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*Nov. 24.
*Dec. 17.

C. J. DREIFUS.....APPELLANT;

AND

HARVEY E. ROYDS.....RESPONDENT.

ON APPEAL FROM THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

Assessment and taxes—Land—Actual value—Assessment on adjacent lands—Principle—Ontario Assessment Act, R.S.O. [1914] *c.* 1955 40 (1) *and s.* 69 (16).

By sec. 41 (1) of the Ontario Assessment Act "land shall be assessed at its actual value" and by sec. 69 (16) "the court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed."

Held, that in assessing land under these provisions the governing principle is to ascertain its actual value.

Held, further, Brodeur J. dissenting, that in this case the assessment was made chiefly, if not entirely, on consideration of the value at which adjacent lands were assessed and the actual value was disregarded. The case was, therefore, sent back to the tribunal appealed from to have the land assessed on the proper principle.

APPEAL from the ruling of the Ontario Railway and Municipal Board which set aside the assessment on appellant's land made by the County Court Judge and restored the higher valuation of the Court of Revision.

The questions raised on the appeal are sufficiently indicated in the above head-note.

Chrysler K.C. for the appellant.

G. F. Henderson K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

THE CHIEF JUSTICE.—This is an appeal by the owner of two parcels of land in the City of Port Arthur from a judgment of the Ontario Railway and Municipal Board reversing a judgment of the District Judge for Thunder Bay, which in turn had altered the judgment of the Court of Revision confirming an assessment of the lands in question.

The assessment of the two parcels of land had been fixed by the Court of Revision at $32,000 and $28,000 respectively, being at the rate of $300 per acre; the District Judge reduced these assessments respectively to $10,700 and $9,300, being at the rate of $100 per acre. The Ontario Railway and Municipal Board restored the assessment fixed by the Court of Revision, namely, $60,000, for the two parcels of land.

Unless it was clearly apparent that the Board from whose judgment this appeal was taken had erred in its conclusions either by adopting some wrong principle or in ignoring some right one, I would not be disposed even if I had the power, to interfere with its judgment.

They are men of great experience in dealing with matters of the kind in question here and, as the hearing took place in Port Arthur where the lands are situate, I assume they would have an opportunity of inspecting them and those in the immediate vicinity and, in this way, would be better qualified than we possibly could be to determine the actual value of the lands in dispute and the weight to be given to the evidence as to the assessment of these adjoining lands in deciding the actual value of those in question here.

It is contended, however, that the Board erred in that they disregarded the provision of the Assessment Act, requiring the lands to be assessed at their actual value and in allowing undue weight to the evidence respecting the assessment of the lands of the same kind as those in question in the immediate vicinity.

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The learned chairman of the Board, during the hearing of the appeal, expressed himself strongly, more than once, to the effect that the Board's duty was to find the actual value of the lands in question, and I find it difficult to reach the conclusion that he erred in giving undue weight to the assessments upon lands of the same kind in the immediate vicinity of those in question. He seemed fully to appreciate the finding of that "actual value" as the dominant and controlling factor in determining the amount at which they should be assessed.

But the evidence given before the board was most meagre and unsatisfactory as to this "actual value" and the Assessment Act expressly provides that, in arriving at such actual value, consideration might be given to the assessed value of lands of the same kind in the immediate vicinity of those in question.

Whether undue weight was given to this evidence of the assessed value of other lands of the same kind as those in question in the immediate vicinity is very difficult to decide.

In view of the large amount involved and the very meagre and unsatisfactory character of the evidence of actual value given, some of my colleagues think that justice requires there should be a rehearing of the case by the board and fuller and better evidence given of the "actual value" of the lands which the Act requires. Under the circumstances, I am not disposed to dissent from such a disposition of the appeal.

I think we are all agreed that the actual value of the lands and that only can be assessed. That is the dominant and controlling factor which must determine the assessment, and it would seem as if the assessor failed to appreciate that fact and did not bring before

the board the evidence necessary to enable it to find such actual value but relied too much upon the subordinate fact of the assessed value of adjoining lands.

