DIARY FOR DECEMBER.

1. Mon.. Cks. (ex. Co. Cks.) ret. res. Ratep. P. T. P. D. Q. B. N. T. D. C. P.
2. Tues.. Last day for not. of trial Co. Ct. N. T. D., Q. B. P. D., C. P.
3. Wed.. Con. Stats. came into force, 1859. Op. D., Q. B. N. N. D., C. P.
4. Thurs. Re-hear. Term in Chy. begins. Op. D., Q. B. Op. D., C. P.
5. Fri. .. Last day but one take out Cer. N. T. D., Q. B. Op. D., C. P.
6. Sat. .. Mich. Term ends. Last day for Art. Clks. and Students to give notice. Open Day, Q. B. Open Day, C. P.
7. SUN.. *2nd Sunday in Advent.*
9. Tues.. Gen. Sessions and Co. Court Sittings in each Co. begin.
14. SUN.. *3rd Sunday in Advent.* Prince Albert died, 1861.
15. Mon.. Collectors to return Rolls to Treasurers, and pay over money unless time extended.
21. SUN.. *4th Sunday in Advent.* Shortest day.
22. Mon.. Nomination of Mayors, Aldermen, Reeves, Councillors, and Police Trustees.
25. Thurs. *Christmas.* Christmas Vacation in Chancery begins.
26. Fri. .. *St. Stephen.* Upper Canada erected into a Province, 1791.
27. Sat. .. *St. John.*
28. SUN.. *1st Sunday after Christmas.*

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THE

Canada Law Journal.

Toronto, December, 1873.

Two vacancies have recently occurred in the English Bench by the death of Vice-Chancellor Wickens on the 23d October, and since then by the death of Chief Justice Bovill. The Attorney General, Sir John Duke Coleridge, is to take the place of the latter; and it is said that Mr. Charles Hall, a stuff gownsman, will be elevated to the Bench as a successor to the V. C.

By a recent decision of the St. Louis Court of Criminal Correction, it has been held that the ordinance of that city regulating what is commonly called "the social evil" (which is based upon an act of the legislature giving special extraordinary municipal powers), is illegal and void, on the ground of its being an infringement of the Constitution, and contrary to the spirit of the Bill of Rights, in operating, as it does, against one sex.

A very fair example of that motley patch-work of figures which the wits of Queen Elizabeth's day used to call *Soraismus:* Anglice, "mingle-mangle," is to be met with in the opinion of Judge Brockenbrough, presiding at a moot court in Washington and Lee University, and published in the *Southern Law Review.* He very ably discusses an intricate question in the law of dower, but having occasion to refer to the "Fine and Recovery Act" of Virginia, passed in 1776, he cannot resist the temptation to use fine language and so eulogizes the Act thus: "The whole pestilent brood of estates tail fell, as by the touch of Ithuriel's spear, and at one fell swoop, perished in an instant, by the mere operation of law!"

We ventured to express an opinion in a former article, 8 C. L. J., N. S., 207, that, upon the construction of the 44th section of the Common Law Procedure Act, the courts of this Province would probably follow the decisions in the English Queen's Bench, particularly that of *Cherry* v. *Thompson*, in preference to those of the other courts. We notice that this has been done in *McGiverin* v. *James*: 33 U. C. Q. B. 203, where the Chief Justice observes: "I think we should follow the decision of *Cherry* v. *Thompson*, L. R. 7 Q. B., 573, as the most reasonable view to take of the intention of the Legislature in passing the Act, and as being in accordance with decided cases in our own Courts under similar provisions (*i. e.*, as touching the import of the words "cause of action")."

We happen to have by us a scrap cut from the *Law Times* which, though rather old in point of date, is not inappropriate to some few of the county judges on this side of the Atlantic. The superior courts here have occasionally had to remark upon the inconveniences and evils resulting from the practice which is objected to in the following:

"The Judge of the City of London Court is setting a very mischievous example to County Court Judges in refusing to state his reasons when his decision is to be appealed against. If it were likely to be followed we should take some pains to show the unfortunate effect which such a course is calculated to have upon the proceedings in the Court of Appeal. But apart from all questions of expediency, an inferior court declining to state the grounds of its decisions, seems to be a confession of timidity and incapacity. We trust that the observations of the Judge to the Admiralty Court will cause the learned Judge of the latter court to adopt the more convenient plan of delivering judgments."

Vice-Chancellor Bacon has given expression to the long-suffering endurance of judges condemned to ascertain the meaning of the language of testators who had no clear idea themselves of what they meant. In *Re Stevens' Trusts*, L. R. 15 Eq., 110, the judge observes, "this is one of those cases which certainly call, for the enactment of a code, or of some rule for the interpretation of expressions to be found in wills." Some of the older judges had a more summary way of solving the difficulties of testamentary cases. On one occasion counsel said to Sir Richard Arden, Lord Alvanley, when Master of the Rolls, that it was the duty of the court to find out the meaning of the testator. "My duty, sir, to find out his meaning!" exclaimed his Lordship. "Suppose the will had contained only these words, *Fustum fumidos tantaraboo.* Am I to find out the meaning of his gibberish?" But seriously it is much to be desired that some plan were hit upon by the legislature to compel people under penalty of being declared to die intestate, to display some evidence of rationality and intelligibility in the final disposition of their property, and also to lessen the chaos of conflicting decisions upon the interpretation of wills.

LAW SOCIETY—MICHAELMAS TERM, 1873.

The examination of students this Term has scarcely reached the average standard of proficiency—though many of them did very well. Of the eleven candidates who presented themselves for call, six were passed, none, however, receiving the number of marks (three-fourths) required for pass without oral, though the first on the list were very near it; that compliment, however, was paid to them in consideration of their having previously been admitted to practice as attorneys and solicitors. The following is the order in which they passed: R. C. Clute, M. D. Fraser, J. B. McArthur, N. F. Hagle, R. E. Kingsford, C. O. Ermatinger.

Of the attorneys, four passed without

an oral: M. D. Fraser, G. B. Gordon, (both of whom were very creditably near the maximum) H. M. Deroche and C. E. Barber. Five others did a fair amount of pass work, E. H. D. Hall being only a few marks short of the required three-fourths.

For the first intermediate examination twenty-eight presented themselves; of these, eight obtained over three-fourths of the maximum of 300 marks; twelve did enough to pass, and eight were rejected. The names of the first eight are in order as follows: McColl, McConkey, Holman, Killam, Hodgkin, Locke. In the second intermediate, ten obtained over three-fourths of the maximum, their names being, in order of merit: O'Brien, Coyne, Watt, Baines, Parks, Watson, Greig, H. Lennox, Wells, J. T. Lennox. Fourteen did enough to pass and two were rejected.

The Scholarship examinations resulted as follows:—First year. Frank Pepler, 254 marks out of a maximum of 320. For three consecutive years Mr. Pepler has obtained scholarships, on each occasion passing an excellent examination. No other candidate came up to the maximum. Second year:—A. J. McColl, 277 marks; J. W. Gordon, 260 marks; W. MacWhinney, 253 marks; maximum 320. First year:—W. E. Thompson, 276 marks; maximum 320. No other candidate reached the maximum.

The Benchers have lately been busily engaged in the re-arrangement of the old and the preparation of some new Rules, for the management of the affairs of the Society.

An important change is made in the Convocation of Benchers by providing for meetings out of Term, on the last Tuesdays in June and December. A difficulty has been experienced in getting business done in Term time; most of the Benchers being, at that time, busily engaged with Court motions of pressing importance. A few hours of uninterrupted and concentrated work in vacation will see more business accomplished than days of distraction and divided attention during Term.

In the Rules under the head "Examination of Candidates," it is now provided that notice of the intention of every person to apply for admission as a student or articled clerk, must be delivered to the Secretary at least *six weeks* before the Term in which he seeks admission. It has also been provided that the Secretary shall make out two lists containing the names, addresses, and family residence of all the candidates, which are to be posted in his office and in Convocation Chambers. There are also some new rules as to the mode of examination of candidates, which need not be referred to at length.

These Rules will shortly be published in pamphlet form.

THE ADMINISTRATION OF JUSTICE ACT OF 1873.

There is recorded a notable dictum of the first Law Redesdale to the effect that the separation of law and equity has produced a purity in the administration of justice which could not be effected by other means. Of late years, however, in England and Canada, the current of legislative action has set in an entirely opposite direction. This has been chiefly evidenced by partial transfers of equitable jurisdiction to Common law courts, and has culminated in the English Judicature Act of 1873, and the Ontario Act which is placed at the head of this paper. Both of these acts are in truth designed to accomplish, though in different ways, that great desideratum, which is popularly spoken of as "the fusion of law and equity." What is really meant by this phrase is that a suitor who has any rights, legal or equitable, against his opponent may assert those rights in the court with the certainty of getting an adjudication

upon the merits, and that the court once seized of a cause, whether legal or equitable, shall be able to work the matter litigated to its ultimate issues, and to administer appropriate relief to all parties therein. The observation of Horne Tooke upon the charge of Mr. Justice Ashurst is well known. "The law," said that ponderous dignitary in his remarks to the jury, "the law is open to all men, to the poor as well as to the rich." "And so," interpolated the wit, "is the London Tavern." But in many cases the mischief was that the guest in the tavern was better off than the suitor in the courts: the former only paid for what he ordered; the latter, although he failed to get what he sought, had nevertheless to foot the inevitable bills of costs.

The intention of the English Act is to dispose effectually of all civil causes by relegating them at the outset to the appropriate chamber of the Supreme Court. The intention of the Provincial act is to give like relief by transferring (if necessary) the cause at a certain stage to the appropriate forum. We are not sure but that in practice the Ontario Act will be found to work as well as, if not more satisfactorily, than the Imperial Act. The existing state of affairs is less disturbed by the Provincial act, which makes the courts of law and equity to be, as far as possible, auxiliary to one another.

The prominent features of our own Act, to which at present we propose to call attention, are in regard to the changes introduced in equitable pleading, and the great scope which is given to the presiding judge in allowing amendments.

And first, as to amendments. An immense stride was made in furtherance of justice by the 222nd section of the Common Law Procedure Act. By this enactment all defects and errors were amendable whether there was anything in writing to amend by or not; whether the error was that of the party applying to amend or not, and it was further provided that "all such amendments as may "be necessary for the purpose of determining in the existing suit, the real "question in controversay between the "parties, *shall* be made." By virtue of this section, courts of common law actually outstripped courts of equity in granting amendments, so that we find Chancery judges adverting to this section as a reason for extending their practice in the same direction. Thus in *McGregor* v. *Boulton* 12 Gr. 293, the Court says the inclination is now to allow amendments as fully as is done at Nisi Prius under the Common Law Procedure Act. See also *Frazer* v. *Rodney* 11 Gr. 426.

In the act under consideration, the sections relating to amendments are the 8th, 49th and 50th. The eighth section gives full power to deal with the question of parties, and in this respect does not add to the powers which courts of equity have always exercised, but is intended rather to enlarge the jurisdiction of the Common law courts in this direction. By this section, parties may be added to or struck out of the record; parties plaintiff may be treated as defendants and *vice versa*, and in all such matters the court of law is to dispose of the same as fully as a court of equity could do.

In regard to an objection for want of parties, the practice in equity is as follows: If the defect appears on the plaintiff's pleading, the defendant may demur on that ground, and, if successful, the demurrer will be allowed with costs. If the objection is not apparent on the face of the plaintiff's pleading, the defendant may raise the objection by his answer, (indicating by name or otherwise the parties who should be added), and if at the hearing the objection is found to prevail, the court will order the cause to stand over, in order that the record may be amended by the addition of parties, and will give the defendant the costs of

the day: *Totten* v. *Douglas*, 15 Gr. 128, 133. If the objection is not taken by the answer, the court will usually give no costs of the day to either side, although it may order the cause to stand over, that the parties may be added.

By the 49th and 50th sections, no formal objection is to defeat any proceeding, but the court is to make such amendments as shall secure the giving of judgment, according to the very right and justice of the case. The court may also, of its own motion, direct all such amendments to be made as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the parties, and of the real question in controversy between them.

