BETWEEN,

WILLIAM FOWLER and Suſanna his wife, *plaintiffs*,

AND,

LUCY SAUNDERS, an infant, by James A Patterſon, her guardian, *defendent*,

IN this cauſe, brought on, by conſent of parties, and heard on the bill and anſwer, and on the teſtament of Thomas Sale, exhibited and read, the court, on the day of March, in the year of our lord one thouſand ſeven hundred and ninety-eight, after conſideration of the arguments by counſil, profeſſed the ſentiments, and pronounced the decree, which follow:

The ſtatute, for preventing fraudulent gifts of ſlaves, enacting, in the year one thouſand ſeven hundred and fifty-eight, that a gift, not declared by teſtament in writing, or deed, recorded, after having been legaly proved, ſhould not be ſufficient to paſs the right of ſlaves, upon which ſtatute, if a gift had been, the plaintiffs relied,—this ſtatute did not comprehend this caſe,—a delivery of ſlaves, in conſideration or for cauſe of marriage, than which no conſideration or cauſe is more eſtimable or meritorious;—did not comprehend this caſe, in which a fraud, condemned in the procœmium of the ſtatute, is attempted to be, by the conſtitutory part of it, juſtified, for the benefit of his family, who contrived it.

A gift, if it may be called a gift, when it is in conſideration of marriage, is ſtrictly not a

A gift

gift purely gratuitous, whereby the donee gaineth the thing given, without meriting it by way of a recompence, ſuppoſed to have been the kind of gift contemplated by the legiſlature, but, is a convention, wherein the parties perform and remunerate, alternately, each beſtowing on and taking from the other ſome thing beneficial.

Nor, if ſlaves, delivered by the father of a wife to her huſband, in conſideration of their intermarriage, may be ſaid to have been given, could the gift be one of thoſe gifts, by means of which frauds detrimental to creditors and purchaſers were practiſed; to prevent which miſchiefs was the prefaced object of the ſtatute;—not one of thoſe gifts, becauſe 'the donor' did not, in the language of that act, 'remain in 'poſſeſſion of the ſlaves, as viſible owner there-'of.'

The meaning of the legiſlature was planely this: donors of ſlaves, who nevertheleſs retain poſſeſſion of them, defraud people, who believe the poſſeſſors, being the viſible, to be the real, owners: for prevention WHEREOF,—for prevention of injury by this deception, which ſecret gifts occaſion, propoſing ſuch a diſunion of the right and poſſeſſion, as that they may be in different perſons at the ſame time; and to the end that people may have the means of knowing the true owners; no gift of any ſlaves, not authenticated in the mode now preſcribed, ſhall be good to paſs any eſtate in ſuch ſlaves; that is,

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with a commentary, neceſſary to produce harmony and ſymmetry in the act, no ſuch unauthenticated gift of any ſlaves, whereof the donor 'retaineth poſſeſſion,' ſhall be good. this evidently remedies the miſchief and all the miſchief which the legiſlature ſaid they intended to PREVENT.

The other ſenſe, in which, as is pretended, the ſtatute may be underſtood, is this: 'for 'prevention of frauds by ſecret gifts of ſlaves, 'which, notwithſtanding, remain in poſſeſſion 'of the donors, as viſible owners thereof, and to 'the end that creditors and purchaſers, recur-'ring to archives, where monuments of acts, 'which ſeparate the right from the poſſeſſion of 'ſlaves, ought to be depoſited, may diſcover 'whether theſe viſible owners, poſſeſſors, be 'the true owners, or not; no gift of ſlaves, 'whereof the donor DOTH NOT retain the 'poſſeſſion, but of which, on the contrary, he 'hath DELIVERED poſſeſſion to the donee, 'ſo that the right and poſſeſſion are, not in dif-'ferent perſons but, in the ſame perſon, and 'people believe the donee, who is the viſible, 'to be the true, owner, and therefore are not de-'frauded, if the gift be not recorded, ſhall be 'good: that is, to prevent deception by gifts, 'diſuniting the right and poſſeſſion, gifts, which 'unite the right and poſſeſſion, ſhall not be 'good, unleſs they be recorded.'

The ſtatute, thus expanded, makes the remedy tranſcend the limits by which the evil intended to be prevented is defined, directly oppoſeth the deſign of its authors, and to him, who is now criticiſing this interpretation, appeareth to be a monſtrous abſurdity. for, *uno flatu*, the legiſlature, according to this interpretation, hallows the fraud which it damns. retention of the right, when the poſſeſſion is reſigned, is as much a fraud as retention of the poſſeſſion, when the right is reſigned; and more dangerous, becauſe to guard againſt this fraud is more difficult than to guard againſt that; but, if this interpretation prevale, when the right was given, and, with it, the poſſeſſion reſigned, the gift, not in writing, and recorded, was void, and the poſſeſſion muſt be reſtored; a doctrine ſaid to be ſanctified by ſupreme authority.

