of fees in this instance: your inference, "*therefore a similar power is vested in the governor of this province*," I deny. The inference will not be granted, unless you prove, that the King by his sole authority, contrary to the express declaration of the commons, has settled the fees of officers belonging to the courts of law, and equity, in Westminster-hall, that is, hath laid new fees on the subject, at a time when they were no longer paid out of the royal revenue, but taken out of the pockets of the people. The fees of officers have been established for many years past in this province by the legislature, and the act establishing them was made temporary, that on a change of circumstances an alteration of the fees, if expedient, should take place; that this was the *sole* motive of making the inspection law temporary, the Citizen has not asserted, nor has Antilon denied it to be *one* of the motives. An inspection of the votes and proceedings of assembly in 1739 will evince, that the principal reason of giving a temporary existence to that act was to alter, and correct the table of fees on the expiration of it.

"31 May 1739.—The conferrees of the upper house "acquaint the conferrees of the lower house, that the "upper house could agree to no law to establish offi- "cers fees, but what should be *perpetual*, and were "ordered not to proceed to consider of any fees, till "the sense of the lower house on that point should be "made known."

"2 June 1739.—This house (the lower) having "taken into consideration the report of their mem- "bers appointed conferrees concerning the officers fees- "bill, and the proposal made by the conferrees of the "upper house, of making that bill *a perpetual act*, do "unanimously agree, that it would be of the *most dan- "gerous and destructive consequence to the people of this "province to make such act perpetual.*"

Judge now reader what was the principal intention of the delegates in making the inspection law temporary; but if fees may be lawfully settled by proclamation, "*when there happens to be no prior provision, or "establishment of them by law*," then may the fees originally settled by a temporary act, be upheld by prerogative, and made perpetual, and the province be left exposed to the same dangerous, and destructive consequences, which were apprehended from a perpetuity of the law.

Antilon asserts, "That the Citizen has been con- "strained to admit, that the judges in England have "settled fees." This assertion I must take the liberty of contradicting; if the reader will be at the trouble of turning to the Citizen's last paper, he will there see, that the Citizen, after quoting Antilon's words, "*The "courts of law and equity in Westminster-hall have like- "wise settled fees*," asks, by what authority? "Anti- "lon, says he, has not been full, and express on this "point"——"Admitting even, (continues the Citi- "zen) that the chancellor, and judges have settled "fees, by virtue of the King's commission, at the re- "quest of the house of commons, without the sanction "of a statute, yet the precedent by no means applies "to the present case."——Is this being constrained to admit that the judges in England have settled fees? Once for all, Antilon, I must inform you, that I shall never admit your assertions, barely on the strength of your *ipse dixits*, unsupported by other proof; I perceive your drift, but I know my man, and will not suffer myself to be intangled in his snares.

"*Vane* ligur, frustraque animis elate *superbis*,
"Nequiequam patrias tentasti *lubricus* artes.

——————"Proud Antilon,
"On others practise thy deceiving arts;
"Thin stratagems, and tricks of little hearts
"Are lost on me——————

"*The judges in Westminster-hall have settled fees.*" A full enquiry into this matter, I am inclined to believe, would expose Antilon's disingenuity, and shew how inconclusive his inference is——"*Therefore the gover- "nor may settle fees*," that is, *impose fees* on the inhabitants of this province. It has been already observed, that the King originally paid all his officers, and that nothing can be more consistent with the spirit of our constitution, than that he, who pays salaries, should fix them. "Fees are certain perquisites allowed to "officers, who have to do with the administration of "justice, as a recompence for their labour, and trou- "ble, and these are either ascertained by acts of par- "liament or established by *ancient usage*, which gives "them *an equal sanction with an act of parliament (D)*." Coke in his comment on Littleton, sect. 701, observes, that it is provided by the statute of Westminster 1st, that no sheriff, or any other minister of the King, shall take any reward for doing his office, but that which the King alloweth. That the subsequent statutes having permitted fees to be taken in some instances, under colour thereof, abuses had been committed by officers: but that they cannot take fees, but such as are given by act of parliament. "But yet such reasona- "ble fees as have been allowed by the courts of jus- "tice of *ancient time* to inferior ministers, and attend- "ants of courts for their *labour* and *attendance*, if they "be asked and taken of the subject, is no extortion." It does not appear to me, that the judges have ever imposed *new fees* by their sole authority. Hawkins says, "the chief danger of oppression is from officers "(E) being left at liberty to set their *own* rates, and "make their *own* demands," therefore the *law* has authorised the judges to settle them.——