Next in regard to equitable pleadings. The amendments of the law are mainly two-fold:—In enlarging the scope of equitable defences in personal actions; and in extending the right to plead equitably to actions of ejectment. We may here draw attention to some observations on the subject of equitable pleading in the last volume of this journal (vol. viii. p. 131), copied from the *Law Magazine.* The case of *Shier* v. *Shier*, 22 C.P. 147, is also instructive upon the point as to the limits within which it was allowed to plead equitably at that time. In that case, Mr. Justice Gwynne, in a very able judgment, in which he dissented from the majority of the court, observed, "It is, I think, much to be regretted, that the courts of law have, as I think they have, taken too limited a view of what the intention of the Legislature was in allowing equitable defences to be pleaded to actions at Common law." In the present Act, the Legislature have interposed to relieve the courts from their self-imposed limitations in regard to equitable pleading. It is now expressly provided, by section 3, that the pleader at Common law may set up facts which entitle him to relief upon equitable grounds, although such facts may not entitle the party to an absolute, perpetual and unconditional injunction in a court of equity, and although the opposite party may be entitled to some substantive relief as against the party setting up such facts.

The provisions of the Act with respect to equitable defences in ejectment are a step in the right direction. The Judicature Commissioners of 1871 in England recommended that there should be an extension of the right to plead equitably to actions of ejectment. Soon after the passage of the Common Law Procedure Act of 1854, whereby equitable pleas at law were first introduced, the question arose as to how this affected actions of ejectment. In *Neave* v. *Avery*, 16 C. B. 328, the defendant set up a defence on equitable grounds, to which the plaintiff demurred, for that equitable pleas were altogether inadmissible in such actions. The Court held that an equitable defence was not available in an action of ejectment, and this was put mainly upon the ground that there could be no "*plea*" in ejectment; and as no legal defence could be *pleaded, à fortiori* no equitable defence could be spread upon the record. They held also that the proper way of getting rid of such defence was not by demurrer, but by a summary application to strike it out.

It is noticeable that in the report of *Neave* v. *Avery*, in 3 Com. L. Rep., p. 914, Mr. Justice Crowder is reported as saying, during the argument, in reference to section 83 of the Act allowing defences on equitable grounds: "The expression in the clause is '*any cause;*' that is as general as possible, and my present impression is, that the action of ejectment comes within it."

However, the decision of the court in this case defined the rule of practice upon the statute, and has been

observed in the Courts of this Province. Sections 4 to 7 of the present bill cut away the technical ground upon which the decision in *Neave* v. *Avery* rests, and give affirmatively the right to set forth by way of equitable plea the facts which entitle the defendant on equitable grounds to retain the possession, and they give the plaintiff the right to reply thereto on equitable grounds,—and as a consequence the right to demur to such defence and replication is also given in express terms.

In Ireland, the course of practice has been quite opposed to the rule laid down in *Neave* v. *Avery*. There it was held that as the defendant could set up a legal defence by way of plea in ejectment, he might do the same in respect of an equitable defence by virtue of the provisions of the Common Law Procedure Act of 1856, applicable to Ireland: *Turner* v. *McAuley*, 6 Ir. Com. Law Rep., 245 (1856). It was also held in the same case that the proper way of raising objections to the validity of such plea was by demurrer. Since then equitable defences have been pleaded in Ireland in actions of ejectment, with such restrictions only as the judges (following the English authorities) have chosen to impose upon themselves in requiring the facts to be such that an absolute and unconditional injunction might be obtained thereon in a Court of Equity: *Cochrane* v. *Camack*, 7 Ir. Com. Law Rep., 10; *Deering* v. *Lawler*, *ib.* 333. As we have above remarked, the provisions of the present Act release the Courts from their self-imposed fetters in this respect, and restore them to that freedom of action which we are persuaded was intended when the legislature first gave the right to plead equitable defences in common law suits.

It is, of course, to be observed that there may be cases of equitable pleas and replications in ejectment which could be objected to under the 119th section of the Common Law Procedure Act (C. S. U. C., cap. 22), as tending to embarrass or delay. The application under this section is not by way of demurrer, but upon motion to have the objectionable plea reformed or set aside. A similar practice obtains in Ireland as to these equitable pleas: *Clarke* v. *Reilly*, Ir. R., 2 C. L., 422.

ADMINISTRATION OF JUSTICE IN TORONTO.

There has been a rather remarkable block in the civil business at the recent Assizes for the County of York. The Court sat for one month, during which period some forty indictments were tried, twenty-eight civil causes disposed of, and eighty-two records made remanets.

It is difficult to estimate the annoyance, inconvenience, loss of time, loss of money and possible loss of property which is represented by this delay in business; it must necessarily be very great.

The difficulty is not, however, likely to occur again, at least for some time to come. The wisdom of some of the provisions of the Act for the administration of justice which affect this question are now fully apparent. The additional sittings of the County Court and General Sessions of the Peace in the County of York will dispose of much of the business which would otherwise (as has been the case this year) come before the Judge of Assize. The same remark is applicable, though to a limited extent, to the additional assize provided for the County of York between Easter Term and the first of July—we say to a limited extent—for the time during which that Court can sit will generally be very short. This Assize is also subject to the great objection of sitting at a period of the year during which it

will be very inconvenient for the farming community who compose the majority of the suitors, witnesses and jurors to attend. These objections are so strong that it may be questioned whether it would not be better to dispense with it altogether, and have more time devoted to the Winter Assizes, and if necessary shove on Hilary Term a week. The force of this suggestion is increased when we refer to the provisions of sec. 54 of the Act, which provides that the Courts of Assize and Nisi Prius may be held separate and apart from the Court of Oyer and Terminer and General Gaol Delivery "either on the same or a different day." This is a very valuable provision and marks an era in the annals of judicial administration.

The old plan of mixing up civil and criminal business was well enough when the amount of business was limited, and is still necessary in outside counties; but the time, has come for the sitting of distinct courts in the City of Toronto. We apprehend the plan adopted will be to have the sittings of the different courts at different times. It would be better not to have both going on at the same time, if it could be avoided, though this is the practice in England. The sitting of the criminal court might be for two weeks and then be closed. Then the civil court with a different panel of jurors would follow, and last for two or three weeks.

We think we may hazard another suggestion, and that is that the Grand Jury should be summoned a few days earlier than the Petit Jury for the criminal sittings, so as to get the work ready for the latter and thus effect a further saving of time.

THE REPORTERS AND TEXT WRITERS.

We continue this interesting collection, made for the *American Law Review* by some industrious student of the reports:

American Authorities, English estimate of. —"The American authorities are not binding on us indeed, but entitled to respect as the opinions of professors of English law, and entitled to respect according to the position of those professors and the reason they give for their opinions."—Bramwell, B., in *Osborn* v. *Gillett*, L. R. 8 Exch. 92.

Bacon's Abridgment. "A sufficient authority."—Blackburn, J., in *The Queen* v. *Ritson*, L. R. 1 C. C. 204.

See Comyns's Digest.

Bentham's Rationale of Judicial Evidence. "The general principles of evidence are ably discussed, and often happily illustrated. That book should, however, be read with caution, as it embodies several essentially mistaken views, relative to the nature of *judicial* evidence, and which may be traced to overlooking the characteristic features whereby it is distinguished from other kinds of evidence." —Preface to Best on Evidence.

Best on Evidence. "A very able and instructive treatise on the principles of evidence." Mr. Justice Willes in *Cooper* v. *Slade*, 6 House of Lords Cases, 772.

Blackstone's (Sir William) Reports. "We must not always rely on the words of reports, though under great names: Mr. Justice Blackstone's reports are not very accurate." —Lord Mansfield in *Hassells* v. *Simpson*, 1 Dougl. 93, 4th ed.

Bonnier (E.). Traite Theorique et Pratique des Preuves en droit civil et en droit criminel. 8vo. Paris, 1843. "An able work."—Preface to Best on Evidence. Although the third edition of this excellent book was published as recently as 1862, still it is now scarce. A faithful translation would be of the greatest possible value to the profession.

Callis's Reading upon the Statute of Sewers. "One of the best performances on that subject, and which has always been admitted as good authority."—Buller, J., in *Dore* v. *Gray*, 2 T. R. 365.

"The course of legal education, at the Inns of Court, consisted principally of readings and mootings, which have been described by Dug-

dale, Stow, and other writers. In times when the works of the learned existed only in manuscript, and guarded in libraries with jealous care, were not easily accessible to the student, the necessity of oral instruction by such exercises is obvious. The readings delivered in the hall with great solemnity by men experienced in the profession, were expositions of some important statute or section of a statute. Many of them have been published, and some of these contain most profound juridical arguments, such for instance as Lord Bacon's Reading on the Statute of Uses, and that of Mr. Serjeant Callis on the Statute of Sewers. These readings being attended with costly entertainments, their original object was forgotten in the splendor of the tables, and it became the duty of the reader rather to feast the nobility and gentry than to give instruction in the principles of the law. From this cause they were eventually suspended."—Spilsbury's Lincoln's Inn, p. 18.

Carthew's Reports. In *The King* v. *Heaven*, 2 T. R. 776, Lord Kenyon, C. J., observed that Carthew "in general is a good reporter." And Chief Justice Willes, a first-class authority in matters of this kind, in distinguishing the reports of a case "more largely and particularly reported" in 5 Modern than in Carthew, said: "I own that Carthew is in general a very good and a very faithful reporter; but I fancy he was mistaken here, because I cannot think that the court would give so absurd a reason for their judgment, especially since there is not a word said of it in 5 Modern, where the case and the arguments upon it are very particularly reported."—*Tapner* v. *Merlott*, Willes, 181. The citation of cases from Carthew in such books as Mr. Serjeant Williams's Notes to Saunder's Reports, and Mr. Serjeant Stephen's Treatise on Pleading, certainly argues well for the reputation of the reporter, who, according to a recent writer, "arrived at an eminence which, but for his early decease, would have secured for him a seat on the judicial bench.—Woolrych, Lives of the Serjeants, vol. ii. p. 460. At p. 462 he continues: "But during the trial of the Bishop of London against Fytche, in the House of Lords, Lord Thurlow observed, that Carthew and Comberbach were equally bad authority. However, with regard to this hostile opinion of Lord Thurlow, there is a curious tradition in the Carthew family, that the Serjeant's grandson headed an adverse party against the Chancellor at school upon one occasion (for they were school fellows), and that Thurlow was a great bully, and remembered the circumstances afterwards with an ungenerous feeling."

Casaregis (Josephus Laurentius Maria de). Discursus Legales de Commercio; et Elucubrationes ac Resolutiones in aliquot, et ad integra Statuta de Decretis, ac de Successionibus ab Intestato Reipublicæ Genuensis. Editio secunda. 4 vols in 1, fol. Venetiis, 1740.

"The highest authority."—Shee, J., in *Kemp* v. *Halliday*, 6 Best & Smith, 736. Casaregis was for more than twenty years a judge in Florence. He taught as a professor of law, and his writings enjoy the highest reputation in Europe as standard authorities in mercantile affairs. Valin affirms that he is beyond all contradiction the best of all maritime authors.

Clayton's Reports. This is a very thin 12mo, containing in the body of the book 158 pages, published in 1651. "If this book," writes Mr. Allibone, "will do all that Mr. Clayton promises for it, we should suppose that our friends the lawyers would insist on its immediate republication. In "The Epistle to the Fair Pleader," the reporter says: "You may see here how to avoid a dangerous jury to your client, what evidence best to use for him, how to keep the judge so he overrule you not; so that, if it be not your own fault,—as too often it is for fear or favor,—the client may have his cause so handled as, if he be plaintiff, he may have his right, and if defendant, moderately punished, or recompensed for his vexation; and such pleaders the people need."

Coke's Reports. See Plowden's Commentaries.

Coke's Third Institute. Hale's History of the Pleas of the Crown. "In the course of the seventeenth century two remarkable works on the criminal law were written, which not only gave an authentic view of it as it stood in the earlier and later parts of the century, but are still regarded as books of the highest authority. Coke's Third Institute is like the rest of its author's works, altogether unsystematic. It is little more than a digest, showing incidentally the progress made by the law since it was first reduced to shape.