If ſlaves, delivered to the huſband, in conſideration of marriage, more truly than ſlaves, delivered to a purchaſer in conſideration of money paid, may be ſaid to have been given, the forementioned ſtatute, if it comprehend ſuch a gift, is, by force of the other, enacted in the year one thouſand ſeven hundred and eighty-ſeven, mentioned in the anſwer, confined in its operation to gifts of ſlaves, whereof the former owners had, notwithſtanding ſuch gifts, remained in poſſeſſion.

The plaintiffs counſil objected, that the intermarriage of the defendents father and mother,

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at which time the right of the former, if any he had, originated, doth not appear to have been prior to the reſtraining ſtatute, and if it were, as by the facts ſtated in the bill and admitted by the anſwer it might have been, poſterior, that ſtatute would not aid the defendent.

To which is anſwered,

firſt, againſt the plaintiffs, the intermarriage would be preſumed to have been poſterior, if to prove or preſume it had been neceſſary, becauſe, if the contrary had been true, they could have proved it. but it was unneceſſary, for,

ſecondly, this ſtatute is a declaratory law, and, although it ſeem retroactive in a manner, yet is it not obnoxious to cenſure, as thoſe laws, which are reprobated, becauſe looking, at the ſame time, behind as well as before, like* *Franc' Bacon. Janus, they attribute energy to rights before they had exiſtence, inflict puniſhments for actions before they could be known by the perpetrators of them to be criminal, and the like. a declaratory law, in its aſpect towards the paſt, hath nothing ſo abſurd or truculent. it ſhews the meaning of the former law, according to which it ought to have been underſtood at its ſanction, and muſt be underſtood in future, but ſo as not to perturb ſettlements by judicial ſentences. it doth not ordain any new conſtitution; but is an interpretation, and conſequently cōēvous with the law interpreted, in the ſame manner as if the ſubſtance of the one had been

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in the other originaly. *lex declaratoria omnis, licet non habet verba de praeterito, tamen ad praeterita, ipsa vi declarationis, omnino trahitur. non enim tum incipit interpretatio cum declaratur, sed efficitur tanquam contemporanea ipsi legi.* Franc' Bacon *de augment' scient,' lib'* VIII, *cap'* III, *aphor'* 51.

So that a gift of slaves in consideration of marriage, accompanied with a resignation of the possession, if it must be called a gift, is sufficient, without registration or even scripture, to transfer the dominion.

But, say the plaintiffs, a gift, or any other disponing act, which is essential to such translation, is not admitted, and cannot be proved, ever to have existed; and, if not, they conclude that the defendent can not have a title; for, then, as they added, the case is no more than this: a father, when his daughter was married, delivered slaves to her husband, and did not demand restitution of them from him, during his life time, not so long however as three years; all which might have happened, and the father might nevertheless have retained the property.

This conclusion, in which the plaintiffs counsil seemed to acquiesce, with full persuasion that it is legitime, is believed to have been formed with temerity, and not to be deducible from sound principles.

Although

Although evidence of the particular words uttered by father and huſband in the treaty, of which an alliance between them was the ſubject, is not and can not be produced, we muſt not hence infer that the parties were mute during the tranſaction. when we ſee the huſband removing, with his wife, to his own manſion and domain, from thoſe of the father, her filial portion, delivered by him,—removing ſlaves, perhaps cattle, things needfull and convenient for houſekeeping, and ſo forth,—and when we ſee the huſband, during all his lifetime afterwards, exerciſing over theſe ſubjects, with the licenſe, the powers, of an uncontrouled owner, and this with the knowledge of the former owner,—evidence cannot be requiſite to convince us, and therefore we venture to aſſume, that ſome pact or other intervened; and that this pact muſt have been, either that the huſband ſhould reſtore the ſlaves to the wifes father conditionaly, or ſhould reſtore them in all events, or that, not obliged to reſtore them at all, he ſhould have the property of them in himſelf.

The plaintiffs would load the defendent with the obligation to prove, by writen evidence or oral teſtimony, the facts on which her title muſt have been eſtabliſhed,—perverſely—for preſumption favoureth her title ſufficiently, to throw on the plaintiffs the burthen of labouring to prove facts by which the credit of that preſumption would vaniſh:—cruely, as well as perverſely;

the defendents age, if it equal, doth not exceede ten or eleven years, of which ſeven had elapſed, before ſhe, deprived of one parent by death, and, by colluſion of the other with a ſtepfather, worſe than completely orphanized, is cited to prove tranſactions which were before her birth.

