ed by it;" and to give it in evidence to main-
action, of an officer or eſtabliſh his claim,
ertainly affect them. To ſupport one of your
, you ſee, the proclamation *may* and *muſt* lie
evidence; to ſupport another of your poſi-
e proclamation *muſt not*, *cannot* be given in evi-
Was ever man ſo bewildered! prerogative, Sir,
dly be benefited by ſuch an advocate.
have been very full in your explanation of the
ph quoted by you from the charter; and we
cerely coincide with you in the aſſertion, that
tive by its ordinances "cannot oblige, bind,
e, or take away, the right or intereſt of any
n or perſons, of or in member, life, freehold,
s or chattels." We further agree with you,
is reſtriction at the cloſe of the paragraph,
d have been implied by law, had it not been
ted?" inſerted, we preſume, to prevent miſ-
ction from an ignorance of the law and conſtitu-
You ſeem to forget that you have maintained
e authority to rate and regulate the fees of of-
conſtitutionally in the proprietary or his gover-
y proclamation. Are not the fees of office,
come out of the pockets of the people, a part
r goods and chattels? and if the authority to
d regulate them is conſtitutionally in the pro-
y or his governor, do you not in ſubverſion of
arter inveſt his lordſhip with a prerogative to
e, bind, charge and take away the right and
eſt of the ſubject in his goods and chattels."
u ſay, the payment of the fees conſtitutionally
nd regulated by the proclamation, is optional
the people. To contend, that a conſtitutional
exiſts to rate and regulate the fees of office by
nation, and in the next breath to contend, that
ercife of ſuch conſtitutional power in the rating
gulating of the fees cannot bind or affect the peo-
a flat contradiction, and an abſurdity in terms,
nce is due to the exerciſe of every conſtitutional
and "Obedience is an empty name, if every
vidual has a right to decide how far he himſelf
obey." Whatever is legal prerogative, is the
the land, and every law carries with it an obli-
upon the ſubject. "In the exertion of thoſe
ogatives, ſaith judge Blackſtone, which the law
es him, the the king is *irreſiſtible* and *abſolute*, ac-
ing to the forms of the conſtitution." The pu-
ves of the crown through the medium of our
r you communicate to the lord proprietary. If
is lordſhip or his governor by virtue of a legal
gative, can conſtitutionally rate and regulate the
office, he is in the exertion of ſuch prerogative
le and *abſolute*, and the people muſt be affected,
and concluded by it. When therefore you affirm
oclamation in queſtion to be a conſtitutional ex-
of legal prerogative, your aſſertion that the
nt of fees rated and eſtabliſhed by it, is optional
people, becomes repugnant and abſurd. Where-
the proclamation is maintained to be an exerciſe
l prerogative, and every exertion of legal pre-
ve is compulſory upon the people; as it rates
gulates the fees of office, and the fees of office
e goods and chattels of the ſubject, it follows as
lubitable conſequence, that the proclamation in
on tends to "oblige, bind and charge the right
intereſt of the ſubject in his goods and chattels,"
a palpable infraction of the charter, and a ma-
vaſion of the property of the people.
now come to your obſervations upon Mr.
; we feel no reluctance to ſubmit to the rule, be
ts, as deciſive betwixt us; let it then ſtand as
t or criterion of legal prerogative. We ſhall en-
ur to ſhew, that you have miſtaken the ſenſe of
uthor, which underſtood, applies directly againſt

ether the proclamation was, or was not, benefi-
the people, has been already conſidered; there
neceſſity to repeat what has been before obſerved,
objection to the old table of fees applies to the
mation which attempts to ſet it up. The op-
ns of that table, and the colourable practices
it, have been pointed out, and if advanced with
muſt be deciſive againſt the proclamation, upon
ueſtion of tendency to the good or hurt of the
e.
come fairly at you upon your conſtruction of
Locke, we wave the arguments evincing the evil
ncy of the proclamation, and ſhall for argument
dmit, that the tendency of the meaſure was to
ublick good. The queſtion then between us is
Whether in Mr. Locke's idea the tendency of
roclamation to the good or hurt of the people is
adopted as the criterion to decide the legality of
an exerciſe of legal prerogative?
ore, Sir, we remark upon Mr. Locke, permit us
nt out a plain and obvious diſtinction, neceſſary
kept in memory, between the tendency of a *par-*
measure and the general tendency of the *power*
d. A particular meaſure may tend to the public
the *power aſſumed* may tend to the publick hurt.
roye it by examples. *A regulation of our fees*
l greatly tend to the good of the people, but if a
was aſſumed to make the regulation by a pre-
tion, the general tendency of *ſuch a power*
l be manifeſtly to the hurt and injury of the peo-
because it would tear up the conſtitution by the
and deſtroy *repreſentatives*. A *regulation* too of
lergy, upon moderate and equitable principles
d tend to the publick good; but ſurely the exer-
ſuch a power by the ſupreme magiſtrate only, by
e of prerogative, would for the reaſon ſuggeſted
roductive of the moſt dangerous and alarming
quences. Again,—It might tend to the publick
to ouſt the authors of particular offences from
enefit of clergy, which has often been done by
f aſſembly, but ſurely ſuch power will never be
ſted to the ſupreme magiſtrate only, to be exerci-
y virtue of prerogative. A *particular meaſure*
fore, may be beneficial, the *power aſſumed* to
ive.
. Locke was a bold intrepid advocate for the

