went in reality upon a different state of facts. But a ground appears in several of them, as well as in numerous other modern cases, which is in addition to the several established principles in conflict with *Dumpor's Case* heretofore noticed, and if logically carried out does, we think, dispose of that decision as authority for ever.

This is the doctrine of continuous conditions, into which class, however viewed, that in the case in question will be found strictly to fall. We assume it as proved that there is no distinction between waiver and license; that this distinction was only introduced to avoid *Dumpor's Case*, but had in reality no foundation at common law. We find that even as early as *Macher* v. *Foundling Hospital*,* it was held by Lord Eldon that a waiver by acceptance of rent, of a breach of a condition not to carry on any trade, must be restricted to the trade so permitted, and was equivalent to "that sort of license which it would have been prudent to give," and could not be construed as a license for any other; thus recognizing at once that a license was in fact no more than a waiver, and that such a condition bound as to everything not expressly waived. The same principle underlies in fact all the decisions restricting a second sublease, notwithstanding the permission to make a first one. Such were *Doe* v. *Bliss*, *McKildoe* v. *Darracott*, and other cases already commented on. Of course it is meant that the obligation of the condition is continuous, but not that the occupation under the first demise is a continuing forfeiture.† It is true that in some of these cases the condition against assigning has been distinguished as capable from its nature of one breach only. But such a distinction is without foundation. If the condition was solely framed to bind the lessee, it might be otherwise, as the condition with its covenant is perhaps unable to run without the mention of assigns,‡ and on this ground the cases

* 1 Ves. & B. 188.

† *Ireland* v. *Nichols*, 46 N. Y. 413. So see *Doe* v. *Rees*, 4 B. & C. 384, where a forfeiture of a condition against lessee's insolvency was held not continuous by continued non-payment of scheduled debts; and *Doe* v. *Pritchard*, 5 B. & Ad. 765, where a like decision was made.

‡ See 7 Am. Law Review, 260, 261; also Dyer, 66 *a*, and cases *ante*.

of *Dougherty* v. *Matthews*, and others hereinbefore referred to, are probably sound. But where assigns are mentioned, the condition is necessarily continuous, because it applies in terms to persons who can only come under its force after one authorized breach; and it presents a stronger case than that of a condition against underletting, because it extends expressly where that and similar conditions apply only by inference. It is idle to say that the condition against assigning is entire, for the very question is, whether it does not properly come under what is a perfectly established exception to that entirety.

The doctrine has indeed not been confined to cases of underletting. Similar decisions have been made in regard to conditions against using rooms in a particular manner;* keeping premises in repair or insured;† keeping up a particular number of trees on the estate,‡ or way open,§ and the like. Indeed, in a recent case,‖ this doctrine was carried so far that a condition against "leaving" a church membership was held continuous, as if the grantee in that case resembled the party in the ballad, who "often took leave, yet was loathe to depart," and remained in a permanent state of departing. We can hardly understand the view of the court in this case, and should conceive that the case rather resembled *Doe* v. *Ries* and *Doe* v. *Pritchard*, already cited. However this may be, it is clear that the law of continuous conditions is well established, at the present day, and that such a condition as that in *Dumpor's Case* comes fairly within its purview.

We conceive, therefore, that we have shown that the rule in question was never good law, of recognized authority, or in accord with modern decisions: that to overrule it, or, rather, to repudiate its imaginary authority, will not only relieve the law of to-day of an incubus, and bring our system of real property into harmony with common sense; but will, in so doing,

* *Doe* v. *Woodbridge*, 9 B. & C. 399.

† *Doe* v. *Gladwin*, 6 Q. B. 953; *Doe* v. *Jones*, 5 Exch. 498; *Bennett* v. *Herring*, 3 C. B. N. S. 470; *Doe* v. *Shewin*, 3 Campb. 134.

‡ *Bleecker* v. *Smith*, 13 Wend. 330.

§ *Jackson* v. *Allen*, 3 Cow. 220.

‖ *Crocker* v. *Old South Soc.*, 106 Mass. 489.