"Hale's History of the Pleas of the Crown differs widely from Coke's Third Institute in point of style and composition, and handles systematically several subjects which Coke touches upon in a fragmentary and occasional

manner. Some, but few, additions were made to the body of the criminal law between the dates of the two works; but in the main the law continued, as it was, a system strangely antiquated, unsystematic, and meagre, but of reasonable dimensions, and apparently sufficient for practical purposes."—Stephen's General View of the Criminal Law of England, pp. 65, 66.

COMYNS'S DIGEST. COKE'S INSTITUTES. BACON'S ABRIDGMENT. TIDD'S PRACTICE. "Text books of the highest reputation."—Kelly, C. B., in *The Queen* v. *Ritson*, L. R. 1 C. C. 203.

COMYNS'S DIGEST. "This dictum, wherever it comes from, derives some confirmation from its reception into the Digest of Lord Chief Baron Comyns."—Sir William Scott, in *The Gratitudine*, 3 Chr. Rob. 269.

COOKE'S REPORTS "Sir George Cooke's Reports (long out of print and scarce) have always been held in good repute, and frequently cited.

"In 3 Wilson, 184, Serjeant Jephson, citing the case of *Palmer* v. *Sir J. Edwards*, says, 'See the case at length, for it seems well reported by that very able chief prothonotary of the C. B.'

"We were induced to select Cooke's Reports as the next volume in our series of reprints, by having become possessed of a copy formerly belonging to Mr. Justice Nares, and containing numerous MS. notes. These notes appear to be partly his own, and partly copied from notes made by Chief Justice Eyre. The authenticity of these notes is confirmed by an observation of Nares, J., in the case of *Crossley* v. *Shaw*, 2 W. Bl. 1088."—Publishers' advertisement to the 3d ed.

CRIPP'S LAW OF THE CHURCH. Cockburn, C. J.: "I have had occasion lately to consult that book, and was much struck with the ability and research displayed in it."—*Griffin* v. *Dighton*, 5 Best & Smith, 100.

DANE'S ABRIDGMENT. "Mr. Dane may be considered as a lawyer of the old school, who had devoted many years of his life to the study and exposition of the laws of Massachusetts." —Shaw, C. J., in *Commonwealth* v. *Alger*, 7 Cush. 73.

DYER'S REPORTS. See PLOWDEN'S COMMENTARIES.

EAST'S PLEAS OF THE CROWN. "A work of good authority.—Shaw, C. J., in *Commonwealth* v. *Webster*, 5 Cush. 306.

ELDON (LORD), AND HIS REPORTERS. "His later reporters were very able men, and if they had felt themselves at liberty to methodize and condense,—accurately preserving the substance and the spirit of the original,—they would have done much more justice to him, and conferred a much greater benefit on the public; but I have been told that he highly disapproved of any proposal for reporting him on this plan, and that he was best pleased when he saw himself in the transcript of a short-hand writer. None of his biographers have ventured on giving an entire judgment as delivered by him."—Lord Campbell, Lives of the Chancellors, vol. x. p. 241, 5th ed.

ELECTION CASES, REPORTS OF. See ELLIOTT ON REGISTRATION.

ELLENBOROUGH (LORD). "Great is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument."—Bramwell, B., in *Osborn* v. *Gillett*, L. R. 8 Exch. 96.

ELLIOTT ON REGISTRATION. Second edition. When the decisions of committees of the House of Commons on elections, collected in this book, were cited in the course of the argument in *Whithorn v. Thomas*, 7 Man. & Grang. 4, Tindal, C. J., said that, so far as the reasoning in these cases went, it might be proper to cite them, but not as authorities.

FITZHERBERT. The New Natura Brevium, by Sir Anthony Fitzherbert. This work, on the nature of writs, is "of the greatest authority."—*Kettle* v. *Bromsall*, Willes, 120. It was first printed in French, in 1534, 8vo, and has been frequently reprinted. The last edition was in 1794, two vols. 8vo, in English. The author was a judge of the Court of Common Pleas in the reign of Henry VIII.

FOSTER'S CROWN LAW. "An authority of the highest character."—Shaw, C. J. in *Commonwealth* v. *Roby*, 12 Pick. 509. "Sir Michael Foster was an eminent judge of the highest court of criminal jurisdiction, many years before our Revolution, when the people of Massachusetts were under English jurisdiction. He was also a most acute, discriminating and exact writer, whose chapter on the law of homicide has been a work of standard authority on that subject for a century."—Shaw, C. J., in *Commonwealth* v. *York*, 9 Met. 111. "An eminent judge and a learned writer on criminal law."—Wilde, J., 9 Met. 132. Lord Chief Justice DeGrey speaks of him as one "who may be truly called the *magna charta* of liberty of persons, as well as fortunes."—3 Wils. 203, quoted 9 Met. 111.

Gale on Easements. Third edition, edited by W. H. Willes, Esq. 1862. "A valuable edition."—Williams, J., in *Bamford* v. *Turnley*, 3 Best & Smith, 75.

Gilbert on Evidence. This work is commended in very high terms by Blackstone, who says it is impossible to abstract or abridge so excellent a treatise, without losing some beauty, and destroying the chain of the whole.—Comm. vol. iii. ch. 23. "To Lord Chief Baron Gilbert principally we are indebted for reducing our law of evidence into a system,"—Best Ev. § 87, 5th ed.

Glanville. Ranulph de Granville is the reputed author of this treatise. The publication of the Fines by the Record Commission in 1835 has cast some additional doubt as to this authorship. See Preface to Book of Fines, p. 16.—Rawle on Covenants, p. 13 note, 4th ed.

Graves (Charles Sprengel, Esq., Q. C.) "The editor of Russell on Crimes is known as a gentleman of great learning, ability, and research."—Pollock, C. B., in *Regina* v. *Curgerwen*, L. R. 1 C. C. 3. "I have the highest respect for the learning of that excellent writer."—Talfourd, J., in *Regina* v. *Bird*, 2 Denison C. C. 149.

Hale De Jure Maris. "The acknowledged authority upon this subject."—Shaw, C. J., in *Commonwealth* v. *Alger*, 7 Cush. 90.

Hale's Pleas of the Crown. See Coke's Third Institute.

Hardres's Reports. "The knight was of some note in this day as a lawyer, a reporter, and a man of rank.—Woolrych, Lives of Eminent Serjeants, vol. i. p. 400. In Wallace's Reporters, p. 201, it is said, with great truth, that "this volume contains some of the most learnedly argued of the old reports."

Hawkins (Mr. Serjeant). "A very learned, painstaking man."—Best Ev. § 134.

Holroyd (Mr. Justice). "One of the most accurate lawyers and profound thinkers that ever sat on the bench."—Lord Denman, C. J., in *Doe* v. *Suckermore*, 5 Ad. & El. 747. "Than whom a more sound and safe authority cannot be quoted."—Williams, J. ib., at pp. 725, 727.

Jacob's Law Dictionary. "The authority of this book must not be too implicitly relied on."—Lord Chief Justice Reeve. Instructions for the study of the Law, in Collectanea Juridica, vol. i. p. 79.

Joy on Peremptory Challenge of Jurors. "A very learned book."—Parke, B, in *Gray* v. *The Queen*, 11 Clark & Finnelly, 473.

Littleton on Tenures. "A work of higher authority than any other in the law of England."—Lord Campbell, Lives of the Chancellors, vol. i. p. 342, 5th ed.

Meeson and Welsby's Reports. In the course of the argument in *Cope* v. *Barber*, L. R. 7 C. P. 404, note, Mr. Justice Willes desired to correct an error in the report of *Worth* v. *Terrington*, 13 M. & W. 781, 795, in which a certain observation was attributed to Baron Parke. He said that he had in his possession a letter from Lord Wensleydale, in which that learned judge declared that he had never made the observation imputed to him. Later in the day, Lord Wensleydale's copy of thirteenth Meeson and Welsby was handed up to the bench; in the margin of the report of the case above referred to were these words, in his Lordship's own handwriting,—"I never said so."

Molloy. Of this author, Sir William Scott thus writes: "Of Molloy I say nothing, knowing well that the authority to which he refers does not sustain him, and that his own authority amounts to little.—*The Gratitudine*, 3 Chr. Rob. 269.

Modern Reports, Vol. V. "This must be the mistake of the reporter, for Lord Holt could not say so absurd a thing."—Lord C. J. Willes in *Morse* v. *James*, Willes, 127.

Moody and Robinson's Reports. These volumes are worthy the attention of the profession, "on account of the brevity and accuracy with which the decisions are given, and the useful notes subjoined to those cases which are of superior interest and importance."—Warren's Law Studies, 931, 2d ed.

Moor (Sir Francis) Reports. "Moor's Reports are a posthumous work, incorrect notes taken for his own use, not intended to be published.—Lord Macclesfield, State Trials, vol. vi. p. 230.

Moor (Sir Francis) Reports. "A collection of Law Cases," printed in 1663, from the original in French, then in the hands of Sir Geoffry Palmer, Attorney-General to Charles the Second, "which is the same, as I take it," says Wood, "written fairly with the author's own hand, in folio, that was lately in the library of Arth. E. of Anglesey."—Athenæ Oxonienses, ed. Bliss, vol. ii. p. 305, quoted in Woolrych's Lives of Eminent Serjeants, vol. i. p. 230.

THE REPORTERS AND TEXT WRITERS.

OUGHTON (THOMAS). Ordo Judiciorum. 2 vols. 4to. London, 1728, 1738. "Oughton's work was published in 1728, and, I apprehend, is considered to have faithfully represented the practice then prevailing."—Coleridge, J., in *Doe* v. *Suckermore*, 5 Ad. & El. 708.

PARKE (BARON). "One of the most distinguished judges who ever sat in Westminster Hall." —Kelly, C. B., in the Exchequer Chamber, in *Brinsmead* v. *Harrison*, L. R. 7 C. P. 553.

PLACE (MR.) "Lord Kenyon observed that the authority of Mr. Place was equal to that of Lord Raymond; that he was reputed to be the author of Watson's Clergyman's Law, and was considered as a lawyer of great eminence.—*Brown* v. *Compton*, 8 T. R. 430, note. "Mr. Place's notes are in general very accurate."—Grose, J., at p. 432.
See WATSON'S CLERGYMAN'S LAW.

PLOWDEN'S COMMENTARIES. DYER'S REPORTS. COKE'S REPORTS. "Contain masterly judicial reasoning, and satisfactorily settle the most important questions which have ever arisen in the history of the common law of England." —Lives of the Chancellors, vol. ii. p. 344, 5th ed.

PASTELL'S ENTRIES. "There are as many faults as lines."—By the Court in *George* v. *Lawley*, Skinner, 392.

RAYMOND (LORD). See PLACE (MR.)

RYLEY'S PLEADINGS. This work is recommended to the professors of the law by Lord Chancellor Nottingham.—Clarke's Bibliotheca Legum.

SALKELD'S REPORTS. "As a reporter, Serjeant Salkeld was, in that day, unrivalled. Few have equalled him at any time in the skill required for that purpose. His reports possess great merit, as being for the most part the judgments of Lord Chief Justice Holt." —Woolrych, Lives of Eminent Serjeants, vol. ii. pp. 488, 495. In the Preface to Cases Temp. Holt, it is said: "The method observed in Salkeld's Reports has had the general approbation, therefore is imitated in this collection."

SALKELD'S REPORTS, VOL. III. In *The King* v. *Higgins*, 2 East, 8, note, Lord Kenyon observed "that the authority of the third part of Salkeld was not to be relied on, unless corroborated by other books; and it has been often denied by Mr. Justice Foster."

SAUNDER'S REPORTS. In *Bissex* v. *Bissex*, 3 Burr. 1729, the court rejected a case as reported in Siderfin, and adopted the same case as reported in Saunders, observing that Saunders was much the most accurate reporter of his time.—1 Saund. 170, 6th ed.; 1 Wms. Notes to Saund. 171.

SCHOALES AND LEFROY'S REPORTS. "Learned reporters."—Selwyn's Nisi Prius, 1185, note, 11th ed.

SELWYN'S NISI PRIUS. The note on the action of replevin in the edition edited by Henry Wheaton was written by Hon. Theron Metcalf.—See The American Law Review, vol. vii. p. 364.

