

DUMFRIES'S CASE.

ance, and that much, if not most, of the so-called resolutions of the Court, are the amplifications or disquisitions of the reporter. That this was so in this case will be apparent on referring to the parallel report in Croke,* where it appears that five points were made for the defendant in the case, and that the rule in question, which occupies in Coke all but five lines of the three pages of the report, is determined by the three judges—Popham, Gawdy, and Clench—in a dozen lines.

In the report in Croke the argument of defendant's counsel is based on the entirety of a condition and its insusceptibility to apportionment, and the case of *Lylds v. Crompton*† is relied on, where, on a like condition in a lease to three, a license was granted to one to alien parcel of the demised premises, and this was held to bar the lessor from entry for a subsequent unlicensed alienation of the residue by the other two. One other case was also referred to.‡ Upon this the Court say that "the condition was gone and discharged by this dispensation to alien to the lessee himself; for the condition being once dispensed with, it is utterly determined; for it cannot be discharged for a time and *in esse* again afterwards." Popham, C. J., then refers to and denies the soundness of a case § which had held the exact opposite of *Lylds v. Crompton*, *supra*; adding, "the lessor cannot enter, because if he should enter for the condition he should enter upon the entire [estate] as it was limited; and if he should enter upon the entire he should destroy that which he had licensed to be aliened, which he cannot do, and therefore the condition is entirely gone; for it cannot be *in esse* for part and destroyed for the residue."

This is the whole of this celebrated case. But before proceeding to examine the law of conditions and the authorities bearing thereon, as they existed at this time, we recur a moment to Coke's report. In Croke the decision is, as we have seen, based solely on the entirety of the condition; and this though it

expressly and in terms contemplated assignment, as it ran to and bound the lessee and his assigns, is held defeated by one assignment in the very mode agreed upon in the demise: viz., by license. The natural construction would clearly have been that suggested by Lord Eldon:* "When a man demises to A., his executors, administrators and assigns, with an agreement that if he or they assign without license, the lessor shall be at liberty to re-enter, it would have been perfectly reasonable originally to say that a license granted was not a dispensation with the condition, the assignee being by the very terms of the original contract restrained as much as the original lessee." But as appears by the language of Popham, C. J., which we have quoted, the case was decided in mistaken analogy to cases where the condition was sought to be apportioned between several parcels demised, or part conveyances of the reversion.†

The reasons given by Lord Coke are in the same key, namely, the entirety of the condition; and are sought to be supported by the same analogy and the same references. They do not advance the case at all beyond the proposition stated in Croke; but they are worthy of attention as showing the inevitable consequences of the doctrine, in which view we shall recur to them later. "The lessor," he says, "could not dispense with the alienation at one time and that the same estate should remain subject to the proviso after." The next reason is the same idea expanded. "And although the proviso be, that the lessee or his assigns shall not alien, yet where the lessors license the lessee to alien, they shall never defeat, by force of the said proviso, the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent; so if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as, by the force of the lessor's license and of the lessee's assignment, the estate and interest of Tubbe was absolute," &c. But how was Tubbe's estate absolute? The assignment by the

* Cro. Eliz. 815.

† 1 Rolle Abr. 472; s. c. *Leeds v. Crompton*, Godb. 93, decided 28, 29 Eliz.

‡ *Anon.*, Dyer, 152; *post*, p. 624.

§ Dyer, 334.

* *Brummell v. Macpherson*, 14 Ves. 173, 176.

† *Lylds v. Crompton*, 1 Rolle, Abr. 472; *Winter's Case*, Dyer, 308; *Anon.*, Dyer, 152.