That a conditional reſtitution of the ſlaves was contemplated in the ſuppoſed pact between the father and his daughters huſband, when they were delivered, is barely imaginable. the plaintiffs indeed, quoting ſome words from the fathers teſtament, writen ſeveral years after the marriage, would inſinuate, that he never intended to diſpoſe of the ſlaves ſo that her huſband would have more than a life eſtate in them. but what the teſtator did or ſaid, at that time, cannot be evidence of any fact derogatory from the marital right, and deſerves leſs, if it could otherwiſe deſerve any, attention, when he is obſerved, in the ſame teſtament, beſtowing on his other daughter her portion abſolutely, the only apparent reaſon for which difference ſhews him to have been ſuſceptible of a duplicity, which ought to detract from his credit.

Was then the pact a mere ſimple loan, implicating a right of reſumption in the lender, whenſoever he ſhould be pleaſed to demand the ſubject, or did the pact transfer the property of the ſubject to the huſband; of which pacts one is neceſſary to be preſumed, every other being excluded by hypotheſis?

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The pact, if it were not a loan, muſt have transfered the property, et vice verſa.

When of two propoſitions, of which one is true, but of which one only can be true, neither is affirmed by certain proof, that which preſumption favours muſt prevale.

Preſumption here favoureth the propoſition, that the pact transfered the property, ſince that effect may be wrought with as little diplomatic formality in the caſe of a ſlave as in the caſe of a horſe, an ox, and the like. for,

firſt, the huſband merited the property, having performed what in legal eſtimation was equivalent to that property, and therefore owed not reſtitution;

ſecondly the ſlaves were delivered to the huſband by the father, as the plaintiffs are underſtood to have admitted by the bill. tradition of the ſubject, the right to which is transfered, typifies a tranſition of that right and the conſent of the owner with more emphaſis than any mode of transfering dominion heretofore invented; and,

thirdly, the huſband, during all his life time retained poſſeſſion of the ſlaves, employing them in his ſervice, and enjoying the fruits of their labour.

From theſe topics the preſumption, that the father transfered the ſlaves to the huſband, is ſo

imperative of our aſſent that we cannot withold it, ſince the plaintiffs have not, on the contrary, proved the ſlaves to have been lent.

If, ſuppoſing no conventional words to have been ſpoken by father and huſband, apt to transfer the property of the ſlaves, we admit only to have intervened a delivery, ſimple otherwiſe than as it was connected with the motive to it, by the father, this with acceptance and fruition by the huſband was ſufficient to vindicate the title of the latter. the will of the parties is all that is eſſential naturaly to tranſlation of dominion, and occurrences manifeſt that will in this caſe. if herds, flocks, ſupellectile ware, culinary utenſils, and other perſonal property, had been, as probably they or ſome of them were, delivered and removed at the ſame time with the ſlaves, no man would have made a queſtion whether the property of theſe chatels was transfered to the huſband, and yet, if the ſtatutes of 1758, and 1787, which are not conſiderable in this tome of the diſquiſition, be praetermitted, the property of ſlaves, whatever be their number, if poſſeſſion of them be delivered in performance of any contract, may be transfered with as little juridical ceremony as a ſingle quadruped, or article of houſe or kitchen furniture.

After all that hath been ſaid in this and ſimilar caſes, in every one of which the ſtatutes of 1758 and 1787, ſo often mentioned, ſeemed by, not only counſil but, judges to be of deciſive importance,

portance, thoſe ſtatutes were introduced impertinently. the ſtatutes apply to the caſe of a DONOR REMAINING in poſſeſſion,—to the caſe of one who having DISPONED the right, RETAINED poſſeſſion; but in this caſe, if there was a gift, the DONOR did not REMAIN in poſſeſſion, but, having DISPONED poſſeſſion to the DONEE, is pretended to have RETAINED the right.

The court therefore would have diſmiſſed the bill; but the parties, in caſe of a deciſion, in affirmance of the defendents title, having propoſed, that an account of the ſlaves and their profits be taken, doth adjudge, order and decree, that the plaintiffs do diſcover the names of the ſlaves which were delivered by the defendents grandfather to her father on his marrige, and of their increaſe, and render an account of the profits of the ſaid ſlaves ſince the death of her father, and deliver ſuch of the ſlaves as ſurvive, and pay the ſaid profits, to the defendents guardian, for her uſe, an account of which profits commiſſioners are appointed to examine and adjuſt, and to report, with the names of the ſlaves to the court; ſaving to the plaintiff Suſanna her rights, if any ſhe have, derived from her former huſband.

