A FAMOUS COLONIAL LITIGATION

The Case between Richard Sherman and Capt. Robert Keayne, 1642.

BY ARTHUR PRENTICE RUGG

THE most celebrated law suit of the colonial period of Massachusetts Bay was *Richard Sherman* v. *Robert Keayne*. Its importance does not rest upon the magnitude of the matter at stake, the eminence of the parties immediately concerned, or the leading legal principle established. These features which commonly distinguish renowned cases, such as the Tichbourne Case, the impeachment of President Johnson, and Marbury v. Madison, are conspicuously absent. This was a simple action of tort for the conversion of an ordinary white sow. The plaintiff was a poor man in whose name the cause was prosecuted by his wife during his absence in England. The defendant was a tailor by trade, of frugal habits, not then of great prominence in the colony, who beside trafficking at large was also a money-lender and thereby gained a general reputation for being a hard dealer. No far-reaching principle of law was declared, the only point in dispute being the pure question of fact whether the plaintiff was the owner of the swine in controversy. As might be expected, the case has been the subject of many a gibe and jest, and much humor has been expended in its exploitation.

Notwithstanding these common aspects, the case is nevertheless one of foremost significance in the history of the Commonwealth and consequently of the country. It was fraught with consequences of no small gravity. It was the occasion for the final establishment of the division of the legislative department of government into two co-ordinate branches. This is one of the

primal securities of constitutional government as understood and practiced in this country. The adoption of this principle in Massachusetts was a momentous if not an essential step in fixing the character of government in the colony as representative and deliberative rather than a pure democracy. Anything, therefore, pertaining to this litigation possesses historical value.

The original sources of information concerning this law suit are first and chiefly the History of New England by John Winthrop, and then the records of the court of assistants, the Records of Massachusetts Colony, The Colony Archives, The General History of New England by the Rev. William Hubbard, minister of the church at Ipswich, and the History of Massachusetts Bay by Gov. Thomas Hutchinson. Hubbard was not a participant in the proceedings so far as known. But he was a contemporary, being one of the first class of graduates of Harvard College in 1642, and he writes apparently out of independent knowledge. Although Hutchinson wrote something over a hundred years later, his intimate familiarity with the sources of colonial history and his insight into the character of our early institutions almost give the weight of first-hand information to his observations on this subject. Excerpts from the original sources, complete as to this matter, are added to this paper as appendices. The subject has received much attention from other writers, but so far as I have been able to discover there are no other sources of information touching the facts. By far the most detailed account and fullest discussion of the case is given by Winthrop. Several pages of his history are devoted to it.

The proposed publication by the American Antiquarian Society of one of its manuscript possessions calls attention anew to this ancient action at law. This manuscript is entitled, "A breaviate of ye Case betwene Richard Sheareman plt by petition & Capt. Robert Keaine defen^{t} aboute ye title to a straye Sowe

supposed to be brought frõ Deare Iland about (9)ber 1636." It is nothing less than a summary of the case. It is dated "at Boston this 5, 15, 1642." It is said by Palfrey, in his History of New England, Vol. I, p. 619, note, to be "in Winthrop's handwriting, with his signature at the end." On the other hand, it is said by Robert C. Winthrop in Vol. 2 of the Life & Letters of John Winthrop, p. 283, "It is not in the handwriting of Governor Winthrop. We doubt whether even the signature is his; and certainly the spelling and abbreviations differ widely from those which he was accustomed to use. But it was unquestionably one of the manuscript copies prepared for circulation among the magistrates and people—that being the ordinary mode of *publishing* papers at that day." I will not undertake to settle this question of handwriting. It is quite sufficient for present purposes that there is no controversy as to the authenticity of the manuscript and that it was composed by Winthrop. Its genuineness as a Winthrop production and its historical value are beyond cavil. It consists of eight leaves or sheets of paper about 7⅞ inches by 6 inches, of which two are blank and six are closely written. It is of deep interest because of its author and its substance. Winthrop was a man of learning, of profound wisdom, of judicial temperament, and a writer of no mean capacity. He had personal knowledge of the matter. This manuscript is a complete and detailed history of the salient points of the case. It is divided into four parts:

1. A recital of the undisputed or agreed facts.
2. An abstract of the evidence produced on both sides at the trial before the General Court in 1642.
3. A discussion of the weight and probative effect of that evidence illustrated by reference to scripture.
4. A statement of the time consumed in the trial and of its indecisive result, with reference to a pertinent statute.

