

DUMPOR'S CASE.

by Lord Eldon, solely because it was "the law of the land," that is, had not then been overruled, the former doctrine was reversed, and the spirit of the engagement held to control its letter; and such a term is now held not void, but voidable only at the lessor's election.* It is conceived that no reason whatever can be urged why the rule in *Dumpor's Case* should not have been similarly overruled.

The recognition which *Dumpor's Case* has received since *Brummell v. Macpherson*, has consisted in nothing but the continued establishment of exceptions to it, and limits to its application, which, if carefully reflected on by the courts declaring them, would have been perceived to virtually overrule it.

In the next case, *Macher v. Foundling Hospital*,† before Lord Eldon in 1813, *Dumpor's Case* was referred to by him in the usual style, "It has long been settled at law," &c., adding at once, however, "I should not have thought a very good decision originally." He accordingly held that its construction should be strict, and that it did not apply to the case before him. This in fact was one of waiver not of license, and in accordance with the now well settled distinction would have operated no discharge of the condition.‡

In the next case, *Doe v. Bliss* § (1812), however, this distinction was first taken in distinct terms, and has ever since been adhered to. The condition was against assigning or underletting; one underlease had been made, and subsequent rent received; and it was claimed that by *Dumpor's Case* the condition was gone. The court, however, admitting *Dumpor's Case* to be law in the depreciatory language quoted at the beginning of this paper, decide that a mere "tolerance" of one breach is no bar to the entry for another; and so the rule in question did not apply. There is no doubt that the conclusion was sound; but there is also as little doubt that there is no real distinction between a waiver and a license, and that whether a breach of a condition is al-

lowed by prior authority or subsequent acquiescence, the breach is as clear, and the condition, if discharged at all, is as much so by one as by the other. In holding the condition not discharged by the waiver, but the breach only, the court in effect overruled the doctrine of *Dumpor's Case*, for they denied the entirety of the condition and its consequent incapability to survive a breach, and affirmed the capacity of its obligation to be continuous.

In *Lloyd v. Crispe*,* decided the next year, there was a condition against the lessee, his assigns, executors, &c., assigning without license, except by will. The lessee demised the term to his executor, who assigned to the defendant. The latter occupied and paid the rent to the lessor, and then contracted to sell to the plaintiff, who at first paid a deposit, but subsequently refused to take, because the defendant had no license from the lessor to alien, and brought this action to recover back his deposit. It was held by Mansfield, C. J., at the trial, that the vendee was bound, as he knew of the restriction, to take the burden of removing it. At the hearing in the court above it was decided that this burden was on the party seeking to assign; and a new trial was granted. This was the whole case, and it will be evident that *Dumpor's Case* was not involved, or if it came in question at all was not followed. At least the doctrine of the two judges in the case in *Dyer*,† which Lord Eldon thought so much in point in *Dumpor's Case*,‡ and which was so strenuously urged by Lord Coke in *Whitchocke v. Fox*,§ on the authority of *Dumpor's Case*, namely, that an exception to a condition, if pursued, discharges the condition as much as a license, was clearly overruled; for here the condition was considered to be still binding on the defendant, notwithstanding the devise to the executor and his alienation to the defendant, under the exception. *Dumpor's Case* had been referred to by counsel, who contended that the condition was discharged by the lessee's devise or the executor's sale to the defendant. But Gibbs, J., after stating *Dumpor's Case*, said: "But here is an exception out of

* Taylor, Landl. & T. (5th ed.) §§ 42. 492, and cases cited; *Reed v. Tuttle*, 35 Conn. 25; *Roberts v. Geis*, 2 Daly, 538.

† 1 Ves. & B.

‡ Taylor Landl. & T. (5th ed.), § 287.

§ Taunt. 735.

* 5 Taunt. 249.

† Dyer, 152.

‡ See 14 Ves. 173.

§ 1 Rolle, 70.