SHEPPARD'S TOUCHSTONE. "Doddridge, now confessedly its author."—Preface to Preston's ed. Lord Truro in *Egerton* v. *Lord Brownlow*, 18 Jur. 100. "A most excellent book." —Chief Justice Willes in *Roe* v. *Tranmer*, 2 Wils. 78. And in *Doe* v. *Salkeld*, Willes, 676, the same distinguished judge, in citing the book, says "Mr. Sheppard, or whoever was the author of that book," &c.

SKINNER'S REPORTS. "Are still highly esteemed."—Woolrych, Lives of Eminent Serjeant's, vol. ii. p. 523 (1869).

SMITH ON MASTER AND SERVANT. "An excellent work."—Bramwell, B., in *Osborn* v. *Gillett*, L. R. 8 Exch. 99.

STAUNFORD'S BOOK ON PREROGATIVE (as well as his Treatise on Pleas of the Crown, which is sometimes cited in the text of Lord Coke's Reports) is a work of considerable authority. I cite it as evidence of what, in his time, was the opinion of the profession on this subject." —Pigot, C. B., in *The Queen* v. *Toole*, Irish Rep. 2 C. L. 40.

STEPHANUS (ROBERTUS). Thesaurus. "Is a book of the best authority."—Lord Hardwicke in *Rex* v. *Francis*, Cunningham, 286, 3d ed.

TIDD'S PRACTICE. See COMYNS'S DIGEST.

TERMS DE LA LEY. The first edition was printed in 1563. In 1616, Lord Bacon wrote, "For the books of the Terms of the Law, there is a poor one; but I wish a diligent one, wherein should be comprised not only the exposition of the terms of the law, but of the words of all ancient records and precedents." —*Proposition touching Amendment of Laws.* Life and Letters, vol. vi. p. 70, ed. Spedding.

TOWNESEND (GEORGE). Tables to most of the printed Presidents of Pleadings, Writs, and Retorn of Writs, at the Common Law. Fol. London, 1667. "A book of very good authority."—Willes, L. C. J., in *Kettle* v. *Bromsall*, Willes, 120.

Twisden (Mr. Justice). "A very great lawyer."—Mr. Serjeant Williams in note to *Benson* v. *Welby*, 2 Saund. 155 *a*, 6th ed; 2 Wms. Notes to Saund. 454.

Watson's Clergyman's Law, or Complete Incumbent. "The Complete Incumbent was not written by Watson, but by Mr. Place, of York."—Denison, J., in 1 Burr. 307. "Mr. Place, of Gray's Inn, was the true author."—*Wolferstan* v. *The Bishop of Lincoln*, 2 Wils. 195. The work is recommended by Blackstone, 1 Comm. ch. 11.

SELECTIONS.

VICE-CHANCELLOR WICKENS.

The late Vice-Chancellor Sir John Wickens, who died on the 23rd Oct., at his residence, Chilgrove, near Chichester, in the fifty-ninth year of his age, was the second son of the late James Stephen Wickens, Esq., solicitor, of Chandos street, Cavendish-square, London, by Anne Goodenough, daughter of John Hayter, Esq., of Winterbourne Stoke, Wilts, and sister of the Right Hon. Sir William Goodenough Hayter, of Southhill Park, Berks. He was born in the year 1815, and was educated under Dr. Keate at Eton, where he obtained the Newcastle Scholarship, and soon afterwards he was elected to an open scholarship at Balliol College, Oxford, then in the height of its first successes under the late Dr. Jenkins, afterwards Dean of Wells. At Oxford he closed his undergraduate career, during which he obtained, among other distinctions, the Newdigate Prize for English Verse, by taking his Bachelor's degree in Michaelmas Term 1836, as a "double first class." He did not, however, obtain the much coveted honour of a Balliol Fellowship, as his facetious propensities had shown themselves in several practical jokes against the master and tutors of his college, which appeared to them to render it extremely doubtful whether he would ever settle down into a staid, sober, and demure "Don," such as they who congregated in the Balliol Common Room. He afterwards settled in London to study for the Bar, and in Easter Term, 1840, he was called by the Honourable Society of Lincoln's-inn, and in a short time obtained a considerable practice. His reputation as an equity draftsman while at the Bar was very great, and he was believed to possess a most accurate acquaintance with the science of Chancery pleading, which, as most of our readers know, is a branch of knowledge not now much cultivated. In 1868 he was appointed to succeed the present Lord Justice James, who was then made a Vice-Chancellor of England, as Vice-Chancellor of the Duchy of Lancaster, a position which has often proved a steping stone to the bench of the High Court of Chancery. Mr. Wickens held at the same time another office which is now looked upon as giving its occupant a still greater claim to a judgeship. He acted for some time as what is called the Attorney-General's "Devil" in Equity. In April, 1871, the deceased judge succeeded Sir John Stuart, on his resignation, as one of the Vice-Chancellors of England. The career of Sir John Wickens on the judicial bench, though so short, was sufficient to show that he possessed the very highest qualities which can be looked for in an equity judge. Indeed, he had showed himself to be abundantly endowed with these even when practising at the Bar. There was always something fair and judicial in his arguments as an advocate. In his judicial capacity Sir John Wickens was called upon to deal with a number of difficult cases, including in particular, many which involved the construction of wills, and very few of his decisions were called in question with success. His name is perhaps best known to the public as the judge who decided the case of *Aylesford* v. *Morris*, which at the time was very much canvassed in all quarters. Vice-Chancellor Wickens, it will be remembered, relieved the Earl of Aylesford from a bargain by which he had agreed to pay within six months of his attaining his majority interest at the rate of sixty per cent. for a loan of money, and the Vice-Chancellor's decision was in March last upheld on appeal by the Lord Chancellor and the Lords Justices. He was a stuff gownsman down to his elevation to the Bench, an appointment which he held for many years as Equity Junior to the Attorney-General being incompatible with his taking silk, and he never aspired to a seat in Parliament. "Sir John Wickens," says a contemporary, "was one of those men whose elevation did not place a distance between himself

and his contemporaries at the Bar. He was always easy and unaffected in his manners, both in and out of court, and even since his elevation to the Bench the Vice-Chancellor walking away from his court with his cigar in his lips was not an unfamiliar figure in the precincts of Lincoln's Inn." The late Vice-Chancellor Wickens married, in 1845, Harriet Francis, daughter of William Davey, Esq., of Cowley House, Gloucestershire, by whom he leaves a family to lament his loss.—*The Law Times.*

DUMPOR'S CASE.

A new commentary on *Dumpor's Case* and the law of conditions of forfeiture, in view of the elaborate and careful annotation thereon in Smith's Leading Cases, might seem at first a work of supererogation. It is nevertheless true that while the essays in question were exceedingly full and well considered upon various derivative topics, arising in the consideration of the general law of conditions, the soundness of the decision itself was hardly referred to, and the extent to which it was either justified by the state of the law when it was pronounced, or has been since confirmed by adjudication or clear authority, was passed by as a matter too well settled for discussion. "Though *Dumpor's Case* always struck me as extraordinary, it is the law of the land," says Lord Eldon, in 1807.* "The profession have always wondered at *Dumpor's Case*, but it has been law for so many centuries that we cannot now reverse it," says Sir James Mansfield in 1812.† And this *decantatum* has since been echoed in cases almost without number, and iterated by text-books as if it was the result of elaborate examination and sound judicial authority.‡

We propose to show in this paper, in the first place, that the case in question was originally without foundation in the law of conditions, as it then existed, and was without subsequent confirmation by decision until the case first above cited; that it had, therefore, no greater claim to be recognized at that time as settled law than any other "venerable error;" that, in the second place, since that recognition it has, with hardly an exception, been confirmed by no decision; and, while referred to by the *dicta* of judges or text writers as law, has been with almost entire uniformity disapproved of in regard to the doctrine it propounds, and only recognized by each case on the ground that the principle it declares has been so long conceded as settled law;* and that, in the third place, the idea on which it was actually founded has been entirely controverted by modern decisions.

The case, as reported by Lord Coke,† was decided 45 Eliz. (*anno* 1603), and was this: A lease for years by the President and Scholars of Corpus Christi College, Oxford, was upon "proviso that the lessee and his assigns should not alien" "without the special license of the lessors." Such a license was granted by the lessors to the lessees to alien *quibuscunque;* and the lessee aliened the term to one Tubbe, from whom by mesne assignment it came to the defendant. The lessors re-entered for condition broken by the latter assignment, and demised to the plaintiff, who entered and sued the defendant in trespass for a re-entry made upon him by the latter. It was held by the Court, "that the alienation by license to Tubbe had determined the condition. So that no alienation which he [or any one else] might afterwards make could break the proviso or give cause of entry to the lessors." In the report of this case by Coke various reasons, or, rather, various forms of one reason, are given for this "extraordinary" conclusion; but when examined they will be found to be merely iterations in different shapes of the proposition, that a condition is an entire thing and cannot be apportioned. In considering the weight of this case it is to be borne in mind that Coke, in his reports, as a rule, expanded the points decided according to his notion of their import-

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

† *Doe* v. *Bliss*, 4 Taunt. 736.

‡ See per Nelson, C. J., *Dakin* v. *Williams*, 17 Wend. 447; Walworth, Chancellor, s. c., 22 Wend. 201, 209; also, *Tenn. M. & F. S. Co.* v. *Scott*, 14 Mo. 46; *Lynde* v. *Hough*, 27 Barb. 415; Williams Real Prop. 354; 2 Prest. Conv. 197; 2 Greenl. Cruise, 10; etc.

* See authorities in preceding note, and *post.*

† 4 Co. 119; s. c. *nom. Dumpor* v. *Syms*, Cro. Eliz. 315, where it is reported as decided 40 Eliz., and in 1 Rolle Abr. 471 as 43 Eliz.

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.

lessee, though unrestricted, could of itself effect no such result; for he could not grant a greater estate than he himself had. But the license gave him no greater estate nor enlarged his original one: it simply authorized him to transfer what he received by the demise, which was an estate restricted to his personal occupancy. Of this restriction, and this only, the license relieved him, and it was the estate freed from this restriction only that he transferred. The fallacy of the court's argument lay in their confounding the right of the lessee to transfer without restriction, with a right in him to enjoy without restriction. The demised estate never was freed of the condition, so far as it related to assigns. It was not before the assignment, for the license was simply for the lessee, and not for his assigns to alien; nor at or after the assignment, for then the license was exhausted.

In order, therefore, to sustain their point, the broad proposition had to be maintained by the court, that the alienation in question was really an apportionment of the condition or in analogy thereto, and that, although the license was in terms no dispensation with the condition as originally created, but simply pursuing the exception there stated, yet a condition in a lease was a mysterious entity that operated independently of the contract which created it, or the benefit of the party for whom it is reserved, and, if its operation was once interfered with, ceased to exist.

That such was the view entertained by Lord Coke is evident from his decisions at this period,* and from the similar doctrine laid down by him, and which obtained equally at that time, that a condition of avoidance in a lease was absolute, and terminated the lease without the lessor's will, or even against it — a proposition which the sounder sense of a later day has entirely repudiated.† We come then to examine the rule forbidding the apportionment of a condition and see on what it was founded, and with what limitations; and what application it has to the doctrine of *Dumpor's Case*.

* See *Hitchcock* v. *Fox*, 1 Rolle, 68, 70; commented on later.

† Taylor, Landl. & T. (5th ed.) §§ 412, 492, and cases cited; *post*, p. 627.

A condition is a creature of contract. It gives, however, rights of a more sweeping character than a mere covenant, laying, as it does, the foundation of a proceeding *in rem*, enforceable by the party himself in whose favour it is created; affecting the quality of the estate to which it is annexed; and, when enforced, abrogating all intermediately acquired derivative rights. Thus dower and courtesy in real property,* or the title of a *bonâ fide* purchaser without notice in personal property† are equally defeated by the enforcement of a condition. A condition does not affect the intermediate *enjoyment* of the estate already had by the grantee, and in so far is unlike a rescission of a contract; but it seems logically to follow from its nature, as a defeasance or defeat of the grant made, that all intermediate creations of *title* by the grantee should fall with his estate, and to this extent it is in effect precisely like a rescission. Hence, if there existed prior and valid parcel alienations, made by or with the consent of the grantor, and which he was therefore estopped to defeat, a technical or strict construction of a condition, as a rescission, which to be good, must be total, would hold the condition barred and destroyed thereby. And such a strict construction seems to have been adopted in regard to conditions generally.