The legal training of Winthrop in the Middle Temple is manifest in the precision, perspicuity and logical

sequence of the document. This "breaviate" of the case was written that the justness of the position of the magistrates in deciding against the plaintiff might be made clear in order to overcome the "much laboring in the country upon a false supposition" as to their position. It was Winthrop's intention apparently to print the "breaviate" in his history. There it is said (Vol. 2, p. 72), "because there was much laboring in the country upon a false supposition, that the magistrate's negative voice stopped the plaintiff in the case of the sow", one of the magistrates published "a declaration of the necessity of upholding the same," (which doubtless refers to this manuscript); and it is added: "It may be inserted here, being brief." That intention was abandoned for this reason, I suspect: In the following year, as he narrates (Vol. 2, p. 117), it was found that this paper had given affront to some and he, desiring as governor to compose all occasions for dissension, made a speech as soon as he came into the General Court wherein, while not retracting, after re-examination, any of the matter therein set forth, he acknowledged his failings as to the manner thereof and "humbly entreated those who had been displeased to pardon and pass them by." After thus publicly declaring such penitence and showing such magnanimity toward those who had criticised him, he hardly could print the offending "breaviate."

This manuscript was mentioned first, so far as I know, by Palfrey, who refers to it in a note in volume 1 of his History of New England, page 619.

In view of its succinct narrative, further elaboration of the facts of the case would be superfluous since a copy of the manuscript itself and the other original sources of knowledge about the case, so far as I have been able to discover them, are to be printed herewith. It only need be added that the matter finally was adjusted probably by the remission by Capt. Keayne of his judgment for costs against Mrs. Sherman and a discharge by the Shermans of all controversies con-

cerning the sow. It has been suggested that the matter was submitted to General Gibbons and Colonel Tyng as referees, who are said to have "most sensibly permitted the thing to die of its own folly." (Vol. 1, History of the Ancient & Honorable Artillery Co. 14). Of the accuracy of this statement I have been unable to find confirmation from original sources.

A word may be said as to the parties. Whether Richard Sherman was in the colony during any part of this litigation, which appears to have been fomenting in some form or other from 1636 to 1644, is not certain. Without doubt he was absent for a substantial part of that time. In any event, the active prosecution of the claim seems to have fallen upon his wife, who was aided and encouraged by the energetic participation of one George Story. Since Winthrop says that he was unable to find any traces of this man save that he was a young English merchant who boarded with Mrs. Sherman, nothing further can be said of him. It is generally conceded that at this time the Shermans were poor in this world's goods. Apparently they were of good standing in the community because, under date of May 14, 1635, are found these entries in 2 Records of Massachusetts, 116-117: "It is ord^red, y^t y^e Treasurer should pay 13⅓^s to y^e wife of Rich^d Sherman, as a gratuity for her care & paines y^s Co^rt about o^r dyet, and a noble to y^e oth^r helpers in the house." "It is ordered, y^t Rich^d Sherman should be alowed 19^s for lodging 3 of y^e deputies & y^e Gov^rn^rs men." It is hardly likely that the members of the General Court in that day would have diet and lodging with any except those who held the respect and esteem of their townsfolk. This entry is interesting also as bearing some indication of acquaintance on the part of the Shermans with members of the General Court. Richard Sherman's will was dated July 31, 1660, wherein he mentions five daughters and no sons. His daughter Abigail married a man named John Damon. Damon came to this country in 1633. One of their descendants was Rev. Samuel C. Damon, born in

Holden, Mass., and graduated at Amherst College in the class of 1836. He studied theology at Princeton and Andover and was a missionary at Honolulu where he also was chaplain of the Seaman's Friend Society.