rights and liberties of his country. He thoroughly underſtood the conſtitution, and generouſly employed his pen in tracing and pointing out the fundamental principles of it. He is often quoted upon conſtitutional queſtions, and his opinion, well underſtood, is generally deciſive—He very well knew that a publick good might reſult from *a particular meaſure* of government, but his veneration for the conſtitution was too great, his judgment too ſound and pervading to draw the fatal inference that therefore the *power aſſumed* muſt be legal prerogative.

You have nevertheleſs argued from the tendency of the proclamation to the good of the people that the *power aſſumed* to make it was an exerciſe of *legal prerogative*. You ground yourſelf upon a quotation from Mr. Locke; if the quotation applies, your argument is concluſive; if it does not apply, your argument falls to the ground. What then is Mr. Locke's poſition?—"If there comes to be a queſtion, ſays that great author, between the executive power and the people "*about a thing claimed as prerogative*, THE TENDENCY "OF THE EXERCISE OF SUCH A PREROGATIVE to "the good or hurt of the people will eaſily decide "that queſtion." Mr. Locke, Sir, does not ſpeak of the tendency of a *particular meaſure* as a rule to decide the legality of it, but ſpeaks of the general tendency of *the power claimed as prerogative*, as a rule by which the queſtion may be decided, whether that *power* be a *legal prerogative* or only an *uſurpation*. You are for deciding the queſtion, whether the *power aſſumed* by his lordſhip's governor and council, is a *legal prerogative* by the tendency of the *particular meaſure* of the proclamation; Mr. Locke is for deciding the queſtion by the general tendency of the *power exerciſed*. Mr. Locke's rule of deciſion is ſound, ſolid, and infallible; your's is precarious, treacherous, and deceiving. If the tendency of a *particular meaſure* was ſufficient to make the *authority*, which created it, a *legal prerogative*, What is it that the legiſlature can do, which might not be done by prerogative? Every *power exerciſed*, according to your conſtruction, is *legal prerogative*, when the particular act done tends to the publick good, and of conſequence prerogative may legally do every act, which is calculated for the publick good—A legiſlature can do no more. Your conſtruction, you ſee, makes *repreſentatives* uſeleſs. But Mr. Locke's rule of deciſion will ſtand the teſt of the ſevereſt ſcrutiny. For if the general tendency of the *power exerciſed* is for the good of the people, no infraction of the conſtitution, no injury to the conſtitutional rights of the people can reſult from it, and therefore ſuch a POWER may be ſafely intruſted, as *legal prerogative*, in the hands of the ſupreme magiſtrate to be diſcretionally exerciſed for the publick utility.

To convince you that our conſtruction of Mr. Locke is not merely the effect of fancy and imagination, permit us to trouble you with an extract or two from the ſpeech of an eminent ſage of the law; in anſwer to an argument drawn from the *ſame words* of Mr. Locke to ſhew, that the tendency of the embargo lately laid in England to the good and not to the hurt of the people muſt decide for the legality of *that meaſure* as an exerciſe of *legal prerogative*.

"Mr. Locke (ſays the great lawyer) is not here "ſpeaking of the tendency of a *ſingle act* done in "exerciſe of a right of prerogative, as a rule to de-"cide the legality of that *particular act*; he ſpeaks, "and his *words are plain*, of the tendency, that is the "general tendency, of the *exerciſe of a power or thing "claimed as a prerogative*, as a rule by which the "queſtion may be decided, whether that *power or "thing claimed as a prerogative* be really a *legal pre-"rogative* or an *uſurpation*, and moſt undoubtedly it is "an infallible rule of deciſion."