BETWEEN,

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PARKE GOODALL and JOHN CLOUGH,

plaintiffs,

AND,

JOHN BULLOCK, the younger, *defendent*,

A WRIT of *fieri facias*, for ſatisfaction of a judgment, rendered by Hanover county court, in an action, which the defendent had proſecuted againſt his father, of the ſame name, for 497l,' 1s,' 11d,' 3q,' with intereſt and coſts, was delivered, in may of the year 1792, to the plaintiff John Clough, a deputy of the other plaintiff, who was ſheriff of Hanover, to be executed.

The plaintiff John Clough, by that authority, ſeiſed the whole eſtate of John Bullock, the father, and ſold it, for 206l,' 3s,' 6d,' to the defendent, who was higheſt bidder, in june, 1792.

In january or february, 1795, William L' Thompſon applied to the defendent for ſettlement of an account of taxes, fees, &c. amongſt which was the plaintiff John Cloughs bill of the commiſſion, clamed by him from the defendent, for ſerving his execution againſt his father. the defendent then refuſed to enter upon the ſettlement, unleſs the plaintiff John Clough ſhould be preſent, and deſired Thompſon to appoint a time, when thoſe three parties ſhould meet together, at the defendents houſe, for adjuſting this buſi-

neſs,

neſs, alleging, that, as he conceived, the plaintiff John Clough was not entitled to ſo much, as he had charged, for commiſſion. at the ſame time, the defendent, who had enquired of Thompſon whether the plaintiff Clough had returned the execution, which enquiry was anſwered uncertainly, ſaid he wiſhed the plaintiff not to return it until the ſettlement.

This fact, namely, that the defendent ſaid he wiſhed the plaintiff John Clough not to return the execution before the ſettlement, is teſtified by a ſingle witneſs, and was ſaid not to be proved, becauſe the defendent, as was ſuppoſed, contradicted it by his anſwer, ſworn by him to be true. but the anſwer doth not contradict the teſtimony. the bill ſtated, that the plaintiff in the judgement, now defendent, who, in june, 1792, bought all his fathers property, when it was expoſed to ſale by the *fieri facias*, and who acknowledged the receipt of it by a certificate, at the ſame time, that is in june, 1792, deſired and requeſted the plaintiff John Clough, to retain the execution, and not deliver it into the clerks office, until they ſhould have an opportunity of making a ſtatement and ſettlement. to this the defendent anſwers in theſe terms: 'he poſitively denies that he re-'queſted the complainant Clough to retain the 'execution, and not deliver it into the clerks 'office, until they ſhould have an opportunity 'of making a ſtatement and ſettlement, nor did

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'he uſe any expreſſion [that is, as the court un-
'derſtands it, uſe any expreſſion, at that time,
'to Clough] having any tendency to keep up
'the execution; on the contrary, he poſitively
'avers, that he requeſted m'r Clough to return
'the execution, and that he often repeated the
'requeſt, before he made the motion for the
'judgement now enjoined.' all this may be true; and yet the depoſition of the witneſs, that the defendent, in a converſation between them, 32 or 33 months afterwards, ſaid to a collector, 'he 'wiſhed John Clough would not return the ex-'ecution until the ſettlement between him and 'the defendent,' may be true likewiſe. if the fact here conteſted, that is, the defendents conſent to the plaintiffs retention of the execution, had been denied by the anſwer, in direct oppoſition to the teſtimony, the latter, accredited by probability, from the confeſſedly true circumſtances of the fathers inability to diſcharge more of the judgment, and from the conſequential inſignificance of a return; from the enquiry whether the precept had been returned, and from the unſettled account of the commiſſions, would outweigh the former.

Upon this occaſion, the court obſerved the danger, to which a plaintiff expoſeth himſelf, when, in propounding interrogatories, he requireth a defendent, as is done in almoſt every bill in equity, to admit or deny facts, which the plaintiff could, otherwiſe, prove or diſprove ſa-

tisfactorily,

tisfactorily, by a ſingle witneſs to each; for where a defendent affirmeth or denieth a fact, of which he is required to diſcover the truth or falſity, and of which to give teſtimony in his anſwer he is compelled by the plaintiff, the matter controverted muſt be in *aequilibrio*, if either a greater number of witneſſes do not contradict the anſwer, or coincident circumſtances do not add a praeponderating momentum to the teſtimony of a ſingle contradicting witneſs; whereas if a diſcovery be not required, a defendent is not bound to anſwer upon oath, and, againſt his anſwer, whether on oath or not, in ſuch a caſe, the ſimple teſtimony of one credible witneſs is affirmed to be prevalent over the anſwer; in other words the anſwer is no more than a partys allegation without oath.

