

DUMPOR'S CASE.

grantee or to his assigns, and so is exactly within the comment on the case of *Dougherty v. Matthews*, *supra*.

The second case* is even less to the point. It was ejectment by the vendor against the vendee for breach of a condition to erect a breakwater and bloomery in two years. The former was built, the latter not; but, after the time had expired, a different structure was substituted, with the grantor's consent therefor. The terms waiver and license are somewhat loosely employed here; but it is evident that neither was correct, as to anything but the time of the obligation. The case was simply one of substituted performance, which of course repels the idea of forfeiture; and the reference of the court to *Dumpor's Case* is entirely unapt. It is to be noticed that the court apparently does not yield to the distinction between realty and personalty set up in the Missouri cases and hereinbefore commented on.

Lastly, the point has been touched upon in New York in more than one instance. The earliest seems to have been *Fletcher v. Smith*.† *Dumpor's Case* was referred to, and the unfavorable opinion of Sir J. Mansfield is quoted: "That the license should only have sanctioned one assignment, and that a subsequent assignment without license should forfeit the estate;" in other words, that that case was not law. It was, at all events, entirely inapplicable to this one, and was so held; first, because here there was no license, but a waiver only; and, secondly, on another ground shortly to be considered. Then followed *Dakin v. Williams*, twice reported.‡ On the first argument it appeared that the case simply was one of covenant, not condition, and *Dumpor's Case* was held clearly not to apply, and was accordingly distinguished, Nelson, C. J., adding: "The reasons of that case do not seem very satisfactory or conclusive . . . The common sense view of the license to the lessee only, and the one coinciding with the apparent intent of the parties, would seem to be that it merely enabled him to alien the premises, leaving the operation of the covenant [condition]

in the lease in full force upon the assignee. To say that it empowered him to assign an absolute estate to the extent of his interest, free from the condition, is assuming the point in question." He then proceeds to say that the law of *Dumpor's Case* was well settled, &c. With all deference to this excellent magistrate, we think we have shown that this was not so. It is indeed a little singular to find so sound a judge next mentioning as part of the same doctrine the non-apportionment of a condition upon severance of the demised premises. That Lord Coke endeavored to deduce both from the same tenet—the entirety of a condition—is indeed true; but that *Dumpor's Case* failed wholly to derive any just support from the notion that the grantor on re-entering must be in of his old estate we think we have fully shown; whereas the letter though not the spirit of that canon did support the latter idea. Yet even as to this apportionment, the judge adds: "I am free to confess that I see no practical difficulty in this respect." At the second hearing a similar view was entertained, and *Dumpor's Case* held not to apply. The subsequent case of *Lynde v. Hough** may be readily disposed of. The condition being without mention of assigns, and against underletting merely, the case would in this view have been nearly the same as *McKildoe v. Durracott*, *Doe v. Bliss*, &c., and the reference to *Dumpor's Case*, as one which, though "wondered at since Lord Mansfield's time, has never been denied," was wholly uncalled for. But as if to make this dictum of even feeble relevancy, it appears that the underlease was by an assignee, and as there was no condition whatever against assignment the assignee was not within the condition at all precisely as in *Dougherty v. Matthews*, and for even stronger reasons. To the quite recent case of *Siefke v. Koch*† the same comment seems to apply, as it does not appear that there was any condition binding the lessee's assigns.

It will be apparent, from this review of the cases, that there is not one which is exactly parallel with *Dumpor's Case*, and that the two or three in which this was not referred to as wholly irrelevant,

* *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 341.

† 13 Wend. 530.

‡ 17 Wend. 447; 22 id. 201.

* 27 Barb. 415.

† 31 How. Pr. R. 388.