"I admit, that a power which is not a legal prero-"gative, may be exerciſed for the good of the peo-"ple: and ſo I will allow too, that the moſt legal "prerogative that exiſts may be exerciſed to the hurt "of the people. But as the hurtful exerciſe of a "legal prerogative, in a particular inſtance, will not "make the prerogative, ſo hurtfully exerciſed, ceaſe "to be a legal prerogative, or prove that the general "tendency of ſuch a prerogative is to the hurt of the "people, and therefore that it ought not to be a "prerogative; ſo neither will a beneficial exerciſe in "a particular inſtance of an illegal or uſurped prero-"gative, change its nature and general tendency, ſo "as to decide that it is or ought to be a legal prero-"gative. I will explain myſelf, though I hardly "think it neceſſary, by examples. It is the undoubt-"ed prerogative of the crown, to declare war, make "peace and treaties, to create peers, and to pardon "offenders. And the general tendency of the exer-"ciſe of all thoſe prerogatives is for the good, and not "for the hurt of the people: and therefore the con-"ſtitution has veſted theſe powers in the crown, and "they are legal prerogatives. But who will deny that "any one of theſe prerogatives may be improperly "and hurtfully exerciſed? If they are, the adviſers "of the crown are reſponſible, though the power ex-"erciſed is legal, and the acts valid. When the king "makes war, it is war to all its conſequences, however "improperly the crown may have been adviſed in "taking the meaſure; and ſo of the reſt."

"After all—What is this *old* and *ſtale* argument "now revived, as to the tendency of the exerciſe of a "prerogative for the good, and not for the hurt of the "people? What is it, I ſay, taking things on a "general view, but the exploded argument of ne-"ceſſity repeated in other words? The wildeſt bigot "to prerogative, or abſolute power never pretended, "that any prerogative whatever, the diſpenſing power "itſelf, could or ought to be exerciſed, but for the "good of the people; the prince indeed always being "judge of that."

"I will venture to ſay, that there is not any one "notion *more exploded and more condemned by our ſtatute "books*, than that notion of the tendency of acts for "the publick good being ſufficient to make them "legal; and indeed it is one of the wildeſt notions "that ever entered the mind of man; for it goes to "cut up all government by the roots, and make every "man a judge and lawgiver for himſelf. I might "have ſaid, that it is condemned and exploded by all "morality and ſound divinity; avowed and profeſſed "only by jeſuits and ſuch diabolical caſuiſts."

From the *expreſs words* of Mr. Locke and from the above obſervations it is plain, that the general tendency of the *power exertiſed* to the good or hurt of the people, and not the tendency of the *particular act*, is the rule, which he lays down as the teſt or criterion, by which we are to decide whether the *power exerciſed* is legal prerogative or uſurpation. To apply the rule to the caſe in queſtion. Is the general tendency of the *power exerciſed* by the governor and council, in rating and eſtabliſhing the fees of office, to the good or hurt of the people? We conceive manifeſtly to the hurt of the people. If ſuch a *power* is admitted as *legal prerogative*, then may the ſupreme magiſtrate, at his will and diſcretion, *give* and *grant* the property of the people in what *quantum* or *proportions* he pleaſes, to the *civil officers* of government for their ſervices; and from analogy and parity of principle and reaſon, he may *give* and *grant* the property of the people, in in what *quantum* or *proportion* he pleaſes, to the *ſoldier* or *military officers* for their ſervices. Can any ſolid diſference ſubſiſt between a right to diſpoſe of the peoples property to pay the *civil officer* and a right to diſpoſe of it to pay the *military?* And would not the exerciſe of ſuch a *power*, by the ſupreme magiſtrate as *legal prerogative*, ſap the foundations of the conſtitution, and render *repreſentatives* uſeleſs, upon the *momentous point of taxation?* Is ſuch tendency of a *power exerciſed* to the good or hurt of the people. If to the hurt of the people, then, according to Mr. Locke, the power exerciſed by the governor and council was not *legal prerogative*, but *uſurpation*.

You have alſo quoted Mr. Locke's definition of prerogative though you have not relied upon it in your argument, he defines prerogative to be "a power to act "according to diſcretion for the publick good with-"out the preſcription of law *and ſometimes even againſt "it*." Mr. Locke explains himſelf by examples; to prevent a wrong conſtruction of theſe expreſſions "*ſometimes even againſt it*" we beg leave to trouble you with the following extract.