To return from this digreſſion—at a time, for the plaintiff John Clough to attend, appointed by the defendent, when a final ſettlement was completed, and at other times, the defendent acknowledged, that he did not expect to get any thing more from his father—that, in truth, his father then had no eſtate—adding, that impriſonment of his fathers body, which was all that his creditors could now take, would be diſtreſsing to the defendent. and here one might expect he would have reſted. yet,

On the 7th of may, 1795, upon a motion on his behalf, the court of Hanover county fined the plaintiff Parke Goodall, for the uſe of the

defendent,

defendent, (a) 264l,' 8s,' 9d,' for the plaintiff John Cloughs default in neglecting to return the *fieri facias*, in auguſt, 1792, as the writ required; and condemned him to pay the fine with coſts.

This procedure was authorized by the ſtatute in 1791, reciting, that ' doubts have ariſen in ' what manner judgement ſhould be rendered ' againſt any ſheriff, coroner, or ſerjeant of a ' corporation, who ſhall fail to return an execu- ' tion to the office from whence it iſſued, on or ' before the return day thereof;' and enacting, ' that, where any writ of execution, or attach- ' ment for not performing a decree in chancery, ' ſhall come into the poſſeſſion of any ſheriff, ' coroner, or ſerjeant of a corporation, and he ' ſhall fail to return the ſame to the office, from ' whence it iſſued, on or before the return day ' thereof, it ſhall be lawfull for the court, ten ' days previous notice being given, upon the mo- ' tion of the party injured, to fine ſuch ſheriff, ' coroner, or ſerjeant of a corporation, at their ' diſcretion, in any ſum, not exceding five dol- ' lars, per month, for every one hundred dollars

contained

(a) Upon what principal, and by what ratio, this fine was calculated doth not appear by the ſentence. if the one were 290l,' 18s,' 11d,' 3q,' which remained unſatisfied of the debt recovered, and the other five *per centum per menſem*, the fine would have ſomewhat exceded 464l.' if the principal were the whole debt recovered, the words of the ſtatute, ' it ſhall be lawful to fine the ſheriff in any ſum, not exceding five dollars per month, for every hundred dollars CONTAINED in the judgement' would have authorized infliction of a fine ſomewhat exceding 794l.' of the fine, actualy inflicted, that it might have been greater ſeems the beſt apology for the hyperbole.

'contained in the judgement or decree, on which 'the execution or attachment, ſo by him detain-'ed, was founded, and ſo in proportion for any 'greater or leſſer ſum, counting the aforeſaid 'months from the return day of the execution or 'attachment to the day of rendering judgement 'for the ſaid fine.'

The plaintiffs counſil objected, that the fine was not appropriated by the ſtatute, to the uſe, although it was recoverable on the motion, of the party injured; affirming, that all fines, before the revolution, were payable to the king; and obſerving that now ſuch as were not differently devoted or aboliſhed were, by the conſtitution, transfered to the commonwealth.

This is incorrect. not all fines, but, only thoſe inflicted for offences againſt the government, were formerly payable to the king. the fine in this caſe is appropriated to the party injured, becauſe it is recoverable on the motion, that is, by the action, of the party injured. an action is a juridical vindication of that which the actor allegeth to be due to him. he, therefore, who hath the right to the action, hath, *per hypotheſin*, the right to the thing demanded—recovers that which is due to him.

The plaintiff Parke Goodall, the ſheriff, condemned for the mulct incurred by the default of his deputy, the other plaintiff, inſtituted, in Hanover county court, a proceſs, and obtained ſentence, againſt him, for reimburſement, but

conſenteth to ſuſpend the further proſecution of that demand, unleſs it ſhall become neceſſary by deciſion of the queſtions, now controverted,

Whether any fine, except a (b) conditional fine, ought to have been inflicted, for not returning the *fieri facias?* if the fine were exceſſive, or otherwiſe unrighteous, whether, in the language of the anſwer, ‘ any matter of equity be ‘ ſuggeſted in the bill, which can give to this ‘ court juriſdiction?’ and, whether ſuch matter, although not ſuggeſted in the bill, appear in the caſe, as will juſtify the courts interpoſition—give it juriſdiction?

The court diſcuſſed theſe queſtions in the following terms:

The neglect to return the precept was not, could not be, (c) detrimental to the defendent. he doth not even pretend it to have been ſo.

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(b) The court might have inflicted the fine conditionaly, reſerving power to abrogate the ſentence, upon the ſheriffs returning the writ, and making amends for any damages and coſts occaſioned by detention of it.

