

clamation—we apprehend unconstitutional in the manner, and shadowed in the manner with the assigned reason to prevent extortion by the officers, in imitation of the practice of arbitrary kings, who in their proclamations, which have been declared illegal, generally covered their designs, with the specious pretence of publick good (W).” What part of the governor’s proclamation (I should be glad it were pointed out to the publick) doth, or can justify the apprehension, that is here declared to be entertained of it? Was it, or was it not—for the good of the people, that the officers should be restrained from acts of extortion and oppression? Was it, or was it not for the good of the people, to be indiscriminately allowed to discharge their fees of office in cash or tobacco, at their option? And that the planter should stand on the same fair and equal footing with the farmer, and be privileged to pay the officer, his dues, in money at the rate of 12½ currency, for every 100 wt. of tobacco, owing by him; and which at that time, at the expiration of the old inspection law, in 1770, and since sold, as I have been informed, and I believe with truth, transferred tobacco, from 18½ to 19½, currently; and crop tobacco, from 30s to 30 odd shillings, per centum? Was it, or was it not—for the good of the people to be enabled to pay at these easy rates; in case they inclined? and was it not manifestly to the dis-interest of the officer, to be constrained to receive at them (X). Wherein then, is the proclamation “shadowed”? Or, how doth it appear to have been issued, “with the specious pretence of publick good”? Doth it not actually give those advantages to the people, in the payment of the fees of officers, in case they incline to make use of them? and are not these, “advantages,” which the people had not generally, under the old inspection law? Which allowed them only to the farmer, but took them up from the planter; and would the people have been enabled to have paid the officers, on any other, or better terms, even had the new inspection bill passed into a law in the session 1770? Did that provide to give more than the alternative, which the proclamation expressly giveth? The publick are requested, to weigh well these questions, and then to pronounce upon them.

It the proclamation hath afforded these advantages to the people; no less beneficial hath it proved to them, in removing all grounds of litigation and contest between them and the officers, which must inevitably have ensued from the different rates, each would be inclined to annex to the service performed by the latter: nor doth the following resolve of the lower house, contribute in the sentiments of some men, to lessen, but rather to increase law suits in the community. Resolved “unanimously, that in all cases where no fees are established by law for services done by officers, the power of ascertaining the quantum of the reward for such services, is constitutionally in a jury upon the action of the party (Y).” Let us suppose then, a service requested by the party, and performed by the officer, in expectation of due payment for it: the party tenders, agreeably, with another resolve of the lower house, viz. “That the fees to be allowed to the several officers in this province, shall be as follow”—to wit; by the “new table (Z);” the officer insists on being paid agreeably with the “old table;” neither will depart a jot from the respective “tables,” adopted by them as their standard for the payment of fees, to compromise the matter between them: What’s the probable consequence? A law suit, if the amount of charge will reach to it; wherein, perhaps, neither of the “tables,” may be regarded by a jury in their verdict; or if regarded, another jury, on the like matter, may think very differently from the former jury; whereby, the point in controversy remains as unsettled as ever, and the people and the officers are left open to perpetual contest about the rates of fees, much to the detriment of the interests of each, and the disturbance of the peace of the community; but greatly to the advantage of our “state lawyers,” who pushed forward this publick resolve, for the promotion of their own, “private gains.” Is it for the good of the people, that endless litigation should be prevented having any foothold among them? If it is, and I guess, it will be denied but by a few; then it follows, that the proclamation, by establishing the most easy and equitable rates of fees, that ever prevailed in our province, for the career of suits among us; hath been much misinterpreted, and misrepresented to the publick, who ought ever to receive the justest and truest information of the nature and tendency of a measure, on which it is to pass judgment; and to view it through a fair and clear, and not through a clouded or foul medium: but not only hath the proclamation “been censured in outrageous terms “of resentment;” and the plain words of it, (quite different from their purport;) by a tortured construction, been made to mean, what they will not bear; but every friend to it, denounced a foe to the province: nay, the author of it, who dignifies the exalted station in which he presides, hath not been able to avoid the obloquy and defamation, of the thousand mouths, the thousand tongues, and iron lungs of some men:

“Oh place and greatness! millions of false eyes
“Are stuck upon the: volumes of report

(W) See votes and proceedings, Oct. 1771. p. 63. The “shadowed” part of this paragraph, (“with the assigned reason,” and “the manner” in which it is set forth) I frankly own is beyond my humble comprehension. It is both too low and too high for me:

“Migret in obscuris humili sermone tabernas:
“Aut dum vitat humum, nubes & inania captet.”

(X) And if so, a question arises—“Has not the right of the officer been broke in upon by the proclamation” (See votes and proceedings 1771. p. 65.)—I answer, not at all. “Voluntibus & assentibus non fit injuria,” is a maxim of the law.

(Y) See votes and proceedings 1771. p. 20.
(Z) See votes and proceedings 1770. p. 270.