Thus in an early case‡ it was held that if the condition was, that "it shall not be lawful for the lessee to give, grant or sell his estate, &c., without the leave of the lessor," as assigns were not mentioned, it did not outlast the lives of lessor and lessee, and the latter's executors succeeding to the term, as assigns in law, might alien without leave.§ But

* 1 Washburn Real Prop. 132.

† *Coggill* v. *Hart. & N. H. R. R.*, 3 Gray, 545; *Whitney* v. *Eaton*, 15 id. 225.

‡ *Anon.*, Dyer, 66.

§ Whether devisees, executors, or administrators were assigns or not, was formerly much debated. That devisees were, seems to have early been settled: *Parry* v. *Harbert*, Dyer, 45 *b*; *Knight's Case*, Cro. Eliz. 60; *Berry* v. *Taunton*, Cro. Eliz. 331; notwithstanding some doubts: *Fox* v. *Swan*, Styles, 483; *Hitchcock* v. *Fox*, 1 Rolle, 48. Executors, on the other hand, as well as administrators, come in by act of law, and it was then and has ever since been held that, even if assigns were expressly mentioned, this would not include those who came

as it had been held in the course of the case of *Stukely* v. *Butler*,* that, if assigns were mentioned, there could be no restraint by condition against alienation, the result was that no conditions against alienation could be made which would operate beyond the life of the lessee. The former notion was, however, corrected by later decisions. †

In the same spirit of literal and strict construction, the doctrine of the non-apportionment of conditions seems to have been established; if, indeed, it should not rather be said to have been assumed. The authorities on the point seem certainly to justify the latter phrase.

In *Dumpor's Case*, three cases are referred to as conclusive on this doctrine. ‡ The first of these was upon the apportionment of the condition as a severance of the reversion. It seems to have been very fully discussed, as if the point were still new, and is given in several different reports; § that in Leonard being at the greatest length, but that in Dyer the clearest. The case, which was decided 14 Eliz. (1572), was that, after a lease for years of three several manors rendering rent, with a condition, if the rent or any part of it were behind, of re-entry into "all of said manors," the lessor granted the reversion of part of manor A to one person, and of the residue of A and all the other manors to another.

The question was, whether the latter grantee could enter for condition broken. It was held not. "All agreed that, by a grant of the reversion of part of the lands, the condition is confounded in all,

in *in invitum*, as by act of law: *Windsor* v. *Berry* (24 Eliz.), Dyer, 45 *b* n.; *Anon*, Dyer, 6 *a*; *Anon.*, Dyer, 45 *a*; *Moore* v. *Farrand*, Leon. 3; *Anon.*, 3 Leon. 67; *Doe* v. *Carter*, 8 T. R. 57; *Doe* v. *Bevan*, 3 M. & S. 353; *Smith* v. *Putnam*, 3 Pick. 221; *Bemis* v. *Wilder*, 100 Mass. 446; *Jackson* v. *Sheetz*, 18 Johns. 174, &c.; and, as such legal assignee ought not to be incumbered with the term, his assignment was not prohibited by a like condition: *Moore* v. *Farrand*, and *Doe* v. *Bevan*, *supra*; though *Anon.*, Dyer, 6 *a*, seems *contra*.

* Hobart, 168, 170.

† *Dennis* v. *Loring*, Hard. 27; *Weatherall* v. *Geering*, 14 Ves. 511.

‡ *Winter's Case*, Dyer, 308; *Anon.*, Dyer, 152; *Lylds* v. *Crompton*, 1 Rolle Abr. 472; s. c. *nom. Leeds* v. *Crompton*, Godb. 93.

§ As *Winter's Case*, Dyer, 308; s. c. *nom. Lee* v. *Arnold*, 4 Leon. 27; s. c. *nom. Appowel* v. *Monnoux*, Moor. 97.

for it is a thing penal and entire and cannot be apportioned. . . . . And the lessor may not enter into these lands for condition broken, for then he might destroy his own grant, and therefore he cannot be as to that of his former estate." "All except Mounson thought that the assignee ought to be of the entire reversion, as it was in the lessor himself who made the condition, and not of part of the reversion, for divers inconveniences," &c. And there can be no doubt that, on a strict construction, this was a just conclusion, for the condition in this case was to re-enter into "all the manors," which clearly meant that the reversionary title should remain in one person only, for if this right accrued to each parcel grantee of the reversion, their claims to the whole would at once conflict.

If, however, a sensible instead of this strict and literal construction had been adopted, and the condition taken distributively, there would seem to be no violation of legal principle in apportioning, even in this case, the condition, any more than the covenant it was inserted to enforce; and the true effect of the rule that the lessor should be in of his old estate, would be merely that he should be relieved from all intermediate incumbrance or derivative title or claim created *by the lessee*, not that he should be construed to claim what he had effectually parted with; in other words that, as the condition was inserted for his benefit, he could waive its operation in part, though he should not be prejudiced by intermediate acts of the lessee.

That a similar construction was given in the second of the cases referred to is not by any means clear. Here it was not the reversion which was severed, but the premises demised. The case, as given in Rolle's Abridgment,* is certainly broad enough. "Si A leas terre al 3 sur condition que eux ou ascun de eux nalieneront sans license del lessor et puis lun alien per license del lessor, ceo discharge tout le condition quant a lauters deux aussi." In Godbolt,† however, the report is, that "the lessor made a license that A., B., *or* C. might alien:" the question seems to have been whether "the same is a good license, notwith-

* I. 472.

† P. 93.

standing the uncertainty;" and there is not a word of discharge by a partial license.

On the contrary, in the case reported in Dyer, 334 (16 Eliz.), exactly the opposite doctrine was laid down. The case was on a demise and condition similar to the last. "The lessee, by the assent of the lesssor, aliens parcel, and afterwards he aliens the residue without his assent, and he for that *re-enters into the residue.* And it was doubted in B. R. whether he could do that, inasmuch as he had dispensed with part of the condition, which is an entire thing, &c. And afterwards the entry of the lessor into the residue was adjudged to be lawful notwithstanding," &c.

This decision is denied to be law in *Dumpor's Case.* But it is surely as sound in principle as the point in *Lylds* v. *Crompton;* and as authority is better than that which only appears in a digest, and is not mentioned in the actual report. Moreover the court which pronounced this decision is the same which decided *Winter's Case* two years before,—the case mainly relied on by the court in *Dumpor's Case,*—and there seems no reason to doubt the correctness of the report of one more than of the other decision.

It is moreover remarkable that while the entirety of a condition is thus insisted on, and its insusceptibility to apportionment considered so essential a characteristic, the very courts which most strenuously enforced this doctrine limited it to apportionment by the acts of parties; and admitted that apportionment could always take place by act of law.* But if the condition were in its nature entire and indivisible, one apportionment would be as fatal as the other; and there was no greater reason why the levying creditor, assignee in bankruptcy, or heir to estate in borough English or copyhold should avail himself of the condition for his parcel of the reversion of the estate demised than any parcel grantee of the landlord. It is indeed such distinctions without a difference as this that mar the symmetry of the real property system of law bequeathed to us.

* *Dumpor's Case,* 4 Co. 119, 120; *Appowel* v. *Monnoux,* Moor. 98; s. c. *Winter's Case,* Dyer, 308; Co. Lit. 215 *a;* 5 Viner Abr. 300; *Anon.,* Godb. 2; *Anon.,* Moor. 91; *Anon.,* Dyer, 6 *a.*

But even if we concede that this doctrine of the apportionment of conditions, so imperfectly supported by authority, has become too firmly established to be controverted at this late day, it affords no foundation for the rule in *Dumpor's Case.* The analogy attempted between these cases of destruction of the condition either by severance of the reversion or discharge of part of the demised premises and the rule there applied, wholly fails. In these cases, the lessor, re-entering, cannot be in of his old estate; if he should, he would in the latter instance destroy his prior grant to the lessee, and in the former to the other parcel reversioner.* But no such bar existed to the re-entry of the lessor upon the assignee in *Dumpor's Case.* The lessor so entering is in of his old estate, and of all of *it;* and defeats no estate previously exempted from the operation of that entry. The license given relieved the estate of the lessee; but by the same act that estate terminated and the assignee's commenced, to which the license had no application.

Indeed, if the rule in *Dumpor's Case* is closely scrutinized, it will be found to result in the extraordinary conception that it is impossible to create a limit or exception to a condition in its inception without avoiding the condition *in toto.* This will be evident if we examine the third case relied on in the principal decision as authority.† "This clause in an indenture of lease for years. 'Provided always . . . that neither the lessee nor his executors or assigns shall not alien nor grant over the term to any person or persons without license of the lessor, but to the wife or one of the children of the lessee.' The lessee died, and his executors granted the term to one of the sons of the lessee *according to the proviso. Quære* whether he may grant this over to the stranger without a license. And Brooke, Brown, and Dyer thought he could not; but by Stamford and Catlin, he may, because the restraint of the clause was determined when the grant was to the son. But *quære* this." It is not a little surprising to find this cited as an authority for the determination of a condition when three judges out of five—

* See *supra,* per Dyer, J., Dyer, 309; per Popham, J., Cro. Eliz. 816.

† Dyer, 152.

two of them of such eminence as Brooke and Dyer—decided exactly the opposite. It seems, on the contrary, to be as strong an authority against the idea of *Dumpor's Case* as could be imagined.

But what is the proposition put forward by the two judges who thought the condition terminated? No other than this, that the lessor having prohibited any alienation except *to* the lessee's own family, this meant unlicensed alienation *through* them. That is, that, by pursuing the exception originally made to the condition, the whole condition was defeated; or, practically, that a condition to which there is an exception is defeated as soon as made. Surely the meaning of the lessor in this case was too plain for comment; namely, that there should be no alienation by the lessee or any one else except to the lessee's own family, and no further.

A condition that the lessee shall not alien to B. will not of course, on any construction, prevent A., to whom the lessee aliens, in turn assigning to B.* It would be otherwise if the condition were that the lessee should not permit B. to take.

The only confirmation therefore to the view taken by the two judges, is in the case of *Whitchcocke* v. *Fox*, 12–14 Jac. 1 (*annis* 1614–16);† which, as it occurred so soon after *Dumpor's Case*, and was decided when Lord Coke was on the bench, is rather parcel of the doctrine of that case than a subsequent recognition of it. It was three times argued and often reported, but the report of Rolle, though diffuse, seems the most exact. The facts were that a lease was made upon the express condition that the lessee *and his assigns* should not alien except to his wife, and the residue to his children, or in default of these to his brothers. His wife dying without issue, he assigned to his brothers, who assigned over, for which latter assignment the lessor re-entered. Several other questions were mooted in the case at great length; but, on the question of the validity of the condition, Coke thought that by the assignment to the brothers the condition was gone; holding broadly the exact position we have stated above as the necessary result of *Dumpor's Case*, "quant l'assignment est un foits fait solonque le condition, le condition est dispense," or an assignment made *in accordance with* an exception to a condition defeats the whole condition; and in support of this he referred to *Dumpor's Case* as his authority. But this view was not concurred in, "mes lauters justices semble a douter de cest point." At the third argument* the correct view was strongly urged, namely, that an exception was no dispensation, and that the lessee's assigns being restricted by the same instrument which allowed him to assign to his brothers, his brothers as such assigns were as much bound as he; "ici per cest exception ils esteant assignees ne sont exclude hors del condition." Coke, however, adheres to his view (again relying on *Dumpor's Case*), that an exception defeats the entire condition; and it is probable that the other judges at last concurred in this opinion. If so, the doctrine of this case forms the clearest possible *reductio ad absurdum* of the idea of *Dumpor's Case*.

We conceive therefore, that, from this review of the law and the state of the cases at the time *Dumpor's Case* was decided, it sufficiently appears that that idea has no support from any analogy to the doctrine of non-apportionment, even were this doctrine better founded on authority or principle than it seems to have been; secondly, that it was wholly without antecedent authority and contrary to the only prior case really *in pari materia* and the grave authority of Dyer and Brooke therein; and, thirdly, that when carried out to its natural consequence, as in *Whitchcocke* v. *Fox*, it led to a conclusion clearly absurd.