(c) How the neglect to return the writ, in this caſe, could have been detrimental to the preſent defendent, to whom the whole eſtate of his debitor bad been transfered, and who could get nothing more from him, is not diſcerned. the defendent cannot avoid the objection by ſaying he might have been required in a controverſy with ſome other creditor, to prove identity of the ſlaves taken in execution, the names of which, for enabling him and others to do ſo, the ſtatute requires to be endorſed on the writ; becauſe the debitors whole eſtate, which muſt include his ſlaves, whether their names were or were not endorſed, appears to have been ſold to the defendent: ſo that any proof requireable from him would have been exhibited by that creditor himſelf, when he ſhould prove the ſlaves, for which he was proſecuting his clame, to have been a part of the debitors eſtate before the ſale.

the neglect to return the precept, if it were not and could not be detrimental to the defendent, was not injurious to him. besides if William L' Thompson may be credited, the return of the *fieri facias* was retarded, if not by desire, with consent, of the defendent; and *volenti non fit injuria*. the sentence of Hanover court, authorized to inflict a fine on motion of a party INJURED only, inflicting that fine on motion of a party (d) NOT injured, is, therefore, a void act. and after answer filed, and no plea in abatement to the jurisdiction of the court, (for surely this answer deserveth not to be called a plea in abatement) this court is prohibited, by statute in 1787, ch' 9, to admit an exception for want of jurisdiction, or to delay or refuse justice. the defendents counsil, by these words, dictated to his client: 'this respondent cannot 'conceive the defence set up by the complainant 'Clough to be better in a court of equity than 'of law,' is supposed to have meditated an objection to this purpose: the statute, authorising the procedure by motion against the officer, who neglects to return a writ of execution or attachment, entrusted the court of common law with the discretive power, the power to moderate the fine; and the court of equity, controuling them in that discretion, in effect directly reversing a legal judgement,

(d) If the argumentation in the note next preceding be fallacious, which, however, it is not yet perceived to be, the sentence ought, as is conceived, not only to have affirmed the defendent to be a party injured, but, to have specified the injury: and without such affirmation and specification, this court ventures to presume the defendent to be a party NOT injured, and, at law as well as in equity, not intitled to the fine.

judgement, would uſurp appellate arbitrary juriſdiction. which objection, if to liſten to it, in the form, not of a plea in abatement, but, of an anſwer, be not prohibited, is repelled thus: the execution was returned in june, 1795. the return put the parties in the ſtate in which they ought to be—the ſtate in which return of the execution in june, 1792, would have left them, and in which if they had been left, the officer would not have incurred a penalty. but the court of common law could not alter their adjudications, which were prior to the return—could not put the parties in the ſtate in which they ought to be. ſo that a fitter caſe for equitable relief than this caſe cannot be propounded. (e)

Again, according to the teſtimony of the witneſs Thompſon, when the plaintiff John Clough aſked the defendent, if he then, that is, at the ſettlement of their accounts, wiſhed the plaintiff John Clough to return the *fieri facias*? the defendent, in the language of the witneſs, 'ſignifi-' ed that it was immaterial—he, the ſaid Clough, ' might make his return, when it was convenient.' the defendent, if he ſaid ſo to the plaintiff Clough, proſecuting his motion for the fine afterwards, was guilty of a foul fraud. and in theſe days ſurely

(e) The court of equity relieves againſt the forfeiture, in caſe of a mortgage, after a judgement in ejectment for poſſeſſion of the land; relieved, before application to that tribunal was by ſtatute rendered unneceſſary, againſt the penalty after a judgement for it in an action of debt upon a bond. why may not that court relieve againſt the fine or penalty in this caſe?

ſurely the rectitud: of this courts interpoſition in the caſe of a fraud,—a fraud not appearingto have been known to the county court,—will not be reprobated. it would have been venial in the eyes of Edward Coke.

Moreover Hanover court, in their ſentence, were as ſevere almoſt as they could be, condemning one to pay more than eight hundred and eighty dollars, for an omiſſion by which no man could looſe ſo much as the hundredth part of one dollar; and this too, notwithſtanding the paragraph of the ſtatute, which authorized the condemnation, taught them that they ſhould exert their power with diſcretion—diſcretion, in the language of grammarians, a verbal noun, from *diſcernere*, i,' e,' to perceive, or note, a difference, ſuggeſting, by its etymon, the requiſite diſcrimination in the cenſure of human actions, and intimating that the penalties to be incurred for them ſhould be analogous to the malignity of them, not inflicted with draconic rigor.

A ſhort review of the principles whence is derived the power exerciſed by the court of equity, when it exonerates intirely from penalties, or alleviates them, may be here expedient for juſtifying that exerciſe, not only in all caſes of voluntary conventional aſſumption, but, in ſome caſes of legiſlative impoſition, of penalties.