What law, common, or statute, has either empowered the judges to impose *new* fees? Antilon asks, how are *these settlements*, and the admission of *their legality* (take notice, reader, I have not admitted *their legality*) to be reconciled with the position, *that fees are taxes?* Before you can reasonably expect an answer to this question, it is incumbent on you, Antilon, first to fix a certain, and determinate meaning to a *settlement of fees by the judges*, and to explain in what manner, upon what occasions, and at what time, or times, the judges have *settled* fees; then shall we have some fixed, and certain notion of those settlements. After you have taken all this trouble, the information may be pleasing (man is naturally curious, and fond of having mysteries unfolded) but the inference, "*Therefore, the go- "vernor may legally impose fees by his sole authority*," will be rejected for this plain and obvious reason. Fees in this province have been generally settled by the legislature; so far back as 1638, we find a law for the limitation of officers fees; in 1692, the governor's authority to settle fees was expressly denied by the lower house; it was voted unanimously by that house, "*That "it is the undoubted right of the freemen of this province "not to have ANY FEES imposed upon them but by the "consent of the freemen in a general assembly.*——The speaker of that house attended by several members went up to the council chamber, and informed the governor, and members thereof, "That no *officers fees* "ought to be imposed upon them, but by the consent "of the representatives in assembly, and that this li- "berty was established and ascertained by several acts "of parliament, the authority of which is so great, as "to receive no answer, but by repeal of the said sta- "tutes, and produced the same with several other au- "thorities; to which the governor's answer was, that "his instructions from his majesty were to *lessen*, and "*moderate* the exorbitancy of them, and not to *settle* "them; to which Mr. speaker replied that they were "thankful to his majesty for the same, but withal de- "sired that *no fees* might be *lessened* or *advanced* but by "the consent of the assembly, to which the governor "agreed." An act was passed that very session for regulating officers fees.

Here was a formal relinquishment of the claim to settle fees by prerogative; from that day to this, the claim has been constantly opposed by the representatives of the people, and in consequence of that opposition, laws have been made from time to time for the limitation of officers fees; these laws ought to be considered, as so many strong, and express denials of the proprietary's authority to settle fees, and as so many acknowledgments on the part of government of its illegality. Precedents, I know, have been brought, to shew, that the power hath been exercised; so have many other unconstitutional powers; the exercise doth not prove the right, it proves nothing more, than a deviation from the principles of the constitution in those instances, in which the power hath been illegally exercised. Precedents drawn from the mere exercise of a disputed authority, so far from justifying the repeated exercise of that authority, suggest the strongest motive for resisting a similar attempt, since the former temporary, and constrained acquiescence of the people under the exertion of a contested prerogative is now urged as a proof of its legality. As precedents have been mentioned, their proper use, and misapplication, cannot be better displayed, than by a quotation from the author of the considerations. After perusing the passage with attention, the reader, I think, will be disposed to treat Antilon's argument drawn from the precedent of New-York, with great contempt, perhaps, with some indignation, should he have reason to believe, that the considerations were wrote by this very Antilon. "When instances are urged as an authori- "tative reason for adopting a new" (or an illegal measure, the reason is applicable to either) "they are "proved to be more important from this use of them" (the countenance and support they are made to give to arbitrary proceedings) "and ought therefore to be "reviewed with accuracy, and canvassed with strict- "ness; what is proposed, ought to be incorporated "with what has been done, and the result of both "stated, and considered as a substantive original ques- "tion, and if the measure proposed is incompatible "with the constitutional rights of the subject, it is so "far from being a rational argument, that consistency "requires an adoption of the proposed measure, that "on the contrary, it suggests the strongest motive for "abolishing the precedent; when therefore an instance "of *deviation* from the constitution is pressed, as a "reason for the establishment of a measure striking at "the root of all liberty; though the argument is in- "conclusive, it ought to be useful. Wherefore, if a "sufficient answer were not given to the argument "drawn from precedents, by shewing that none of the "instances adduced are applicable, I should have very "little difficulty in denying the justice of the princi- "ples, on which it is founded; *what hath been done if "wrongful confers no right to repeat it*; to justify op- "pression and outrages by instances of their commis- "sion, is a kind of argument, which never can pro- "duce conviction, though it may *their* acquiescence, "whom the terror of greater evils may restrain; and "thus the despotism of the east may be supported, and "the natural rights of mankind trampled under feet. "The question of right therefore doth not depend "upon precedents, but on the principles of the con- "stitution, and hath been put on its proper point al- "ready discussed," whether the prerogative may lawfully settle fees in this province. Antilon has laid great stress on the authority of the English judges to settle fees, and from that authority, has inferred a similar power in the governor of this province; he has not indeed explained, as it behoved him to do, the origin, nature, and extent of that authority, nor has he shewn, in what manner it has been exercised.