We are next to consider what modern recognition it has received. In 1807, after a lapse of two centuries, it is referred to by Lord Eldon,† as "the law of the land;" and by Sir James Mansfield in 1812,‡ as "law for so many centuries that we cannot now reverse it." It is somewhat remarkable that in each instance the recognition of its (supposed) authority was accompanied with the em-

* *Anon.*, Dyer, 45 *a*.

† 1 Rolle, 389, s. c. *nom. Hitchcock* v. *Fox*, 68, 70; s. c. *nom. Whitchcot* v. *Fox*, Cro. Jac. 398; s. c. *nom. Fox* v. *Whitchcock*, Bulst. 290.

* 1 Rolle, 390.

† *Brummell* v. *Macpherson*, 14 Ves. 170.

‡ *Doe* v. *Bliss*, 4 Taunt. 735.

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 cautious 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

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

* Co. Lit. 214 *b*.

† *Pennant's Case*, 3 Co., 64; *Browning* v. *Beston*, Plowd. 131; *Mulcarry* 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.

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 allowed 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 *Whitchcocke* 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.

the original restriction to alienate, so that in the original alienation by will there was nothing to license;" and Chambre, J., added: "It is no breach of the condition if it is excepted by the condition itself. It is no violation of the condition imposed by the landlord. There is no permission given by him." In the course of the decision, however, it was intimated by Mansfield, C. J., that a new trial might be of no use to the plaintiff, as the landlord by receiving rent had waived the forfeiture if any had occurred by the executor's assignment; but as a new trial was in fact granted, and this remark was the *obiter dictum* of a single judge, in which the others did not join, it would in any event afford but little support to the rule of *Dumpor's Case*, and is rendered of still less weight even as a *dictum*, from the fact that there was no forfeiture in this case at all; since, where one receives a devise of a term as executor, he is not assignee within the purview of the condition, and, as he takes the term merely *virtute officii*, he is allowed in turn to assign, in order to realize the assets of the estate, without avoiding the lease.*

Of equally little pertinency is the case of *Doe* v. *Smith* (1814).† Here, on a demise with a condition against assigning or underletting without license, the lessee became bankrupt, and his assignees in bankruptcy sold the term to one who re-assigned it to the original lessee, and he underlet. For this underlease, ejectment was brought. The case turned wholly on the provision of the Statute 49 George 3, c. 121, § 19, that a bankrupt should be relieved of all covenants, &c., after his assignees had accepted the lease. "The question is whether the legislature have not used such extensive words as to put an end to all covenants of the lessee whatsoever, and we are of opinion that they have." It was accordingly held that there was no forfeiture; and *Dumpor's Case* was not even referred to.

The last of these cases was *Mason* v. *Corder* (1816).‡ The question here was the same as in *Lloyd* v. *Crispe*,§ the action being assumpsit, for not accepting an assignment, against one who had contracted with the lessee to purchase the lease, and had refused to do so because the lessor would not license the assignment, the demise containing the usual condition against assigning without license; and the court held, on the authority of *Lloyd* v. *Crispe*, that the lessee was bound to procure such a license, and nonsuited the plaintiff. So far, there was no question of *Dumpor's Case*. But it also appeared that the lessor had offered to give a new and similar lease to the assignee, with a like condition against his assigning, &c., in it. This the court held he was not bound to take; but that, as the lessee had contracted to sell him the lease, and as to do this would require the landlord's license, and this if given would avoid the condition under the rule in *Dumpor's Case*, the assignee had a right *to expect the term free from the condition* as the real purport of his bargain. This was certainly going an extraordinary length in interpretation. The sensible meaning of the bargain made rather was that the assignee should be entitled to what the lessee had, namely an estate restricted from assignment, and no more, and not have a right to prescribe the mode in which the term should be transferred to him. Indeed this was urged by Best (afterwards Chief Justice of the C. P.), for the plaintiff, contending that the lessor might well under the lessee's contract give his license to the assignment, with a like restriction upon the assignee's alienation; but Gibbs, J., "intimated that there would be great difficulty in effectuating such a restriction, for that the doctrine of *Dumpor's Case* is that the condition is indivisible." So far as this general proposition goes, we have amply shown heretofore that no such broad doctrine can be maintained; apportionment by act of law, by the wrong of the lessee, or even by subdivision of the granted estate having long been well-established exceptions thereto. But precisely the thing here declared to be impossible, it has in effect long been settled, can be done; and the only means requisite "to preserve the operative force of the condition so as to guard against future assignments," is, when licensing an assignment, to execute therewith a defeasance. "Leases for years are considered in law as mere chattel interests, they may be defeasanced by means of a grant or condition, as well after they are

* See *ante* p. 620, n. 6.

† 5 Taunt. 795.

‡ 7 Taunt. 9.

§ 5 Taunt. 249.

created as at the time of their creation;"* and the distinction between such a defeasance and a conditional license is only in the name,† as each reannexes to the term the condition declared to be discharged.‡

We have been thus particular in the examination of these cases, because they are doubtless the foundation of the doctrine of *Dumpor's Case* as a modern rule of law, and are usually referred to, as if expressly confirming that case in terms, whereas it was in issue, necessarily only in the first, and collaterally in the last. In one of the remaining four, it did not arise even in the remotest degree; and, in the other three, was so far from being confirmed that these merely established a second exception thereto; namely, that a waiver is no discharge, which is in effect as clear a denial of the entirety of a condition as the earlier and original exception of apportionment by act of law.

What is a license, upon which so much stress is laid as a dispensation not of the breach, but of the condition itself? It is simply "an excuse for a trespass." It is personal merely, and operates to relieve the party, otherwise chargeable with a breach of duty, from the consequence of that one default. It does not relieve him any further, and cannot justify any other default or series of defaults, nor enlarge his estate. These are elementary principles, for which a citation of authorities would be absurd. But what other or less is a waiver? It equally relieves from the consequences of the default or trespass when committed, and sanctions that, when done, which the license permitted to be done. Each therefore presupposes the trespass; that is, that the condition is broken, and each accepts and ratifies and adopts that state of facts. If, therefore, the condition is gone by a license, it is equally so by a waiver; and in holding that a waiver does not discharge the condition but the breach only, we recognize not merely a return to common-sense interpretations, but the adoption of a doctrine radically inconsistent with *Dumpor's Case*.

But this logical consequence of these exceptions does not seem to have been apprehended, and we still find the courts reasserting them, and deciding in accordance therewith, and yet referring to *Dumpor's Case* as if this was not affected by them. In *Doe* v. *Pritchard** the demise was on condition of re-entry, if the lessee became "insolvent and unable to go on with the lease." After this happened, the lessor accepted rent; and it was claimed, in defence to his ejectment, that this waived the forfeiture. It was contended in reply that the one breach might be, but that the condition still subsisted, as it imposed a continuous duty. The court held that the breach was complete once for all; and that *Dumpor's Case* did not apply at all, because, as there was no breach after the waiver, the question of the continuance of the condition did not arise, Taunton, J., remarking *obiter:* "There is a difference between waiving the condition as in *Dumpor's Case* and waiving the particular breach. The courts in modern times have been inclined in such cases to consider the breach overlooked rather than the condition as waived.† But the waiver of the condition is not necessary to the argument," &c.

In order to reconcile the asserted authority of *Dumpor's Case* with the admitted exceptions, text-writers have been driven to assert new distinctions. Thus an able author,‡ after quoting Sir James Mansfield's comments thereon, suggests that, while a waiver will not discharge the condition against underletting and the like, it will a condition against assigning, as here the breach is complete once for all. On the other hand, a prominent English real property writer,§ who is followed by a recent American writer|| asserts that, after the waiver of one assignment, the lessor may re-enter for a new one. And it is a sufficient answer to the former to say that there is no authority for any such proposition in any decided case. *Doe* v.

* 2 Prest. Conv. 198, 199. So 2 Greenl. Cruise, 10 n. "Under the learning of defeasance a mode may be resorted to by which the objection generally made to give a license to assign can be obviated. Upon the assignment with license a deed of defeasance should be executed in order to determine the lease on alienation by the lessee." Sheph. To. 195.

† Thus the condition in *Fox* v. *Whitchcocke* is called equally a defeasance. 1 Bulst. 290.

‡ Williams, Real Prop. 354.

* 5 B. & Ad. 689.

† 4 Taunt. 735.

‡ Smith, Landl. & T. *117.

§ Burton, R. P. Comp. § 853.

|| Washburn, Real Prop. *317.

Bliss went on the ground of the "toleration" or waiver, not of the character of the act prohibited by the condition, and the *dictum* of Patteson, J., in *Doe* v. *Pritchard*,* was, as we have seen from the statement of that case, wholly *obiter*.

On the other hand, it has been suggested that a license of a condition to underlet and the like, which from its nature is susceptible of more than one breach, will not discharge the condition, but the breach only.† This proposition, which we shall notice hereafter in considering the doctrine of continuous conditions, though without the support of expressed modern decisions, and contrary to the opinion of some text-writers,‡ is based on the doctrine that a condition may be suspended; which is well sustained by the older authorities. Thus in a case decided 10 Eliz. (*anno* 1568),§ it was held that upon the seizure by a judgment creditor, under an elegit, of a moiety of the reversion, "le condicion fuit suspend pur tout," meaning, apparently, that the condition would revive when the rent of the moiety had discharged the execution. Numerous similar determinations are mentioned by Mounson and Harper in their judgments in *Winter's Case*.|| So in a later case,¶ it was held that the second grantee of a reversion might avail himself of a condition reserved on a lease, though his mesne grantor could not. And this doctrine of suspension constitutes a third exception to the ideal entirety of a condition as conceived in *Dumpor's Case*, and one which, equally with apportionment and waiver, are rather contradictions than exceptions thereto.

The American decisions relating to the rule in question are open to exactly the same comment as the English cases already discussed, and even in a stronger degree; as, with a single and somewhat doubtful exception, there has been no decision directly in point, and the rule has been recognized only to be distinguished, and solely on the ground advanced in *Brummell* v. *Macpherson*. In England, owing to the express adoption of the rule

* 5 B. & Ad. 781.

† 1 Smith, Lead. Cas. (5th Am. ed.) 91.

‡ Woodfall, L. & T. (10th ed.) 550.

§ Moor. 91, pl. 225.

|| *Lee* v. *Arnold*, 4 Leon. 27, 28.

¶ *Pain* v. *Malory*, Cro. Eliz. 832, (43 Eliz.)

by this case, it remained the law until repealed by statute;* but in this country there is really nothing, with the exception above noted, and occasional *dicta*, more or less clear, to support it; and it has in no case been examined or approved on its intrinsic soundness. It stands, as it has been emphatically described by Mr. Williams,† as an "artificial and technical rule which . . . owes its origin to an antiquated system of endless distinctions without solid differences." Bearing in mind then the clear distinction between the rule and the doctrine of non-apportionment which we have already sought to point out; and that the latter doctrine, whatever may have been its original soundness and proper limits, bears no analogy whatsoever to the rule in question, or gives any support thereto in the decisions which have enforced it,‡ we proceed
Tinkham v. *Eric R. R.*, 53 Barb. 393.
to examine the decisions in any way properly relating to *Dumpor's Case* in this country.

In Massachusetts there are certainly but two;§ and these of little pertinency. In the first, which is sometimes referred to as a case of waiver, the condition was in reality merged by the grantee's subsequently acquiring the whole of the reversionary estate. In fact it appeared that there had actually been no breach, because there was no refusal to perform the obligation. In the latter case there was merely a *dictum* on the subject, the question being whether a covenant had been discharged by a license; and the court held that it had not, adding: "It is not the case of a condition which when once dispensed with is discharged for all purposes, and cannot be revived," which was not necessary for the decision.

In Missouri the authorities are similarly unsatisfactory. In an early case|| it is said: "*Dumpor's Case*, though much criticised by eminent judges, is still adhered to as law;" but it was held not to apply to contracts not touching the reality, and a condition in a policy of insurance that the insured should notify the com-

* 22 & 23 Vict. c. 35; 23 & 24 Vict. c. 28.

