(XXVIIIth YEAR.) THE (No. 1447.)

MARYLAND GAZETTE.

THURSDAY, JUNE 3 1773.

Duceris ut nervis alienis mobile lignum.
HOR.

Thou thing of wood, and wires by others play'd.
FRANCIS.

THE Citizen in a former paper expreſſed his expectation, that "lawyers would not be wanting to undertake a refutation of Antilon's legal reaſoning, in favour of the proclamation," and ſignified it to be *his* deſign to examine the meaſure, on the more general principles of the conſtitution. His expectation I am induced to believe from various circumſtances, from occurrences extrinſick to the laſt performance publiſhed with his ſignature, and from the many peculiar marks with which the work abounds, has not been diſappointed. The artifice of this ſhifting management obliges me to enter into a minute detail, and in this to repeat ſome paſſages of my former letters, for the purpoſe of giving a plain view of the ſubject, which my adverſaries have endeavoured to perplex by their cavils, and obſcure by their declamations: for I am perſuaded that the better the meaſure, which has been branded with the character of an arbitrary tax, is underſtood, the more will its legality, and expediency appear.

When the late inſpection law expired, as there remained no regulation of the fees of officers, ſo would they have had it in their power to commit exceſſive exactions, if there exiſted no competent authority to reſtrain their demands, or if ſuch authority did exiſt, and was inactive. If ſuch authority exiſted before the temporary act was made, it of courſe revived on the expiration of this act, and no declaration, or reſolve of the lower houſe could prevent the exerciſe of it; becauſe if the authority was competent, its competency was derived from the law, which can't be abrogated, altered, or in any manner controuled, but by an act of the whole legiſlature. The queſtion relates to *old*, or *conſtitutional* officers, who are ſupported not by ſalaries, but by caſual fees, whoſe incomes are not fixed by ſtipend, but turn out to be more or leſs according to the ſervices they perform. As the offices are *old* and *conſtitutional*, and thus ſupported by incidental fees, ſo is the right, to receive ſuch fees, *old*, and *conſtitutional*. There have been, as will appear hereafter, different regulations of theſe fees at different periods, none of which remained, when the late inſpection law expired. The officers, being entitled to theſe rewards for their ſupport, they could not be guilty of * *extortion* merely for receiving fees—when they perform ſervices. They could not commit extortion, but by taking *larger* fees than they ought, and conſequently, without ſome poſitive rule, or ſtandard, it would not be extortion, if an officer ſhould exact *any* fees for his ſervices. In this ſituation, when there was no regulation of fees, no reſtriction of the demands of officers, the proclamation iſſued, with the profeſſed deſign of preventing the exceſſive exactions of officers, and for this purpoſe ordered, that no officer ſhould receive *greater* fees, than the rates ſettled by the then laſt regulation, under pain of the Governor's diſpleaſure, which rates were the moſt moderate of any, that had before been eſtabliſhed, and in conſequence of the falling of the inſpection law, leſs beneficial to the officers. Such in ſubſtance is the proclamation. It has, however, been objected, that it did not proceed from the *profeſſed* deſign of preventing extortion; but the *real* motive was the benefit of the officers, and the time, when it iſſued, is urged as a proof, that this was the motive. The rectitude, or impropriety of the meaſure is not to be determined by profeſſions, or imputations, but by its effects. Officers, without ſettled rates of fees, would be under no legal reſtriction. The preſent regulation contains *no enforcement of payment from the people*, the officer being *left* to his *legal remedy*. When the inſpection act was in force, his remedy was by execution. This effect of the new regulation can't be denied, viz. that the officer, being removeable, is reſtrained, by the threats of the perſon, who has authority to remove him, from receiving beyond the rates preſcribed, and without this regulation, would have it in his power to demand, and receive fees, not only to the extent of the rates, but beyond it. The little ſuggeſtion, introduced by a puerile dialogue, that a party might have the ſervice done, and refuſe payment for it, if he thought the demand not reaſonable, has been anſwered, by ſhewing that an officer would not have been bound to perform a ſervice, without payment at the time of performing it. Whence then the benefit to the officer by the reſtriction reſulting from the proclamation? and if a benefit to the officers can't be ſhewn, and the reſtriction can't be denied, how is the profeſſed deſign of the proclamation, productive of the very effects explained by it, refuted by imputing to it a different motive, with which its effects do not correſpond?

