

...ual, against the intention of the de-
...ered in enacting the temporary law.
...h such was the motive, as the ob-
...making the act temporary, yet
...ired, the authority, which excited
...on of the temporary law, of course
...question is, whether there was an
...to settle the rates of the fees due to
...h I have already considered. The
...the temporary act might justly be ad-
...regulation, and very properly, be
...erate of any, that had ever been
...the whole regulation could not be
...it gave the remedy of execution to
...any time before, or after the expira-
...ary act, the tables of fees, without
...been corrected, or altered, by the
...not by the delegates alone, but the op-
...erary act did not, in any degree,
...limited duration. Whilst in being,
...other authority; when it ceased, all
...pre-existent authority ceased.
...the judges have authority to settle the
...en fees are due, but their rates not
...no occasion for the parliament to as-
...variety of instances. If the judges
...well as the parliament, there would
...distinct powers capable of the same
...equal," they may clash. If the le-
...shall disagree, and in consequence
...there should not be a regulation
...the rate of parliament may
...y, should the want of a legislative
...ied by the authority of the judges.
...ament may have peculiar motives for
...arious instances—when laws are en-
...the services of officers, the merit of
...very properly considered, and the re-
...Peculiar penalties, which judges
...the general principles of law, may be
...t on many occasions. Judges may
...practice in their courts; but the
...has been regulated by parliament in
...and without doubt, may be in all
...parliament, and the judges having a
...et, which might clash in the exercise
...difficult to require a serious answer.
...ts or three branches, and they must
...establish laws, and how the judges, by
...ant of a legislative regulation when
...a tender the intervention of parlia-
...is beyond my conception. The in-
...liament, declaring the legislative will,
...such a declaration constituting law,
...interposition of parliament. The
...ges will prevail against the declaration,
...the branch of the legislature, because
...out-lookable only by a law, and such
...of law is not a law, nor has it any de-
...ronal efficacy either in prohibiting the
...legislative authority, or in conferring
...an authority, not before legal.
...ould the leading members of one
...branch be deeply interested in the re-
...that branch would probably endea-
...an exorbitant provision, which another
...ill not do. The two branches disagree,
...ade. A necessity for the judges to act
...and they may, perhaps, establish
...perpetually, which one branch con-
...sultive—judges who hold their seats dur-

...cient to defray their daily expences. Such an altera-
...tion, I am persuaded, would be productive of a very
...great diminution of the fees both of officers, and law-
...yers, by promoting the dispatch of juridical business,
...and, of course, by discouraging litigiousness.
...Objection: Though the legality of the late regula-
...tion of fees be determinable in the ordinary judicato-
...ries, and course of proceeding, yet that does not prove
...any difference between this regulation, and the levy
...of ship-money: for the legality of ship-money was de-
...termined in the same course.
...Answer. This, at best, is a weak cavil founded on
...disingenuous misrepresentation. When the regulation
...of fees was pronounced to be an imposition of tax, as
...arbitrary, and tyrannical, as the ship-money, I stated
...each measure, to prove their dissimilarity. I shewed
...that the proclamation issued with the professed design
...of preventing excessive exactions—that it restrained the
...officers—that there was no enforcement provided or at-
...tempted against the people—that the officer was to seek
...his remedy, where every other creditor is entitled to
...relief—that the effect of the regulation, as to the peo-
...ple's payment, depended upon its legality determin-
...able in the ordinary judicatories, there being no de-
...gree of enforcement, except what should be derived from the
...law in its regular, ordinary course.—That King Charles
...having determined to govern without a parliament had,
...against the fundamental principles of a free constitution,
...recourse to the prerogative of raising money on the sub-
...ject, and in pursuance of this scheme of tyranny, the
...ship-money was raised on the whole kingdom, that
...writs, directing the collection of the tax, required the
...sheriffs to execute the effects of the people, and to re-
...commit to prison all who should oppose it, there to re-
...main till the King should give order for their delivery;
...but these expressions, occurring in the statute, "its le-
...gality is determinable in the ordinary judicatories,"
...are selected by the objectors, as if the proof of the
...transactions of the ship-money tax, and of the regula-
...tion of fees, having different principles, and effects,
...relied merely on this circumstance; and moreover, the
...egregious misrepresentation of my argument turns
...out to be of no use in the application, through their
...extreme ignorance of the subject: for the question,
...respecting the legality of the ship-money tax was not
...determined in an ordinary judicatory, and course of
...proceeding.