† Williams Real Prop. 262.

‡ *Van Rensselaer* v. *Jewett*, 5 Denio, 121,

§ *Merrifield* v. *Cobleigh*, 4 Cush. 178; *Gannett* v. *Albree*, 103 Mass. 372, 374.

|| *Tenn. M. & F. S. Co.* v. *Scott*, 14 Mo. 46.

pany of a change of ownership, was held binding, after one assent to such a change had been given. There was, however, no soundness in the distinction attempted between real and personal contracts, and the ground taken, in fact controverted the rule of the case referred to. A like *dictum* occurred in *McGlynn* v. *Moore;** but the single point decided in that case was, that acceptance of rent after the structure is completed waives defects in performance of a contract to build. *Dougherty* v. *Matthews,*† at first sight, seems more in point; a promise by an assignee of a lease, conditioned against the lessee's assigning, to pay the lessor for his permission to assign being held *nudum pactum.* But the decision did not go on the dispensation of the condition by one assignment; but on the ground that the lease not being under seal and the condition in terms applying only to the lessee and not mentioning assignees, its obligation was personal to the lessee and could not bind assigns. The court say: "The lease is not stated to be under seal, and therefore the case does not come within the doctrine of covenants running with the land." "The plaintiff proceeds on the assumption that the assignee could not himself assign the lease without the consent of the lessor; but it is not made to appear by anything contained in the petition that such consent was at all necessary," &c. This is exactly the anonymous case n Dyer‡ hereinbefore referred to, and is undoubtedly sound.

A case occurs in the early California reports,§ whose looseness seems to accord with the generally unsettled state of things in that region at that day. It is held that a "covenant" [*sic*] against assigning without license is discharged by one authorized transfer. *Dumpor's Case* is referred to, from which we may perhaps infer that there was a condition as well as a covenant here. The court, however, repeated that the "covenant" was discharged and add: "It is questionable whether in any case such a covenant would be enforced to produce a forfeiture. It is in restraint of alienation, and therefore against the policy of the law." We do not know that much comment is necessary upon the opinion of a court that was ignorant that it is only conditions upon grants in fee that are so void.* But as assigns do not appear to have been mentioned in this condition, the decision stands well enough on the same ground as the preceding one, though not adverted to by the court.

In Virginia the point has been referred to in one well-considered case.† It was held here that one underletting was waived by the receipt of rent subsequently accruing; and the case in fact was the same as *Doe* v. *Bliss,*‡ which was held to be conclusive. *Dumpor's Case* was referred to and distinguished, and did not even receive the qualified approval which it has at times had.

In Pennsylvania the point seems to have arisen twice. In the first case§ the facts are quite complicated; but, so far as they relate to our present inquiry, seem to be that the plaintiff, then holding a leasehold interest in certain mills, transferred this to the defendant, on the agreement that he was to receive advances from the latter, who was also, as well as plaintiff, to give his personal services in working the mills, and neither was at liberty to assign without permission. There was no mention of assigns of either party. The defendant, with the plaintiff's assent, was discharged from his undertaking, and another person substituted. But he desiring subsequently to withdraw, the defendant sold out to a new party, and it was claimed that this was a forfeiture of his interest. The court, indeed, held otherwise as a matter of strict law, but gave relief in equity by decreeing a reconveyance. It is remarked incidentally, that a condition once dispensed with is wholly gone. It may be conceded that this was so in this case, as the condition was personal to the grantee, and had been expressly released. It was not the case of a mere license, but of an entire substitution and discharge. But, apart from this consideration, the condition could not apply beyond the first alienation, as it did not run beyond the

* 25 Mo. 384.

† 35 Mo. 520.

‡ Dyer, 66, *a*.

§ *Chipman* v. *Emeric*, 5 Cal. 49.

* *Depeyster* v. *Michael*, 6 N. Y. 467.

† *McKildoe* v. *Darracott*, 13 Gratt. 278.

‡ 4 Taunt. 735.

§ *Dickey* v. *McCullough*, 2 W. & S. 88.

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. *Darracott*, *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 feebler 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. 383.

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 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,

* 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*.

* *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.

involve little or no disturbance to settle titles or vested rights of ownership. And, finally, that the argument of long standing, which is the whole and only ground of acquiescence in its authority by modern judges, ought, in view of these facts, to avail nothing; as an admitted error should receive no greater tolerance, merely because it is venerable. We have already noticed one of kindred origin and equal age, which the better sense of a later day has corrected;* and we may refer, among many other examples, to the well known instance in *Semayne's Case*,† where the proposition that illegality of an officer's entry did not affect the validity of his service of process was enunciated by Lord Coke, founded on the high authority of Littleton a century before;‡ and received the recognition of the most approved text-writers at a later day.§ Yet this has since been entirely reversed,|| and the contrary doctrine is the settled rule of modern law.¶ Why should not *Dumpor's Case* receive the like measure from even-handed justice?

COMMUNICATIONS BETWEEN SOLICITOR AND CLIENT.

There have been some fluctuations of judicial opinion as to the extent to which communications between solicitor and client are privileged from disclosure. It has, indeed, long been settled, and was pointed out by Wigram, V. C., in *Walsingham* v. *Goodricke*, 3 Hare, 124, that communications between solicitor and client, made pending litigation, and with reference to such litigation; or made before litigation, but in contemplation of and with reference to litigation which was expected and afterwards arose; or made after the dispute between the parties followed by litigation, but not in contemplation of or with reference to such litigation, are privileged from disclosure, whether the party interrogated be the solicitor or the client. It has also been settled that professional communications between a party and his professional adviser, although they do not relate to any litigation either commenced or anticipated, are privileged *where the solicitor is the party interrogated.*

It has, however, been a matter of doubt whether the rule extends beyond the last case, and embraces such communications where the client, and not the solicitor, is interrogated. Some of the cases seem to imply that the privilege of the solicitor is more extensive than the privilege of the client, and that communications might pass between a solicitor and client as to which the solicitor, if called upon to give evidence, might refuse to answer, while the client could not; although if the communications had been made after a dispute arose the client also might refuse. Well might Vice-Chancellor Knight-Bruce remark (*Pearse* v. *Pearse*, 1 De G. & Sm. 27):—"What for the purpose of discovery is the distinction in point of reason or principle between such communications and those which differ from them only in this, that they precede instead of following the actual arising, not of a cause of dispute, but of a dispute, I have never hitherto been able to perceive." Anomalies of this kind are often the precursors of a broader rule in which arbitrary distinctions are merged. and the decision in *Minet* v. *Morgan*, 21 W. R. 467, L. R. 8 Ch. 361, has at length finally established the law on a footing accordant with common sense and general convenience.

This case was a suit by a commoner against the lord, to establish rights of common claimed by the plaintiff and others. The plaintiff was required by the defendant to make an affidavit as to documents. Accordingly, he admitted the possession of correspondence between himself and the solicitors of his family, or between himself and his solicitors in the suit, written in contemplation or in the course of the suit, or with reference to the subject-matter in dispute, and of letters between his mother, from whom he derived title, and her solicitors, with reference to questions connected with the matters in dispute in the cause; but he stated that all these documents were of a private and confidential character, and that he believed them to be privileged, and therefore objected to produce them. The defendant took out a summons to compel productions of these documents,

* *Ante*, pp. 627, 628.

† 5 Co. 93.

‡ 18 Edw. 4, fo. 4.

§ Bac. Abr. Sheriff, n. 3, &c.

|| *Ilsley* v. *Nichols*, 12 Pick. 270.

¶ 1 Smith, Lead. Cas. (5th Am. ed.) 194, and cases cited.

which was heard on appeal by Lord Selborne, C., and Mellish, L.J.

The judgment of Lord Selborne, in which Mellish, L.J., concurred, traces the development of the rule as to the compulsory disclosure of communications between solicitor and client, and shows the successive steps by which the law has reached a broad and reasonable footing. In *Bolton* v. *Corporation of Liverpool*, 1 My & K. 88, *Hughes* v. *Biddulph*, 4 Russ. 190, and some other cases about the same date, the doctrine of protection was expressed in terms which had a tendency to narrow its scope. But in these cases a decision on the general question was not required; and the subsequent case of *Pearse* v. *Pearse*, 1 De G. & Sm. 12, clearly showed that the tide had turned. The case of *Minet* v. *Morgan*, coming at the end of a series of authorities tending in the same direction, seems to place beyond question the doctrine that whether the solicitor or the client be the party interrogated it is sufficient for the protection of communications between the party or his predecessor in tittle and his solicitor acting in a professional capacity, and that it is not necessary that they should be made either during or relating to an actual or even an expected litigation. Thus a simple principle has superseded a number of partial rules and arbitrary distinctions.—*Solicitors' Journal.*

SUING UPON AN ADVERTISEMENT OF AN AUCTION.

A novel attempt was made in *Harris* v. *Nickerson*, 21 W. R. 635, L. R. 8 Q. B. 286, to fix an auctioneer with liability for withdrawing from a sale certain goods which had been included in the advertisement. It is difficult to see how the plaintiff in that case could have possibly recovered damages, for he had bought other things at the sale, so that the expenses of attending the sale, in respect of which he claimed, were not incurred solely for the sake of the articles withdrawn. But on principle the action was really without grounds. To support it it must have been held that an auctioneer, by advertising goods for sale contracts with any one and every one who comes to the sale to sell them. To have held so would certainly have been inconsistent in principle with *Spencer* v. *Harding*, 19 W. R. 48, L. R. 5 C. P. 561, where the defendant who had offered goods for sale by tender was held not to have contracted with the highest bidder to sell to him. In the case of *Harris* v. *Nickerson*, however, there was even less to bring the plaintiff into privity with the defendant than in *Spencer* v. *Harding*, for in the last named case the plaintiff had at least made a bid, and so had brought himself into a position of apparent analogy with that of a person who furnishes information in answer to an advertisement offering a reward, as in *Williams* v. *Carwardine*, 4 B. & Ad. 621, and *Tarner* v. *Walker*, 14 W. R. 793, L. R. 2 Q. B. 301. Apparent analogy, we say, because there were wanting in *Spencer* v. *Harding* any such words of promise as are contained in these advertisements. Nor are there ever any such words of promise in an auctioneer's advertisement. The case was argued, however, on the authority of *Warlow* v. *Harrison*, 7 W. R. 133, 1 E. & E. 295; but there again, the goods had actually been put up for sale and the plaintiff had made a bid—in fact, he was the highest bidder; and if only it could be held that actually putting up the goods for sale and taking bids created an implied contract to sell to the highest bidder, that contract had been made, and the plaintiff was in the same position as the person who answers an advertisement offering a reward. It is very difficult to say that *Warlow* v. *Harrison* (if it is good law) does not establish that under such circumstances a contract may be implied. Blackburn J., indeed, distinguished that case from *Harris* v. *Nickerson*, on the ground that there the sale was advertised as "without reserve." This amounted to a representation that the auctioneer was instructed to sell "without reserve," and if that representation was fraudulent (of which the buying in would be good evidence, as the employment of a puffer at a sale by auction is evidence of fraud: *Green* v. *Baverstock*, 14 C. B. N. S. 204, 11 W. R. C. L. Dig. 12), the auctioneer would no doubt be liable. But in *Warlow* v. *Harrison* the auctioneer was sued in contract, and it is difficult to see how an advertisement that there will be a sale *without reserve* can make a contract, if an advertisement that there will be a sale does not. The distinction seems to be rather that which we have pointed out, namely, that in *War-*

low v. *Harrison* the goods were actually put up for sale and bids taken, in which case ordinarily there could be no contract to sell implied, because of the well understood customary power of the auctioneer to buy in; but there was room for implying it from the use of the words "without reserve." In another view, indeed, the absence of these words is of weight, because without them, even if the auctioneer had put up the goods for sale, he might, consistently with *Warlow* v. *Harrison*, have bought them in, and so defeated the buyer's expectations; which would make it impossible for the buyer to prove he had sustained any damage by his not putting them up. But, except indirectly, this does not touch the question of whether the *advertisement* made a contract with every one who came to the sale. Until *Warlow* v. *Harrison* is over-ruled (and some doubt was thrown upon the decision in the recent case) it must be considered that where goods are actually put up "without reserve," and bid for, the auctioneer is bound to knock them down to the highest bidder; but there is no reason for carrying the doctrine one step further, and the cases of *Harris* v. *Nickerson* and *Spencer* v. *Harding* must put an end to the fantastic idea of suing upon an *advertisement* of an auction.

