

DUMPOR'S CASE.

lessee, though unrestricted, could of itself effect no such result; for he could not grant a greater estate than he himself had. But the license gave him no greater estate nor enlarged his original one: it simply authorized him to transfer what he received by the demise, which was an estate restricted to his personal occupancy. Of this restriction, and this only, the license relieved him, and it was the estate freed from this restriction only that he transferred. The fallacy of the court's argument lay in their confounding the right of the lessee to transfer without restriction, with a right in him to enjoy without restriction. The demised estate never was freed of the condition, so far as it related to assigns. It was not before the assignment, for the license was simply for the lessee, and not for his assigns to alien; nor at or after the assignment, for then the license was exhausted.

In order, therefore, to sustain their point, the broad proposition had to be maintained by the court, that the alienation in question was really an apportionment of the condition or in analogy thereto, and that, although the license was in terms no dispensation with the condition as originally created, but simply pursuing the exception there stated, yet a condition in a lease was a mysterious entity that operated independently of the contract which created it, or the benefit of the party for whom it is reserved, and, if its operation was once interfered with, ceased to exist.

That such was the view entertained by Lord Coke is evident from his decisions at this period,* and from the similar doctrine laid down by him, and which obtained equally at that time, that a condition of avoidance in a lease was absolute, and terminated the lease without the lessor's will, or even against it—a proposition which the sounder sense of a later day has entirely repudiated.† We come then to examine the rule forbidding the apportionment of a condition and see on what it was founded, and with what limitations; and what application it has to the doctrine of *Dumpor's Case*.

* See *Hitchcock v. Fox*, 1 Rolle, 68, 70; commented on later.

† Taylor, Landl. & T. (5th ed.) §§ 412, 492, and cases cited; *post*, p. 627.

A condition is a creature of contract. It gives, however, rights of a more sweeping character than a mere covenant, laying, as it does, the foundation of a proceeding *in rem*, enforceable by the party himself in whose favour it is created; affecting the quality of the estate to which it is annexed; and, when enforced, abrogating all intermediately acquired derivative rights. Thus dower and courtesy in real property,* or the title of a *bonâ fide* purchaser without notice in personal property† are equally defeated by the enforcement of a condition. A condition does not affect the intermediate enjoyment of the estate already had by the grantee, and in so far as it is unlike a rescission of a contract; but it seems logically to follow from its nature, as a defeasance or defeat of the grant made, that all intermediate creations of title by the grantee should fall with his estate, and to this extent it is in effect precisely like a rescission. Hence, if there existed prior and valid parcel alienations, made by or with the consent of the grantor, and which he was therefore estopped to defeat, a technical or strict construction of a condition, as a rescission, which to be good, must be total, would hold the condition barred and destroyed thereby. And such a strict construction seems to have been adopted in regard to conditions generally.

Thus in an early case‡ it was held that if the condition was, that "it shall not be lawful for the lessee to give, grant or sell his estate, &c., without the leave of the lessor," as assigns were not mentioned, it did not outlast the lives of lessor and lessee, and the latter's executors succeeding to the term, as assigns in law, might alien without leave.§ But

* 1 Washburn Real Prop. 132.

† *Coggill v. Hart. & N. H. R. R.*, 3 Gray, 545; *Whitney v. Eaton*, 15 id. 225.

‡ *Anon.*, Dyer, 66.

§ Whether devisees, executors, or administrators were assigns or not, was formerly much debated. That devisees were, seems to have early been settled: *Parry v. Harbert*, Dyer, 45 b; *Knight's Case*, Cro. Eliz. 60; *Berry v. Taunton*, Cro. Eliz. 331; notwithstanding some doubts: *Fox v. Swan*, Styles, 483; *Hitchcock v. Fox*, 1 Rolle, 48. Executors, on the other hand, as well as administrators, come in by act of law, and it was then and has ever since been held that, even if assigns were expressly mentioned, this would not include those who came