...Objection. There has been no such necessity on ac-
...count of the costs, as will justify the regulation of
...fees: for if fees are taxes, and taxes can be laid by
...the legislature only, the necessity of settling the rates
...ought to have been urgent, and invincible, which was
...not the case; but if the necessity is invincible, they,
...who advised the regulation, ought to have seen, that
...it was not occasioned by their fault; for if so, the ne-
...cessity is their accusation, and not their excuse. The
...blame of the supposed necessity is imputable to those,
...who apprehended a diminution of income by a legal
...regulation of fees, and have exposed their country, to
...all the difficulties, and distresses which the wanton
...exercise of arbitrary power was sure to introduce.
...This objection is principally drawn from some publi-
...cations, on the affair of the embargo in the 6th or
...7th year of the present King.
...Answer. The occasion, and nature of the necessity
...to ascertain the fees, the officers were entitled to, for
...the purpose of enabling the judges to award costs, ad-
...minister justice, and execute the laws, have been fully
...explained, and the question, whether these fees are
...taxes, has been already discussed in this paper—the
...fixing of the rates of fees always due, I contend, is not
...a tax, and if not, the objection made on the hypo-
...thesis that it is, of course fails. The reasoning appli-
...ed, in the publications on the affair of the embargo,
...to that sudden, and peculiar necessity, which, if not im-
...mediately provided against, would endanger the pub-
...lick safety, it would be easy to prove, if not entirely
...impertinent, is quite foreign to our question. The
...necessity, I mentioned, is that ordinary obligation on
...those, who act in a judicial capacity, to discharge their
...duty. The necessity of awarding costs flows from the
...obligation the judges are under to give them by the
...statute law. The necessity of settling the rates flows
...from the obligation they are under by the same law to
...award certain costs. Whose fault it was, that a legis-
...lative regulation did not take place, in consequence of
...the disagreement between the two houses, if a question
...not determinable in any jurisdiction, or by any legal
...authority, neither branch being amenable to any
...superior court. Uncommonly indistinct must the ideas
...of the objectors be, who confound the authority of a
...branch of the legislature to propose, or reject, with the
...functions of ministers?
...On the question, which of the two branches was
...blameable, very opposite suppositions may be made,
...imputations cast, and with equal decency, and pro-
...priety. On the one side it has been supposed, that a-
...varice prevented the regulation of fees, because it
...would have been productive of a diminution of income
...—on the other side it may be alleged, that a very
...considerable diminution was agreed to, at least of one
...third, in the alternative to pay in money, or tobacco,
...and that the imputation of avarice might be cast by
...and that the imputation of avarice might be cast by
...men, disposed to find fault, and who have the arro-
...gance to expect, that their dictate ought to be a rule
...to govern the conduct of others, if a diminution of
...two thirds had been agreed to, and their proposition
...of a still greater reduction rejected—that if the regu-
...lation of the clergy, and officers had been established
...on the terms proposed by the upper house, general sa-
...tisfaction would have been given, and therefore this
...branch deserves no reproach, who offered their con-
...sent to a measure, which, if adopted by the other,
...would have been thus satisfactory—that this regulation
...was rejected through the influence of men, whose aim
...it was to create confusion, and popular discontents,
...which they have many opportunities of fomenting by
...their declamations and harangues, in which they
...affirm, with very little scruple, what may subvert the
...purposes of pleasing their vanity, magnifying their
...importance, celebrating their own pure, and immacu-

...late virtues, and gratifying their spleen against their
...political antagonists. A declaimer of this kind—
...“ Confidens, tumidus, adeo sermonis amari,
...“ Sifennas, Barros ut equis precurret albis.”
...“ hic, si plostra ducenta,
...“ Concurrantque fore tria fumera, magna sonabit
...“ Cornua quod vincatque tubas.” —†
...must speak with great energy, and persuasive force.
...Thus suppositions may be made, and imputations cast
...on either side; but they concern not the question
...whether the regulation of fees always annexed to old,
...or constitutional officers, not granting fees not before due,
...but fixing their rates, be a tax, or not.