* *Extortion is committed, when an officer, by colour of his office takes money, or other valuable things, which is not due, or more than is due, or before it is due.*

As to the time, when the proclamation iſſued, the new regulation was then if ever proper, becauſe the former then ceaſed, and the two houſes having diſagreed on the ſubject there remained no regulation at all, ſo that as to this imputation,

"Cùm ventum ad verum eſt, ſenſus moreſque repugnant,
"Atque ipſa utilitas, juſti propè mater et æqui." *

But the grand objection to the new regulation of fees is, that it *impoſes a tax upon the people*, and conſequently is competent only to the legiſlature. Whether this idea be proper or not, I ſhall conſider. If when fees are due, a regulation, allowing the officer to receive them at a certain rate, be a tax, there can be no legal regulation of fees, *in any inſtance*, except by the legiſlature; but if it can be proved, that there may be legal regulations of fees *without* a legiſlative act, then the idea of tax is improper. I have already obſerved, that the lords, and commons, and the upper, and lower houſes of aſſembly, *ſeparately*, have allowed fees to be taken by their *neceſſary* officers, and ſince taxes *can't* be impoſed but with the *concurrence* of *all* the branches of the legiſlature, I have concluded, that *theſe* fees are *not* taxes; but the propoſition that taxes can't be laid, but by the legiſlative authority, is denied by my adverſaries, who, in order to evade the direct conſequences of the inſtances put, add this reſtriction, "ſaving ſuch caſes, as are *warranted* by "long immemorial, and uninterrupted uſage." This exception, they have not attempted to prove, and therefore have not advanced any reaſoning for particular diſcuſſion; but their principle may be aſcertained, and it will be incumbent upon them either to give up their exception, or to maintain this poſition, that there is *an authority to tax*, *warranted* by long, immemorial, and uninterrupted uſage, *diſtinct* from the legiſlative; for the exception being applied to qualify the general, or major propoſition that "taxes can't be "laid, but by the legiſlative authority" neceſſarily implies, that there *may* be *taxes lawfully* eſtabliſhed by *ſome other*, than the legiſlative authority, and the exception being expreſſed to reſult from "ſuch caſes, as "are *warranted* by long, immemorial, and uninter"rupted uſage," it remains to be proved, that there are ſuch *warranted* caſes of *tax*, or the exception ſtands on a mere ſuppoſition to evade the force of my concluſion, without any proof to ſupport it. Now I call upon my adverſaries to prove, on the principles of our conſtitution, that there are caſes of *tax*, *warranted* by uſage, *known* to have received *no* legiſlative ſanction, but to have been eſtabliſhed by the lords or commons, the upper or lower houſe of aſſembly, ſeparately, or by the judges. If they fail in their proof, my argument, that "no tax can be impoſed except by the le"giſlature; but fees have been lawfully ſettled by "perſons not veſted with a legiſlative authority, con"ſequently the ſettlement of fees is not the impoſition "of a tax," remains in full force. If the original ſettlement of any fees was a tax, it continues a tax, if it was not a tax, it can't become ſo from the acts of officers, and parties receiving, and paying the fees. The *origin* of it being *aſcertained*, and not left to *preſumption*, if the ſettlement of fees was originally a tax, and therefore unlawful in the commencement, the uſage, or, in other words, the repeated acts of paying, and receiving, can't make it lawful: for it is an eſtabliſhed maxim of law, if, on enquiry into the legality of cuſtom, or uſage, it appears to have been derived from an illegal ſource, that it ought to be aboliſhed—if originally invalid, length of time will not give it efficacy.

It is, indeed, ſtrange that they, who object to the argument from precedents, ſhould rely altogether upon them in ſupport of a doctrine ſo extraordinary, as that the legality of even taxes, not laid by the legiſlature, may be maintained by the precedents of their having been paid, and received! For what conſtitutes uſage; but the frequent repetition of the ſame acts, or examples for a long time? Wherefore, I preſume, the ſettlement of the fees of *old*, *conſtitutional* offices, *to which the right of fees was annexed when the offices were created* is not a tax, and that the lawful allowance of fees to their neceſſary officers by the lords &c. who are not veſted with a legiſlative authority, is proof of my poſition. Saying that theſe allowances are founded on the law of parliament, which is part of the general law, amounts to no more than ſaying, they are lawful; but the proof is wanting, that either branch of the legiſlature, *alone*, can impoſe taxes on the ſubject by the law of parliament.

The judges are not governed by the law of parliament; they have no authority to tax the ſubject; but their allowance of fees to their neceſſary officers is lawful. It appears by the 21ſt Hen. 7th, that an officer was entitled to receive a fee of a perſon acquitted of a felony *on this principle*, that it was aſſigned him by the *order*, and *diſcretion of the court*; and with reaſon, and good conſcience, for his trouble, charge, and attendance on the court with priſoners. This is a pointed authority, and I believe, has never been impeached. In the caſe of Shurley and Packer, Hill. 13 Jac. Coke obſerved, that by the ſtatute of Weſtm. 1ſt. no ſheriff could take money for ſerving proceſs, and that the receipt of money for ſuch ſervice would be extortion; but *that the judges may allow him fees*, and with ſuch allowance he may receive them, and he cited the 21ſt Hen. 7th.

