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Dumpor's Case: Its Status

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DUMPOR S CASE: ITS STATUS.—"Always a stumbling-block in the way of the profession, 'originally without foundation. , without subsequent confirmation by decision until' *Brummel v. MacPherson,* 14 Ves. 173, ' no greater claim to be recognized at that time as settled law than any other venerable error. '"[1] Such is a characterization of the notorious "Dumper's Case." Its question is one which has not yet arisen in Washington, and a consideration of it may prove interesting, in the event that the point come up in this state.

Dumpor's Case holds, according to the syllabus in Sir Edward Coke's Reports (4 Coke 119b) that "a condition in a lease that the lessee or his assigns shall not alien without the special license of the lessor, is determined by an alienation by licence, and no subsequent alienation is a breach of condition, nor does it give a right of entry to the lessor." The same case more properly titled "Dumpor v Symms" (Coke) or "Dumper v Syms" is reported by Sir George Croke (Croke's Eliz. 815) The head note there reads: "On a proviso that a lessee and his assigns shall not alien without licence, if the lessor give licence, the condition is entirely destroyed and the assignee may afterwards assign or demise the whole or any part of the term without licence; but otherwise a devise of the term would have been a breach of the condition."

Croke indicates that this case was decided in 43 Eliz. in the Queen s Bench. At that time the officers of that court were Sir John Popham, Chief Justice, Sir Francis Gawdy, Sir Edward Fenner and Sir John Clerich, Justices, Sir Edward Coke, Attorney General and Sir Thomas Fleming, Solicitor General.

Sir Edward Coke states the decision as of Hilary Term of 45 Eliz. This divergence of opinion between the reporters is likewise to be found in the story they have written of what took place and what was actually decided.

A careful survey of the two reporters indicates that they are of about equal learning and integrity Croke's reports are of unquestioned veracity except insofar as error is to be found in all the early reports. On the other hand Coke was a jurist of greater eminence, altho in political disfavor during much of his troublous life. It is reputed of him that in his desire to have all reported cases logical and grounded on accepted legal doctrines, he often added or subtracted and frequently inserted his statement of the controlling principles.

All this preliminary statement is only of value in seeking to arrive without prejudice at a correct statement of what Dumpor's Case really held—then we may wisely launch forth in this present attempt to determine just what force and validity the doctrine of Dumpor's Case has in this day and age.

Coke's report is by far the most complete; but the statement ac-

[1] Washburn on Real Prop., 503 n., with quotations from 7 Am. Law Rev. 616-640.

cepted for the purposes of this paper is one determined by a careful comparison and study of both the learned reporters.

The facts which gave rise to the case may thus briefly be stated.

1. A lease for years was made by Oxford College to Bolde.

2. It was a term of this lease that "the lessee or his assigns should not alien the premises to any person or persons without the special license of the lessors."

3. Five years later the lessors by their deed licensed the lessee to alien or demise the land or any part of it to any person or persons whom he pleased.

4. Bolde assigned the term to Tubb.

5. Tubb devised the term to his son.

6. The administrator of the son assigned the term to the defendant.

7 The lessor, Oxford College attempted to enter for breach of condition.

8. This action of trespass was then brought.

9. Decision for the lessee. The license once given, the condition is gone forever.

It is to be noted that the license to alien originally given was general, and not specifically limited, that the license was expressly given in writing; and that the knowledge of the lessor as to the various transfers is not indicated or deemed important.

The basis of the decision is simple enough, viz., that a condition may not be apportioned — it must be binding for the whole of the estate or none of it.

As to whether this reason may be sound is dependent on the meaning given the term "condition." The following definition is found in Co. Litt. 201a—"A qualification or restitution annexed by him that hath an estate, or interest or right to the same, whereby an estate, etc., may either be defeated, enlarged, or created upon an uncertain event."

Within this generally accepted and very broad construction of the term, it seems to be false logic to say that a condition cannot be apportioned. This, in the face of considerable ancient authority that a condition may not be apportioned, [2] but the rule and the cases are based on earlier cases holding that a general condition against alienation in a lease is void because repugnant to the grant. [3] This was later resolved not to be the law [4] But in the interim Dumpor's Case had been decided—and it has been an anomaly in the law of Landlord and Tenant ever since,—always strictly construed, heartily disapproved, yet followed with little or no enthusiasm.

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2 Leeds v. Crompton, 1 Rol. Abr. 472 Pl. 7· Winter's Case, Dy. 308b; Anon., Dy. 152 Pl. 7· Wright v. Burroughs, 3 C. B. 685-699.

3 Stickley v. Butler, Hob. 170.

4 Dennis v. Laving, Hard. 427· Weatherall v. Geering, 12 Vesey 511.

Thus it was that the rule in *Dumpor v. Symms* became law and the doctrine of precedent and *stare decisis* carried it down to modern times.

In England, because of legislative enactment, the doctrine is no longer law [5]

In America we adopted the common law of England as our "rule and guide," when we separated from the mother country The doctrine of Dumpor's Case was part and parcel of that common law "too firmly settled to be judicially reviewed."