...Objection. The council advised the regulation of
...fees. Such of the provincial judges as were of the
...council, concurred in the advice. The legality of the
...regulation may be questioned before them, as
...judges; but this question was, “in some degree,” pre-
...judged by the advice they gave in council. The court
...of appeals is constituted of the council, and the ques-
...tion may ultimately receive a decision in this
...court. The council in Nov. session 1770 declined giv-
...ing an opinion upon the question put by the lower
...house, “whether any officer had been guilty of ex-
...cessive extortion by the usual charges,” upon this principle,
...that “it might come before them for decision in the
...“ court of appeals.”
...Answer. Upon the principle of this objection, the
...judges ought to establish no rule, till the legality of it
...is brought in question before them by the contest of
...parties, because the rule would, in some degree, pre-
...judge the question of its legality, which a party may
...choose to advance, therefore no rules or ordinances
...ought to be made by the courts, till a case between
...A. and B. is brought before them, and lawyers heard
...pro, and con, on the legality of them. This objec-
...tion is, to be sure, very ingenious, though an obser-
...vance of the method suggested is liable to the dull ex-
...ception, that it would promote litigation, and a con-
...siderable consequential expense. The judges, without
...paying a just regard to the principle, have settled the
...rates of fees; they have occasionally informed them-
...selves, by impanelling a jury of officers. The rates of
...fees have been settled in consequence of a royal com-
...mission issued on the address of the commons—the
...commons in 1753 thought the establishment of fees,
...the proper means of preventing excessive exactions.
...Various orders, and regulations of practice have been
...established by the courts, frequent have been the con-
...ferences of the judges for the purpose of settling gener-
...al rules, and an uniformity of conduct. Judges have
...been called upon, in council, to advise their sovereign
...on questions of law. Judges, in inferior jurisdictions,
...have acted as judges, in the house of lords in the same
...cause. In all the cases put, the objection would apply
...with equal force; but, I suspect, he would be deemed
...to be rather an odd sort of a person, who should make
...it, in any of them—it would be a very difficult thing,
...such are the narrow prejudices of judges, to establish
...the liberal sentiment—expedit reipublice ut (non) sit
...finis utium, (it would be of public advantage to have
...no end to suits,) and bring into contempt the adage,
...miseria est servitus, ubi jus est vagum, (wretched is the
...slavery where the law is unsettled.) The question put
...by the lower house, and which the upper declined
...answering, related to the construction of an act of as-
...sembly, and transactions under it, whether certain
...charges were criminal or not, and consequently whe-
...ther penalties had been incurred, or not. The principle,
...on which the upper house acted, will best appear from
...their own words. The regulation of fees was in prospect,
...the question was put to obtain an answer, with retro-
...spect. The one to prescribe a rule for the future con-
...duct of officers, the other to draw a censure, of what
...they had done.
...Objection. Two of those, who advised the gover-
...nor, were interested, and if a suit be brought before
...twelve judges, and two of them plaintiffs, should
...those two sit in judgment on their own case, and de-
...liver their opinions in favour of their own claims,
...the judgment would be void. Besides in the present
...cases the other advisers might be swayed by the pro-
...spect of a remote interest. The governor, as chancel-
...lor, might decree his own fees, under his own regula-
...tion, or refuse to affix the seals, without immediate
...payment.
...Answer. This is putting one case, in the place of
...another of a very different nature. The advisers of
...the proclamation, restraining the officers, did not act in
...the capacity of judges; it flowed from the governor's au-
...thority over officers removeable by him, and as I have

...already said, his conduct was not to be directed by the
...votes of the majority of the advisers; they having no
...authoritative influence. I have already shewn that
...Lord Hardwicke had the advice, and assistance of the
...master of the rolls in settling the tables of fees, in
...which the fees, due to the latter, were included—that
...officers, and clerks of the courts have assisted the
...judges in their establishment of tables of fees. Their
...opinions were not binding, but their information was
...called for. The authority to regulate was reposed in
...the chancellor, and judges, and the establishments
...flowed from their authority. As to the supposition that
...the other advisers might be swayed by their prospects,
...it is of such a kind, that it may be applied on all occa-
...sions—it may be applied to the most violent dema-
...gogues, and experience would give it a colour. The
...absurdity in supposing, that the governor is included
...in a proclamation threatening those officers with his
...displeasure, who should not obey his orders, has been
...sufficiently exposed. If he should have occasion to sue
...for fees due to him as chancellor, he could not, in the
...court, where he is the sole judge. He receives his fees
...now, and would be equally entitled to receive them if
...the proclamation had not issued. This part of the
...objection is not more extraordinary, on account of the
...extreme ignorance it betrays, than on this, that the fee
...for the seals was the same in all the proposed regula-
...tions.