Hawk. 1 book, cap. 68, ſpeaking of the ſtatute of Weſtm. 1ſt, obſerves that "it can't be intended to be "the meaning of it to reſtrain the *courts of juſtice*, "in whoſe integrity the law always repoſes the higheſt "confidence, *from allowing reaſonable fees* for the la"bour, and attendance of their officers: for the *chief* "*danger* of oppreſſion is from officers being at liberty "to ſet their own rates, and make their own de"mands; but there can't be ſo much fear of theſe "abuſes while they are *reſtrained* to known, and *ſtated* "*fees, ſettled by the diſcretion of the courts*, which will "not ſuffer them to be exceeded without the higheſt "reſentment." Do my adverſaries deny this authority, have they any diſtinction to evade the force of it, or do they admit it? If it is admitted, it directly applies to, and ſupports, my poſition, that the ſettlement of fees, and reſtraining officers to known, and ſtated rates, by the allowance, and order of the judges, is not taxing the ſubject. To prove that fees can be ſettled only by act of parliament, or antient uſage, they have quoted a paſſage from Bac. abrid. 2 Vol. 463; but in the next page of the ſame book, this paſſage, which they have omitted, occurs, "ſuch fees as "have been *allowed* by the *courts of juſtice* to their "*officers*, as a *recompence* for *their labour and attendance* "are eſtabliſhed fees," a poſition which correſponds with Hawkins's doctrine. Coke's expoſition of the ſtatute de tallagio non concedendo is again cited. "All *new* offices erected with *new* fees, or *old* offices "with *new*, fees, are a tallage (or tax) put upon "the ſubject, and *therefore can't be done without com*"*mon aſſent by act of parliament*." Whenever therefore, a fee is a tax, it can't be eſtabliſhed *without an act of parliament*. This was the reſult of my major, or general propoſition, which they have endeavoured to reſtrain by the exception, ſuch caſes as are warranted "by long, immemorial, uninterrupted uſage," an exception directly repugnant to Coke's opinion. When fees are taxes, only the legiſlature can lawfully grant them; but that fees are not taxes, in the inſtances I have put of allowances made by the lords &c. and the judges, the legality of theſe allowances is a plain proof. What conſtruction then ſhall the paſſage cited from Coke receive, that it may be reconciled with the other authorities? "new offices erected with new fees," my adverſaries admit are out of the queſtion, that fees may be ſettled or aſcertained at a time ſubſequent to the inſtitution of the offices, the caſes, I have cited, prove, and if the conſtruction of the paſſage from Coke be carried ſo far as to include theſe ſettlements, or rates, he is contradicted by thoſe caſes, and appears to be inconſiſtent with himſelf, not only from the caſe of Shurley and Packer, but the doctrine he has laid down in his 1ſt inſt. which I ſhall preſently conſider. This being the ſtate of the matter, there is a neceſſity for putting ſuch a conſtruction upon his words, as may reconcile his opinion with the other authorities, or it will be overruled by them. Fees may be due, without a preciſe ſettlement of the rate, and the right to receive them may be coeval with the inſtitution, or firſt creation of the offices, as in the caſe of our old, or conſtitutional offices; when ſuch fees are ſettled, they are not properly *new* fees, and therefore a regulation, reſtraining the officer from taking beyond a ſtated ſum for each ſervice, when he was before entitled to a fee for ſuch ſervice, is not granting, or annexing a *new* fee to an *old* office; but when the officer is not entitled to receive a reward from the party in the execution of an old office, or is entitled to a certain ſum from him, the granting of a fee, when nothing was before due, or augmenting the ſum the officer was before entitled to, creates a *new* fee, according to Coke's expoſition. When a man, in conſideration of receiving an adequate recompence for the ſervice, performs work, and labour for another at his requeſt, without a ſpecial contract fixing the ſum to be paid, he, for whom the ſervice is done, becomes indebted. If the parties to the contract afterwards aſcertain the ſum due for the ſervice, this ſettlement does not create a *new* debt, but fixes, or regulates the quantum or rate payable on the original contract. In this ſenſe I underſtand Lord Coke, and admit that, when fees are ſettled, they ought not to be augmented—when ſervices ought to be performed without a fee, a fee ought not to be granted; but oppoſe any conſtruction contrary to the authorities I have cited to eſtabliſh this point, *that when officers are entitled to fees, not preciſely ſettled as to the quantum or rate*, they may be fixed, or aſcertained by the authority of the judges incident to their functions, or offices, and that it is not a juſt objection to their exerciſe of this authority that "the ſettlement of fees is the impoſition of taxes "on the ſubject."

Co. Litt. 368 is alſo quoted, to this effect, "it is "provided by the ſtatute of Weſtm. 1ſt? That no

* *When we appeal to truth's impartial teſt,*
"Senſe, cuſtom, ſocial good, from whence ariſe
"All forms of right, and wrong, the fact denies."
FRANCIS.