

The case of the *Watch Co. v. Meyer*, 29 Fed. Rep. 225, decided by this court, contains nothing contradictory to these views. There, in the first instance, the plaintiff commenced an action of attachment, alleging fraudulent conveyances by the defendant. Succeeding in the action, it filed a bill to subject certain real estate, transferred by one conveyance, to the satisfaction of its judgment. In that action the conveyance was held valid, and a decree rendered against the plaintiff. Thereafter it filed a second bill, alleging that all the conveyances made by the defendant were part and parcel of a voluntary general assignment, under the laws of the state of Missouri, and it was entitled to have all the property sold, and distributed among all the creditors *pro rata*. The difference between the two causes of action is obvious. In the first, plaintiff's primary right, as alleged, was to have the specific property wholly appropriated to the payment of its claims by reason of its attachment, levy, and the fraudulent conveyance. In the second, its primary right, as alleged, was to have all the property conveyed by the defendant distributed among all the creditors *pro rata*.

My conclusion, therefore, is that the former judgment is a bar to the present. The plea must therefore be sustained and the bill dismissed. It is unnecessary to take any notice of the demurrer; for, if the bill cannot be sustained upon the merits, any inquiry as to the sufficiency of the description in the conveyance of the land would be superfluous.

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### BERKLEY v. UNION PAC. RY. CO.

(Circuit Court, D. Colorado. January 18, 1888.)

#### DEED—UPON CONDITION—BREACH—REVERSION.

Where land is conveyed upon consideration that a railroad company is to "locate, erect, and maintain" upon the land its depot, and in pursuance of the conveyance the depot is erected and maintained for 11 years, and then is removed, the land does not revert. It is only a failure of part of the consideration, entitling the grantor to his action at law therefor.

In Equity. On demurrer to bill.

Action by Berkley, plaintiff, against the Union Pacific Railway Company, defendant, to recover possession of land.

*Browne & Putnam*, for complainant.

*Teller & Orahod*, for defendant.

BREWER, J. This is a bill in equity to which a demurrer has been filed, and the question submitted is on that demurrer. The bill alleges that the complainants' ancestor was the owner of a tract of land in the vicinity of Boulder, which had been laid off into lots and blocks; that, in order to enhance the value of that addition, he conveyed a tract of a few acres to the Denver City & Boulder Railroad Company, of which

the present defendant is the successor in interest, the consideration of which conveyance was the promise of the railroad company to locate, erect, and maintain its depot on the land conveyed. This was in 1872. It alleges that the railroad company did erect and maintain its depot there until 1883,—11 years,—when it changed its depot, and put it about three-quarters of a mile away; whereupon they claim that the consideration has failed, that therefore the conveyance also falls, and that they should be restored to the title and possession of the property. It is alleged that this contract or promise on the part of the railroad company was the consideration of the deed, it containing the following clause, namely: "As a part consideration, the party of the second part is to locate, erect, and maintain upon the grounds hereinbefore described, its depot for the transaction of its business in the town of Boulder." Then, after alleging that there was a money consideration of one dollar specified, the bill avers that it was not in fact paid, and was not a real consideration, the solitary consideration being the said promise of the railroad company. Now counsel insists that this is a condition subsequent, which, having failed, the title reverts. I think not. The erection and maintenance of the depot is stated to be a consideration, a consideration perhaps in the nature of a condition subsequent; but the conveyance does not purport to be one upon condition that the grantee will perform, but it is a conveyance in consideration of its promise to erect and maintain. That consideration it has partially performed; for 11 years it has maintained its depot there, although it may be and is, according to the language of the bill, true that it has not paid all the consideration,—that it has not permanently or up to the present time continued its depot there. Under those circumstances, where there is a part performance,—a part payment,—the title does not revert. There may be a cause of action for damages; but the title does not revert upon a mere partial failure of the consideration.

The demurrer to the bill will be sustained and the bill dismissed.

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CAMPBELL v. MAYOR, ETC., OF NEW YORK.

(Circuit Court, S. D. New York. February 15, 1888.)

**EQUITY—PLEADING—PRACTICE.**

In a suit in equity some defendants filed pleas, and then obtained leave to withdraw them, while other defendants demurred. It being doubtful whether or not the pleas were before the court, *held*, to be the better practice to postpone action on the pleas until the hearing on the demurrer.

In Equity. On pleas to supplemental bill.

Harvey D. Hadlock, for plaintiff.

George Bliss and Marcus P. Norton, for defendants filing pleas.