Robert Keayne, after having been a member of the Honorable Artillery Company, of London, came to America in 1635. He is said to have been the founder of the Ancient & Honorable Artillery Company of Boston. His name is first on the roll of members, and in the charter, and he was its first commander. He was also a deputy for several terms and speaker of the House in 1646. He was punctilious in attendance upon religious services and industrious in taking notes of sermons. Being shrewd in business matters, he soon was regarded as sharp at a bargain and was publicly rebuked for his offenses of covetousness. A fine of 200 pounds, ultimately remitted to 80 pounds, was imposed on him for extortionate charges. Doubtless he would be called either a leading merchant or a profiteer, according to the point of view. Keayne died in 1655. He left a will, which is probably the longest on the records of Suffolk County, comprising one hundred fifty-eight of its original pages and one hundred forty-two pages in a recopied record. His benefactions were catholic in extent and generous in nature and include legacies to Boston for a market house, and a free school, to Harvard College, to the Ancient & Honorable Artillery Company and for other good causes. Drake says of him in the History of Boston, p. 246, 247: "From all that can be learned of Captain Keayne it does not appear that he was a bad man, but that on the contrary he was a very good man; yet he was one of that peculiar mind and temperament, which rather invited than repelled the insults from a class common in all communities. He was deeply religious, but, like nearly all men who buy and sell, his interest in his business was so strong, that he could not well help losing sight of his scruples at times. But when abstracted from his business he

relented and condemned himself. He appears to have been of a forgiving disposition, and more ready to receive an injury than to give one, and could be oppressed with impunity."

It is manifest from Winthrop's account that the merits of the cause were plainly in favor of Captain Keayne. That is clear from his statement of the facts and the evidence. This is strongly confirmed by three facts: (1) that the elders, upon a thorough investigation of the matter and after hearing the material witnesses, found in favor of Keayne, (2) that the jury in the court at Boston, in a direct action by Sherman for the conversion of the pig, found also in Keayne's favor, and (3) that in an action brought in court by Keayne against Mrs. Sherman and Story for slanderously reporting that he had stolen her sow, a jury again returned a verdict in favor of Keayne and assessed damages in his behalf in the sum of twenty pounds. These three successive findings all one way, separated by considerable intervals of time, two of them being verdicts by a jury, afford rational ground for the inference, indeed almost indubitable proof to the effect, that Winthrop and the magistrates were right in their stand against Sherman and in favor of Keayne on the merits of the case. That aspect of the case would seem to be set at rest by this "breviate" and the other documents to be published herewith. However, in a popular contest in which such a woman as Mrs. Sherman, sufficiently good cook to satisfy the members of the general court in their diet, a housekeeper of such merit that they were content to lodge under her roof, was pitted against the sharp trader with a reputation for hard dealing, the advantage naturally would be with the representative of the fair sex. Even so good a soldier as Captain Keayne would be pretty apt to ride to his fall in any controversy with such a suitress for popular sympathy. It therefore is not surprising that after the matter had been talked over by the people at large without the evidence before them, the trend of public feeling should be with Mrs. Sher-

man, and that this should be reflected in the attitude of the deputies on the subject. When, however, it was sought by the deputies by sheer force of numbers to out-vote the magistrates or assistants and thus reach a decision in favor of Sherman, a delicate and fundamental principle in government was reached transcending in significance the decision of any controversy between parties over their private rights, important as that always is. There the statesmen of the colony practically without exception were on one side. This question whether, in matters brought before the General Court, the assistants or magistrates and the deputies acted or had the right to act as separate bodies, the approving vote of each body being essential for affirmative action, had been under discussion for some time. The phrase by which reference commonly is made to it is "The Negative Voyce" or "The Negative Vote." Since the deputies constituted the more numerous body and therefore would have greater power in joint session, the term was used as indicating the negative of the assistants or magistrates upon measures receiving the approval of the deputies. Although the charter gave important powers to the governor, deputy governor and assistants, no difficulty on this point seems to have developed so long as the body of freemen met together with the assistants constituting the General Court. Up to 1634 the government of the colony had been almost that of a pure democracy. The General Court was composed of both the assistants or magistrates and all the freemen. The inconvenience and even danger of this soon became manifest. As the settlements were more and more scattered, they were exposed to the hazard of Indian attack and the other manifold perils of pioneer times if all the freemen left at one time for attendance on the General Court. Moreover, the loss of time in travel and attendance was no inconsiderable factor. Therefore, on May 14, 1634, an order was passed by the General Court that there should be four sessions yearly to be summoned by the governor and not to be