Sympathy, fellow-feeling, experienced early and univerſaly, ſeems a natural affection. *homo*

ſum:

ſum: humani nihil a me alienum puto. Terentii heautontimor.' it diſpoſeth every man, not perverted by the trade of rapine, or of what in cant-phraſe is called ſpeculating, to approve, at leaſt in theory, the praecept, 'all things whatſoever ye would that men ſhould do to you, do ye even ſo to them;'—a ſentiment, which the ſpirit of juſtice exhales, and which the miniſters of juſtice ought upon every occaſion to inculcate.

Exaction of the penalty, denounced or ſtipulated for non-performance of a duty, in every caſe where it would be *ſtricto jure* demandable, would contravene that divine praecept.

Agricola, bound to carry 100 meaſures of corn, which he had ſold, and for which he had received the price, and to deliver them on the firſt day of may, to Mercator, in a warehouſe at Alexandria, doth not deliver them, for which failure, in terms of the obligation, he is obnoxious to the penalty of five hundred dollars. the warehouſe is burned next day, before the commodity could 'ave been uſed or diſponed; ſo that it would, in caſe of accurate performance, have periſhed in the combuſtion. in this caſe, the people, whoſe ſyſtem of juriſprudence would allow Mercator to recover his penalty, beſides profiting by ſalvation of his corn, which remains unimpaired in the garner of Agricola, though his default occaſioned it, can have derived little benefit from that philological erudition, by which the manners of men are poliſhed, and their ſentiments refined.

The

The corn, deſtined for a tranſmarine market, is not put on board, ſo that the veſſel performs the voyage, without a full lading. the product from ſale of what was exported is, by mean of an accidental ſaturity, not equal to the freight; ſo that here too, Mercator is a gainer—a gainer (f) by how much his loſs would have been greater if the burthen of the veſſel had been complete.

A cargo, deliverable on the firſt day of may, which arrives not until a week afterwards but as ſoon as the buyer could be prepared to receive it, is refuſed.

In theſe caſes the penalties, if any were menaced by clauſes for that purpoſe in the contracts, would be ſtrictly forfeited, but, upon what principle, we will not ſay with what grace, could they be demanded?

They could not be demanded conſcientiouſly, to make reparation of damage for a wrong. no damage was ſuſtained. reparation and damage are correlatives. if the one exiſt not, the other cannot be due.

The penalties could not be demanded, to make atonement for an offence againſt ſociety, by failure to perform a moral duty. in that caſe the *piaculum* is due to the public, if to any; certainly not to a private citizen; although the defendent

(f) Ciceros *magnum vectigal ſit parſimonia*, in his 6 paradox, is tranſlated, by engliſh lexicographers, 'a penny ſaved is a penny got.'

dent ſeemeth to have clamed it, by theſe words in his anſwer: 'it is a neglect of duty, to which 'the ſaid Clough has been much accuſtomed.' nor were comminations of penalties, for failures to perform private duties, invented for preſervation of good or reformation of bad manners.—men rarely, if ever, in their ordinary dealings, are ſtudying ethics.

Yet in ſuch caſes, the courts of law formerly condemned the party delinquent to pay the mulct, enormous as it was. they could do or ſuppoſed they could do nothing leſs. they, the *lex loquens*, were bound to pronounce the ſentence which the law preſcribed, though barbarous it ſeem. the contract, which, obliging parties to perform it, is a law to them in theſe inſtances, preſcribed the ſentence, that the penalty for non-performance muſt be paid.

In ſome of the caſes ſuppoſed, and others, which will occur to an attentive auditory, he, who might have been ruined by anothers fidelity, is not only ſaved by his infidelity, but would be enriched by the penalty, which is demandable by ſtrict adhaeſion to the letter of the contract. the law enjoins performance, and is deaf to deprecation. *leges rem ſurdam, inexorabilem eſſe,—nihil laxamenti nec veniae habere*—ſaid the Vitellii, Aquilii, and the ſons of Brutus, *Livii hiſtor,' lib' 11, cap' 3, 4.*

But is not ſocial happineſs rationaly conſulted, by confiding to ſome the power to mitigate legal ametrical ſeverity?

