CHRISTOPHER A. TONKS and ANNA TONKS (*Defendants*) .... APPELLANTS;

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* Oct. 26, 27
Nov. 29

AND

HAZEL DOREEN REID and JOHN CAIRD REID (*Plaintiffs*) ..... RESPONDENTS;

AND

THE CORPORATION OF THE TOWNSHIP OF YORK (*Defendant*).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal law—Sale by municipality to municipal official of part of closed highway—Failure to fix price and make offer to abutting owner—By-law and sale of land thereby authorized void—Claim for lien rejected—The Municipal Act, R.S.O. 1960, c. 249, s. 477—The Conveyancing and Law of Property Act, R.S.O. 1960, c. 66, s. 38(1).

The Township of York closed a highway and sold part of it to the defendant T, the reeve of the township, without compliance with s. 477 of *The Municipal Act*, which compels the municipality, if it decides to sell, to fix a price and offer it to the abutting owner or owners. T had arranged to buy the land in the name of a nominee. The owner of an abutting property and her husband brought an action for a declaration that the by-law and the sale of the closed road thereby authorized were null and void and for an order setting aside the sale. The trial judge dismissed the action. The Court of Appeal in reversing this judgment held that non-compliance with s. 477 of *The Municipal Act* results in a void transaction. They also held that in this particular case the conduct of T was fraudulent. They set aside that part of the by-law which authorized the sale and declared the deed of conveyance to be null and void. T appealed to this Court.

Held: The appeal should be dismissed.

The Court agreed with the judgment of the Court of Appeal that if the provisions of s. 477 of *The Municipal Act* are not observed, the council is without authority and a by-law authorizing sale is void and is open to attack notwithstanding that more than a year has elapsed from the date of its passing. The council was under no compulsion to sell, but if it determined to sell, it had to sell in accordance with the provisions of s. 477. It fixed no price and it made no offer to the abutting owners. Council had no authority whatever to make this sale to T. It was not within its competence to pass any by-law authorizing such a sale or the execution of a deed to T.

Nothing was found in the conduct of the plaintiffs which would indicate any waiver of their rights and they could not be deprived of these rights except by compliance with s. 477. There was nothing in this case but a by-law which was passed in bad faith at the instigation of the reeve and simply to subserve his interest as a private individual. Such a by-law was a nullity.

*PRESENT: Cartwright, Abbott, Martland, Judson and Spence JJ.

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T's claim that under s. 38(1) of *The Conveyancing and Law of Property Act* he was entitled to a lien of $30,600 upon the lands in question, this being the amount that the land and the improvements had cost him, was rejected. Section 38(1) did not apply to a case such as this. T acquired this land knowing that s. 477 had not been complied with and knowing that he had no right to purchase. He could have no honest belief that he was making improvements on land that was his own. He knew the weaknesses of his title and took his chance.

Jones v. Tuckersmith (1915), 33 O.L.R. 634, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of King J. Appeal dismissed.

H. E. Manning, Q.C., for the defendants, appellants.

F. M. Catzman, Q.C., and *M. A. Catzman,* for the plaintiffs, respondents.

J. H. Boland, Q.C., for the Corporation of the Township of York.

The judgment of the Court was delivered by

JUDSON J.:—The municipality closed a highway and sold part of it to a municipal official without compliance with s. 477 of *The Municipal Act,* now R.S.O. 1960, c. 249, which compels the municipality, if it decides to sell, to fix a price and offer it to the abutting owner or owners. The trial judge dismissed the action. The Court of Appeal[1] reversed this judgment and the defendant Tonks now appeals. The municipality submits its rights to the Court.

The Court of Appeal held that non-compliance with s. 477 of *The Municipal Act* results in a void transaction. They also held that in this particular case the conduct of the municipal official was fraudulent. They set aside that part of the by-law which authorized the sale and declared the deed of conveyance to be null and void.

In 1955 the two plaintiffs, Hazel Doreen Reid and John Caird Reid, who are husband and wife, purchased No. 2 Paulson Road in the Township of York as joint tenants. In 1959, the husband conveyed his interest to his wife, who remains the sole owner.

[1] [1965] 2 O.R. 381, 50 D.L.R. (2d) 674.

The defendants, Christopher A. Tonks and Anna Tonks, are husband and wife. Christopher Tonks was elected a member of the municipal council of the Township of York in 1951. He was elected as deputy reeve in 1952 and was appointed acting reeve on September 4, 1956. He was elected reeve in December 1956 and held this office until December 1960.

