

DUMPOR'S CASE.

phatic dissent from its soundness which we have quoted at the beginning of our paper; and we are led to inquire somewhat curiously into what intermediate confirmation it had received, to prevent its being then squarely overruled. It may excite some surprise to learn that in the whole period it had not been confirmed, indeed, hardly even mentioned, in a single case. It had at most been merely acquiesced in by the bar, never recognized by the bench, and the expression of Mansfield, C. J., leaves it doubtful if even the former were the fact. These cases or rather this case of *Brummell v. Macpherson*, for *Doe v. Bliss* turned as we shall see on quite a different doctrine, not only was the first, but, as will appear upon an examination of the decisions, was, with somewhat doubtful exception, in the English Courts, the last and only case where the point was directly or even collaterally in issue. In the repeated references in the reports and text-books which have been since made to *Dumpor's Case*, and which are often loosely stated as indorsements of it,* the point did not arise, its principles have never been examined, and Lord Eldon's ruling and remark, or that of Mansfield, C. J., have been echoed without variation or inquiry; and the result of all the succeeding cases has been an almost unbroken dissent from the soundness of the rule, coupled with an acquiescence in it because of its supposed long standing; this last being wholly based on the case of *Brummell v. Macpherson*.

In this case it was, it is true, affirmed. Three considerations are, however, to be borne in mind. First, that it was not likely that a judge of Lord Eldon's proverbially caustic temper would be the first to overrule a case which had Coke's positive authority to support it. It is even remarkable that his lordship could bring himself to comment upon it in the terms he did; "video meliora proboque, deteriora sequor." In the second place, it certainly does not add to the weight of his confirmation, that he refers to the case from Dyer, 152 (upon which we have fully commented above), as sustaining *Dumpor's Case*; for, as the decision of the former case was exactly the reverse

of the point to which it is cited in the latter, it seems much as if his lordship had not looked at the original report; and that, had he done so, his view of the weight of *Dumpor's Case* might have been reversed, in spite of the long standing of that precedent. Indeed, it might well have been so; as this latter circumstance presented little reason on the ground of inconvenience for adherence to the rule *stare decisis*. A holding under a lease is necessarily of brief duration; and few titles, if any, could have been so founded on the discharge of a condition under the rule in question that such a decision could have unsettled them. Perhaps a case could hardly be presented where the correction of a venerable error would have led to so few dangerous results.

When a doctrine, admitted to be unsound, has nevertheless been so long "the law of the land" that many titles are founded thereon, or that general commercial dealings and usages have conformed thereto, a valid reason may exist for hesitancy to overrule it. But no such considerations did or could, from the nature of the case, exist with regard to the proposition under consideration. A further argument exists, however, at this day, that had not developed in Lord Eldon's time, and which might have altered his lordship's view in this case. It was a rule laid down with equal emphasis by Lord Coke as part of the law of conditions, conceived in the same spirit with the rule we are now considering, and much more consonant than that with common sense, that a lease for years expressed to be void became absolutely so by breach.* That this left the lessor at the mercy of a knavish lessee who desired to end his tenancy, and enabled the latter to take advantage of his own wrongful act, afforded no ground against it in the view of the earlier and of some of the later authorities.† Nevertheless, though it had remained as unquestioned law for two centuries, at about the same period that *Dumpor's Case* was affirmed

* Co. Lit. 214 b.

† *Pennant's Case*, 3 Co., 64; *Browning v. Boston*, Plowd. 131; *Mulcahy v. Eyres*, Cro. Car. 511; *Finch v. Throckmorton*, Cro. Eliz. 221; *Doe v. Butcher*, Douglas, 51 and n.; 2 Prest. Conv. 195-197; *Kenrick v. Smith*, 7 W. & S. 41; *Davis v. Moss*, 38 Pa. St. 346, 353.

* 1 Washb. Real Prop. 317; Taylor, Landl. & T. (5th ed.), §§ 286-288, 410.