Canada *Railway Act*, 1903, the appeal

(1) (1907) 38 Can. S.C.R. 511.
(2) (1901) 31 Can. S.C.R. 311.
(3) (1898) 25 Ont. A.R. 88.
(4) [1909] A.C. 624.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

given to a Superior Court from an award under that Act, lies, in the province of Ontario, to either the Court of Appeal or the High Court of Justice at the option of an appellant; but that in case of appeal to the High Court, inasmuch as it is not the Court of last resort in the province within the meaning of the *Supreme and Exchequer Courts Act,* (R.S.C. 1886 c. 135, section 26), there was no appeal therefrom to the Supreme Court of Canada.

The ground upon which the judgment of the Privy Council was based was, therefore, that there was no right of appeal from the judgment of the High Court of Ontario because that Court is not, within the meaning of section 36 of the *Supreme Court Act,* "the highest court of final resort" established in the province of Ontario; and that an appeal lies to the Supreme Court of Canada only from such highest court of last resort. That is not a decision which can be of any help to the appellant in the premises.

On this point, I am of opinion that the respondent fails on his motion to quash.

So far as the letter of the Minister of National Defence for Naval Services dated March 12th, 1941, is concerned, I do not think it has the meaning ascribed to it by the respondent; and, moreover, the letter was filed only in this Court in support of the motion to quash. It was not put or invoked before the learned trial judge in the Exchequer Court and was not referred to in any way while the case was before that Court. The letter itself was by no means resorted to for the purpose of referring the matter to that Court nor can it be interpreted as intending to make the Exchequer Court a mere arbitrator between the parties.

By the very terms of the reference, the matter was brought to the Exchequer Court under section 7 of the *War Measures Act,* through the intervention of the Minister of Justice, and it was as a consequence of the reference so made that jurisdiction in the matter was vested in the Exchequer Court. I cannot accede to the contention of the respondent that this had the effect that the determination of the amount of the respondent's claim

by the Exchequer Court was to be final and non-appealable, as that appeal is provided by the provisions of section 44 of the *Supreme Court Act*.

The respondent's motion to quash for want of jurisdiction ought, therefore, to be dismissed with costs.

I shall now take up the judgment on the merits of the adjudication which it has made, and for the purpose of this discussion, the award in respect of the *Seaborn* must be envisaged separately from that with regard to the *Sankaty*.

Very little need be said about the *Seaborn*. She was entered in the balance sheets of the respondent as representing a value of $92,764.63, as we have already seen. That figure included $79,500 for the "vessel at cost", $6,505.14 for maintenance and $6,759.49 for "expenses directly applicable". By Order in Council, the Minister was authorized to pay the sum of $196,377.55 for the acquisition and charter hire of the two vessels stated. The sum was made up as follows:—

Advisory Board valuation of *Seaborn*..	$92,764.63
Charter hire payable on *Seaborn*.....	8,200.00
Advisory Board valuation of *Sankaty*..	83,900.00
Charter hire payable on *Sankaty*.....	11,512.92
	$196,377.55

Such was the sum paid to the company and detail of the amount so paid.

Thus, disregarding the $8,200 for charter hire of the *Seaborn*, the actual figure tendered and paid for the acquisition of that vessel is therefore the last sum entered in the balance sheet of the respondent as at December 31, 1939. Therefore the Government paid for the cost, for the maintenance and for the expenses directly applicable as entered in the books of the company.

Then if we look at the reasons for judgment of the learned trial judge, we find the following:—

The proof shows that the cost of overhauling her [the *Seaborn*] 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

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

were not completed on account of her being taken over by the [appellant, His Majesty the King], cost $2,181.73. These various items [including $80,000 for the purchase price of the *Seaborn*] form a total of $98,833.67.

And the learned judge concludes:—

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

Under the circumstances, I do not feel that this Court would be justified in interfering with the award made by the learned judge in respect of the *Seaborn*. It need only be said that there was undoubtedly evidence upon which the learned trial judge could make the award he made. It would be asking too much from an Appellate Court to nullify the judgment of the learned trial judge in expropriation matters, merely because in its own view the Court might think that, on a total award of $100,000, there might be a possible error of valuation amounting to $1,166.33.

Only in two respects could the correctness of the award be disputed.

(1) On the ground that the learned trial judge would appear to have taken the purchase price of the *Seaborn* to have been $80,000, of which $30,000 was paid in cash, $25,000 by shares, and $25,000 by two mortgage bonds of the Company; and it was argued by the appellant that the shares and the bonds should not be considered at their face value, because they were subsequently acquired by other interested parties for the sum of $25,000.

But the learned trial judge was perfectly justified to decide that the subsequent sale of the shares and bonds was not made at their true value. Several reasons may have prompted the vendor to accept that sum as being in exchange for the shares and bonds. So far as the respondent was concerned, he undoubtedly continued to be responsible for the full amount of $25,000 represented by the second mortgage bonds and it cannot be assumed that the shares were valueless, in the absence of any evidence to that effect.

Moreover, the purchase price of a ship does not necessarily represent the value of that ship. Such value may be either less or more than the purchase price, according

to the circumstances under which the purchase on the one part and the sale on the other were made. I do not think that the allowance made in the judgment for the value of the *Seaborn* was successfully challenged by the appellant.

(2) So far as the inclusion of a certain amount for the cost of the maintenance of the *Seaborn* until she was requisitioned is concerned, I would have been of the opinion that it should not have been included in the allowance that was made, but it is apparent that the appellant accepted the item of maintenance as being properly claimed by the respondent and, in fact, he has actually included it in the payment made by it as a consequence of the Order in Council.

The validity of that payment is not questioned by the appellant and it was no longer an issue when the reference was made to the Exchequer Court.

I think, therefore, that the award of $100,000 for the *Seaborn* should stand.

But it is different so far as the award for the *Sankaty* is concerned. The trial judge awarded $205,000, while the Advisory Board valuation was only $83,900.

The learned trial judge, as a reason for his valuation, said that the award in respect of the *Sankaty* should be made on the replacement basis and he gave three alternatives of the way in which such replacement value might be arrived at:—

One was for the cost of buying a new ship to replace the *Sankaty*; another was for the purchase of the *Fishers Island* for which her owner asked the price of $285,000, representing $316,550 in Canadian funds, from which should be deducted an appreciation of 33⅓% representing the increased value due to the existence of the war, leaving a balance of $210,900; and the third alternative was that the respondent might have purchased another vessel of the type of the *Prince Nova,* which the respondent had acquired after the *Sankaty* was requisitioned.

This would have meant, in the view of the learned trial judge, an expenditure in round figures of $92,000, bringing the price of the two vessels purchased to replace the *Sankaty* to an amount of $184,000.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

With these two vessels, in the view of the learned trial judge, the respondent 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.

And the learned trial judge added:—

> 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 judgment appealed from quoted several authorities in support of the proposition that, in a case such as the present one, there was justification for applying the principle of the replacement value in the premises.

But the authorities referred to in the judgment, as well as all those to which the learned counsel for the respondent drew our attention either in his factum or in the course of his argument before the Court, have to do with the application of statutes worded differently from the statutes which are applicable in the present case and therefore they cannot support either the judgment or the argument put forward by the respondent on that point.

Here, the statute and the only statute applicable, is *The Compensation (Defence) Act, 1940,* assented to on August 7th, 1940; and section 5 of that statute, relating to the compensation payable for the acquisition of a vessel, is the one on which the allowance is based and must be based.

That section says that:—

> The compensation payable in respect of the acquisition of any vessel * * * shall be a sum equal to the value of the vessel * * * no account being taken of any appreciation due to the war.

It is idle, therefore, to resort to any other statute or to the judgments rendered on the interpretation of other statutes for the purpose of ascertaining what, in the present case, the compensation should be.

Section 5 is very clear: "the compensation shall be a sum equal to the value of the vessel, no account being taken of any appreciation due to the war".

What the Court must do, therefore, to estimate the compensation to be allowed, is merely to find out the value of the vessel requisitioned, without taking into account any increased value resulting from the existence of a state of war.

It seems clear that that is not what the learned trial judge has done, in basing his award upon what it would have cost, either to build a new ship or to purchase other ships in order to replace the *Sankaty*.

If I found in the evidence taken before the Exchequer Court the elements enabling this Court to establish the value of the *Sankaty* in accordance with the directions contained in section 5 of *The Compensation (Defence) Act, 1940,* I would probably have endeavoured to arrive at the right figure within the meaning of that statute and to substitute it to the amount allowed in the judgment appealed from.

Unfortunately the necessary elements are not to be found in the record now before us and there is no other course opened to this Court but to return the case to the Exchequer Court with a direction that there should thereby be proceeded to an estimation of the value of the *Sankaty* at the time of its requisition, without taking into account any increased value which she might have acquired as a result of the existence of a state of war.

It follows that, in my view, an order should go to the effect just mentioned and that the appeal should be allowed to that extent, the appellant being entitled to two-thirds of the cost of this appeal, as I consider that the appeal in respect of the *Seaborn* did not represent more than one-third of the appeal costs.

So far, however, as the *Seaborn* is concerned, the judgment should stand.

As to the costs at the trial, the respondent should get one-half its costs against the appellant; the remaining one-half and the costs of the new trial should be in the discretion of the Judge presiding thereat. The respondent is, therefore, entitled to be paid by His Majesty the King the sum of $7,235.37, with interest thereon at the rate of three per cent. per annum in accordance with Order in Council 529 of January 22nd, 1943.

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Kerwin J.

KERWIN J.—This is an appeal by His Majesty the King from a judgment of the Exchequer Court that the respondent was entitled to recover from the appellant the sum of $128,335.37, being the balance of the compensation payable by reason of the appropriation by the appellant of the title to two vessels owned by the respondent, and interest at 4 per centum per annum from March 1st, 1941, the date of appropriation.