We may observe that it is pointed out in a note to *Frost* v. *Knight*, L. R. 5 Ex. 337, that in some systems of law a remedy seems under some circumstances to be given to one to whom an offer is made, which is retracted before he accepts it; but there is no trace of any such right being allowed by the English law, nor does the mischief which such a rule seems designed to remedy appear to be equal to the inconvenience which it would cause.—*Solicitors' Journal.*

Lord Selborne's ideas upon the subject of trial by jury may be gathered from what fell from him in the *Patent Marine Inventions Company* v. *Chadburn* (see Notes of the Week). An application was made to his Lordship to have issues in a patent cause relating to novelty and infringement tried by a jury. In directing that the trial should take place before the Judge without a jury, Lord Selborne said that the Judge could keep the evidence better under control when sitting alone, and that upon any questions of science the Judge was as competent as a jury to form an opinion. If trial by jury is to be judged upon such grounds, it will speedily decay. In every case, probably, a judge, by keeping all the evidence in his own head, would keep it better in hand than if it had to be submitted to a jury, and probably in a vast number of cases the opinion of one man is as good as that of twelve. The question is, whether, in important causes involving evidence which may have a different effect upon different minds, it is not expedient that the tribunal to decide them should comprise a jury.—*Law Journal.*

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

COMMON PLEAS.

Easter Term, 1873.

McGuire v. McGuire.

Married Woman—Right to maintain trover against husband for goods possessed by her before marriage—Consol. Stat. U. C. ch. 73, & 35 Vict. ch. 16—Construction of.

Held, that a married woman who, without any just cause, leaves her husband's house and lives apart from him, cannot in virtue of Consol. Stat. U. C. ch. 73, in connection with 35 Vict. ch. 16, bring an action against him as for the wrongful conversion by him of certain goods, chattels, and household furniture, which having been the property of the wife before marriage, came into the actual possession of the husband upon and in virtue of the marriage, and were used by husband and wife jointly subsequently to the marriage at the dwelling house of the husband, until she chose to separate herself and live apart from him, by reason that upon her demand, after her departure from his house, he refused to give her up the goods to take away with her.

Feaver v. Montreal Telegraph Company.

Telegraph Companies—Failure to transmit message—To whom liable—Contract.

One F., at Hamilton, delivered to the defendants a message to be transmitted to plaintiff, at Wakefield, Mass., paying for the transmission. The defendants having failed to deliver the same to the plaintiff, he brought an action against them for damage caused thereby.

Held, following *Playford v. United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706, that the defendants' liability arose only from contract; that as the message was sent by F. on his own account, and not on behalf of the plaintiff, there was no privity between the plaintiff and the defendants, and the plaintiff could not maintain an action against the defendants for their negligence.

ROBINSON V. SHISTEL.

Services performed in expectation of marriage.

Held, that services rendered for a person in expectation of marriage do not afford the ground of an action, as upon an implied assumpsit to pay in money.

AHRENS V. MCGILLIGAT, (GRAND TRUNK RAILWAY COMPANY, GARNISHEES.)

Railway Companies—"Live and carry on business" at head office—Jurisdiction of Division Court—32 Vict. ch. 23, sec. 7, O.—Construction of.

Held, that a Railway Company does not "live and carry on business," within the meaning of 32 Vict. ch. 23, sec. 7, O. at any other place than at its head office, at which its business is managed.

Where the garnishees had their principal station at Montreal, and a local station at Berlin at which they took passengers and received goods, and a cause of action having arisen against the defendant, the plaintiff issued a garnishee summons against the company out of the said Division Court at Berlin, on the ground that they lived and carried on business there.

Held, that the judge of the Division Court had no jurisdiction to try the cause.

VARS V. THE GRAND TRUNK RAILWAY CO.

Railway Companies—Placing hand-car on highway—Liability.

Some men in defendants' employment, who had been using a hand-car for laying down rails, approached the Colborne Station on their return home, about 5 p. m., and finding the railway track occupied by a train, stopped at a highway crossing, about 400 yards from the station. They removed the car from the rails and placed it on the highway, the car encroaching some 6 or 10 inches on the road-way The men then left it, remaining away about half an hour. Two men seeing the car seated themselves upon it. At this time the plaintiff drove past in his carriage, and his horse shying at the car, ran away, threw plaintiff out, and severely injured him.

Held, that the placing of the car on the highway constituted negligence, for which the defendants were responsible.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BRONTE HARBOUR V. WHITE.

Harbour Company—Express power to distrain—Right to maintain action in addition—3 Vict. ch. 33—Construction of.

By 3 Vict. ch. 33, the plaintiffs were incorporated under the name of the President, Directors and Company of the Bronte Harbour, and were declared to be capable by such name of contracting and being contracted with, suing and being sued, pleading and being impleaded in all courts in all manner of suits, actions, complaints, matters, and causes whatsoever. By the 2nd sec. they were authorized to construct a harbour and by the 7th sec. it was further enacted, that if any person should neglect or refuse to pay the tolls or dues, which by the Act were vested in the plaintiffs as their property, the plaintiffs might distrain the goods on which the tolls or dues *were due and payable*, until such tolls should be paid.

Held, that the plaintiffs were not confined to the remedy by way of distress; but could also maintain an action.

ZEALAND V. DEWHURST.

Husband and wife—Goods supplied to wife not living with husband,—Liability of husband.

In an action against a husband for goods supplied to his wife, it appeared that up to February, 1872, when the husband received an appointment worth $1,200, he had been in embarrassed circumstances, and owed debts amounting to $3,000. In May, 1870, his wife being in delicate health went to live with her father at Brantford, and continued to reside with him for two years with the exception of an occasional visit to her husband, who lived in St. Catharines. during which time the father expended on her and her son upwards of $1,000. In May, 1872, when visiting her husband she complained for the first time of wanting clothes, her husband appearing to have always furnished her with money and clothes whenever she asked for them, and also to have paid for the son's board and clothes; the husband then gave her what articles she required and what money he possessed, at the same time expressly telling her not to incur any debts in Brantford. It appeared, however, that in the following month she incurred the debt now sued for, consisting of silks, valuable laces. and shawls, amounting to the husband's salary for the quarter, the plaintiff at the time being fully aware that she was living, not with her husband, but with her father.

Held, that the husband was not liable.

CHANCERY CHAMBERS.

Clariss v. Ellis.

Order 113.—Decree nisi—Effect of proceeding under.

[The Referee—October 1, 1873.]

Proceedings under a decree which is not absolute, are invalid.

The purchaser at a sale under such a decree was refused a vesting order, though offering to waive all objections to the proceedings, it being considered that it was only the defendants who could waive such an objection.

Cameron v. Eager.

Abatement by bankruptcy of a plaintiff—Costs.

[The Referee—October 2d, 1873.

The bankruptcy of a sole plaintiff causes an abatement of the suit.

A motion by a defendant to dismiss after such abatement and before revivor was refused; his proper course being to call upon the assignee of the plaintiff in insolvency to revive within a limited time.

The plaintiff, the insolvent, was awarded his costs of the application to dismiss.

Abel v. Hilts.

Motion for production or committal upon default—Notice required.

[The Referee—October 21, 1873.]

A motion for production, with the alternative that the party be committed in default, being substantially a motion to commit, requires four clear days' notice.

De Blaquiere v. Armstrong.
Armstrong v. Deedes.

Consolidation of suits, effect of—Motion for leave to appeal.

[The Referee—October 25, 1873.]

By a decree made in *De Blaquiere* v. *Armstrong* it was ordered that that suit be consolidated with a suit of *Armstrong* v. *Deedes*. One of the parties had a different solicitor in each suit. *Held*, that subsequent proceedings must be carried on in the suit in which the decree was made, and that the solicitor in that suit was the proper solicitor to be served with notice of further proceedings, and not the solicitor in the suit of *Armstrong* v. *Deedes*; the consolidation being held to constitute a stay of proceedings in that suit.

On a motion for leave to appeal after the lapse of the time limited for that purpose, reasonable and probable grounds must be shewn by the affidavits. It is not sufficient merely to state the grounds of the proposed appeal in the notice of motion.

Hamelyn v. White.

Vacating order pro-confesso—Defences which may be raised in an answer filed—Ex gratiâ.

[The Referee—Oct. 10; Strong, V. C., Oct. 27, 1873.]

An order *pro confesso* was vacated and a defendant allowed to file an answer notwithstanding great and unexplained delay, no sittings of the Court having been lost thereby.

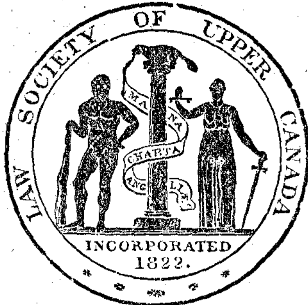
The Referee refused to allow the defendant to set up a defence amounting to a plea to the jurisdiction as not being a meritorious defence, according to the practice at law, (see Lush Pr. 447.) But on appeal Strong V. C., reversed this part of the order of the Referee, and allowed the defence to be set up.

REVIEWS.

The Canadian Monthly and National Review. Adam, Stevenson & Co., Toronto.

The Publishers, in their announcement for 1874, very naturally congratulate themselves on the success they have achieved so far. This monthly is undoubtedly highly favoured by being under the editorial management of one of the greatest masters of the English language, who himself contributes largely to its pages. It is stated that the periodical criticism upon national affairs, under the caption of "Current Events," will continue, and that the same impartiality of discussion will be adhered to in the treatment of all questions under review. We trust this may be so, and that there will be an avoidance of anything like siding with any political party, and this we believe the writer earnestly desires. We are told, however, that the atmosphere is at present highly charged with an unsavoury smell, said to have the flavour of political rancour, and that there is a fear that it may penetrate even to the judicial mind of this most able critic. However, having no nose for such matters, and not being able to see the length of that organ, except in things appertaining to the law and its administration, we cannot offer an opinion on the subject—we can, however, assert most positively, that we wish the *Canadian Monthly* a continuance of that success which has so far attended it, and an ever increasing circulation in this Canada of ours.

Law Society—Michaelmas Term, 1873.



LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Michaelmas Term, 37th Victoria.

During this Term, the following Gentlemen were called to the Degree of Barrister-at-Law:

No. 1270. Maxwell D. Fraser.
Rupert Etherege Kingsford.
Joseph Benjamin McArthur.
Roger Conger Clute.
Charles Oakes Zaccheus Ermatinger.
No. 1275. Nathaniel F. Hagle.

And the following gentlemen received Certificates of Fitness:

Maxwell D. Fraser.
George B. Gordon.
Hammel Madden Deroche.
Charles E. Barber. } Without oral examination.
Edward Harry D. Hall.
Kenneth Maclean.
Charles Oakes Z. Ermatinger.
Henry Theophilus W. Ellis.
Charles Bagot Jackes.

And on Tuesday, the 18th November, the following gentlemen were admitted into the Society as Students of the Laws:

University Class.

Richard W. H. N. Dawson.
John E. K. Gourlay.
F. M. Morson.
Robert Shaw.
William H. Culver.
Frank S. Nugent.
Robert E. Wood.
John L. Whiting.
Walter Barwick.
Francis Madill.
Alexander C. Galt.
James H. Madden.
Peter L. Palmer.
Charles L. Ferguson.
Richard P. Palmer.
Albert A. F. Wood.

Junior Class.

Trevelyan Ridout.
James V. Teetzel.
John Alexander Palmer.
Harry Dudley Gamble.
George Edgar Millar.
Lorenzo Udolphus C. Titus.
Ralph Winnington Keefer.
Oliver Richard Macklem.
James Norris Waddell.
James Rymal.
Henry Ryerson Hardy.
Robert Conolly Miller.
E. Sydney Smith.

The above names are all given as on the rolls, and not in order of merit.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding. —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ançient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

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