No man, I believe, hath a precise, and clear idea of a settlement of fees by the judges, from what Antilon has hitherto said on that subject. What does it mean? I ask again, does the authority to settle, imply a power to lay *new fees*? The judges it is allowed cannot alter, or increase the *old* fees; they have not therefore, I presume, a discretionary power to impose *new*; if their authority should extend to the imposition of *new fees*, why in a variety of instances, have fees been ascertained by act of parliament? Where was the necessity of enacting those statutes, if the judges were empowered *by law*, to settle, that is, to impose fees by their own, or delegated authority? Here seem to be two distinct powers in the same state, capable of the same thing; if co-equal, they may clash, and interfere with each other; if the one be subordinate to the other, then no doubt, the power of the judges must be subject to the power of the parliament, which is, and must be supreme; if subject to, it is controulable by parliament. The parliament, we all know, is composed of three distinct branches, independent of, yet controuling, and controuled by each other; no law can be enacted, but by the joint consent of those three branches; now, if in case of disagreement between them about a regulation of fees, the power of the judges may step in, and supply the want of a law, then may the interposition, and authority of parliament in that case be rendered useless, and nugatory. Suppose the leading members of one branch to be deeply interested in the regulation, that branch will probably endeavour to obtain, if it can, an *exorbitant provision* for officers: the other may think the provision contended for, too great, they disagree; the fee-bill miscarries; the power of the judges is now left at liberty to act, a necessity for its acting is insisted on, and they perhaps establish the *very fees*, which one branch of the legislature has already condemned as unreasonable and excessive. Suppose the judges should hold their seats during pleasure, suppose them strongly prejudiced in favour of government, might not a bad administration, if this power were submitted to, obtain what establishment it pleased for its officers? Should the judges discover a disinclination to favour the views of government, the removal of the stubborn, and the putting in of others more compliant, would overcome that difficulty, and not only secure to government for a time, the desired establishment of fees, but render that establishment perpetual. That a bold, and profligate minister will embrace the most barefaced, and shameful means to carry a point, the creation of twelve peers in one day, "*on the spur of the occasion*," is a memorable proof. A settlement of fees by proclamation, I still presume to assert, notwithstanding the subtile efforts of Antilon to prove the contrary, to be an arbitrary, and illegal tax, and consequently thus far similar to the ship-money assessment: my Lord Coke's authority warrants the assertion and his reasoning will support the principle; all new offices erected with new fees, or *old* offices with *new* fees, are within this act (de tallagio non concedendo) that is, they are a *talliage*, or *tax* upon the people.

I never asserted, that our offices relating to the administration of justice were not *old*, and *constitutional*; but I have asserted, that we have *no old*, and *established fees*; that fees settled by proclamation, are *new* fees, and that consequently they come within the act, and Coke's exposition of it; and therefore, as *new* fees are taxes, and taxes cannot be laid but by the legislature, except in the cases heretofore mentioned; fees settled by one, or two branches thereof, are an unconstitutional, and illegal tax. What Coke observes, says Antilon, in his comment on the statute (de tallagio non concedendo) "may be fully admitted, without "any proof, that "*every settlement* of *fees* is a tax;" therefore, I presume, some settlement of fees is a tax, what settlement of them, Antilon, is a tax? If fees settled by act of parliament are taxes, why should they cease to be taxes, when settled by the discretionary power of the judges? if when settled by the latter authority, they come not within the strict legal definition of a tax, are they on that account less oppressive, or of a less dangerous tendency? According to Antilon, the words, "*new fees are not to be annexed to old offices*," mean, "*that the old and established fees are not to be "augmented or altered but by act of parliament*;" yet, in "*the old offices, fees may be settled.*" That is, if I comprehend him right, *new* fees may be established by the judges "*for necessary services, when there happen to be "no prior provision made by law for these services.*"

How is this interpretation of my Lord Coke's comment to be reconciled with his position, that fees cannot be imposed but by act of parliament, and with the doctrine laid down in ad Bacon already recited? The *legality* of the proclamation, Antilon has said, is determinable in the ordinary judicatories; does it follow therefore, that the measure is *constitutional?* On the same principle the assessment of ship-money would have been constitutional; for the legality of that too was determinable in the ordinary judicatories, and it was actually determined to be legal by all the judges, four excepted; if in that decision the parliament, and people had tamely acquiesced, proclamations at this day would have the force of laws, indeed would supersede all law.

Antilon's next argument in support of the proclamation is derived from the necessity of ascertaining precisely by the judgment, or final decree, the costs of suit, which are sometimes wholly, sometimes partly composed of the lawyers, and officers fees. If fees are taxes, and taxes can be laid by the legislature only, that *necessity* (admitting it for the sake of argument to exist) will not justify the settlement of fees by proclamation, who is to be judge of the necessity? Is the government? then is its power unlimited. Who will pretend to say, that the *necessity* is *urgent*, and *invincible?* Such a necessity only, can excuse the violation of this fundamental law; "*The subjects shall not be taxed "but by the consent of their representatives in parliament.*" "If necessity is the sole foundation of the dangerous "power" of settling fees by prerogative, when there is no prior establishment of them by law, "it behoves "those, who advise the exercise of that power, not "only to see that the necessity is indeed *invincible*, but "that it has not been occasioned by *any fault* of their "own; for, if it is not the one, the act is in no way "justifiable, and if the other, that very necessity, "which is the excuse of the act, will be the accusation "of those, who occasioned it, and in place of being

(D) *Bacon's Abridg. 2d Vol.*

(E) *Antilon has acknowledged, that two counsellors were interested in the settlement of fees: he is, perhaps, one of them: he has also acknowledged, that he advised the proclamation as expedient and legal: he has held up the proclamation as the standard, by which the courts of justice are to be guided in awarding costs: if all this be true, has he not endeavoured to set his own rates? and make his own demands?*