The respondent was the owner of the motor vessel *Seaborn* (afterwards known as the *Charles A. Dunning*) and the S.S. *Sankaty*. Under the provisions of section 3 of the *War Measures Act*, R.S.C. 1927, c. 206, the Crown, after the outbreak of the present war, requisitioned the use of these vessels and subsequently, on March 1st, 1941, compulsorily acquired the ownership thereof. Certain amounts as charter hire for the use of the vessels were paid and no question arises thereon but the parties were unable to agree as to the amount to be paid for the acquisition of title. A sum considered adequate by the appellant was paid therefor in pursuance of an arrangement set forth in a letter of March 12th, 1941, from the Minister of National Defence for Naval Services and addressed to the respondent's solicitor. That letter refers to the solicitor's suggestion that the respondent was prepared to accept the amount paid as on account, leaving the final determination of the amount payable to be settled by the Exchequer Court and concludes:

> In view of these considerations I am preparing to recommend, and I am recommending, that a cheque be forwarded to you for the amount of $196,377.55, leaving to the determination of the Exchequer Court of Canada the question whether any further sum is due, and if so, in what amount.

It was first argued that the Exchequer Court had been named as arbitrator, from whose decision there was no appeal. The Minister's letter, however, is only a reference to the power conferred upon the Minister of Justice under section 7 of the *War Measures Act* and which power was in fact exercised and in pursuance of which the proceedings were taken. This section provides:

> 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.

It was under this section that the Minister of Justice on June 7th, 1941, referred to the Exchequer Court for adjudication the claim of the respondent for compensation in respect of the two ships appropriated for naval services by His Majesty the King.

The respondent takes the further point that the Exchequer Court was *curia designata* and that no appeal lies from its adjudication. This is based upon a number of decisions to the effect that where a judge is *persona designata,* there can be no appeal. So far as this Court is concerned, the first statement of such a principle appears in the judgment of Sir William Ritchie in *Valin* v. *Langlois* (1). Leave to appeal from the decision of this Court was refused by the Privy Council (2). The precise question did not actually arise because a section of the Supreme Court Act provided for an appeal to this Court, but the statement of the Chief Justice was afterwards approved and adapted by Sir Charles Fitzpatrick in *Canadian Northern Ontario Railway Company* v. *Smith* (3). This statement is as follows:

> Reading these special provisions in connection with the Act of 1873, and what has been said of the Act generally, I think it is not arriving at a forced or unnatural conclusion to say that that Parliament intended to establish Dominion Tribunals exceptional in their jurisdiction, perfect in their procedure, and with all materials for exercising such jurisdiction, and having nothing in common with the Provincial Courts; that these judges and courts were merely utilized outside their respective jurisdictions for giving full effect to these statutory tribunals to deal with this purely Dominion matter.

Next in order is *Canadian Pacific Ry. Co.* v. *The Little Seminary of Ste. Thérèse* (4), where two things were held. One was that the Judge in Chambers in Quebec, before whom certain proceedings under the Dominion *Railway Act* originated, was not a Superior Court, and the second, that such Judge was a *persona designata.* All the judges agreed, but the ground for decision on the second point is perhaps made clearer in the judgment of Mr. Justice Patterson where, referring to various functions assigned to the Judge mentioned in the Act, he states (pp. 618-619):

(1) (1879) 3 Can. S.C.R. 1 at 33, 34. (2) (1879) 5 App. Cas. 115.
(3) (1914) 50 Can. S.C.R. 476. (4) (1889) 16 Can. S.C.R. 606.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

They are functions which from their nature and object must be intended to be exercised in a summary manner and not liable to the delay incident to the appeals from court to court. From these considerations, as well as from the language of the statute, it is plain that the judge acts as *persona designata* and does not represent the court to which he is attached.

—referring to *Re Sheffield Waterworks* (1).

The *Ste. Thérèse* case was distinguished in *City of Halifax* v. *Reeves* (2). There, under a section of the charter of the City of Halifax, any person intending to erect a building upon or close to the line of the street was first to cause such line to be located by the city engineer and obtain a certificate of the location; and if a building were erected upon or close to the line without such certificate having been obtained, the Supreme Court of Nova Scotia or a Judge thereof might, on petition of the Recorder, cause it to be removed. In *North British Canadian Investment Company* v. *The Trustees of St. John School District* (3), it was held that the confirmation of a tax sale transfer by a judge of the Supreme Court of the Northwest Territories under a section of the *Land Titles Act, 1894,* was a matter or proceeding originating in a Court of superior jurisdiction and an appeal would lie to this Court from the final judgment of the full Court affirming same. The majority of the Court were unable to distinguish the case from that of *City of Halifax* v. *Reeves* (*supra*).

In *St. Hilaire* v. *Lambert* (4), there had been an application for the cancellation of a liquor licence issued under the Alberta *Liquor Licence Act* to a judge of the Supreme Court of Alberta in chambers, who granted an originating summons ordering all parties concerned to attend before him, and after hearing the parties who appeared, refused the application. The full Court of Alberta reversed this order and cancelled the licence. The majority of this Court were of the opinion that the case came within the principle decided in the *Ste. Thérèse* case (5). In *Canadian Northern Ontario Ry. Co.* v. *Smith* (6), the Chief Justice, Sir Charles Fitzpatrick, with whom Idington J. agreed, adapted the quotation from Sir William Ritchie's judg-

(1) (1865) L.R. 1 Ex. 54.
(2) (1894) 23 Can. S.C.R. 340.
(3) (1904) 35 Can. S.C.R. 461.
(4) (1909) 42 Can. S.C.R. 264.
(5) (1889) 16 Can. S.C.R. 606.
(6) (1914) 50 Can. S.C.R. 476.

ment referred to, and considered that the case came clearly within the rule in the *Ste. Thérèse* and *Lambert* cases (*supra*). Mr. Justice Duff stated the principle which, I think, is the proper one to be applied in such cases in the following words:

> The jurisdiction created by section 196 of the *Railway Act* is not, I think, a jurisdiction given to the Superior Court or County Court as the case may be, but to the judge or judges of those courts. In other words, when acting under that section the judge does not exercise the powers of the court as such, but the special powers given by the Act.

The other three members of the Court disposed of the matter on the ground that there was nothing in the record to show that the amount in dispute was $2,000 or over, and that, therefore, the appeal failed.

In *Calgary and Edmonton Railway Company* v. *The Saskatchewan Land and Homestead Company* (1), the majority of the Court determined that a judge, when taxing costs under a section of the *Railway Act,* acted as *persona designata* and that no appeal lies from his decision. In *Consolidated Wafer Company Limited* v. *International Cone Company Limited* (2), it was held that this Court had jurisdiction to hear an appeal from the Exchequer Court's judgment delivered on an appeal from the Commissioner of Patents under section 40 of the *Patent Act.* In *Sun Life Assurance Company of Canada* v. *The Superintendent of Insurance* (3), the majority of the Court considered that no actual amount was in controversy in an appeal from the Exchequer Court's decision on an appeal from a ruling of the Superintendent of Insurance under the provisions of the *Insurance Act;* and that furthermore, in giving a right of appeal to the Exchequer Court in what was deemed to be a summary manner, Parliament intended to make that Court *curia designata* and that no further appeal could be had. Two of the Judges were of opinion that there was jurisdiction. When the case went to the Privy Council (4), the question of jurisdiction was abandoned and, on the merits, the judgment of this Court was reversed. I have only to add that

(1) (1919) 59 Can. S.C.R. 567.
(2) [1927] S.C.R. 300.
(3) [1930] S.C.R. 612.
(4) [1931] 4 D.L.R. 43.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

in my view, the decision of this Court in *James Bay Railway Company* v. *Armstrong* (1), and of the Privy Council (2), has no bearing upon the point under consideration.

The effect of these decisions and the many others referred to is that in any particular case, the relevant statutory enactments must be read to ascertain the nature of the jurisdiction conferred. In the present case, subsection 1 of section 82 of the *Exchequer Court Act*, R.S.C. 1927, c. 34, is conclusive when taken in conjunction with sections 35 and 44 of the *Supreme Court Act*. The latter provide:

> [Section 35] The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada. [Section 44] Notwithstanding anything in this Act contained the court shall also have jurisdiction as provided in any other Act conferring jurisdiction.

Subsection 1 of section 82 of the *Exchequer Court Act* reads as follows:

> Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as a judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

The words "in virtue of any jurisdiction now or hereafter in any manner vested in the Court" are sufficiently broad to include the reference by the Minister of Justice under the *War Measures Act*. It is suggested that only Parliament has the power to vest jurisdiction in the Exchequer Court, but by section 7 of the *War Measures Act*, Parliament has provided for the very vesting required by subsection 1 of section 82 of the *Exchequer Court Act*. It was further contended that it could not be presumed that Parliament intended to permit the Minister of Justice to refer one dispute to a Court from which there would be an appeal to this Court, and another to a Superior or County Court of the Province within which the claim arose, with the possible result that there would be no appeal

(1) (1907) 38 Can. S.C.R. 511. (2) [1909] A.C. 624.

at all. There might very well be cases, however, where only small amounts were involved and where the Minister would consider it proper to refer the claims to one of the last mentioned courts "or to a judge of any such court."

The point now taken was advanced on behalf of the Crown in *Warner Quinlan Asphalt Co.* v. *The King* (1). None of the judges dealt with the point except Mr. Justice Idington who, while disposing of the appeal on its merits (as did the others), was inclined in favour of the argument on the ground that if the reference had been made to any of the judges of the courts referred to, except the Exchequer Court, it could not be contended that an appeal would lie by either party from his disposition of the claim. With respect, I am of a contrary opinion. If a reference were made to a provincial, superior or county court or a judge thereof, whether any appeal would lie from the ensuing judgment would depend upon the ordinary jurisdiction of such court and the provisions made as to appeals from judgments thereof. While it is true that section 9 of the *War Measures Act* gives a court power to make rules, none have been made by the Exchequer Court and, so far as known, by any other court. Even if they had, it would be almost impossible for any court or judge to proceed with a reference unless the aid of all the relevant statutory provisions dealing with such court could be invoked. This being a case or matter in which the Exchequer Court has given a final judgment in virtue of the jurisdiction vested in it by section 7 of the *War Measures Act* and the Minister's reference, an appeal lies to this Court. The motion to quash is dismissed with costs.