Under all the circumstances I would agree to the reference back to the board with instructions to take further evidence of the actual value of the lands in question, due regard being had to the assessment values, unappealed from, of the lands of a similar kind in the immediate vicinity of those in question, in order to arrive at the actual value of those in question

It must not be assumed however, by this reference back to the board to fix the assessment upon the "actual value" of the land, that the statutory direction in arriving at that actual value to consider the assessed values of similar lands in the immediate vicinity of those under consideration, is to be ignored. On the contrary, these values must have due consideration and weight, but they were evidently not intended by the legislature to be the sole or even the controlling factor in determining the actual value of the lands being assessed, but simply as one item of evidence in reaching that actual value which had to be considered.

IDINGTON J.—The appellant is a non-resident owner of two parcels of land situated in Port Arthur, one of one hundred and seven acres and the other of ninety-three acres, separated only by a highway running between them, and thus together forming a rectangular block of two hundred acres.

The respondent is the Assessment Commissioner of Port Arthur who had these parcels placed on the said city's assessment roll at an assessed value of three hundred dollars an acre.

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The said owner appealed from said assessment to the Court of Revision for the municipality, which dismissed his appeal.

He then duly appealed to the learned judge of the District Court of the Provisional District of Thunder Bay, who, after hearing evidence (which for some reason or want of reason is not before us) allowed the appeal and reduced the assessment to one hundred dollars an acre.

It does appear from notes of his finding that appellant had called two witnesses well acquainted with the lands in question for many years, and well qualified to speak on the subject of real estate values in the part of Port Arthur in question, who put the value of the whole possible farm land, undrained, at $75 to $100 an acre. One of these men speaking from personal experience, indicates it would cost more to drain and clear and make productive than it would be worth.

The learned judge says Mr. Royds did not call any witnesses.

And then the learned judge closed his remarks thus:—

> In my opinion, the value put by Mr. Schwigler and Mr. Tomkin is altogether too high, and I cannot see where any owner can put these swamps and muskegs to any use that would justify such a value. But on their evidence I fix the assessment at $100 per acre and it is reduced accordingly.

From that judgment the respondent herein appealed to the Ontario Railway and Municipal Board, which reversed same and restored the assessment made by said respondent.

The record of the proceedings before us indicates that counsel appeared respectively for the appellant then, now respondent herein, and for the respondent then, now the appellant herein. Yet the proceedings

were opened by Mr. Royds in person without being sworn, so far as appears, though in regard to any others called as witnesses the record indicates that each man so called was sworn.

He began thus:—

> As shewn on the blue print submitted, the parcels marked in red ink, 1, 2, 3, 4, 5 and 6, form assessment subdivision 22, and parcels numbered in red pencil 7, 8, 9, 10, 11, form assessment subdivision 32. We do not intend in this particular appeal to burden this Court with witnesses regarding the valuation. We do not wish to take up that matter at present, because as you know since the war these things differ considerably, and we are going to appeal to you as a matter of equity in the assessment of this property.
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> The Chairman: The reduction as made by the judge stands unless we are satisfied that its actual value is more than the value fixed by him.

Passing that perfectly correct ruling of the chairman, without heeding it, Mr. Royds launched out into something unusual on the part of a witness, and which is somewhat difficult to understand, but incidentally discloses, if it means anything, that he had in mind to compare adjoining or adjacent blocks of land (which had been subdivided and partly built on) extending over a wide stretch of such neighbouring territory with these uncleared, unbroken, unimproved non-subdivisions now in question.

He apparently conceived the idea of selecting such improved subdivisions into small lots (assessable to different owners) and making a total estimate of the whole of such assessments, and then, computing the entire acreage of each of such tracts so selected, divided the total assessment of each by its acreage so ascertained, and thus arrived at an assessment per acre exceeding the assessment of the land now in question herein, thus satisfying his own mind that he had made an equitable assessment.

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The only vacant unsubdivided block considered at all lay nearer the centre of the city and hence furnished no basis for a fair comparison based on acreage.