dissolved without the consent of the major part of the court. On the same day provision was made for a representative body of deputies in place of the gathering of freemen at large in the General Court. The order was that two or three deputies might be chosen from each town. [2 Records of Massachusetts, 118]. On March 4, 1635, the nature of the deputies as a separate body was recognized by conferring upon them power to hear and decide disputes as to the election of their members, and "to order things amongst themselves that may concerne the well ordering of their body." [1 Records of Massachusetts, 142.] This was in effect the establishment of the house of deputies as an independent body free at least in these particulars from interference by the magistrates or assistants. In 1634-35 a controversy arose whether Mr. Hooker and his friends should be granted permission by the General Court to leave for a settlement in Connecticut. A majority of the deputies, so great as to constitute a majority of the General Court in joint session of both the assistants or magistrates and the deputies, were for the removal, although all the assistants save two were against it. The deputies contended that a majority of the whole body should prevail while the assistants refused to recede from their stand that a majority of both the deputies and the assistants was necessary. This was the beginning of the controversy about the "negative voice" of the assistants. It was adjusted then by resort to a day of humiliation and prayer and a sermon by Mr. Cotton. After this the assistants prevailed. A short time later the substance of the matter was settled by a statute. On March 3, 1636, the number of annual sessions of the General Court was reduced to two, and it further was provided:

"And whereas it may fall out that in some of theis Genall Courts, to be holden by the magistrates & deputies, there may arise some difference of iudgem^t^ in doubtfull cases, it is therefore ordered, that noe lawe, order, or sentence shall passe as an act of the Court, without the consent of the great^r^ p̃te of the magistrates on the one p̃te, & the great^r^ number of the

deputyes on the other p̃te; & for want of such accorde, the cause or order shalbe suspended, & if either ptie thinke it soe materiall, there shalbe forthwith a comittee chosen, the one halfe by the magistrates & the other halfe by the deputyes, & the comittē soe chosen to elect an umpire, whoe togeather shall have power to heare & determin the cause in question."[1]

It is to be observed that the concluding words of this act, which provide for a committee of conference and the choice of an umpire, refer in terms only to "cause or order" and the only thing which they have power to "heare & determin" is "the cause in question." These words both in their common meaning and in their strict signification refer to something in the nature of a suit or litigation. No mention is made in this connection of a "lawe" as to which in the earlier part of the statute current action of the greater part of the magistrates and the greater number of the deputies is required. Concerning legislation in the nature of enactment of laws, the absolute negation of one branch on action by the other seems thus to have been established. However, even if the concluding words of this statute are given a broader scope than is indicated by their natural significance and the committee of conference and umpire be thought to apply to every vote, it still is indubitable that this statute established the separation of the legislative department of the colony into two separate, distinct and independent bodies, whose concurrent affirmative vote was required to the enactment of laws. Notwithstanding this positive action, still the subject of the negative voice was much debated. It was a fundamental question in government. It would not easily down. It required full discussion in order that the public mind might be at rest. The litigation between Richard Sherman and Captain Keayne afforded good ground for renewal of the arguments. The dramatic incidents of the case challenged universal attention. The simplicity of the issue involved could be comprehended by everybody. Its relation to the principle of the

[1] [1 Records of Massachusetts, 170.]

"negative voice" was direct and immediate. There was much writing concerning the point after the first decision by the General Court in 1642. "The deputies were very earnest to have it taken away." One of the magistrates wrote "a small treatise" about it and another wrote an "answer." Thereupon Winthrop himself wrote "a reply". This paper alone survives of those written at the time. The original is now in the archives of the commonwealth and a copy is printed in 2 Life and Letters of John Winthrop, 427-438; see also 440-459. While the controversy was at its heat the General Court took this action, May 10, 1643:

"This Co^rt being to bee adiourned, it is desired, that ev^ry member of this Co^rt will use their best indeavo^r in the mean time to informe themselues & the Co^rt concerning the question about the negative vote, & to take advice from any therein; and it is ordered, y^t it shalbee no offence for any of them, or any other, either elder or other pson, who shall, either privately or in any lawfull assembly, deliver their minds soberly & peaceably therein, or to deliver the same in writing, in any modest or breife way, so it bee under their hand, & the elders to bee desired to give their advice in the case."[2]