We are now in a position to discuss the merits of the appeal. The provisions of *The Compensation (Defence) Act, 1940,* are to be observed in fixing the compensation for the "acquisition" of the two vessels, which term in relation to any vessel or aircraft means (s. 2 (*a*)) the appropriation by or on behalf of His Majesty of the title to or property in the vessel or aircraft. It was recognized that by reason of the actual and threatened destruction of vessels by the enemy in the present war the available tonnage would be considerably lessened, and it was deemed

(1) [1924] S.C.R. 236.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

only proper that the owner of any vessel acquired by the Crown in the stress of war should not have the advantage of the resulting higher prices of ships. Therefore, by subs. 1 of s. 5 it is provided that the "compensation" payable in respect of the acquisition shall be a sum "equal to the value of the vessel or aircraft, no account being taken of any appreciation due to the war."

The term "value of a ship" occurs in the British *Merchant Shipping Act, 1854,* c. 104, s. 504, this being one of the earliest Merchant Shipping Acts in which permission was granted the owner of a ship to limit his liability to the value of the ship. Counsel for the appellant argued that decisions under that section were relevant to the ascertainment of "value" in the *Compensation (Defence) Act,* and also the authorities as to the amount recoverable arising out of the total loss of a ship due to collision, and in the matter of the ascertainment of the value of a ship for the purposes of determining the loss in a case of marine insurance. The provision in the *Merchant Shipping Act* was enacted for an entirely different purpose and the other decisions referred to proceed upon a principle that is not applicable to subs. 1 of s. 5 of the *Compensation (Defence) Act.*

Were it not for that Act, the subject of an enquiry such as this would be the "compensation" to be made under section 7 of the *War Measures Act;* and, that enactment being *in pari materia* with the Dominion *Expropriation Act,* the expression "compensation" should, so far as possible, be given the same meaning in the two enactments. In some respects but not all, "value" as used in subs. 1 of s. 5 of the *Compensation (Defence) Act* means the same as "compensation" in the Dominion *Expropriation Act.* Thus an owner of a ship acquired by the Crown is entitled to be paid the value of the vessel to him, not to the Crown. In *Lake Erie & Northern R. Co.* v. *Brantford Golf and Country Club* (1), a case of compulsory taking of land under the *Railway Act,* Duff J., at p. 228, states what, with appropriate changes, is applicable here:—

> The phrase "the value of the land to them" has most frequently been made use of to emphasize the fact that it is not the value of the land arising in consequence of the requirements of the undertaking for which it is taken that is to determine the scale of compensation.

(1) (1916) 32 D.L.R. 219.

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.

That it is not necessarily the market value appears from a further quotation from the same judgment which immediately follows:

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* (1) 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.

The shipowner is also entitled to be paid the present value of the vessel (as of a date immediately prior to the outbreak of war), including the future advantages of the ship but only insofar as they help to give it that present value. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (2), and *The King* v. *Elgin Realty Co. Ltd.* (3) in which latter case the following extract from the judgment of the President of the Exchequer Court was quoted with approval as an accurate statement of the law:—

I do not mean to say that the defendant, by reason of the special adaptability of its property for particular purposes on account of its size, shape and location, is thereby entitled to a hypothetical or speculative value which has no real existence, and therefore any remote future value must be adequately discounted.

The learned trial judge awarded as the value of the *Seaborn* the sum of $100,000, of which $92,764.63 had already been paid. In arriving at this amount, he stated that the respondent did not base its claim, and he did not rest his judgment, on the doctrine of reinstatement, so that we need not presently consider it. It should be explained that in 1938 an agreement was made between the Minister of Trade and Commerce and Farquhar Steamships Limited whereby the latter agreed that on May 1st, 1939, they would place the motor-ship *Djursland* or a suitable substitute vessel to be built subject to the

(1) [1914] A.C. 1083, at 1088. (2) [1914] A.C. 569.
(3) [1943] S.C.R. 49.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

approval of the Minister, on a route between Wood Island, Prince Edward Island, and Caribou, Nova Scotia, for the carriage of passengers, freight, motor cars and motor trucks from May 1st to November 30th in each year for a period of five years. The service to be given and the fares to be charged were particularized. In return a subsidy of $28,000 per year was to be paid. The *Djursland* disappeared from the picture and the Farquhar Company's rights were transferred to the respondent which, to fulfill its accompanying obligations, purchased the *Seaborn*.

The *Seaborn* was originally an ocean-going pleasure yacht, built in 1925 in Scotland and lengthened in the United States, at a total cost of about $400,000. While it had not been used for some years prior to its purchase by the respondent, it had not been dismantled but, on the contrary, always had a skeleton crew on board to look after it. As a yacht it was in first class shape but when the respondent purchased it in July, 1939, expensive yachts were a drug on the market. The price paid by the respondent was $80,000 payable $30,000 in cash, $25,000 in second mortgage bonds, and the remaining $25,000 by the issue of five hundred shares of the respondent company without par value at $50 per share. The bonds and shares were subsequently repurchased from the vendor by the group promoting the company for $25,000. While it has been argued by the appellant that the net purchase price was really $55,000, the respondent contends that so far as the company is concerned it was $80,000. I am inclined to think that the true explanation appears in the following question and answer in the cross-examination of Robert E. Mutch, the President of the respondent company, at page 81 of the record:

> Q. And the purpose of issuing the second mortgage bonds was to enable this to be done, to repurchase for $25,000 securities to the value of $50,000, and put them back in the hands of people putting up $25,000?
>
> A. The reason for it was this, that when we bought the boat our first mortgage bonds were not ready for issue and Miss Morrison, or whoever was the American party to the deal, agreed to give the boat and accept this as protecting her until such time as funds were available and in the meantime the Maritime Trust Company were preparing the trust deed and the advertising of the sale of the bond issue to the public. I do not know that the Maritime Trust Company was selling the bond issue but I rather think it was some St. John firm that was selling it.

Whatever the original cost, certain repairs were made and expenses incurred. The company carried the ship on its books at varying amounts but a letter dated May 10th, 1940, from it to the Director of Shipbuilding of the Department of Munitions and Supply stating "the actual cash laid out at the time of purchase of the boat was $55,000" would indicate that the answer above quoted meant that the original cost was the amount stated in the letter.

In view of the conclusion at which I have arrived, the question of the discrepancy between that amount and $80,000 need not be further pursued. Negotiations took place as to the sum to be paid for the acquisition of the ship and at that time (March 29th, 1940) the respondent was willing to accept $65,000, while the department offered $50,000. On September 17th, 1940, an Order in Council was passed authorizing the payment of what is called "an agreed sum" of $58,000 and a bill of sale, dated October 11th, 1940, was executed by the respondent in which the consideration is stated to be $70,705. For some unexplained reason, this transaction was never completed. Unless the cost of the vessel to the respondent was intended to be taken by the appellant as $80,000, it is difficult to ascertain the basis upon which the amount finally offered and paid, $92,764.63, was arrived at. As a matter of fact, this amount appears under the heading "Fixed Assets" in the respondent's balance sheet, dated December 31st, 1939, made up as follows:—

Vessel (*Charles A. Dunning*) at cost	$79,500 00
Maintenance—*Charles A. Dunning*	6,505 14
Expenses directly applicable	6,759 49
	$92,764 63

In the balance sheet as of December 31st, 1940, appears the following:

S.S. *Charles A. Dunning* cost	$75,500 00
Maintenance	9,514 18
Expenses	7,531 19
	$92,545 37

Why the "cost" in these statements appears as $79,500 and $75,500 is not satisfactorily explained but, in any event, these are mere bookkeeping entries.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

The trial judge quite rightly considered that, while cost should be borne in mind, it was not conclusive and that the sums, which in March and October, 1940, the respondent was apparently willing to accept, were the result of the unfortunate financial position in which it found itself. I also agree that the suggestion made throughout the trial that the *Seaborn* was or would be unstable as a ferry is not borne out by the evidence. Two witnesses for the respondent placed the value prior to the war at $175,000 as being what a willing purchaser would pay to a willing vendor. Two witnesses for the Crown placed such value at $60,000. The trial judge fixed it at $100,000.

In the *Elgin Realty* case (1) it was said that in cases under the *Expropriation Act,* if a judge of first instance has acted upon proper principles, has not misdirected himself on any matter of law, and that if the amount arrived at is supported by the evidence, this Court ought not to disturb this finding. Later, in *Canadian National Ry. Co.* v. *Harricana Gold Mine Inc.* (2), it was stated that if these rules have not been infringed the Court will not interfere in such a case on a mere question of quantum, unless it is satisfied that the amount allowed was clearly excessive or just as clearly too small.

The mere fact that in a dispute as to the compensation to be paid for a ship, admittedly worth a very substantial sum, the amount awarded is approximately $7,200 over the amount tendered and paid would not be sufficient in itself to warrant this Court refusing to interfere. There was no real cross-examination of the witnesses as to how their estimates of $175,000 and $60,000 were arrived at but, in my view, that is no reason for interfering with the trial judge's finding based upon such evidence as the parties chose to place before him. From a careful reading of the reasons for judgment I am unable to find that the trial judge failed to observe the applicable principles and I cannot say that the sum of $100,000 is excessive so as to justify any alteration of it and I would, therefore, dismiss the appeal of the Crown so far as the *Seaborn* is concerned.

(1) [1943] S.C.R. 49. (2) [1943] S.C.R. 382, at 393.

