

DUMPOR'S CASE.

Bliss went on the ground of the "toleration" or waiver, not of the character of the act prohibited by the condition, and the *dictum* of Patteson, J., in *Doe v. Pritchard*,* was, as we have seen from the statement of that case, wholly *obiter*.

On the other hand, it has been suggested that a license of a condition to underlet and the like, which from its nature is susceptible of more than one breach, will not discharge the condition, but the breach only.† This proposition, which we shall notice hereafter in considering the doctrine of continuous conditions, though without the support of expressed modern decisions, and contrary to the opinion of some text-writers,‡ is based on the doctrine that a condition may be suspended; which is well sustained by the older authorities. Thus in a case decided 10 Eliz. (anno 1568),§ it was held that upon the seizure by a judgment creditor, under an elegit, of a moiety of the reversion, "le condicion fuit suspend pur tout," meaning, apparently, that the condition would revive when the rent of the moiety had discharged the execution. Numerous similar determinations are mentioned by Mounson and Harper in their judgments in *Winter's Case*.|| So in a later case,¶ it was held that the second grantee of a reversion might avail himself of a condition reserved on a lease, though his mesne grantor could not. And this doctrine of suspension constitutes a third exception to the ideal entirety of a condition as conceived in *Dumport's Case*, and one which, equally with apportionment and waiver, are rather contradictions than exceptions thereto.

The American decisions relating to the rule in question are open to exactly the same comment as the English cases already discussed, and even in a stronger degree; as, with a single and somewhat doubtful exception, there has been no decision directly in point, and the rule has been recognized only to be distinguished, and solely on the ground advanced in *Brummell v. Macpherson*. In England, owing to the express adoption of the rule

by this case, it remained the law until repealed by statute;* but in this country there is really nothing, with the exception above noted, and occasional *dicta*, more or less clear, to support it; and it has in no case been examined or approved on its intrinsic soundness. It stands, as it has been emphatically described by Mr. Williams,† as an "artificial and technical rule which . . . owes its origin to an antiquated system of endless distinctions without solid differences." Bearing in mind then the clear distinction between the rule and the doctrine of non-apportionment which we have already sought to point out; and that the latter doctrine, whatever may have been its original soundness and proper limits, bears no analogy whatsoever to the rule in question, or gives any support thereto in the decisions which have enforced it,‡ we proceed *Tinkham v. Eric R. R.*, 53 Barb. 393. to examine the decisions in any way properly relating to *Dumport's Case* in this country.

In Massachusetts there are certainly but two;§ and these of little pertinency. In the first, which is sometimes referred to as a case of waiver, the condition was in reality merged by the grantee's subsequently acquiring the whole of the reversionary estate. In fact it appeared that there had actually been no breach, because there was no refusal to perform the obligation. In the latter case there was merely a *dictum* on the subject, the question being whether a covenant had been discharged by a license; and the court held that it had not, adding: "It is not the case of a condition which when once dispensed with is discharged for all purposes, and cannot be revived," which was not necessary for the decision.

In Missouri the authorities are similarly unsatisfactory. In an early case|| it is said: "*Dumport's Case*, though much criticised by eminent judges, is still adhered to as law;" but it was held not to apply to contracts not touching the reality, and a condition in a policy of insurance that the insured should notify the com-

* 5 B. & Ad. 781.

† 1 Smith, Lead. Cas. (5th Am. ed.) 91.

‡ Woodfall, L. & T. (10th ed.) 550.

§ Moor. 91, pl. 225.

|| *Lee v. Arnold*, 4 Leon. 27, 28.

¶ *Pain v. Malory*, Cro. Eliz. 832, (43 Eliz.)

* 22 & 23 Vict. c. 35; 23 & 24 Vict. c. 28.

† Williams Real Prop. 262.

‡ *Van Rensselaer v. Jewett*, 5 Denio, 121,

§ *Merrifield v. Cobleigh*, 4 Cush. 178; *Gannett v. Abree*, 103 Mass. 372, 374.

|| *Tenn. M. & F. S. Co. v. Scott*, 14 Mo. 46.