He was asked, before he got started very far, as follows:—

> To the Vice-Chairman:
>
> Q. Is this property marsh lands? A. No. It is straight back nearly directly west from the post office. There is one lot on each side of the Dawson Road. The assessment against parcels 1 to 6 at the time it was purchased by the owner were approximately $10,000; that was in 1895.
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> To the Chairman:
>
> Q. That is the aggregate assessment? A. Yes, in 1895, and the aggregate assessment of that subdivision 22 at the present time is $536,275.
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> To Mr. McKay:
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> Q. What do you mean by subdivision 22? A. The land west of High Street to the city boundary, subdivision 2 of Ward 2. That is the assessment for the whole subdivision. It was assessed for $10,100 in 1895. Parcels 7 to 11 were assessed approximately at $7,000 in 1895, and the assessment in 1919 was $331,810. I have taken the whole block of land so as to make the assessment appear more equitable, and I have taken the total assessment against these lands.
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> To the Chairman:
>
> Q. It is actually assessment by subdivision lots? A. Yes, but I have apportioned it out in the whole acreage, including streets, lots and everything.

One and another asked questions but the results may be just as inaccurate as when he denied the fact of those lands being marsh lands.

I doubt if he really intended to swear as it reads, for if anything is clearly proven in the case, these lands in question are largely marsh lands.

Possibly his mind was running on his preconceived notion of the other tracts he was speaking of a minute later. If so then there was no fair comparison possible between the subdivisions he referred to and the unsubdivided lands in question and, for the purposes of this appeal, that is all that need concern us.

He seems aggrieved that appellant has not improved and subdivided his lands, although, from all that appears, subdivision within the city's bounds seems to have run, as elsewhere, far beyond the bounds of prudence.

The only other evidence, if this and such like irrelevant talk can be called evidence, given on behalf of appellant before the board appealed from herein, was a single witness who was called to prove that in 1911 or 1912 he tried to buy the land in question from the appellant and he refused to consider any offer as he had determined to keep his land for some relative, although the said witness tried it on by steps up to $20,000 or $30,000 and even $50,000. The latter figures evidently I suspect, were a joke.

That witness on cross-examination testified as follows:—

Q. You anticipated making a large profit? A. We wanted a sudivision and we wanted to divide it up. It was close to the town, and the extension of the railway out that way would make it a marketable property, if we spent a little money on it.

Q. What did you reasonably expect to make over your figure of $50,000? A. I could not tell you that now. This was a long time ago.

Q. Would you give that for it now? A. No.

Q. At what price did you anticipate putting the individual lots on the market? A. We had not made up our minds; we would figure that out. We would fix a price according to what it would cost, but Mr. Dreifus would not commit himself to any price and we had to give him up. We corresponded with him for about two years. He would not answer a letter for a long time after we had written him.

The respondent would not venture to swear that the land in its present state and in the state of the market when the assessment was made, was worth, in the market, what he had assessed it at, or to name a price.

His appeal ought, I respectfully submit, instantly to have been dismissed for want of evidence, but it was not.

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The now appellant, therefore, was driven to calling three witnesses who demonstrated by facts that the judgment of the learned district judge could not have been disturbed by raising the assessment above what he had fixed.

The ruling which followed, and is now appealed against, would maintain any assessment, no matter if double or treble the actual value, so long as it could be argued that some other property, assessed in like manner illegally and improperly beyond its value on same assessment roll and hence must be upheld.

That is not the meaning of the words

> and the Court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed,

interjected in 1892 into the section from which the section 69, sub-section 16, relied upon, has come.

In the Assessment Act the predominating clause is that in which, as the chairman of the board repeatedly suggested in the course of the proceedings, the actual value is made the rule to be observed.

To reject this appeal would revolutionize the whole jurisprudence established by many decisions during the twenty-eight years since the embarrassing subsidiary paragraph relied upon was quietly introduced so long ago as 1892, and enable municipalities to defeat through compliant assessors the very fundamental principle of the Assessment Act.

Instead of the respondent bearing the onus of proof in such an appeal as before the Board, it was the duty of the appellant assessor to have established by evidence that the actual value of the land in question had been that set down on the roll. If the practice had been adopted of reporting the evidence given

before the learned judge from whose judgment the appeal was taken, so that the Board could read it, that might not be necessary. Assuming, however, as appears herein, that it formed no part of the record before the board, then clearly the appellant on a re-hearing must bear the burden I indicate; in same manner as an appellant to the Court of Revision must bear the burden of proving the assessor in error.