...Objection. Any person, the least acquainted with
...the arguments in favour of ship-money, and the dis-
...pensing power, will perceive that Austin's defence
...of the regulation of fees is a repetition, and revival of
...them “tricked off in a new dress to hide their defor-
...mity, the better to impose on the unthinking and
...“ unwary.”
...Answer. A person, the least acquainted with those
...arguments, may imagine they have been revived; but
...no one, well, or even a little acquainted with 'em, can.
...The assertion of the objectors is at random. They
...might as well have called the defence, a papal anathe-
...ma, or bull in cæna Domini—such imputations, un-
...supported by proof, would almost disgrace the charac-
...ter of a spouting declaimer, too contemptible to be re-
...garded.
...Objection. That the argument from precedents
...doth not prove the right; it proves nothing more than
...a deviation from the principle of the constitution, in
...those instances, wherein the power hath been illegally
...exercised—that the inference from the precedent in
...New-York ought to be treated with great contempt,
...perhaps, even with some indignation, and a pamphlet
...is quoted to shew, that the argument from precedents
...is inconsistent with the doctrine advanced by the au-
...thor of it. The quotation is too long to repeat here,
...and therefore I refer the reader to the Citizen's last
...letter.
...Answer. This pointless shaft hath been before
...thrown, without reaching the object, and “if I com-
...prehend it right,” there would be no difficulty in at-
...taining the quiver, whence it was supplied.
...“The use of precedents must be perceived, when
...the inconveniencies of contention, which flow from
...a disregard of them are considered, and especially
...when they are severely felt: when we reflect, that
...the intercourse of the members of political bodies,
...the measures of justice, in contents of private prop-
...erty, the prerogatives of government, and the rights
...of the people are regulated by them.” See the mes--
...sage from the upper house, December session 1765.
...But I most readily admit that, “if what has been
...done, be wrong, it confers no right” to repeat
...the wrong, that “oppression, and outrage can't be justi-
...fied by instances of their commission,” and that “if
...a measure be incompatible with the constitutional rights
...of the subject, it is so far from being a rational a gu-
...ment, that consistency requires an adoption of the
...proposed measure, that, on the contrary, it suggests
...the strongest motive for abolishing the precedent, and
...therefore when an instance of deviation from the
...constitution is pressed, as a reason for an establish-
...ment striking at the root of all liberty, it is inconclu-
...sive.”
...The precedents, I have cited, directly apply. I
...have not attempted to draw any consequences from
...them, in support of a “measure incompatible with the
...constitutional rights of the subject, or an esta-
...blishment striking at the root of all liberty.” The
...common law results from general customs, precedents
...are the evidences of these customs, judicial determina-
...tions and decisions the most certain proofs of them,
...and the arguments therefore from precedents, the
...practice of courts, the decisions of judges respectable
...for their knowledge, and probity, and from the con-
...venience of uniformity, are of great weight. I have
...proved that justice can't be administered, nor the laws
...duly executed without a settlement of the rates of fees,
...that an authority to settle them is necessary to the pro-
...tection of the people, who, if officers were not re-
...strained, would be exposed to the hazard of very great
...oppression. The conclusion, I contend, is not very ja-
...vous to the liberal sentiments, and generous views
...of those, who are adverse to the narrow restrictions of
...systematical certainty, and, if allowed to choose their ground,
...would, like Archimedes, undertake to turn the
...world, which way they please.
...“You knew me of old.” You have the advantage,
...if your memory hath not been impaired, for I did
...not know you, and yet Cimex, you have my wish,
...— ut, dique, deaque,
...Vestrum ob consilium, donent tonfore—
...take back your shaft, and preserve it. There may be
...a future occasion, for its use.
...Objection. If fees may be settled at one time, they
...may be increased at another, as happened in the year
...1739, when the fees of sheriffs were increased by pro-
...clamation.
...“may the powers divine,
...“For this same friendly assistance of thine,
...“Give thee a barber in their special grace.”