There has been no tendency to enlarge upon the rule. It has been kept within rather narrow confines. The chief difficulty has been the inability of American courts to analyze the true holding of the original case, and there is consequently much contrariety of decision. The case has been as often misstated as correctly quoted.

Before attempting to reconcile the conflicting views of judicial opinion in America, and seeking the true principle of law involved, the difference between condition and covenant should be noted. There may be a covenant against assigning without license; there may be a condition against assigning without license; there may be both. Breach of the condition alters the estate; breach of the covenant gives rise to a right of action for damages. The covenant continues after the condition is gone—which is an anomaly arising purely out of the rule in Dumpor's Case.

It was previously stated that there is no tendency in modern jurisprudence toward enlarging the doctrine. The result is that the better

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5 22 and 23 Vict. e. 35 §§ 1, (Lord St. Leonard's Act)

"An Act to further amend the Law of Property and to relieve Trustees (Aug. 13, 1869).

"Be it enacted by the Queen's most excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same, as follows:

LEASES

1. Where any license to do any Act which without such license would create a Forfeiture, or give a right to re-enter, under a Condition or Power reserved in any Lease heretofore granted or to be hereafter granted, shall at any time after the passing of this Act be given to any Lessee or his Assigns every such License shall, unless otherwise expressed, extend only to the Permission actually given, or to any specific Breach of any Proviso or Covenant made or to be made or to the actual Assignment, under lease or other Matter thereby specifically authorized to be done, but not so as to prevent any Proceeding for any subsequent Breach (unless otherwise specified in such license) and all Rights under covenants and Powers of Forfeiture and Re-entry in the Lease contained shall remain in full force and virtue, and shall be available as against any subsequent Breach of Covenant or Condition. Assignment, Under-Lease, or other Matter not specifically authorized or made dispunishable by such License, in the same manner as if no such License had been given, and the Condition or Right of Re-entry shall be and remain in all respects as if such License had not been given except in respect of the particular Matter authorized to be done."

considered cases accept the doctrine of *Dumpor v. Symms* confining it to the narrowest limits. At the same time they say that an oral license does not destroy the condition. If all this be true, wherein does the reason lie? The basis of the original decision that a condition may not be apportioned is gone as is the morning mist before the gentle light of modern judicial insight—but the doctrine which resulted from that original reasoning lives on with manly vigor, and the result is that it is humanly impossible to reconcile modern cases on assignment of leases.

This leads to a consideration of the modern American cases. Let us examine into the rule they establish.

If a general license is given by the lessor, the condition is gone forever, [6] (altho an assignment by operation of law does not touch the condition.) [7]

This does not apply to a covenant. [8]

There is a difference between licenses and waivers. [9] Silent acquiescence or waiver is not a license, and does not void the condition as to subsequent breaches, [10] and the condition is revived by a new notice of enforcement. [11]

A license specifically restricted does not void the condition. [12]

A continuing condition is not avoided by acquiescence or waiver. [13]

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6 Bleecker v. Smith, 13 Wend. 531 (N. Y.) German-American Savings Bank v. Collmer, 155 Cal. 683, 24 L. N. S. 1066, 102 Pac. 932; Pennock v. Lyons, 118 Mass. 92; Sharon Iron Co. v. City of Erie, 41 Pa. St. 341, Contra, Kew v. Trainor, 150 Ill. 150, 37 N. E. 223.

7 Gazley v. Williams, 210 U. S. 41, 52 L. Ed. 950.

8 Springer v. Chicago Real Estate Loan & Tr. Co., 202 Ill. 17, 66 N. E. 850; Paul v. Nurse, 8 B. & C. 486; Dakin v. Williams, 22 Wend. 201, 209; Gannett v. Albree, 103 Mass. 372.

9 Armsby v. Woodward, 6 B. & C. 519; Beckenbach v. Harlow, 31 Ohio C. C. 496; Heeter v. Eckstein, 50 How Pr. 445, Lloyd v. Crispe, 5 Taunt. 249, 257· Mason v. Cordu, 7 Taunt. 9, 11n.

10 Ireland v. Nichols, 46 N. Y. 413; Hepp Wall Paper & Mercantile Co. v. Deahl, 125 Pac. 491 (Colo.) Seaver v. Coburn, 10 Cush. 324 (Mass.) Douglas v. Herms, 53 Minn. 204, 54 N. W 1112; Zotalis v. Cannellos, 138 Minn. 179, 164 N. W 807· Gluck v. Elkan, 36 Minn. 80, 30 N. W 446; Doe dem Boscawen v. Bliss, 4 Taunt. 735; Johnson v. Seaborg, 69 Ore. 27, 137 Pac. 191, Wertheimer v. Hosmer, 83 Mich 56, 47 N. W 47. Contra: German-American Savings Bank v. Gollmer, 155 Cal. 683. 24 L. N. S. 1066, 102 Pac. 932; Murray v. Harway, 56 N. Y. 337.