Then, if that *prima facie* is so established, the onus of proof may be shifted to the respondent.

It does sometimes so happen that the conflict of evidence renders it difficult to determine. The actual difference of opinion so made to appear may be slight and in such a case I conceive the change of 1892 was designed to permit the appellant court to refer to the roll as an element to help to a solution of such a problem as thus presented.

It was never conceived that it should be taken as the sole guide, but only as a factor in the last resort to avoid, by the allowance or disallowance of the appeal, unjust consequences of disturbing a roll clearly founded on the strictest effort to give full force and effect to the imperative requirement of the Act that land, unless in the excepted cases, had been set down at its actual value.

A roll that its maker does not pretend to have been so made out is not available for any such purpose.

It certainly is remarkable that in a city of the size of Port Arthur not a single person could be brought to say the assessment was right on the basis of actual value.

The pretence that there are no sales rather tends to shew there is no value. Of course we ought to know that such is not the case.

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It may well be that the actual value is low, indeed very low, and, if you will, unexpectedly so, but whatever it is, according to the judgment of witnesses competent to speak, their evidence must be the guide.

The absurdity of bringing forward evidence of a refusal to sell, or worse still, of such a refusal in 1911 and 1912 when everyone knows that estimated values then and eight or nine years later are not identical, tends to show, on respondent's part, a rather perverse way of looking at things, which, I submit, should not be encouraged.

The appeal should be allowed with costs herein and before the board appealed from, and the judgment of the learned district judge be restored.

DUFF J.—Section 40 s.s. 1 should be read with sec. 69, s.s. 16 of the Assessment Act. Reading the two provisions together I can entertain no doubt that the rule given by them as the rule governing the Court of Revision in hearing and determining an assessment appeal is that the assessment is to be determined by the actual value of the land and that for the purpose of arriving at the actual value of the land the court may refer to the assessment of land in the vicinity "similar" in character and consider the value of such land as manifested by the assessment. It is not necessary to attempt for the purposes of this appeal any definition of the phrase "actual value" as employed in this statute. It is very clear to me that the board has proceeded upon the theory that the enactment of sec. 40, s.s. 1 is modified by that of s.s. 16 of sec. 69 and that the actual value for the purpose of assessment may be something other than the actual value in fact, the determination of which is governed by the

practice of the assessor as applied to similar lands in the vicinity. This I think is an erroneous view. The governing enactment is that of section 40, s.s. 1, and the rule laid down by s.s. 16 of sec. 69, is a subsidiary rule which has been enunciated with the object of facilitating the application of the governing rule. The assessment of other lands may be referred to for the purpose of ascertaining the actual value, that is to say as affording some evidence of the actual value but only for that purpose.

The appeal should be allowed and the matter referred back to the board to enable them to determine the assessment in accordance with this principle.

ANGLIN J.—The following concluding paragraph from the opinion of its chairman contains the basis of the decision of the Ontario Railway and Municipal Board allowing an appeal in this case from the learned District Court Judge.

> The chief reliance of the appellant is the provisions of section 69, subsection (16) of "The Assessment Act" which so far as material reads "the Court may, in determining the value at which any land shall be assessed have reference to the value at which similar land in the vicinity is assessed."
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> Under the authorization of this provision, the appellant showed that parcel 4, the unsubdivided block above referred to, is assessed to a resident of Port Arthur at $400 an acre; parcel 6, the subdivided parcel above referred to, is assessed in the aggregate at $425 per acre; parcel 7, a subdivided parcel lying west of parcel 8 and further than it from the centre of the city is assessed in the aggregate at $400 per acre. No satisfactory proof was given that the character and quality of the land embraced in parcels 5 and 8 were materially different from the land in parcels 4, 6 and 7.
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> From this evidence the Board has reached the conclusion that there is not such a disparity in the value of parcels 5 and 8 as compared with parcels 4, 6 and 7, as to warrant the reduction made by the learned district judge, and in the opinion of the board the assessment as confirmed by the Court of Revision should be restored.