“Run with their false and most contrarious quests
“Upon thy doings: thousand jeaps of wit
“Make thee the father of their idle dreams,
“And rack thee in their fancies!”

“No night nor greatness in mortality
“Can conjure Jeaps: back-wounding calumny
“The whitest virtue strikes! What king so strong
“Can tie the gall up in the hand rous tongue? (A)

“I was not (writes his excellency, (B) so rash as to promise, or languine to expect, that any measure I could pursue, would divert the aims of faction, or appease the rage of disappointment. The plain view of the address was, that the loss of the inspection law might be aggravated by the confusion and vexation, which would naturally arise from the total want of every kind of regulation. Let it be supposed that actions should be brought for the establishment of each fee, or that officers should be prosecuted for extortion, who would be benefited by the litigation? Not the community in general. Such contents would hardly be deemed by friends to the peace, welfare, and happiness of this province.”

“Twas for the very purpose, therefore, of regulating the conduct of the officers, in the article of their fees, to point out to them what they might, and beyond which they should not demand; that I issued my (shadowed, as you call it) proclamation;” “for it must be admitted, that without some rule to controul the demands of officers, there would be great danger of extortion, and of perpetual contest; the timid might submit to the most grievous oppression, and the turbulent refuse to pay the most reasonable demand (C).” Indeed, without such regulation of fees by proclamation, I do not clearly see how right and justice could have been fully administered in our courts: I will endeavour to explain myself: our judges and justices are bound by oath, “to do equal law and right to all the king’s subjects, rich and poor, according to the laws, customs, and directions of the acts of assembly of this province, so far forth as they provide.” (See the act for ascertaining the form of the oath of judge or justice, passed—1737. ch. 5.)

Now it is directed by perpetual laws of this province, as follows.

1st. “That security shall be given for payment of all officers fees, accruing by any suit commenced in any county court by the plaintiff, in case he doth not reside in that county; or in default thereof, or of his attorney’s signifying his intention of paying the same, to suffer non-suit.” This by act of assembly in 1715. ch. 48. sect. 12.—again,

2dly. “Any person or persons may order out process in their own names, without any titling from an attorney, such party or parties suing out the same, if non-residents within this province, securing to the secretary or the clerks of the several county courts, and all other officers their lawful fees.” This by act of assembly in 1716. ch. 20.—and further;

3dly. By act of assembly in 1731. ch. 15. It is enacted, “That from and after the end of this present session of assembly, all the several and respective officers within this province, shall be, and are, by virtue of this act, obliged, to draw out the particulars of their fee, in a fair legible hand, and in words at full length; and on failure thereof, such officer to lose such fees so expressed in words cut off or abbreviated. And that the several clerks of the several courts of record, register of the court of chancery, and register of the consistory court, within this province, shall be, and they are hereby obliged to deliver to the defendants, if required, full copies, in a fair legible hand, of all the costs of suit recovered against such defendant, under penalty of forfeiting and paying the sum of 2000 pounds of tobacco,” to be applied as this law directs.

And here I would fain be informed, how each of these acts, or the above recited parts of them, are to be complied with: Was there at present subsisting among us, no regulation or establishment of fees, by proclamation, for the guidance or direction of the conduct of the officers? The rates of fees, which prevailed at the passage of these laws, fell, as I apprehend, with the laws that gave them, at the time our first inspection law was enacted: the inspection law, with its rates of fees, hath since fallen: the “new table of fees,” framed by the lower house in the session 1770, hath no legislative sanction; and had not the prerogative of proclamation been happily interposed by the governing power in this emergency of our province, to give relief; it would seem to me, that the above acts of assembly must have lain dormant, or been suspended in their respective operations, or else that the judges must have given them efficacy and vigor, by adopting some regulation, or forming themselves, some rate of fees; or, otherwise, that there must have ensued among us, a failure of justice; to which, the constitution of our mother country, and that of our province, which is modelled after it, are utterly abhorrent. Thus the reader perceives, not only the expediency, but also, the necessity of the proclamation, at the critical time it issued; and marvels, without doubt, that it hath been held forth, to the publick, by some men, as a measure fraught with evils, which must prove ruinous to us all, if it be not speedily suppressed or withdrawn. “When magistracy explains itself by words, or by writings, which are the image of words; it is contrary to gentility as well as to reason, (saith a sensible writer,) to quit the exterior signs of a man’s thoughts, in order to search into his thoughts themselves; because, there are none besides himself, who know his thoughts: it is much worse, when his thoughts are good, to attribute to him those that are bad.” For, “that art of finding in what has naturally a good meaning, all the bad meanings, which a mind accustomed to false reasoning can give, is of no service to mankind; those who practise

(A) Shakespeare.

(B) See votes and proceedings, Oct. session, 1771.

(C) P. 85.

(D) See votes and proceedings, October sessions, 1771, page 85.