Doubtless as a result of this action, an illuminating discussion of the negative voice was contributed by one of the elders. See Proceedings Massachusetts Historical Society, Jan. 1913, p. 276, et seq. The conclusion of the whole affair was that not only was the statute of March 4, 1635, establishing the negative voice not repealed but the matter was set at rest by the passage on March 7, 1644, of this law:

"It is therefore ordered, first, that the magistrates may sit & act busines by themselues, by drawing up bills & orders w^ch they shall see good in their wisdome, w^ch haveing agreed upon, they may p̃sent them to the deputies to bee considered of, how good & wholesome such orders are for the country, & accordingly to give their assent or dissent, the deputies in like mann^r siting a p̃t by themselues, & consulting about such orders & lawes as they in their discretion & exppience shall find meete for cō̃on good, w^ch agreed upon by them, they may

[2] [2 Records of Massachusetts, 40.]

p̃sent to the magistrates, who, according to their wisdome, haveing seriously considered of them, may consent upon them or disalow them; & when any orders have passed the appbation of both ma^trats & deputies, then such orders to bee ingrossed, & in the last day of the Court to bee read deliberately, & full assent to bee given; pvided, also, that all matt^rs of iudicature w^ch this Co^rt shall take cognisance of shalbee issued in like manner."[3]

In 2 Records of the Colony of Massachusetts Bay in New England, 46, under date Sept. 7, 1643, appears this:

"Three conclusions were deliv^rd in by M^r Cotton, in the name of himselfe & other eld^rs about the negative voyce."

It has been thought that these are the long answers of the elders printed in 2 Records of Massachusetts, 90-96, under date of Nov. 13, 1644, although the substance of these answers seems to relate largely to other matters and does not directly touch the negative voice. Moreover, they are subsequent to the law of March 7, 1644, by which the question was laid at rest. (See Commonwealth v. Roxbury, 9 Gray, 451, 481.)

It was resolved by a vote of May 6, 1646 that "notwithstanding all the reasons alleged" the separate sittings and actions of the house of deputies should be continued. 3 Records of Massachusetts 62 [65].

A superficial examination of the colony records might lead one to think that the controversy arose again. Under date of May 14, 1645, 3 Records of Massachusetts, 11, occurs this:

"Itt is ordered, y^t M^r Speaker, Majo^r Gibbons, M^r Dummer, Lef^t Duncomb, & M^r Sparowhawke shall joyne w^th o^r honno^red Dep^ty Goun^r, M^r Bradstreete, & M^r Hibbings as a comittee to consider of some way whereby y^e negative vote may be tempered, y^t justice may have free passage, & y^t y^e retourne of y^e comittee be p̃sented to y^e consideration of y^e Courte."

No record of a report of this committee is found. On October 17, 1649, by the General Court,

[3] [2 Records of Massachusetts, 58-59.]

"It is ordered, that in cases wherein there hath bein difference the Generall Court should heare the case together, & determine the case by y^e^ major vote."[4]

This on its face was an abolition of the negative vote. But that this was not its purpose or intent or effect is manifest from a later vote. Under date of May 26, 1652, 4 Records of Massachusetts, Part I, 82, occurs the following:

"Whereas there is a manifest & inconvenient mistake in the penning of the order, title Gennerall Court, page the 8^th^ of the last printed booke, that leaves all or most of the cases formerly issued in the Gennerall Court doubtfull & vncertjane, and takes away the negative vote, both of Magist^s^ and Deputjes, in making lawes, as well as in cases of judicature, which was not intended, much lesse consented to, itt is therefore ordered, that for tjme to come, if there fall out any difference betwixt y^e^ Magistrates and the Deputjes, in any case of judicature, either civill or criminall, it shall be determined by y^e^ major p̃t of the whole Court, and the forementioned lawe is hereby repealed."