11 Carpenter v. Wilson, 100 Md. 13, 59 Atl. 186, Hanson v. Hanson Hardware Co., 23 N. D. 169, 135 N. W 766.

12 Farr v. Kenyon, 20 R. I. 376, 39 L. R. A. 773, 39 Atl. 241, Hepp Wall Paper & Mercantile Co. v. Deahl, 125 Pac. 491 (Colo.) Kew v. Trainor, 150 Ill. 150, 37 N. E. 223; Moss v. Chappell, 126 Ga. 196, 11 L. R. A. (N. S.) 398, 54 S. E. 968; Springer v. Chicago Real Estate Loan & Trust Co., 202 Ill. 17, 66 N. E. 850.

13 Farwell v. Easton, 63 Mo. 446; Bleecker v. Smith, 13 Wend. 531 (N. Y.) Jackson v. Allen, 3 Cowen 229; Adams v. Ore Knob Copper Co., 7 Fed. 634; Doe dem Ambler v. Woodbridge, 9 B. & C. 376; Doe

The rule as to covenant differs from the one as to condition, for a covenant is not gone by general license.[14] Silent acquiescence or waiver as to one breach of covenant does not void the covenant as to subsequent breaches[15] or continuing breaches.[16] Breach of covenant gives right to damages[17] or injunction[18] or specific performance,[19] none of which is given by a condition.[20]

The rule in Dumpor's Case has as yet never been directly passed upon in the State of Washington. Our court, however, seems to recognize the doctrine of waiver,[21] and by statute, Washington gives the right to declare a forfeiture for breach of a covenant not to assign or sublet.[22]

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dem Flower v. Peck, 1 B. & A. 428; Crocker v. Old South Society 106 Mass 489.

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

15 Jones v Durrer, 96 Cal. 95, 30 Pac. 1027· Bleecker v. Smith, 13 Wend. 531 (N. Y.).

16 Alexander v. Hodges, 41 Mich. 691, 3 N. W 187· Bleecker v. Smith, 13 Wend. 531 (N. Y.).

17 Buckner v. Warren, 41 Ark. 532; Weller v. Brown, 160 Col. 515, 117 Pac. 517· Thornton v. Trammill, 39 Ga. 202; Brown's Adm. v. Bragg, 22 Ind. 122; DeLancry v. Ganong, 9 N. Y. 9· Woodruff v. Trenton Water Power Co., 10 N. J. Eq. 489, 508; Spear v. Fuller, 8 N. H. 174, 28 A. D. 391, Simmons v. Jarman, 122 N. C. 195, 295 S. E. 332; Smith v. People's Natural Gas Co., 257 Pa. 396, 101 Atl. 739· Johnson v Gurley 52 Tex. 222.

18 Godfrey v. Black, 39 Kan. 193, 7 A. S. R. 544, 17 Pac. 849· Maddex v. White, 4 Md. 72, 59 A. D. 67· Spalding Hotel Co. v. Emerson, 69 Minn. 292, 72 N. W 119· Orvis v. Natl. Com'l Bank, 80 N. Y. S. 1029; Joseph Schlitz Brewing Co. v. Neilsen, 77 Neb. 868, 8 L. R. A. (N. S.) 494, 110 N. W 746, McEacharn v Colton (1902) App Cas. 104.

19 Tscheider v. Biddle, 4 Dill 58; Monihon v. Wakelin, 6 Ariz. 225, 56 Pac. 735, Hall v. Center, 40 Cal. 63; Worthington v. Lee, 61 Md. 530; King v. Raab, 123 Iowa 632, 99 N. W 306, Hayes v. O'Brien, 149 Ill. 403, 23 L. R. A. 555, 37 N. E. 73; Arnot v. Alexander, 44 Mo. 25, 100 A. D. 252; N. Y. Life Ins. & Trust Co. v. St. George's Church, 12 Abb. N. C. 50; Kollock v. Scribner, 98 Wis. 104, 73 N. W 776.

20 Hale v Finch, 104 U. S. 261, 26 L. Ed. 732; Seaboard Air Line R. Co. v. Armiston Mfg. Co., 186 Ala. 269, 65 So. 187· Sanitary Dist. of Chicago v. Chicago Title & Trust Co., 278 Ill. 529, 116 N. E. 161, Close v. Burlington C. R. & N. Ry Co., 64 Iowa 149, 19 N. E. 843; Blanchard v. Letroit L. & L. M. R. Co., 31 Mich. 43, 18 A. R. 142; Wooduff v. Trenton Water Power Co., 10 N. J. Eq. 489; Palmer v. Fort Plain & C. Plank Road Co., 11 N. Y. 376, Erwin v. Hurd, 13 Abb. N. C. 91, Sharon Iron Co. v. Erie, 41 Pa. 341.

21 Andersonian Inv. Co. v. Wade, 108 Wash. 373.

22 Rem. Comp. Stat. § 812, Pierce's Code 1923, § 7970, L. '05, p. 173.