“it, resemble the ravens who shun living bodies, and fly on all sides in search of carcases.” The reader is left here to make the application of these passages, sensible as he must be, ere now, of the misrepresentations that have prevailed, in relation to the legality, the motive, the tendency, and effects of the proclamation among us: I now begin to be tired, I think of approaching toward a conclusion: I confess, I have tired myself; and I am thankful, that long since, I wearied the reader: however an objection or two to the proclamation, still remain, to be slightly observed on. And the principal one, is, “that it doth establish a tax on the people.” This, I deny; and my negation, is equal to another’s affirmation: it is incumbent therefore, on those, who maintain the affirmative, to adduce proof in support of this position, before it be admitted: assertion and proof are two very different things: as different, as fees and taxes; and between these, I discover a striking disparity, or I am much deceived: fees, I look on, to be compensations made to an officer, in consideration of a service performed by him: ‘tis the render of the service that doth—intitle to the compensation a reward; a right then to some compensation or reward, in consequence of a service performed; may evidently exist, prior to the rate, or regulation of the quantum of such compensation, which doth constitute, what, we call the fee; compensations therefore, or fees, may originate and subsist, exclusive of any legislative authority, to impose or grant them, which is held essential to taxation (D): So far then it appears, “that fees and taxes are clearly discriminated: fees, beside are incidental to office: taxes, not so: offices, the most ancient and constitutional, in our province, owe their rise, to the sole act and establishment of the proprietary, or his governor, here for the time being; in virtue of powers and authorities derived to them by grant from the crown, confirmed as we have seen, by act of assembly: taxes, the most ancient or modern that have been laid here, owe their rise, to the joint act and establishment, of the three component branches of our legislature, imposing them; by a positive law: fees being incidental to, or as, some chuse to call them, “the perquisites” of office, are constitutionally, and properly, rateable only, by the same or like authority, that established the office, and appointed the officer; but taxes, are solely rateable, by a different authority, whose power singly doth not extend to the erection of a state office: taxes are certain portions of property, which individuals pay into the hands of the publick, for the publick’s service; fees are certain rewards which the officer is entitled to receive of some individuals, to his own or another’s private use, for certain services rendered to the party: fees when certain, are sueable tot, and recoverable by process of a “indebitatus assumpsit, &c. when uncertain, by a “quantum meruit,” brought by the officer: but neither of these processes will lie for recovery by taxes: payment of these, is generally compelled, by distress or execution, provided in the law, which gives the tax: these instances, all these, in my weak opinion, that fees are not taxes; or taxes fees; utterly considered; but that they are of “different natures” and, not as some esteem them; “as indistinct, as water is in water (E);” nay, these considerations, have, I trust, shewn somewhat more; “in whom, the constitutional right and power of regulating the fees of office doth reside, and by whom it is to be exercised on fit and proper occasions.”

It might further be remarked here, but I doubt not the reader, hath long ago, made the observation; that the proclamation, which regulates the fees of officers with us, hath not by its context, or import, the least tendency to lay a tax on the people: it leaves them just as they were before it issued; as to any “compulsory charge,” or “payment to be enforced from them;” it most assuredly, then, is a very strange kind of tax, which obliges the people to pay “nothing” in particular to the officer, but “only restrains” him, from “exacting unreasonable fees” from them; and leaves him to the recovery of his reasonable fee by law against them; a fee, which goes, differently, on recovery as hath been said, already, from a tax; into the officer’s purse for his own private profit; and not into the publick’s, for its service. Nor, doth it, in reality, strengthen the argument, generally made use of against the proclamation, that “it prerogative may “rightfully regulate the fees agreeable to the law inspection law, it has a right to fix any other quantum;” if it has a right to regulate to one penny, it has a right to regulate to a million; for where does its right stop? At any given point? (F) I answer, yes; and let the sound sense of Horace, expressed in the following lines, confirm my assertion:

“Est modus in rebus; sunt certi denique fines,
“Quos ultra, citraque, nequit consistere rectum.”

For, though prerogative may rightfully adopt the regulation of fees under the old inspection law, a regulation formerly held just, reasonable, and equitable; a regulation established and confirmed by several successive acts of legislature; and which subsisted (I believe) among us, upwards of twenty years; nay, the prerogative may have a right, to fix other quantum, more beneficial to the people (as doth the proclamation at present, which giveth the alternative to the planter, as well as to the farmer); yet, it hath not a right, to establish a rate that must prove grievous to them; consequently, though it may well “have a right to regulate “to a penny,”—“yet, it may not have a right to re-

(D) “Taxation and representation are inseparable.” This position is founded on the laws of nature; it is more, it is itself an eternal law of nature; for whatever is a man’s own, is absolutely his own, no man hath a right to take it from him, without his consent, either expressed by himself or by his representative; whoever attempts to do it, attempts an injury; whoever does it, commits a robbery; he throws down the distinction between liberty and slavery;” and confounds the variant essences, or natures, of fees and taxes.

(E) Shakespeare.

(F) See address of the lower house in the votes and proceedings, of October session, 1771.