No. 2 Paulson Road was a corner lot before Myra Road was closed. It fronts on Paulson Road and its easterly boundary was Myra Road. Paulson Road runs east and west, Myra Road north and south. The property was on the northwest corner. There is no access for vehicles to the rear of No. 2 Paulson Road from Paulson Road. Before the closing there was access to the rear of the property from Myra Road. Myra Road had been dedicated as a highway in 1951 by by-law of the township and it was closed on August 13, 1956, by by-law 15396. There is no attack on the propriety of the closing.

On September 10, 1956, Reid wrote to the township clerk and solicitor to say that he wished to acquire part of the west side of Myra Road as closed by the by-law to enable him to gain access to the rear of his property. He received an acknowledgment of his letter from the clerk and solicitor telling him that it would be put before council at its next meeting and that he would be advised later. Reid's letter was put before the Committee of General Purposes of the township on September 17, 1956. Tonks was then acting reeve of the township and was present at the meeting of the committee, which referred the request to the Committee on Sale of Land. The report of the Committee of General Purposes referring Reid's request was approved by the township council at a meeting on October 9, 1956, at which Tonks was present as acting reeve. There is no record that Reid was advised that his request was being considered, or that the Committee on Sale of Land ever dealt with his application. His letter is missing from the file and has never been found. Reid heard nothing further about his application and assumed that nothing could be done.

Early in 1957, Tonks became interested in buying the southern half of Myra Road, which abutted on the plaintiff's property. He well knew as a member of council that

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he was disqualified from purchasing. He had consulted the township solicitor and had received this advice. Tonks discussed the matter with another deputy reeve and decided to buy the property in the name of a nominee. In June 1957, he had one Joseph Fraser, a friend and relative by marriage, submit an offer for $6,600. Fraser enclosed his own cheque for $1,320 with the offer as a deposit. This money was supplied by Tonks. The offer was made subject to a condition that the municipality as vendor would secure the approval of the Ontario Municipal Board to amend a restrictive by-law against building on a lot having a frontage of less than 70 feet. Myra Road was only 66 feet wide. Fraser's offer of June 10, 1957, was submitted to the Committee of General Purposes, which recommended directly to council that the offer be accepted. Tonks was then reeve and was present at the meeting. If it makes any difference, there is no evidence that Tonks declared his interest at the meeting, although he does say that he may have disclosed it to some of the members before the meeting. There is no reference to any disclosure in the minutes of the meeting.

On June 17, the report of the Committee of General Purposes was approved by council, which formally accepted Fraser's offer by enacting by-law 15649. On June 24, 1957, council enacted by-law 15656 permitting the erection of a house on these lands notwithstanding that they had a frontage of less than 70 feet. Tonks was present at that meeting and signed the by-law in his capacity as reeve. Again he made no disclosure of his interest in the by-law. He says that he assumed that everybody knew. The by-law was submitted to and approved by the Ontario Municipal Board without any disclosure of Tonks' interest.

Fraser, who was the first nominee of Tonks, did not take a conveyance of the property. He assigned his right to purchase to Marie Eunice Froman, another nominee of Tonks. She received a deed from the township on January 14, 1958, executed by Tonks, as reeve, and by the township clerk. On December 19, 1957, Fraser, the first nominee, had paid the balance of the purchase price with money supplied by Tonks.

On July 17, 1958, Marie Eunice Froman executed a deed to Tonks and his wife. This deed was registered on the

following day, which was more than one year after the enactment of by-law 15649 which had approved the sale to Fraser.

Tonks applied for a building permit to erect a house on this property on December 20, 1957. His plans were approved on January 14, 1958 and he began building the house in April of 1958.

The learned trial judge found that the township had not complied with the provisions of s. 477 of *The Municipal Act* in selling this property. He was, however, of the opinion that the township by-law 15649, passed on June 17, 1957, approving the acceptance of Fraser's offer, was voidable only and could not be impeached except by an application to quash brought within one year of its passage. No such application having been made, the action failed and was dismissed with costs.

The Court of Appeal in reversing the judgment held that the by-law was a nullity for non-compliance with s. 477 and should be set aside on that ground. They also found fraud on the part of Tonks. They further rejected a defence that the plaintiffs had waived their rights under s. 477 and had acquiesced in Tonks' purchase.