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The principle involved in this passage is in my opinion clearly erroneous. If it does not entirely ignore the paramount provision of s.s. 1 of s. 40, of the Assessment Act—that "land shall be assessed at is actual value" it at least treats as dominant a subordinate clause of s. 69 (16) which permits the Court of Revision

> in determining the value at which any land shall be assessed (to) have reference to the value at which similar land in the vicinity is assessed.

Moreover this latter provision rests on the assumption that the assessment shall have been made on the basis directed by the Act, i.e., that land shall be assessed at its actual value. The evidence of the assessor Royds shows that the roll in this instance was not so prepared—that his idea in making his valuations was that there should be such relative uniformity of assessment that the burden of taxation "should be borne in an equitable manner"—that a person situated as is the appellant

> should be at least willing to contribute his equitable share with the people who gave his land the value it has.

Royds' evidence as a whole demonstrates that in preparing the assessment roll his purpose was not to assess land at its actual value, but rather to assure what he deems equality of assessment, regardless of actual value. The assessments on similar lands in the vicinity of those of the appellant, therefore, do not in this case afford the criterion of value which the legislature doubtless had in view when it provided that reference might be had to them by the Court charged with

> determining the value at which any land shall be assessed.

With great respect, the board appears to have restored the original assessment of $300 an acre, which the District Court Judge had reduced to $100, solely because

> there is not such a disparity in the value of parcels 5 and 8 (the subject of the assessment under appeal) as compared with parcels 4, 6 and 7 (similar land in the vicinity) as to warrant the reduction made by the learned District Judge.

The Board would seem to have taken the assessment of these neighbouring lands, assumed in the absence of evidence to the contrary to be of the same character, as conclusive of the valuation that should be put upon the lands of the appellant for the purpose of the assessment roll. Actual value, of which there was some evidence, seems to have been wholly disregarded. The decisions of this Court—*La Corporation Archiépiscopale C. R. de St. Boniface* v. *Transcona* (1), and *Rogers Realty Co.* v. *Swift Current* (2), seem to me to be in point.

I would allow the appeal with costs and set aside the order of the board. Although at first disposed to restore the order of the learned District Court Judge, which there is evidence to support, I think on the whole the better course is to exercise the power conferred by s.s. 2 of s. 41 of the Supreme Court Act, as enacted by 8 & 9 Geo. V., ch. 7, and remit this case to the Ontario Railway and Municipal Board in order that it may fix the assessment of the actual value of the land as prescribed by s.s. 1 of s. 40 of the Assessment Act.

(1) 56 Can. S.C.R. 56.

(2) 57 Can. S.C.R. 534.

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BRODEUR J. (dissenting).—I am not satisfied that the Ontario Municipal Board have based their decision on some erroneous construction of the law.

The law requires (R.S.O. 1914, ch. 195, s. 40, Assessment Act) that land should "be assessed at its actual value."

The land in question covers a somewhat large area in the midst of the city of Port Arthur and has belonged for a great number of years to the appellant who apparently keeps it for a relative to whom he proposes to leave it in the future.

It is not subdivided into town lots.

Some years ago the appellant had the opportunity of selling this land for $50,000 and he would not consider favourably such an offer. The land is assessed at about that sum.

The evidence is conflicting. Some witnesses say the property is not worth more than $100 an acre. On the other hand, it is in evidence that it is worth far more than that. The members of the board held their sittings in the locality and saw the land and could make as good an estimation as these witnesses. They came to the conclusion that the property should be assessed at $300 an acre. They base their judgment on a case of *In re Lake Simcoe Hotel Co. and Barrie* (1), or at least they refer us to the decision in that case.

In that case of *Lake Simcoe*, it is stated that value alone is to be considered in making assessments and it is added also that the proper guide is to be found in sect. 69 (16) of the Assessment Act, providing that the Court may in determining the value at which any land shall be assessed have reference to the value at which similar land in the vicinity is assessed.

(1) 11 Ont. W.N. 16.

In the present case, the land not being on the market, we have no sale price to guide us. It does not give any revenue, and we cannot then have reference to the returns to determine the value. The board considered the assessment at which the lands in the vicinity were assessed. Different groups of lots of land were formed for making the comparison and it was found that these adjoining properties were assessed at four and five hundred dollars an acre.

It seems to me that the appellant, in these circumstances, cannot complain of the decision of the board which assessed its land at three hundred dollars an acre.