The *Sankaty* was built in 1911 and was purchased by the respondent on December 12th, 1939, from a United States Trust Company for approximately $4,995 in Canadian funds. While it was suggested at the trial that this was a forced sale, there is nothing in the evidence to substantiate the suggestion. An amount of $6,342.45 was expended at the point of purchase to get the ship ready for the voyage to Halifax, including wages, fuel and emergency repairs. Accounts for work done at Halifax amounted in all to $56,736.73 (or $56,876.73), certain other expenditures were charged to the vessel, and the trial judge fixed the total cost to the respondent at $71,226.14. It was estimated by John Paterson of Halifax Shipyards, Limited, a witness for the respondent, that a further sum of $20,000 would have been required to complete the repairs and alterations necessary to make the ship available for the ferry service between Wood Island and Caribou. The *Sankaty* was purchased after the use of the *Seaborn* had been appropriated by the Crown and in order that the respondent might fulfil its obligations under the agreement of 1938 with the Minister of Trade and Commerce.

The Crown appropriated the use of the *Sankaty* and ultimately, on March 1st, 1941, acquired the title thereto. Subsequently the respondent endeavoured to find a ship to replace the *Sankaty* and mention is made in the evidence of the *Fishers Island,* the *Red Star,* and *Erie Isle,* the latter of which was purchased by the respondent and renamed the *Prince Nova.* The trial judge examined at length the evidence as to the sums asked for the two first named vessels and as to the cost to the respondent of the *Prince Nova.* When dealing with the *Seaborn* he had not considered the replacement value, but that was the basis of his final allowance to the respondent as the value of the *Sankaty* of the sum of $205,000.

This is not the correct principle to apply. Value to the owner without any appreciation due to the war, which is the proper test, is far different from replacement value. As a matter of fact, on August 19th, 1941 (after the requisition of the two vessels) a new agreement was entered into between the respondent and the Minister of Trade and Commerce cancelling the previous agreement with

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

Farquhar Steamships, Limited, and providing that the contract should remain in force until November 30th, 1950. The same subsidy of $28,000 per year was promised. In this agreement, the *Prince Nova* is named as the motorship then in use and it was provided that the required service would be continued with that vessel, or a suitable substitute. Whatever might be said about the *Prince Nova*, it was apparently satisfactory to the Minister for the ferry service.

Under the *Expropriation Act*, damage to the owner is relevant and even there it is only in exceptional circumstances that it has been awarded: Cripps on Compensation, 8th Edition, pp. 180 and 181. But over and above that, the proviso in subs. 1 of s. 5 of the *Compensation (Defence) Act* prevents its application. How can the value of a ship be reinstated when the court is prohibited from giving any effect to appreciation due to the war? To do as the trial judge did—take a figure as representing what the cost of a similar ship would be in wartime and then deduct a percentage for such appreciation, is too uncertain. As Middleton J.A. put it in *Re Lennox and Toronto Board of Education* (1): "There are too many contingencies; too many factors to be considered, all of which rest on opinion, or, in other words, mere guessing."

The respondent rested its claim for the value of the *Sankaty* on the basis of replacement and the appellant on market value—instead of on the principles outlined above. It is with regret that I see no escape from the necessity of sending the case back for the reassessment of the value of the *Sankaty*. The appellant should have two-thirds of its costs of the appeal, against which may be set off one half the costs of the respondent of the trial. The remaining half and the costs of the new assessment should be in the discretion of the judge presiding thereat. The judgment *a quo* should be varied accordingly, and so far as the *Seaborn* is concerned the result is that, upon tthe respondent giving to the appellant a good and valid title thereto free from all charges and encumbrances whatsoever, it is entitled to be paid by His Majesty the King the sum of $7,235.37. The respon-

(1) (1926) 58 O.L.R. 427 at 441.

dent is entitled to interest thereon but it is agreed that under Order in Council 529 of January 22nd, 1943, the rate should be three instead of four per centum per annum.

HUDSON J.—On the 1st of March, 1941, His Majesty acquired for war purposes two ships designated respectively *Sankaty* and *Seaborn*. Both of these ships were the property of the respondents and they, as owners, claimed as compensation a larger amount than the Crown was willing to pay. The Minister of Justice thereupon referred such claim to the Exchequer Court for adjudication under the authority of section 7 of the *War Measures Act*.

This appeal is brought by the Crown from an adjudication by the Exchequer Court, that the respondents were entitled to an amount in excess of what the Crown had already paid. It is now objected by the respondents that this Court has no jurisdiction to entertain the appeal, on the ground that the Exchequer Court acted as a *curia designata* under section 7 of the *War Measures Act* and that there was no right of appeal provided for in such Act.

By the *Exchequer Court Act*, R.S.C. 1927, c. 34, it is provided:

> 18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.
>
> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*a*) Every claim against the Crown for property taken for any public purpose;
>
> * * *
>
> (*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council;
>
> * * *
>
> (*g*) The amount to be paid whenever the Crown and any person have agreed in writing that the Crown or such person shall pay an amount of money to be determined by the Exchequer Court,

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Hudson J.

or any question of law or fact as to which the Crown and any person have agreed in writing that any such question of law or fact shall be determined by the Exchequer Court.

From this it appears plainly that the matters here referred to the Court fell well within those comprised in its ordinary jurisdiction.

The adjudication which must be made under section 7 certainly calls for the exercise of judicial functions and necessarily involves the application of rules of law to facts adduced in evidence legally received. There is nothing in the section to indicate that it was intended to grant the court named by the Minister of Justice any arbitrary or discretionary powers.

The procedure followed in this instance was in accordance with the normal practice of a suit carried on in that court. There was a statement of claim, a statement of defence, discovery, examination and cross-examination of witnesses, and then a judgment was rendered in the form ordinarily used in disposing of cases in the Exchequer Court, including an award of costs as against the Crown.

In the case of *Mayor, etc., of Montreal* v. *Brown et al.* (1), the Judicial Committee, in dealing with a somewhat similar objection, strongly stressed the procedure adopted by the Superior Court in Quebec as evidence that the proceeding was a judicial proceeding with a final judgment and, as such, subject to appeal under Article 1115 of the *Code of Civil Procedure.*

It was further contended in argument that the fact that under section 7 the Minister of Justice is given an option of referring the matter to any one of a number of courts, is evidence that the court named by the Minister was not a court to exercise its ordinary jurisdiction, but one of special designation. This argument is adequately answered by a statement of Lord Macnaghten in the case of *James Bay Railway Co.* v. *Armstrong* (2):

> The Supreme Court in the present case appear to think that this view is right [the view that there was no right of appeal from the High Court to the Court of Appeal in the case of railway awards.] It is, however, objected that, if the appellant has the option of going either to the High Court or the Court of Appeal, and if the Supreme Court is right in holding that no appeal lies from the High Court to the Supreme

(1) (1876) 2 App. Cas. 168.

(2) [1909] A. C. 624, at 630.

Court, an appellant has the power of shutting out any further appeal at his own will and pleasure. No doubt that privilege, whether it be a benefit to the litigants or a calamity, is somewhat anomalous, but it does not seem to their Lordships that the anomaly is so great or so startling as to make it necessary or permissible to confine the expression "superior Court" to the Court of Appeal.

Section 82 of the *Exchequer Court Act* provides:

> Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as a judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

By the *Supreme Court Act,* R.S.C. 1927, c. 35, section 35, this Court is given a general appellate jurisdiction within and throughout Canada, and by section 44 it is expressly given jurisdiction as provided in any other Act conferring jurisdiction. In my opinion, section 44 read with section 82 of the *Exchequer Court Act* is in this instance ample to vest in this Court jurisdiction to hear and determine this appeal.

It was also objected that the reference was made as the result of an argeement between the parties and that, therefore, it should be regarded as in the nature of an arbitration. No such agreement was put in evidence at the trial and, even if it had been, I think the matter would clearly fall in the provisions for an appeal to this Court contained in section 82 of the *Exchequer Court Act.*

The amount to which the respondents are entitled for the two ships in question is prescribed by *The Compensation (Defence) Act, 1940,* chapter 28 of the Statutes of Canada, 1940. Section 5 of that Act is the section here relevant and is as follows:

> 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 * * *

The "value of the vessel" referred to in the section is not further defined but the generally accepted rule of law is that when property is taken for public purposes the owner is entitled to a fair pecuniary equivalent.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Hudson J.

In ascertaining the amount, the well established rules in the case of expropriation of land provide a guide. It is the value to the owner, not to the Crown. It is the commercial value, including the present value, if any, of its future potentialities. Where it is possible to establish a market value, that would be most important (see *Cedars Rapids* v. *Lacoste* (1); *Pastoral Finance* v. *The Minister* (2)). It must be kept in mind, however, that these rules apply here subject to the restriction imposed by section 5 of the *Compensation (Defence) Act.*

With regard to the *Sankaty,* I agree with my Lord the Chief Justice that the learned trial judge was in error in accepting the replacement value as a proper test of compensation under the *Compensation (Defence) Act* and the circumstances here. For that reason, I would have the case sent back to the Exchequer Court for the purpose of reassessment.

The *Seaborn* was acquired by the respondent company in July, 1939, at a cost of $55,000, which sum included profits made by a promoter and its largest shareholder. Subsequently, they expended for refitting and maintenance less than $25,000.

On September 2nd, 1939, the vessel was requisitioned by the Crown, and thereafter, except for a period of less than three months, has been in the possession of the Crown and charter hire paid at an agreed rate until ownership was finally acquired by the Crown.

Early in 1940 negotiations were entered into between the owner and the Crown as to the price to be paid for acquisition. On March 29th the respondent company made a firm offer to accept $65,000. This was followed by a counter offer by the Crown of $50,000. Then, in September, 1940, a sum of $58,000 was agreed upon and an Order in Council was passed approving of the payment of this sum. However, such agreement was never carried out. Eventually, in March, 1941, the Crown paid the respondents $92,764.63, without prejudice to any claim which the respondents might submit to the Exchequer Court.

