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**107 A. 82 (R.I. 1919)**

**STATE**

**v.**

**FRANK W. COY REAL ESTATE CO. et al.**

**No. 445.**

**Supreme Court of Rhode Island**

**June 19, 1919**

Herbert A. Rice, Attorney General, for the State.

John J. Dunn, of Westerly, and Waterman & Greenlaw, Lewis A. Waterman, and Edwin J. Tetlow, all of Providence, for appellees.

PER CURIAM.

The above cause is now before this court upon the complainant's appeal from a decree of the superior court, entered January 18, 1919, sustaining respondents' demurrer to the amended bill of complaint and dismissing that bill.

The amended bill prayed for an injunction to restrain the respondents from obstructing and in various ways interfering with public travel upon a certain road known as the "Shore Road" in the town of Westerly. It also prayed that the complainant be declared to be entitled to be subrogated to the rights and duties of the town of Westerly under a certain agreement referred to in the bill as a part thereof (Exhibit A), and contained certain other prayers for relief which it claimed that the complainant, if so subrogated, would be entitled to have enforced against the respondents, in the nature of a specific performance of the said agreement (Exhibit A) between the town of Westerly  
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and the other respondents, including the ascertainment of certain facts with regard to the performance or nonperformance of the terms of said agreement, the ascertainment of damages, if any, to be paid by said town of Westerly to the other respondents, for nonperformance, if any, and the declaration that upon payment of such ascertained damages the respondents should make a deed of that certain property in said agreement (Exhibit A) agreed to be made; also for a decree that the town of Westerly abandon the old layout of a certain portion of the said Shore Road; also for general relief.

The respondents demurred to the amended bill on numerous grounds, among which the principal ground, and that upon which the court below seems to have acted, in coming to its decision, resolved itself into the contention that the bill could be maintained only on the theory of subrogation, and that the allegations of the bill and the tenders or offers of payment of damages by the complainant in the bill did not make out a proper case for the subrogation claimed by complainant. The court below so found, and sustained the demurrer principally on that ground, and, after so finding, entered its decree of January 18, 1919, above referred to, sustaining the demurrer and ordering the bill to be dismissed.

Upon coming to this court on appeal from this decree the Attorney General, who appears for the state, stated in his oral argument, in substance, that he abandoned the claim, made by the

amended bill, to be subrogated to the rights and duties of the town of Westerly, and claimed further that the amended bill was so drawn and the allegations of fact therein contained were such that the state was nevertheless entitled to maintain its bill for an injunction as against the respondents on the principle of estoppel in pais and on the analogous ground of dedication; and in concluding his brief on page 38 the Attorney General, after urging briefly certain reasons why he still believed that the bill should have been sustained and the demurrer overruled on the question of subrogation, makes the following statement:

"Without urging further the sufficiency of the bill in offering damages for nonperformance, it should be emphasized that any offer at all was wholly gratuitous on the part of the state, and was made solely for the purpose of recognizing the equities of all parties in a disinterested attempt to do full justice to the respondents. This attitude on behalf of the state has been met with so much antagonism that it is now disavowed, and that portion of the amended bill relating to subrogation and title will not be pressed. \*\*\* In conclusion the complainant submits that the bill sets forth an equitable cause, that an easement has been created in the new layout of the Shore Road, and that the respondents should be enjoined from obstructing that easement, either upon the principle of estoppel in pais, or upon the principle of dedication, or upon both said principles."

After a careful reading and consideration of the amended bill and of the briefs and arguments of counsel, this court is of the opinion that the court below took too narrow a view of the scope and purpose of the bill and of the equities therein claimed on behalf of the complainant; and we are further of the opinion that, granting, but not deciding, that the bill does not set forth a good case for subrogation and specific performance as therein prayed (the decision of which question is not now necessary by reason of the act of the Attorney General), the amended bill nevertheless contains sufficient allegations of fact, so broad and also so specific in their character, that if they are proved by legal and convincing testimony the court would be warranted in granting a permanent injunction against the respondents substantially as prayed upon one or the other or both of the grounds set forth by the Attorney General.

We do not deem it necessary at this stage of the case to render an extended opinion with authorities upon the questions involved. While we deem the allegations upon the face of the bill to be sufficient to maintain it for the purposes and upon the grounds above set forth, we prefer to have the proofs before the court, so that we may know just what the case is upon the facts, and upon what principles of law the case is to be considered and decided.

We are of the opinion, further, that the Attorney General, in order to make good his disavowal of any claim to subrogation and consequent relief based thereon, should amend his bill by striking out such allegations and prayers as relate solely to the claim to be subrogated and to the relief claimed on the ground of subrogation.

We are of the opinion that the court below was in error in dismissing the bill; the appeal is allowed, the decree of January 18, 1919, is reversed (except that portion of the decree which continued in force the interlocutory injunction heretofore granted which is hereby ordered to be continued); and the cause is remanded to the superior court sitting in Washington county, with direction that the respondents Frank W. Coy Real Estate Company, Frank W. Coy, and Katherine R. Welsh be required to answer the bill, as further amended (said town of Westerly having already

answered the bill), and for further proceedings.