If I could read in the decision of the board that they had disregarded the actual value of the land and had based their valuation only on the neighbouring property I would decide in favour of the appellant. But as they failed to find out by sales, by the income or by other means the actual value of the property, and as the evidence of value given by witnesses was "little more than guesses," they found in the value of adjoining properties a guide which the law itself declares could be considered.

The appeal should be dismissed with costs.

MIGNAULT J.—The only ground on which this Court has jurisdiction to vary the valuation of property assessed, is that the court appealed from has proceeded upon an erroneous principle (sec. 41, Supreme Court Act). So on this appeal from the Ontario Railway and Municipal Board, which is the court of last resort in the province of Ontario on matters of assessment, it must be shown that the board, in allowing the appeal of the present respondent from the judgment of the district judge, has proceeded upon an erroneous principle.

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There is no doubt that the respondent urged an erroneous principle before the board when he contended that because of municipal requirements the city of Port Arthur had to have a certain amount of revenue and that therefore equity of assessment (whatever that may mean) would be the fair way. But the Board does not appear to have proceeded on any such ground, so it is unnecessary to consider it.

However the board clearly bases its judgment upon subsection 16 of section 69 of the Assessment Act, which says:—

> In other cases, the court, after hearing the complainant, and the assessor, or assessors, and any evidence adduced, and, if deemed desirable, the person complained against, shall determine the matter, and confirm or amend the roll accordingly. And the Court may in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed. And in all cases which come before the Court it may increase the assessment or change it by assessing the right person, the clerk giving the latter or his agent four days notice of such assessment, within which time he must appeal to the Court if he objects thereto.

The governing provision in the Assessment Act is section 40, subsection 1, which is as follows:

> Subject to the provisions of this section, land shall be assessed at its actual value.

Section 40, which lays down an imperative rule, is among the provisions of the Act concerning the valuation of lands, while section 69 is in the part of the statute which deals with the Court of Revision. Subsection 16 is clearly permissive only, and allows the Court, before which an appeal against the assessment is taken, to have reference, in determining the value at which any land shall be assessed, to the value at which similar land in the vicinity is assessed.

Thus the imperative rule is that land shall be assessed at its actual value, and that rule is binding on the Court. But in determining the actual value of the land, the Court may have reference to the value at which similar land in the vicinity is assessed.

Careful reading of the reasons for judgment of the learned chairman of the board, has convinced me that undue prominence was given by the board to subsection 16 of section 69, while the imperative rule of subsection 1 of section 40 was apparently lost sight of. Evidence of the actual value of the land was given before the board, but this evidence was dismissed with the remark that

> in view of the fact that there is no movement in properties of this kind at present, or indeed since before the war, such estimates of value can be little more than guesses.

Other facts were also relied on by the learned chairman, such as the assessment of the two parcels in question in 1915 at $104,500 without protest, and the further fact that when asked whether he would take $50,000 for the property some eight or nine years ago, the appellant stated that he did not wish to sell and was holding the lands for a relative. It is noticeable that Meikle, who testified as to this conversation with the appellant, says, in answer to a question put to him by the respondent's counsel, that he would not give that price for the property now. And the silence of the appellant in 1915 is certainly not conclusive against him when he protests the assessment in 1919, although it is possibly a circumstance to be weighed.

I have therefore come to the conclusion that instead of considering what was the actual value of the land, the board based its judgment, to the exclusion of

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evidence of actual value, on subsection 16 of section 69, which merely permits the Court, in determining the actual value, to have reference to the value at which similar land in the vicinity is assessed. Giving to this provision the prominence which the Board gives it, practically nullifies the imperative rule of section 40, subsection 1, and makes it really the dominant rule, instead of being, what it is, a guide to the Court in determining the actual value. The result is that evidence of actual value was disregarded, and the assessment of similar land in the vicinity was considered as the controlling element in the passing on the appeal from the district judge, whose judgment was based on evidence of actual value.

I agree that the case should be referred back to the board in order that it may determine what the assessment of these lands should be according to their actual value as required by the Assessment Act. To that end the appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Malcolm A. McKay.*

Solicitor for the respondent: *D. J. Cowa*