It appears from the Order in Council that it was made on the recommendation of an Advisory Board, but the report of such Board is not in evidence.

(1) [1914] A. C. 569.

(2) [1914] A. C. 1083, at 1087.

The amount so paid corresponds very closely with the value of the *Seaborn* appearing on the balance sheet of the respondents. The only evidence given at the trial of a value higher than the sum paid is that of two experts who expressed an opinion that the *Seaborn* was worth $175,000 but gave no adequate reasons or facts to support such opinion; that they were not accepted by the learned trial judge is shown by the fact that his award was made for a round sum of $100,000.

With respect, I am of the opinion that this award failed to give due weight to the cost of the vessel to the respondents. It was acquired only a few months before the war, it was found to be unsuitable for the purpose for which it was purchased, at any rate without expensive or dubious alterations. It went into the possession of the Crown in the course of a few weeks. It is true that the price paid by the owner is not necessarily evidence of its value but, under the circumstances here, it seems to me that apart from the offers and counter offers of the parties it is the only real evidence of value which we have. All else is speculative and more or less influenced by war conditions, and excluded under section 5 of the *Compensation (Defence) Act*.

As pointed out by my brother Kellock, the learned judge has made errors of fact in several particulars, including items which were duplications. I think the case falls well within the exceptions to the general rules applicable to appeals from awards in cases of this kind, as set forth by this Court in a number of cases: *Vézina* v. *The Queen* (1), followed in *The King* v. *Elgin Realty Company* (2), and *Canadian National Railway Co.* v. *Harricana* (3). I would, therefore, modify the judgment of the Exchequer Court by fixing the compensation for the *Seaborn* at the sum already paid by the Crown: $92,764.63.

I would dismiss the motion to quash with costs, allow the appeal to this Court with costs to the appellant.

In respect of the *Sankaty*, the costs of all proceedings below should be as directed by the judge presiding at the reassessment.

(1) (1889) 17 Can. S.C.R. 1. (2) [1943] S.C.R. 49.
(3) [1943] S.C.R. 382.

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Taschereau J.

TASCHEREAU J.—A preliminary objection to the jurisdiction of this Court was raised by the respondent. It has been submitted that the Exchequer Court of Canada, which determined the amount payable by the Crown for the acquisition of two vessels, the *Seaborn* and the *Sankaty*, was *curia designata*, and that its decision was final and not appealable.

It was under the provisions of section 3 of the *War Measures Act*, R.S.C. (1927), chap. 206, that the Crown requisitioned these two ships, and, under section 7 of the same Act, the matter of compensation was referred to the Exchequer Court.

The Supreme Court of Canada, in virtue of section 35 of its Act, holds an appellate, civil and criminal jurisdiction, within and throughout Canada. And section 44 of the same Act says that it "shall also have jurisdiction as provided in any other Act conferring jurisdiction."

The *Exchequer Court Act*, subsection 1 of section 82, reads as follows:—

> Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, *vested in the Court* and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as a judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

The Exchequer Court was undoubtedly vested with the necessary jurisdiction to hear this matter, in virtue of the reference made by the Minister of Justice, who was acting under the *War Measures Act*. The trial Judge did not exercise any special jurisdiction with an appropriate machinery for that particular purpose, but dealt with the matter as a judge of the court in the discharge of his ordinary judicial functions.

In support of his motion to quash, the respondent contended that there could be no appeal to this Court, because the Minister of Justice is at liberty to refer such a matter indifferently 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. It is submitted that

no appeal to this Court would lie if the matter had been referred to a county court judge, and it cannot be assumed that there could be an appeal in one case and none in the other. The answer to this objection may be found in the reasons of my brother Kerwin, who says that there might very well be cases where only small amounts are involved and where the Minister would consider it proper to refer the claims to a different court, or to a judge of any such court.

I may add also that, in my judgment, the matter has been settled by the Privy Council itself in *James Bay Railway Co.* v. *Armstrong* (1), where it was held that, according to the true construction of section 168 of the Canada *Railway Act* (1903), the appeal given thereby to a superior court from an award under that Act, lies in the Province of Ontario to either the Court of Appeal or the High Court of Justice therein at the option of the appellant; but that in case of appeal to the High Court, inasmuch as it is not the court of last resort in the province within the meaning of the *Supreme and Exchequer Courts Act,* R.S.C. 1886, chap. 135, section 26, there is no appeal therefrom to the Supreme Court of Canada.

At page 630, Lord MacNaghten says:—

> It is, however, objected that, if the appellant has the option of going either to the High Court or the Court of Appeal, and if the Supreme Court is right in holding that no appeal lies from the High Court to the Supreme Court, an appellant has the power of shutting out any further appeal at his own will and pleasure. No doubt that privilege, whether it be a benefit to the litigants or a calamity, is somewhat anomalous, but it does not seem to their Lordships that the anomaly is so great or so startling as to make it necessary or permissible to confine the expression "superior Court" to the Court of Appeal.

The principles enunciated in that case are applicable here, and I believe that the option given to the Minister of Justice, to choose the court to which he may refer the matter, has not the effect of making that court a *curia designata.*

I have reached the conclusion that this Court is competent to hear this appeal, and that this preliminary objection should be dismissed with costs.

The learned trial judge in his judgment, rendered in November, 1943, awarded the respondent in respect of the *Seaborn* a sum of $100,000, and in respect of the *Sankaty*

(1) [1909] A. C. 624.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Taschereau J.

a sum of $205,000, a total of $305,000, from which must be deducted a sum of $176,664.63 paid to respondent. He directed that the respondent should recover the balance of $128,335.37, with interest at 4% from March 1st, 1941, to the date of the judgment, with costs.

The compensation for the acquisition of these two ships must be determined by *The Compensation (Defence) Act, 1940*. Subsection 1 of section 5 says that "the compensation * * * shall be a sum equal to the *value* of the vessel * * *, no account being taken of any appreciation due to the war".

I do not think that this Court ought to interfere with the finding of the trial Judge so far as the *Seaborn* is concerned. In its statement of claim, the respondent valued this ship at $175,000, and His Majesty the King offered $92,764.63. The learned trial Judge reached the conclusion that the value of this ship before the war in 1939 was $100,000. In order to reach this conclusion, he took into account various elements revealed by the evidence, as the purchase price, the cost of overhauling and bringing the ship to Halifax, the cost of maintenance and of structural changes.

He did not ignore the fact that the purchase price was low, but he added, and with this statement I fully agree, that the cost, although it may be an element of estimation in some cases, is seldom decisive, and particularly in the present case, where the owner, old and unable to use this ship, which was a pleasure yacht, had no other alternative but to put her for sale at whatever price could be obtained.

Although I entertain serious doubts that the cost of maintenance before the requisitioning should have been taken as an element in determining the value of the ship, I think it was properly considered by the learned trial Judge, owing to the fact that His Majesty the King agreed in his offer to pay this amount.

It has been the constant jurisprudence of this Court not to interfere with the finding of the Court below, in cases such as the present one, when the trial Judge has acted upon proper principles, has not misdirected himself on a

matter of law, unless it is satisfied that the amount allowed is clearly excessive. (*The King* v. *Elgin Realty Co. Ltd.* (1); *Canadian National Ry. Co.* v. *Harricana* (2)).

I agree with the view that the learned trial Judge has not misdirected himself in the principles to be applied, and that he has taken into account the proper elements in assessing the ship *Seaborn* which he valued at $100,000. I do not think that this Court would be justified to interfere with the finding that he has made.

As to the *Sankaty,* the principle of replacement value has been applied, and the trial Judge has reached the conclusion that, in order to put the claimant in as favourable a position financially as it was before the taking of this ship by the appellant, 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.

Is this the true principle applicable? *The Compensation (Defence) Act, 1940,* chap. 28, sec. 5, para. 1, provides that:—

> 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.

The words used in the drafting of this section make it impossible, I think, to apply the principles of the reinstatement or replacement value. It is the real *value* to the owner of the ship requisitioned that must be determined, and the award cannot be based on what it would have cost to acquire another ship to replace the *Sankaty.* If this principle were to be adopted in the present case, and if the award were to be based on the value of substituted property, then, the respondent might obtain a larger amount than Parliament has decided he should get.

I agree that the case should be sent back to the Exchequer Court so that the value of the *Sankaty* be determined as above indicated. I adopt the proposition of my brother Kerwin as to the disposition of the costs.

RAND J.—This appeal concerns the matter of compensation for two vessels, called the *Seaborn* and the *Sankaty,* acquired by the Dominion Government under the *War*

(1) [1943] S.C.R. 49.
(2) [1943] S.C.R. 382.

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Rand J.

Measures Act. Two questions are raised: jurisdiction to hear the appeal, and the basis of compensation to be applied.

The point of jurisdiction arises from the language of section 7 of the *War Measures Act*:

> 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.

The contention is that each court and each judge of each court is constituted a *curia* or *persona designata* and, as no appeal is expressly provided, none lies. As Middleton J. A. in *Hynes* v. *Swartz* (1) observes, it was not until the middle of the 19th century that these terms, *curia designata* and *persona designata,* came into use in relation to courts or judges; they arose in the course of interpreting statutes granting powers for public undertakings in which provision was made for the summary determination of questions of compensation. They connote a judge or court in which limited powers have been vested in relation to subject-matter which in general is either justiciable or administrative. The question that arises in each case is whether the subject-matter has been placed within the ordinary jurisdiction of the court or judge, or whether a new and disparate tribunal has been set up for a special and limited purpose.