"When Mr. Locke ſpeaks of the prerogative as "*ſometimes acting even againſt law*, or of the laws "themſelves yielding to the executive, it is far from "his meaning that the *prerogative* or *executive* can *diſ-"penſe* with or *ſuſpend* laws—*his example* makes it "clear, viz. that of pardoning offenders where the "law condemns, which is certainly undoubted pre-"rogative. There the law yields but not in its *force* "or *ſubſiſtence*, but in its conſequences in a particular "inſtance; but though the king can pardon, he can-"not before hand, even in a particular inſtance, *diſpenſe* "with the law. The expreſſion of *acting againſt law* "is perhaps not well choſen, but it is evident Mr. "Locke intended no more than this, that the crown "can by pardon for inſtance prevent that execution, "which the law would effect. As for the other in-"ſtance mentioned by Mr. Locke of the law yielding "viz. pulling down a houſe to ſtop a fire, it is a clear "inaccuracy; for that has nothing in the world to "do with prerogative or magiſtracy, even no more "than throwing goods overboard to keep a ſhip from "ſinking. It is an inſtantaneous act of ſelf defence "to authoriſe what no man waits nor needs ſeek the "order of a magiſtrate."

We would here diſmiſs your argument drawn from the tendency of the proclamation, were we not apprehenſive, that you expect we ſhould take ſome notice of another authority, which you have quoted upon this point. Lord Hobart, you ſay, very rightly remarks upon proclamations "that they are ſo far juſt as they are made pro bono publico, i. e. for the pub-lick good." We have turned to the authority, fol. 251, and though we find the expreſſions, we do not find, that they are the expreſſions of his lordſhip. They are, Sir, the expreſſions of *arbitrary judges*, in *an arbitrary ſtar chamber court*, upon *an arbitrary proclama-tion*, by the *arbitrary king James*. That king had iſſued a proclamation prohibiting the building without brick; the attorney general Yelverton informed in the ſtar chamber, *ore tenus*, for breach of the proclama-tion. The culprits were ſeverally fined to a years value of the houſes built. Mark, Sir, upon what prin-ciples this *arbitrary proclamation* was maintained to be legal. It was held "that proclamations were ſo far "juſt as they were made pro bono publico; for publick "uſility, as againſt the increaſe of buildings in London "and about it, whereby if they cannot be ſed, cleanſ-"ed or governed, the country is diſpeopled and tim-"ber conſumed, the city leſs ſtrong and beautiful, and "more ſubject to fire." This *ſtar chamber authority* is directly with you; for the *power aſſumed* is deemed to be a *legal prerogative* from the tendency of the *particu-lar act* for the *publick good*; you are welcome to it—valeat quantum valere poteſt. What do you think the citizens of Annapolis, for example, would ſay to ſuch a proclamation prohibiting the building in the city without brick? Leſs timber to be ſure would be con-ſumed, the city more beautiful, and leſs ſubject to fire, and therefore the proclamation would tend to the pub-lick good; but would they be ſilenced by the argu-ments drawn from the tendency of the particular meaſure? Would they not be apt to ſay, that not-withſtanding ſuch tendency, the *power aſſumed* is illegal, deſtructive of natural right and conſtitutional li-berty, and ought to be reſiſted and oppoſed? Your *ſtar chamber authority* is founded upon another princi-ple—PRECEDENT. The caſe goes on "and in this, "the king builds upon old foundations; for he found "the *like proclamations* in queen Elizabeth's time." Yes, one arbitrary meaſure is generally adduced as a precedent for another; the proclamation in 1733 has been quoted to juſtify the preſent; and the preſent unretracted will in all probability be quoted upon poſterity, and another, of the like nature, crammed, down their throats as *an exerciſe of legal prerogative*—Such, Sir, is your caſe from Hob. ſuch your *ſtar chamber authority*; Do you not feel a bluſh upon your cheek?

You are offended with the following objection in the addreſs; "if prerogative may regulate "the fees agreeable to the late 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? to attempt to limit its right, after "granting it to exiſt at all, is as contrary to reaſon, as "granting it to exiſt at all is contrary to juſtice." (*A*) But you 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."

And what is the purport of theſe lines in Engliſh? why a medium ought to be obſerved in all things. When a right is admitted in a man, who, but him-ſelf, is to aſcertain the medium, which he is to keep in the exerciſe of it? If a right is exerted beyond a medium, will the exceſs deſtroy the right, or will the act done become illegal? by the law of the land every man has a right to make what diſpoſition of his pro-perty he pleaſes; a parent is under a natural and mo-ral obligation to provide for his children; were he in the exerciſe of the right, which the law gives him over his own property, to paſs by his children, and by deed grant it to a ſtranger, would he not exceed the medium, which Horace ſpeaks of? but ſurely, Sir, ſuch a diſpoſition would nevertheleſs be legal. It is the undoubted right of prerogative to declare war and make peace. A peace upon diſhonourable and inglo-rious terms, would not be conſiſtent with Horace's idea of a medium in the exerciſe of a right; but would ſuch an exertion of the right of prerogative make the peace invalid? Horace lays down a *moral*, and not a *legal* rule; upon queſtions of *morality* his rule is de-ciſive, upon *legal* queſtions it is not applicable.