I agree with the judgment of the Court of Appeal that if the provisions of s. 477 of *The Municipal Act* are not observed, the council is without authority and a by-law authorizing sale is void and is open to attack notwithstanding that more than a year has elapsed from the date of its passing. The provisions of s. 477 are set out here:

> 477. (1) Where a highway for the site of which compensation was paid is established and laid out in place of the whole or any part of an original allowance for road, or where the whole or any part of a highway is legally stopped up, if the council determines to sell such original allowance or such stopped-up highway, the price at which it is to be sold shall be fixed by the council, and the owner of the land that abuts on it has the right to purchase the soil and freehold of it at that price.
>
> (2) Where there are more owners than one, each has the right to purchase that part of it upon which his land abuts to the middle line of the stopped-up highway.
>
> (3) If the owner does not exercise his right to purchase within such period as may be fixed by the by-law or by a subsequent by-law, the council may sell the part that he has the right to purchase to any other person at the same or a greater price.

Words could not be plainer. The council was under no compulsion to sell, but if it determined to sell, it had to sell in accordance with these provisions. It fixed no price and it

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made no offer to the abutting owners. Council had no authority whatever to make this sale to Tonks. It was not within its competence to pass any by-law authorizing such a sale or the execution of a deed to Tonks. This is the effect of *Jones v. Tuckersmith*[1], and I agree with the analysis of that case in the reasons of the Court of Appeal[2].

The Court of Appeal stated a second ground for its reasons for judgment. They held that the reeve of this municipality fraudulently acquired this land in violation of the rights of abutting owners. A mere recital of the facts as I have outlined them leads irresistibly to this inference. No innocent construction is possible. Although Reid had enquired in good time about his right to purchase, he was ignored, and I think deliberately ignored, and the person who appeared on the scene as the ultimate purchaser was the reeve. There can be no doubt that he had determined to purchase this property when he well knew that his position forbade him to do so, and Reid had no notice of this until it was an accomplished fact. When he learned about it, instead of at once attacking the transaction, he tried to make a deal with Tonks which would give him access to the rear of his lot. From what Reid did it is argued that he renounced or waived his rights under s. 477. Reid's explanation is that he was confronted by the fact of acquisition and that he did the best he could. It is urged against him that he did not follow up his letter of 1956; that when he knew that Tonks had become the purchaser he signed consents on his own behalf and persuaded others to sign consents to have the restriction of 70 feet varied; that in March of 1958 he was not interested in buying more land. He had in fact separated from his wife and was not living in the house. I have already mentioned that he conveyed his interest to his wife in 1959. But he also said that he was promised access to the rear of his lot by Tonks—Reid says 12 feet wide, Tonks says 8 feet—but as a result of Tonks' building plans, which were perhaps dictated by the configuration of the ground, the space between the two houses was too narrow for vehicles to pass between them.

I can find nothing in the conduct of the Reids which would indicate any waiver of their rights and I do not

[1] (1915), 33 O.L.R. 634, 23 D.L.R. 569.
[2] [1965] 2 O.R. 381, 50 D.L.R. (2d) 674.

think that they can be deprived of these rights except by compliance with s. 477. There is nothing in this case but a by-law which was passed in bad faith at the instigation of the reeve and simply to subserve his interest as a private individual. Such a by-law is a nullity.

The final point raised by the appellant is that under s. 38(1) of *The Conveyancing and Law of Property Act*, R.S.O. 1960, c. 66, he is entitled to a lien of $30,600 upon the lands in question. This is what the land and the improvements cost him. Section 38(1) reads:

> 38. (1) Where a person makes lasting improvements on land under the belief that it is his own, he or his assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

This section does not apply to a case such as this. Tonks acquired this land knowing that s. 477 had not been complied with and knowing that he had no right to purchase. He could have no honest belief that he was making improvements on land that was his own. He knew the weaknesses of his title and he took his chance. His claim for a lien should be rejected.

I would affirm the judgment of the Court of Appeal and dismiss this appeal with costs. The municipality submitted its rights to the Court. There should be no order for costs for or against it.

Appeal dismissed with costs. No costs for or against the Township of York.

Solicitors for the defendants, appellants: Manning, Bruce, Paterson & Ridout, Toronto.

Solicitors for the plaintiffs, respondents: Catzman & Wahl, Toronto.

Solicitor for the Township of York: J. H. Boland, Toronto.