The subject-matter of compensation for property taken by the Crown is well known to the Exchequer Court; and references to the court to determine compensation, made by heads of government departments, a long-established procedure. Originally such questions were referred to what were known as official arbitrators, but their jurisdiction was transferred to the court upon its establishment. By section 19 (*h*) of the *Exchequer Court Act* (c. 34, R.S.C. 1927), the head of any department may refer the question of determining the value "of any real or personal, movable or immovable, property, or of any interest therein,

(1) [1938] 1 D.L.R. 29.

sold, leased or otherwise disposed of by the Crown, or which the Crown proposes to sell, lease or otherwise dispose of." By section 37,

> Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the department in connection with the administration of which the claim arises.
>
> 2. If any such claim is so referred no *fiat* shall be given on any petition of right in respect thereof.

Now, section 7 of the *War Measures Act* does not expressly give any right to compensation for property taken. Its language is, "and compensation is to be made therefor." Neither does the *Compensation (Defence) Act*, c. 28, Statutes of 1940. By section 19 of the *Exchequer Court Act*, that court shall

> have exclusive original jurisdiction to hear and determine the following matters:
>
> (*a*) Every claim against the Crown for property taken for any public purpose;
>
> * * *
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The latter paragraph has long since been held not only to give jurisdiction but to create the right against the Crown. Applying that principle, I have no doubt that when, by the authority of the *War Measures Act*, property is acquired by the Crown, a right to compensation arises under paragraph (*a*).

The mandatory effect, then, of section 7 is to deprive a subject of his right to bring a petition of right in the Exchequer Court and to give to the Minister of Justice a choice of courts; but that a reference to that Court by the Minister is to be taken in any other sense than one by a departmental head, or that it should be deemed to deprive the subject of statutory rights to which otherwise he would be entitled, are propositions with which I am quite unable to agree. The effect of the reference in each case is to place the claim within the ordinary procedure of the court. Whether a similar reference which, for obvious reasons of quantum and convenience, is allowed to the county or superior courts of a province, carries with it the ordinary rights of appeal under provincial law, it is not

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rand J.

necessary to decide. The language, "or to a judge of any such court," does not permit a reference to a particular judge. It contemplates a judge exercising the original jurisdiction of his court. The provision of section 9, which empowers the court to make rules of procedure for such a reference, is obviously necessary because of the unusual mode by which the matter is introduced to the court. The Crown in such case has no claim against the owner; the claim is against the Crown; and procedure is required to enable the claim to be placed in form to be adjudicated according to the ordinary course of the court. In the present case, for instance, the claimant has properly been made the plaintiff and the issue is on the claim which it is asserting against the Crown.

As the proceeding, then, is in the Exchequer Court as such, an appeal lies under section 82 of the Act governing the Court, and the preliminary objection fails.

The facts relating to the *Seaborn* have been stated and I shall not repeat them. To make that vessel suitable for the proposed service, alterations estimated to cost around $55,000 would have been required. Space for twenty-four automobiles and possibly three or four trucks was planned but there was serious doubt that the vessel so altered would be safe for operation at the maximum draught of 10½ feet. The only evidence on this point is that of a naval architect of the department, who had reported adversely on the vessel. There is nothing before the court to warrant the view that the company was settled upon proceeding with the alterations at the time of the requisition in December, 1939. To explain the delay in commencing the work, some suggestion was made of intimations from the department that the vessel would again be required, but that evidence is too vague and general to be regarded. On the other hand, it is clear that the company had been negotiating for the *Sankaty* before that time. In any event, the purchase of the *Sankaty,* admittedly a much more suitable vessel for the service, excludes any special value to the respondent as of the time of acquisition.

The general market value, then, must govern; but, as I read it, the judgment below does not confine the allowance to that. After dealing with the estimates of value made by

the witnesses and the items making up the total accounting charge of the respondent against the *Seaborn,* the trial judge states his conclusion in these words:

> 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.

Besides the inclusion of items that are irrelevant to market value, the reference to the value "to the owner," otherwise unexceptionable, in the particular context indicates that considerations of *realized special adaptability* were in his mind: but no such element was admissible. I do not find in the evidence sufficient to bring the market value to more than the sum offered: and although the difference between that and the amount allowed is relatively small, what was tendered was, I think, so generous as to prevent us from exceeding it.

About a week after the requisitioning of the *Seaborn,* in December, 1939, the respondent acquired the somewhat larger vessel, the *Sankaty.* It was purchased apparently at a judicial sale for about $5,000 and was brought to Halifax for rehabilitation. It had been built in 1910 and needed extensive reconditioning before being fit for the service intended. For that service there were two governing features: the shallow draught already mentioned, and the desirability of a maximum capacity for automobiles and trucks. The necessary alterations and equipment were proceeded with and toward the end of June, 1940, the work was almost completed. The cost was in the vicinty of $56,000 and the total outlay up to that time was not more than $65,000. In that month the vessel was in turn requisitioned. This continued until March, 1941, when with the *Seaborn* she was acquired. The compensation was fixed at $205,000, and against this allowance the appeal is brought.

Evidence was given by a yacht broker of another vessel said to be the equivalent of the *Sankaty,* and purchaseable at a "rock bottom sum" of $285,000 in American funds, at an American port. Other evidence related to the cost of building a suitable vessel in the Halifax shipyards. Estimates had been made for the predecessor of the respondent of $200,000 for the hull and a minimum of $115,000 for

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Rand J.

the machinery, heating, lighting and other equipment: from this, deductions were made for depreciation and for increased value of materials and labour due to the war. But the principle applied was that of reinstatement, and whether that rule is applicable becomes the decisive question in the appeal.

The Compensation (Defence) Act, 1940 (c. 28), section 5 (1), provides that:

> 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 * * *

The court is to determine, then, "the value of the vessel." Mr. Schroeder, in his thorough argument, urged two contentions which, as I understood him, he treated as two aspects of the same principle: the value to the owner, and the reinstatement cost. That the value is to be the value to the owner is, I think, incontestable, but what is that value? With special adaptability realized in the ownership from which it is expropriated, that value is the amount which a prudent man in the position of the owner would be willing to give for the property sooner than fail to obtain it: *Pastoral Finance Assn. Ltd.* v. *The Minister* (1): without realized special adaptability, it is market value—theoretical, if need be—which is the present value of all possible utility reached in a competitive field.

But reinstatement is something quite different: it is placing the owner from whom property is taken in a substantially equivalent condition by means of substituted property. The cost of furnishing that substitute might exceed by far the value which the owner would be willing to pay as the value of the property to him.

It is applied to determine the compensation to an owner arising from damages resulting from the exercise of statutory powers. Under both the *Lands Clauses Consolidation Act* (1845) and the *Railways Clauses Consolidation Act* (1845), in the interpretation of which principles of compensation were laid down which have been accepted in this country as governing under the *Expropriation Act* and the *Railway Act* (*City of Toronto* v. *Brown Co.*) (2), it has been treated as a proper measure in certain cases: but that it was damage which was being ascertained, and

(1) [1914] A.C. 1083, at 1088. (2) (1917) 55 Can. S.C.R. 153.

not merely value of property, was never questioned. The principle evolved as a measure of compensation where none had been laid down by the statute.

But under the enactment with which we are dealing, it is not a matter of damages generally; compensation, it is true, but the precise measure is prescribed: value to the owner. The replacement cost of the same vessel with a deduction for physical depreciation or obsolescence cannot be said to have no relevancy to market value; but it is simply one of the aggregate of elements that determines price. Estimates of market value should be made by those who, through experience or acquaintance with similar or analogous transactions, are capable of judgments cognate with those of prudent purchasers and susceptible of analysis and exposition; but this, though at times difficult, is scarcely satisfied by a melange of notions crowned with a guess. And, as laid down in *Pastoral Finance Assn. Ltd.* v. *the Minister, supra,* the special value to the owner is not a capitalized value of estimated savings or increased profits; it is an addition to the ordinary market price which a prudent purchaser, contemplating all of the risks and circumstances in which his investment and prospective use are to be placed, would, if necessary, be willing to pay.

As sufficient evidence was not presented to enable us to ascertain the value on the basis indicated, the appeal should be allowed and the case remitted to the Exchequer Court for the necessary finding. When that has been made, the total judgment will have regard to the reduction in the amount allowed for the *Seaborn* from $100,000 to $92,764.63. The appellant should have his costs of the appeal; the costs of all proceedings below will be as directed by the judge presiding at the reassessment.

KELLOCK J.—This is an appeal by the Crown from the judgment of the Exchequer Court of Canada, Angers J., pronounced November 24th, 1943, on a reference by the Minister of Justice dated June 7th, 1941, under the provisions of section 7 of the *War Measures Act,* to determine the compensation payable to the respondent in respect of the acquisition by the Crown of the title to two ships owned by the respondent, known respectively as the *Sea-*

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Kellock J.

born and *Sankaty*. By the judgment in appeal, the compensation in respect of the first named ship was fixed at $100,000 and of the second ship, $205,000.

By the provisions of the *War Measures Act*, R.S.C. chapter 206, section 7, whenever any property or the use thereof has been appropriated by His Majesty under the provisions of the Act or of any Order in Council, order or regulation made thereunder and compensation is to be made therefor and is not agreed upon, the claim is to 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". Section 9 provides:

> Every court mentioned in the two sections last preceding may make rules governing the procedure upon any reference made to, or proceedings taken before, such court or a judge thereof under the said section.

The Compensation (Defence) Act, 1940, 4 Geo. VI, chapter 28, provides for the compensation payable in respect of the requisition or acquisition of a vessel by His Majesty. "Requisition" is defined by section 2 (*f*) as the appropriation of the use of a ship or requiring it to be placed at the disposal of His Majesty, and "acquisition" by section 2 (*a*) as appropriation by or on behalf of His Majesty of the title to the vessel. By section 5, subsection (1), the compensation payable in respect of the acquisition of any vessel "shall be a sum equal to the value of the vessel * * * no account being taken of any appreciation due to the war".