After all, what is this medium? Is it defined, aſ-certained and pointed out by the law of the land, as a legal rule for the *limitation* of the right of prerogative? has this *ſound ſenſe* of Horace been adopted by our common law or ſtatute books? and who is to *judge*, that the limitation is *exceeded*, and declare and notify the *nullity* of the act?

You have given us many entertaining examples to prove the abuſe of prerogative to be no argument againſt the right of prerogative We do not differ upon this point. If prerogative has the right to regulate fees, a regulation to a million we grant would be an abuſe of the right; but would ſuch a regulation be invalid, and not compulſory upon the ſubject? A pa-rent in the diſpoſition of his property may abuſe the right which he has over it; the crown in making a peace may abuſe the right of prerogative by a conclu-ſion of it upon diſhonourable terms; but ſuch diſ-poſition by the parent, and peace by the crown, are nevertheleſs valid and obligatory acts.

"In matters within the *legal prerogative* the crown "is entruſted with the power and has the right to act, "and muſt be judge of the *neceſſity* and *ſeaſon* of acting, "ſubject always to the controul of that conſtitutional "advice, by which the crown muſt act in all caſes; "but theſe acts are *legal*, not becauſe they are *neceſ-"ſary*, and *proper*, but becauſe they flow from the "*proper authority*, and they are *legal* and *valid*, tho' "*wrong* in themſelves, till *corrected*, as a legal power "may be improperly exerciſed, for which the *adviſers* "are *reſponſible*."——

You have endeavoured to refute ſome of the objec-tions in the addreſs to the proclamation, and though your force ſeems to have been levelled principally againſt that piece, you have paſſed over other objec-tions contained in it, without taking the leaſt notice of them. We do not know, nor ſhall we hazard a conjecture, what reaſons you have for ſuch ſilence; but take the liberty to mention one of the objections. "Applications to the publick offices are not of *choice* "but *neceſſity*; redreſs cannot be had for the ſmalleſt "or moſt atrocious injuries, but in the courts of "juſtice; and as ſurely as that neceſſity does exiſt, "and a *binding force* in the proclamation, or the regu-"lation of fees in the land-office, be admitted, ſo "certainly muſt the fees thereby eſtabliſhed be paid in "order to obtain redreſs." That the ſubject in this province, by the laws and conſtitution of it, has a right to obtain redreſs in the eſtabliſhed courts of juſtice, for injuries done to him, cannot, we preſume, be denied; and that, that right cannot be *taken away*, *leſſened*, *broke in upon*, or *impaired*, by new modifica-tions, terms, or conditions impoſed by any other than *legiſlative authority*, is equally plain—This doctrine is ſtrongly ſupported by authorities in law.——Judge Blackſtone writeth—"a third ſubordinate right of every engliſhman, is that of applying to the courts of juſtice for redreſs of injuries. Since the law is in England the ſupreme arbiter of every man's life, liber-ty and property, courts of juſtice *muſt at all times* be open to the ſubject, and the law be adminiſtred there-in. The emphatical words of magna charta, ſpoken in the perſon of the king, who in judgment of law (ſays Sir Edward Coke) is ever preſent and repeating them in all his courts, are theſe, *nulli vendemus, nulli negabimus, aut deferemus rectum vel juſtitiam*; and therefore every ſubject, continues the ſame learned author, for injury done to him in *bonis*, or in *terris* vel *perſona*, by any other ſubject, be he *eccleſiaſtical* or *tem-poral*, without any exception, may take his remedy by the courſe of the law, and have juſtice and right for the injury done to him, freely *without ſale*, fully *with-out any denial*, and ſpeedily *without delay*. It were endleſs to enumerate all the affirmative acts of parlia-ment, wherein juſtice is directed to be done according to the law of the land: and what that law is every ſubject knows, or may know, if he pleaſes: for it de-pends not upon the *arbitrary will* of any judge, but *is permanent, fixed and unchangeable, unleſs by authority*

(*A*) *Vide* Farmer's letters.