

DUMPOR'S CASE.

pany of a change of ownership, was held binding, after one assent to such a change had been given. There was, however, no soundness in the distinction attempted between real and personal contracts, and the ground taken, in fact controverted the rule of the case referred to. A like dictum occurred in *McGlynn v. Moore*;* but the single point decided in that case was, that acceptance of rent after the structure is completed waives defects in performance of a contract to build. *Dougherty v. Matthews*,† at first sight, seems more in point; a promise by an assignee of a lease, conditioned against the lessee's assigning, to pay the lessor for his permission to assign being held *nudum pactum*. But the decision did not go on the dispensation of the condition by one assignment; but on the ground that the lease not being under seal and the condition in terms applying only to the lessee and not mentioning assignees, its obligation was personal to the lessee and could not bind assigns. The court say: "The lease is not stated to be under seal, and therefore the case does not come within the doctrine of covenants running with the land." "The plaintiff proceeds on the assumption that the assignee could not himself assign the lease without the consent of the lessor; but it is not made to appear by anything contained in the petition that such consent was at all necessary," &c. This is exactly the anonymous case in *Dyer*‡ hereinbefore referred to, and is undoubtedly sound.

A case occurs in the early California reports,§ whose looseness seems to accord with the generally unsettled state of things in that region at that day. It is held that a "covenant" [*sic*] against assigning without license is discharged by one authorized transfer. *Dumpor's Case* is referred to, from which we may perhaps infer that there was a condition as well as a covenant here. The court, however, repeated that the "covenant" was discharged and add: "It is questionable whether in any case such a covenant would be enforced to produce a forfeiture. It is in restraint of alienation,

and therefore against the policy of the law." We do not know that much comment is necessary upon the opinion of a court that was ignorant that it is only conditions upon grants in fee that are so void.* But as assigns do not appear to have been mentioned in this condition, the decision stands well enough on the same ground as the preceding one, though not adverted to by the court.

In Virginia the point has been referred to in one well-considered case.† It was held here that one underletting was waived by the receipt of rent subsequently accruing; and the case in fact was the same as *Doe v. Bliss*,‡ which was held to be conclusive. *Dumpor's Case* was referred to and distinguished, and did not even receive the qualified approval which it has at times had.

In Pennsylvania the point seems to have arisen twice. In the first case§ the facts are quite complicated; but, so far as they relate to our present inquiry, seem to be that the plaintiff, then holding a leasehold interest in certain mills, transferred this to the defendant, on the agreement that he was to receive advances from the latter, who was also, as well as plaintiff, to give his personal services in working the mills, and neither was at liberty to assign without permission. There was no mention of assigns of either party. The defendant, with the plaintiff's assent, was discharged from his undertaking, and another person substituted. But he desiring subsequently to withdraw, the defendant sold out to a new party, and it was claimed that this was a forfeiture of his interest. The court, indeed, held otherwise as a matter of strict law, but gave relief in equity by decreeing a reconveyance. It is remarked incidentally, that a condition once dispensed with is wholly gone. It may be conceded that this was so in this case, as the condition was personal to the grantee, and had been expressly released. It was not the case of a mere license, but of an entire substitution and discharge. But, apart from this consideration, the condition could not apply beyond the first alienation, as it did not run beyond the

* 25 Mo. 384.

† 35 Mo. 520.

‡ *Dyer*, 66, a.§ *Chipman v. Emeric*, 5 Cal. 49.* *Depeyster v. Michael*, 6 N. Y. 467.† *McKildoe v. Darracott*, 13 Gratt. 278.

‡ 4 Taunt. 735.

§ *Dickey v. McCullough*, 2 W. & S. 88.