On the 7th of June, 1941, the Minister of Justice, acting under the provisions of section 7 of the *War Measures Act*, referred to the "Exchequer Court of Canada" for adjudication, the claim made by the respondent in respect of the acquisition of the two ships, and the judgment now in appeal was pronounced upon that reference. It is objected by the respondent that no appeal lies to this Court on the ground that the Exchequer Court was *curia designata*.

It may be pointed out that, were it not for the provisions of section 7 of the *War Measures Act*, it would seem that the respondent would have been entitled to proceed by

way of petition of right in the Exchequer Court, and that that Court would have had jurisdiction under the provisions of section 19 (*a*) and (*d*), or that the claim might have been referred to the Exchequer Court by the head of the department of Government concerned, under section 37, in either of which cases an appeal would have lain to this Court under section 82 of the *Exchequer Court Act* and section 44 of the *Supreme Court Act*. Is, then, section 7 of the *War Measures Act* intended to produce a different result where a claim is referred to the Exchequer Court under that section?

In support of the contention of the respondent, many authorities were referred to, including the reasons of Idington J. in *Warner Quinlan Asphalt Company* v. *The King* (1). The other members of the Court in that case did not express any opinion on the point. The question is always one of intention to be gathered from the provisions of the legislation in question, and, in my opinion, the objection is not well taken in the present case. It is argued that because the Minister of Justice has an option as to the court or judge to whom the reference shall be made, no appeal can be intended, as there can be no uniform procedure by way of appeal from these various tribunals.

In *James Bay Railway Co.* v. *Armstrong* (2), an appeal from an award of arbitrators under the provisions of the Dominion *Railway Act* was taken to the High Court in Ontario, the legislation providing for an appeal to a "superior court" which was defined as including the High Court and the Court of Appeal. It was held, following *Ottawa Electric Co.* v. *Brennan* (3), that no appeal lay to this Court. On a further appeal to the Privy Council (4), the judgment was affirmed, although the Judicial Committee entertained an appeal direct from the High Court pursuant to special leave which had been obtained. In giving the judgment of the Board, Lord Macnaghten, after referring to the relevant legislation, said at page 630:

It seems to follow that a party desirous of appealing from an award under the Canada Railway Act has in Ontario the option of going either to the High Court or to the Court of Appeal. This has uniformly been so held in Ontario, and it has also been held from the first that no

(1) [1924] S.C.R. 236.
(2) (1907) 38 Can. S.C.R. 511.
(3) (1901) 31 Can. S.C.R. 311.
(4) [1909] A.C. 624.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kellock J.

appeal lies from the High Court to the Court of Appeal in Ontario in the case of railway awards: see *Birely* v. *Toronto, Hamilton and Buffalo Railway Co.* (1).

The Supreme Court in the present case appear to think that this view is right. It is, however, objected that, if the appellant has the option of going either to the High Court or the Court of Appeal, and if the Supreme Court is right in holding that no appeal lies from the High Court to the Supreme Court, an appellant has the power of shutting out any *further appeal* at his own will and pleasure. No doubt that privilege, whether it be a benefit to the litigants or a calamity, is somewhat anomalous, but it does not seem to their Lordships that the anomaly is so great or so startling as to make it necessary or permissible to confine the expression "superior court" to the Court of Appeal.

The basis for that part of Lord Macnaghten's judgment, which I have quoted, would appear to be that under the Dominion *Railway Act,* which provided for an appeal from the award, either to the High Court or to the Court of Appeal, at the option of the appellant, there was no provision for a further appeal from either Court, and that it was within the power of an appellant, by taking an appeal to the High Court, to shut off any further appeal, which he could not do if his appeal were taken to the Court of Appeal, as other Dominion legislation, namely the *Supreme and Exchequer Courts Act,* R.S.C. 1886, chapter 135, provided for an appeal from the Court of Appeal. At page 631, Lord Macnaghten said:

* * * except in certain specified cases within which the present case does not come, an appeal to the Supreme Court lies only from the Court of Appeal.

This was the view expressed by Osler, J.A., in *Birely* v. *Toronto, Hamilton and Buffalo Railway Co.* (2), and this would appear to be the view prevailing after the decision in the *James Bay* case (*supra*), as in *Ruddy* v. *Toronto Eastern Railway Co.* (3) an appeal from an award under the Dominion *Railway Act* was taken to the Appellate Division of the Supreme Court of Ontario and an appeal from the judgment of that Court was entertained without objection by this Court. Similarly, in *Standard Fuel Co.* v. *Toronto Terminals Railway Co.* (4), an appeal from an award was taken to the Court of Appeal in Ontario and a further appeal was had directly to the Privy Council.

In *Sun Life Assur. Co.* v. *Superintendent of Insurance* (5), the majority of the Court, in considering section 82

(1) (1898) 25 Ontario Appeal Reports 88.
(2) (1898) 25 Ont. A.R. 88, at 90.
(3) (1917) 33 D.L.R. 193.
(4) [1935] 3 D.L.R. 657.
(5) [1930] S.C.R. 612.

of the *Exchequer Court Act,* considered it legitimate to refer to the definition of "judicial proceeding" in section 2 (*e*) of the *Supreme Court Act* as indicating "the class of matters which Parliament thought should be excluded from the appellate jurisdiction of" this Court, and they held that the Exchequer Court was *curia designata.* On appeal to the Privy Council (1) the objection to the jurisdiction was given up and the appeal was heard and disposed of.

I do not think that there is any question but that the proceeding in the Exchequer Court in the case at bar was a judicial proceeding within the definition applied in the above case to section 82 of the *Exchequer Court Act,* nor that the judgment of Angers J. is a "judgment" within the meaning of that section. Accordingly, I think that the combined effect of that section and section 44 of the *Supreme Court Act* is to authorize an appeal to this Court. Section 7 of the *War Measures Act,* in my opinion, vests jurisdiction in the Exchequer Court within the meaning of section 82, conditional only upon the exercise by the Minister of the power of reference given him by the *War Measures Act.*

Turning to the merits, the first question for determination is as to the meaning of the phrase "the value of the vessel" as used in section 5 of *The Compensation (Defence) Act, 1940.* It is to be observed that the same language appears in clause (*d*) of subsection (1) of section 4, and that, although by subsection (6) of that section the expression "total loss" is to have the same meaning as it has for the purposes of the law relating to insurance, the Statute does not define the phrase "the value of the vessel".

The learned trial judge took the view that the principles applicable are those which have been applied in fixing compensation under section 23 of the *Expropriation Act,* R.S.C. 1927, chapter 64. Whatever may be the position under the *Expropriation Act,* it is erroneous, in my opinion, to apply the principles applicable under that Act, to a case arising under *The Compensation (Defence) Act, 1940,* the provisions of which are not the same but narrower in scope.

(1) [1931] 4 D.L.R. 43.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kellock J.

The comprehensive nature of the language used in the *Expropriation Act* is referred to by Maclean J., in *Federal District Commission* v. *Dagenais* (1), where he says that 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.

In *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (2), Lord Dunedin, in delivering the judgment of the Privy Council, at page 576, approved of the judgments of Vaughan Williams and Fletcher Moulton L.JJ., in the case of *In Re Lucas and Chesterfield Gas and Water Board* (3), in which judgments the principles applicable in determining the value to the owner of land compulsorily taken are laid down. Where the value of the thing taken, whether it be land or other property, is being determined without regard to the question of damages suffered by the owner, over and above the value of the thing taken, as in the case at bar, the matter is governed, in my opinion, by those principles. The owner is entitled to the "value to him" of the property taken, as it existed at the date of the taking. There must be taken into consideration all advantages, present or future, which it possesses for other possible purchasers as well as for the owner himself, but there is to be excluded from consideration any special value to the person exercising the power of compulsory taking where that value exists only for him in connection with the scheme for which the property is taken. I am not intending to do anything more than to epitomize what is found in the authorities to which I have referred, as I understand them. Lord Moulton, in delivering the judgment of the Judicial Committee in *Pastoral Finance Association* v. *The Minister* (4), summed up the matter in this way:

> Probably the most practical form in which the matter can be put is that they [the owners] were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.

(1) [1935] Ex. C. R. 25, at 33.
(2) [1914] A.C. 569.
(3) [1909] 1 K.B. 16.
(4) [1914] A.C. 1083 at 1088.

The Statute there in question was the Statute of New South Wales (No. 26 of 1900, section 117) which provided as the basis for assessment "the value" of the land being acquired. The section also dealt with damage caused by severance, but that question did not arise in the case before the Board. Reference may also be made to *Lake Erie and Northern Ry. Co.* v. *Schooley* (1).

With respect then to the *Seaborn,* this ship was acquired by the respondent on the 14th of July, 1939, and it was requisitioned by the Crown on the 4th of September following. The Crown retained possession for a period not disclosed by the evidence, when the ship was then returned to its owners, with the intimation that it would be sooner or later again required. Subsequently, on the 2nd of December, 1939, the ship was requisitioned and its possession was retained until the acquisition of the title by the Crown on the 1st of March, 1941. The ship was built as a private yacht and at the time of its purchase by the respondent, had been out of commission for a few years, although it had been well taken care of. On its purchase, the respondent had done some refitting for the purpose of converting it for use as a ferry boat, the respondent at that time being the owner of a franchise expiring November 30th, 1943, for the operation of a ferry between Wood Island, Prince Edward Island, and Caribou, Nova Scotia. Although the franchise agreement called for the operation of this ferry from the 1st of May, 1939, the respondent had not operated the ferry and did not do so until sometime in 1941.

The respondent paid $30,000 in cash for the ship and in addition had issued $25,000 par value second mortgage bonds and 500 shares of its capital stock of no par value at $50 per share, there being in addition to these shares only three other outstanding shares issued for qualifying purposes. According to the evidence of the president of the respondent company "Miss Morrison, or whoever was the American party to the deal, agreed to give the boat" and accept the bonds and the shares "as protecting her until such time as funds were available". Later, the bonds and shares were acquired by an interested group for $25,000. The prospectus of the company filed with the Registrar of

(1) (1916) 53 Can. S.C.R. 416.

