

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.

WHEELER, J. A bill, called a "supplemental bill," appears to have been filed in this cause by a party other than the orator, against the orator and others. To that bill some of the defendants filed pleas, and some a demurrer. The demurrer appears to be set down for argument at the next term. The pleas do not appear to be set down for argument at all, or traversed. When the cause was reached on the calendar it was taken on briefs to be submitted as to one plea, in the absence of counsel for the orator in the supplemental bill, at the request of counsel for the party filing the plea. Since then it is made to appear that leave had been obtained to withdraw the pleas, and that notice had been given by counsel who obtained the leave that the pleas were withdrawn. The pleas, or some of them, may have been renewed, or there may be question as to the effect of the withdrawal. However these things may be, there is so much doubt whether there is any question upon the plea, or in regard to it, properly now before the court, that it seems best to continue the whole to the hearing on the demurrer.

Hearing on pleas continued to hearing on demurrer.

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ROBOSTELLI *v.* NEW YORK, N. H. & H. R. Co.

(Circuit Court, S. D. New York. January 31, 1888.)

1. CARRIERS—PASSENGERS—SAFE CARRIAGE—HOLDER OF NON-TRANSFERABLE TICKET.

If a passenger on a railroad train, in good faith, and without attempt to conceal his identity, present for his passage a non-transferable commutation ticket issued to another, and his claim is recognized, and he is carried as a passenger, he is entitled to the right of a passenger to be carried safely, and to have a safe place to alight and leave the road.

2. SAME—CARRIAGE OF PASSENGERS—RUNNING TRAIN PAST STATION—RATE OF SPEED.

The running of a railroad train at a high rate of speed, at an unusual hour, and without warning, past a train standing at a platform discharging its passengers, who, to reach their destination, must cross the track of the moving train, is evidence not only of neglect of common care, but of recklessness and gross negligence.

3. NEGLIGENCE—CONTRIBUTORY—CROSSING TRACKS FROM DEPOT.

Whether or not a passenger on a railroad train, in alighting upon a track running at the side of the train, instead of at the platform, is guilty of negligence, is a question of fact for the jury to determine from all the circumstances.

4. SAME—CONTRIBUTORY—PROVINCE OF JURY.

In an action against a railroad company for the death of plaintiff's intestate, after the jury were instructed that the plaintiff could not recover if the want of ordinary care on the part of the deceased contributed to the injury, a juror asked if the fact that deceased had alighted upon that side of the track before would give him the right to do so again, to which answer was made that this was all left to the jury. *Held* that, in view of the former instruction, the answer was not misleading.

At Law. On motion for a new trial.

Action by Maria Robostelli, administratrix of the estate of Joseph Robostelli deceased, against the New York, New Haven & Hartford Rail-