

UNITED STATES *v.* SOUTHERN PAC. R. CO. *ET AL.*

*Circuit Court, S. D. California.*

November 22, 1889.

EQUITY PLEADING—DEMURRER.

A demurrer to a bill, which goes to matter comprising a part of facts which constitute a good cause of action, as well as of facts which are insufficient to constitute a cause of action, is properly overruled.

In Equity. On motions to modify order overruling a demurrer, (39 Fed. Rep. 132,) and to file a second amended bill.

*W. H. H. Miller*, Atty. Gen and *Joseph H. Call*, Special Asst U. S. Atty.

*Joseph D. Redding* and *Creed Haymond*, for defendant the Southern Pacific Railroad Company.

ROSS, J. Two motions have been made, argued, and submitted in this case,—one on behalf of the Southern Pacific Railroad Company, that the order made and entered on the 27th day of May, 1889, (39 Fed. Rep. 132,) overruling the demurrers theretofore filed to the amended bill of complaint, be so modified as to sustain the demurrer filed by said company to the said amended bill; and the other is a motion on behalf of the government to file a second amended bill in cases numbered 67, 68, and 69, respectively, which case, subsequent to the submission of the aforesaid demurrers, were consolidated by an order entered by consent of all of the parties in interest. The ground of the first-mentioned motion is that the demurrer filed by the defendant railroad company only went to that portion of the amended bill as to which the court held no cause of action was stated. If that was all, undoubtedly the proper order, so far as that demurrer was concerned, would have been one sustaining it. But while the court held that the grant to the Atlantic & Pacific Railroad Company conferred upon that company no right of any nature to any particular piece of land within the indemnity limits of that grant prior to its selection, and, as a consequence, that the fact that lands were within such indemnity limits did not exclude them from the subsequent grant to the Southern Pacific Railroad Company, and that patents issued to the latter company were not for that reason invalid, yet, because the amended bill on its face showed that the lands in controversy were at the time of the grant to the defendant railroad company claimed to be within the limits of a certain named Mexican grant, which latter grant was then *sub judice*, and because of that provision of the grant to the Southern Pacific Company to the effect that if the route it was authorized to designate should be found to be upon the line of any other railroad route to aid in the construction of which lands had been theretofore granted by the United States, as far as the routes are upon the same general line, the amount of land theretofore granted should be deducted from the amount granted by the act in question, coupled with the alleged facts regarding the latter matter, the amended bill was considered

by the court to state, in each of those respects, a good cause of action. A portion of the matter to which the demurrer of the defendant railroad company went was a material part of each of those causes of action, as well as of that as to which the bill was held insufficient, particularly the allegations in relation to the making of the grants, and for that reason all of the demurrers were properly overruled. The amendment to the amended bill was filed without objection, prior to the commencement of the argument on the demurrers, and the matter therein set up was argued orally and in the brief of one of the parties, and was therefore considered and passed upon by the court in its opinion. The motion to modify the order sustaining the demurrers is therefore denied. That on the part of the complainant for leave to file a second amended bill I think should be granted. As at present advised, the additional matter, as explained by counsel, does not seem to me to be material to the real questions involved; but I think it but fair that every fact deemed by counsel to be material should be allowed to reach the supreme court, in which tribunal, no doubt, the important questions at issue will receive their final solution. Motion for leave to file second amended bill granted