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Kellock J.

Joint Stock Companies for the Province of Nova Scotia on May 1st, 1940, states that the *Seaborn* was purchased from Miss Morrison, who acted as agent for Mr. W. N. MacDonald of Sydney, Nova Scotia. The same document also states that "Mr. W. N. MacDonald, who negotiated the transaction [which refers to another ship, the *Sankaty*] has declared that he realized a gross profit of $15,000 in the purchase of the *Charles A. Dunning* [the *Seaborn*], out of which he paid his own expenses". Mr. MacDonald appears as the largest single shareholder and largest holder of second mortgage bonds of the company.

The American owner of the ship then sold it for $40,000 American funds. There is no difficulty on this evidence in concluding that the shares and second mortgage bonds issued in connection with the purchase of the ship did not, at that time, exceed $25,000 in value. It was stated by the president of the respondent company in evidence that each of the directors received a first mortgage bond of the company for their first year's services. The company was incorporated on the 10th of January, 1939. He went on to say that this bond, at the time, was not saleable and "perhaps not worth anything." *A fortiori,* neither the second mortgage bonds nor the shares could have differed much in value. The only asset of the company in September, 1939, was the *Seaborn* and the ferry franchise. This latter item does not appear in the balance sheet of the company of December 31st, 1939, and was of uncertain value, as the service had not been commenced. The subsidy payable by the Crown under the franchise amounted to $28,000, but under the provisions of the deed of trust securing the first mortgage bonds of $110,000, the subsidy was to be applied in paying the interest on outstanding bonds and the principal of maturing bonds.

The *Seaborn* underwent some refitting at New London for the purpose of making the ship fit for the voyage to Halifax and the expenditure under this head was $2,397.02. Fuel for the trip cost an additional $500. Apart from work done at Halifax for the purpose of reconverting the ship from a yacht to a ferry, the cost of which was $2,303.09, the expense applicable to this ship including maintenance to the end of 1939 was $13,264.63, against which must be set $500 realized on the sale of one of the ship's launches.

The total of these items, $79,567.72 plus exchange on $55,000, represents the full expenditure in connection with the ship, up until the time of its second requisition by the Crown in December, 1939.

The learned trial judge finds that the cost of the ship was $98,833.67, although at another place in his judgment, he states the amount as $93,264.63. In arriving at the higher figure, he takes the price of the ship as $80,000 and the cost of overhauling, bringing her to Halifax and maintenance until she was requisitioned at $16,651.94, to which he adds the cost of reconversion, $2,181.73. This last item is a duplication, as it is already included in the amount of $16,651.94. Exhibit "G", a letter written by the respondent company to the Director of Shipbuilding dated the 10th of May, 1940, shows that the $16,651.94 is made up as follows: $13,264.63—representing "maintenance and other expenses directly applicable to the boat, including cost of bringing it to Halifax"; $2,303.09—"most of which is represented by the bill presented by the Halifax Shipyards Limited for overhauling after arrival at Halifax"; $1,084.22—"expenses of the company for the period January 1st, 1940 to May 2nd, 1940 . . . a large part of which represents interest on borrowed money required to help finance the company".

Not only, therefore, must the item of $2,181.73 be deducted from the figure used by the learned trial judge, but also the item of $1,084.22, as this represents expenses after the 1st of January, 1940, when the ship was under requisition to the Government and earning hire. There must also be deducted $500 for the sale of the launch, as well as the difference between the purchase price of the ship in American funds and the $80,000 figure accepted in full by the trial judge.

Evidence was given casting doubt upon the suitability of the ship for reconversion as a ferry, owing to the fact that when converted to carry cars and trucks, its stability would be affected. The learned trial judge, in his reasons for judgment, refers to the "possible lack of stability of the *Seaborn* if converted into a ferry boat" and says "from the evidence adduced I am inclined to think that the *Seaborn* was not the right kind of vessel to use for the

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kellock J.

carrying of trucks and automobiles, at least to carry the quantity which she was expected to carry". According to the president of the respondent company, when the company on the 12th of December, 1939, acquired the *Sankaty*, the respondent was agreeable to making a sale of the *Seaborn*.

The respondent called two experts, Jagle and Strang, each of whom placed a value of $175,000 on the ship as of September, 1939. Jagle gave no explanation as to the basis of his figure which he called an "appraised" value. This often means reconstruction cost less depreciation. It may have other meanings and the witness did not explain his meaning. There is nothing to indicate that the phrase was used to express the opinion of the witness as to the value of the vessel on the basis of the principles already referred to. In my opinion, such evidence is valueless. Strang said that in arriving at his figure, he did not calculate the amount by any method known to appraisers of vessels. He said his figure was based on the sale of two similar vessels, though of slightly different size, but he paid no attention to the fact that the ship was a yacht. He did not have in mind in any way the value of the ship for the purposes of a ferry, but he valued it "just as a vessel, without reference to any particular trade." He described his value as an "actual value" and said that he did not know the current prices in 1939, particularly in the case of yachts. It is evident, therefore, that the two similar vessels, to which he had already referred in his evidence, were not yachts. He went on to say that in 1939 the "market value" would be higher than the "actual value" because the owner of a vessel has to make a profit and the profit would have to be added to what he called the "actual value". This profit he described as 10 per cent, but he went on to say that if one knew the "market value" in 1939, the "actual value" could not be arrived at by deducting this profit. He also said that the "actual value" might be higher or lower than the "theoretical" sum which he called "market value". It is impossible, in my judgment, intelligently to place any value upon this evidence.

The Crown paid to the respondent in respect of the acquisition of the title to the *Seaborn*, the sum of $92,764.63, being the amount of the valuation made in

respect of this ship by an Advisory Board. It does not appear what evidence the Board had before it when this amount was arrived at, although it appears that this amount is the book value of the ship as it appears in the books of the respondent company. As already pointed out, the learned trial judge erred in his determination of the principle to be applied in assessing value under the provisions of section 5 of the *Compensation (Defence) Act*. Applying the principles to which I have referred, I am of opinion that there is no evidence which enabled the learned trial judge consistently with those principles to assess the value of the *Seaborn* at any amount beyond the amount paid by the Crown. It is not necessary to consider whether, consistently with those principles, the value should be determined at any lesser amount, as there is no complaint by the Crown except with respect to the excesses over and above the amount paid.

With regard to the *Sankaty,* this ship was purchased by the respondent on the 12th of December, 1939. At that time, she was an old boat, having been built in 1911. The purchase price was approximately $5,000. The ship being unseaworthy, it was necessary largely to rebuild her and some $6,300 was expended in rendering her capable of proceeding to Halifax. In Halifax, an additional sum of approximately $54,000 was spent upon her in the shipyards there, and approximately $2,500 in materials was supplied to employees of the respondent, who were also working upon her. The total expenditures up to the time the ship was requisitioned by the Crown on the 17th of June, 1940, according to the evidence, was approximately $67,800, there being still some $20,000 required to complete the work. Ultimately, the title to the *Sankaty* was acquired by the Crown on the 1st of March, 1941. According to the evidence of the secretary of the respondent company, it was as a result of both of these ships having been requisitioned that the respondent company decided to purchase another ship then known as the *Erie Isle* but whose name was changed on purchase to the *Prince Nova.* The cost of *Prince Nova,* which was a smaller ship than the *Sankaty,* was $92,000.

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Kellock J.

In connection with the *Sankaty*, the learned trial judge, basing himself on the view that the principle applicable in cases arising under the *Expropriation Act* was equally applicable under the *Compensation (Defence) Act*, held that the doctrine of reinstatement applied and fixed the amount at $205,000. Reinstatement is not limited to the value of the property taken, but involves the substitution of other property and a consideration of its value or cost. It is applicable in cases where the principle *restitutio in integrum* governs, but it is quite inapplicable to cases such as the case at bar, for that principle is excluded by the terms of the governing Statute which confines the tribunal assessing compensation to a consideration of the value of particular property, without regard to other property which may be necessary to place the person whose property is taken in the same position in which he was immediately prior to the exercise of the compulsory powers. It may well be doubted whether the principle of reinstatement could in any event have any application to the case at bar, depending as it does for its application, in any given case, upon the existence of circumstances under which the obtaining of substitute property was made necessary by the forcible taking and the course followed in obtaining that property was reasonable: *A & B Taxis, Limited* v. *Secretary of State for Air* (1). It has not been shown in evidence that the purchase of the *Prince Nova* was rendered necessary by the acquisition of the title to the *Sankaty*. The exact date of the purchase of the *Prince Nova* is not established, although it appears to have been sometime in the early part of 1941. The *Sankaty* was then, and had been since June 17th of the previous year, under requisition and it is expressly stated by the witness McKay, the secretary of the respondent company, that it was as a result of the *requisitioning* of the *Sankaty* and the *Seaborn* that the decision to purchase the *Prince Nova* was made. It is not necessary to decide this point, however, as in my opinion, for the reasons mentioned, the doctrine of reinstatement has no application. I do not find it possible on the evidence to arrive at the proper value of the *Sankaty*, as, in my opinion, the evidence was not directed in accordance with the pertinent principles.

(1) [1922] 2 K.B. 328.

The appeal should, therefore, be allowed and the case remitted to the Exchequer Court to determine the value of the *Sankaty* in accordance with the principles referred to, but the compensation allowed in respect of the *Seaborn* should be reduced to $92,764.63. The appellant should have the costs of the appeal. The costs of the former trial should be in the discretion of the Judge presiding at the new trial, who will have regard to the fact that the appellant has succeeded throughout with respect to the *Seaborn*.

Estey J.—I agree in the conclusion of my brothers Rand and Kellock.

Motion to quash dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Burchell, Smith, Parker & Fogo.*

Solicitor for the respondent: *George J. Tweedy.*