The law, if its text condemn one, for neglecting to do what he had obliged himſelf to do, which neglect is, not only not detrimental but, beneficial to another, nevertheleſs to pay the ſame penalty as it would have condemned him to pay, if the defaúlt, inſtead of being fortunate, had been detrimental in the extreme, ought, in ſuch a criſis, to be dumb as well as deaf. if how to ſilence it on ſuch an occaſion ſeem a *dignus vindice nodus*, juſtice, if we could, aſſiſted by epic or dramatic machinery, introduce her in a viſible form, like Pallas, whom Aeſchylus fabled to have appeared in the caſe of Oreſtes, would indicate, Horat.

that he, who would have been unfortunate, if a default had not happened, ought not to be doubly fortunate by the default; (g)

and further, if the default had not been intirely compenſated by the fortunate eſcape of loſs,

(g) For Agricola to arrogate a merit from his own default, becauſe it was fortunate to Mercator, would be futile. but for Mercator to have the corn by the default, and to have his penalty too by the default, whereas he muſt have been without both in caſe of no default, would be abſurd. the deſign of the law compelling payment of penalties for non-performance of contracts was that the delinquent parties ſhould make retribution, and thereby do juſtice. the law is the ordinary miniſter of juſtice. when the law, executing the praecepts of juſtice, exacts the penalty, although no detriment, for which the penalty ſhould be the retribution, had emerged, the law thwarts th deſign of juſtice, which then, by its extraordinary miniſter, aequity, controuls the law.

juſtice, ſuſpending her balance, and putting the detriment and penalty in oppoſite ſcales, and taking out of that which contained the latter, until the beam ſhould ſettle in a horizontal poſition, (h) would ſignify that ſhe approved the liberal and benign doctrine inculcated in the court of equity, that forfeitures, intended to compenſate detriment, are irrational, becauſe, at the times when they are fixed, they cannot be ſubjects of iſometrical computation; and that they are odious, becauſe, being extenſive enough to cover the detriment in any event, they muſt be extravagant in almoſt every event.

This is believed to be the rationale of the daily practice of relieving againſt forfeitures, by the court of equity, which, if no detriment hath been ſuffered, exonerates from the forfeiture, intirely, and, if detriment hath been ſuffered, exonerates from ſo much of the forfeiture as excedes the detriment. by which accommodation parties are put into the ſtate in which they ought

to

(h) If, as has been ſuppoſed, the party, who hath not ſuffered any detriment by the default, be not entitled in equity to the penalty; he ought to take only ſo much of the penalty as is equal to the detriment, if any he hath ſuffered. a penalty threatened for not performing a contract is not like a wager, in which the whole ſtake is lucrative. this was the primary and the ſole object of the adventurers. they ſubmit to the juriſdiction of fortune, an arbiter blind to merit and demerit. whereas, in a contract, the object is not pure lucre, but, a commerce, mutualy beneficial. the parties intend to perform, not to forfeit. ſometimes, when they foreſee probability, that performance may be intercepted, or may be not eligible, reſorting to calculation, they adjuſt the penalty by an aequation of it with the detriment. but when a penalty doth not appear to have been the reſult of calculation, the emblem of juſtice is an index ſignifying a requiſite aequilibrium of wrong and reparation, and a conſequent defalcation of penalty.

to be, neither gaining nor loſing more than they would have gained or loſt if no default had been; the ſtate in which they would have provided, by the contract, they ſhould be, if the quantum of detriment, to be occaſioned by the default, could then have been aſcertained exactly. and thus the court of equitys ſentences in relieving againſt forfeitures, are genuine interpretations of the parties words, and apocalypſes of the ſpirit which prompted the words,

The defendents counſil, when a motion was made to diſſolve the injunction which had been awarded, to coerce him from ſuing forth execution in ſatisfaction of his judgement, affirmed, that the power of the court of equity to relieve againſt penalties and forfeitures, did not extend to the caſes of penalties and forfeitures inflicted by ſtatutes, although inflicted ſolely for availment of private citizens. for which diſtinction a plauſible reaſon cannot, as is conceived, be aſſigned, ſince the vigor of obligation to pay the ſtatutory mulct, and of the obligation to pay the conventional mulct, is unqueſtionably derived from the ſame ſource, conſent of the obligors. that conſent indeed is not yielded in the ſame manner. but this difference, if influential, would favor the relieving power, in caſe of the ſtatutory, more than in caſe of the conventional, mulct, becauſe the conſent was ſignified, in the latter, by an act of the party himſelf, in the former, by an act of his repreſentative, the legiſlature.

Upon

Upon principles herein before ſtated, an officer, ſentenced to pay a fine for not returning a writ of capias ad ſatisfaciendum, or an attachment in execution of a decree in chancery, who, returning the precept after the ſentence, ſheweth, as ſatisfactorily as hath been done in this caſe, that the creditor had not been damnified, would be intitled to like relief as is afforded by the following decree:

That the injuctions, which were awarded to reſtrain the defendent and the plaintiff Parke Goodall from ſuing forth executions of their judgements, reſpectively, be perpetual.