Substantially the same entry is found in 3 Records of Massachusetts, 266, under date of May 27, 1652. A further record is found much later; under date of May 7, 1673, 4 Records of Massachusetts, Part II, 559, occurs the following entry:

"It is ordered, & Samuel Symonds, Esq̃, Dep^t^ Goû, Symon Bradstreet, & Wm Staughton, Esq̃s, M^r^ Jn^o^ Oxenbridge, M^r^ Vryan Oakes, Capt̃ Joshua Hubbard, M^r^ John Richards, M^r^ Henry Bartholmew, Capt̃ John Hull, & M^r^ Samuel Torrey shallbe & hereby are appointed a committee to consider of these three questions or proposalls, the magistrates to appoint time & place of meeting, making their return to the next sessions of y^e^ Court. 1 Q. Whither according to pattent there be a negative vote in any part of the Generall Court; if there be, then in what cases. Secondly. How farr our possitive lawes doe in this matter agree w^th^ or disagree from the patent.

3Q. Where the vse of the neagtive voat causeth an obstruction in any matter of necessity to be concluded or of great moment to the publick, what may be the best expedient for an issue, whither by lot or otherwise."

It does not appear that this committee ever made

[4] [2 Records of Massachusetts, 285.]

report. It seems manifest, however, that all these records relate to the decision of questions strictly judicial in their nature and have nothing to do with legislative principle involved in the earlier records. The statutes of 1635 and 1644 stand together unaffected in essence by later action, and apparently the governmental controversy was stilled by the statute of the latter year.

Thus separate sittings for the two houses came into existence as part of the government of the colony. Two houses as independent branches had been established nine years earlier. That was the vital step. Two distinct branches of the general court might in those days without inconvenience sit together except in cases of disagreement. Separate sittings were bound to come sooner or later. The sow case accentuated the difficulty of two independent branches sitting together and brought it distinctly to public attention. It was the occasion for the permanent establishment of separate sittings. Its real significance, however, is that it settled finally that in the Commonwealth of Massachusetts, there should be two branches of the General Court. There was hammered out upon the anvil of free public discussion, to which the case gave rise, the mighty principle that this should be a government with a single legislative department divided into two distinct and independent branches. That itself was but an amplification of the deeper principle that this should be a representative government and not a pure democracy. That which has come down to us of the writings on the subject shows that the first settlers had a profound and accurate appreciation of the inherent and fatal weaknesses of a pure democracy and of the absolute necessity of a representative form of government for the preservation and permanence of free institutions. They bent their energies with deep conviction toward the establishment of a government which could endure. The march of events during the last three centuries has demonstrated their wisdom and foresight.

Appendix I

Copy of Manuscript in Possession of American Antiquarian Society.

Att the general Courtt (3) 18-1642

A breaviate of ye Case betwene Richard Sheareman plt by petition & Capt Robert Keaine defen^{tt} aboute ye title to A straye Sowe supposed to be broughtt frō Deare Iland about (9)^{ber}-1636.

The poynts in the Case agreed

1 The plt had a Sowe all white, save a black Spott under the eye of the biggnesse of a Shilling & a ragged eare.

2 This Sowe was Carryed to deare Iland

3 Noe prfe that it was brought back. onelye prbable itt might be though neare 40 Swine miscaryed there that yeare

4 The defen^{dt} had a straye Sowe soposed to be brought frō Deare Iland last yeare

5 This Sowe was Cryed divers tymes, & many came & sawe her, in the tyme the defend^{t} keept her, w^{ch} was betwene one & 3 yeares.

6 The defend^{dt} had before this tyme, a faire white Sowe of his owne w^{ch} he keept in his yarde wth the straye Sowe about a yeare.

7 The defen^{dt} killed one of these Sowes about (8) ^{ber} 1637

8 The pl^{ts} wife soon after, charged the defen^{dt} to have killed her Sowe

9 The defen^{dt} shewing the pl^{ts} wife the Sowe w^{ch} remained alive she disclaimed itt

10 Upon Complaint of y^{e} pl^{ts} wife, the cause was brought to y^{e} Elders (as matter of offence) & upon hearing all Allegations, & the most materiall witnesses on booth parts, the defen^{dt} was cleared.

11 The cause thus rested till (2-1640 and then the pl^{ts} wife brought itt to the Inferyor Courte att Bostō where (upon a full hearinge) the jurye founde for y^{e} defen^{dt} & awarded him about 3$^{£}$ costs

12 Now (about 2 yeares after) the pl^{t} brings the cause (by petition) into the generall Courte declyning the Court of

Assistants to w^ch^ itt prplye belonged, & declares againe for the Sowe w^ch^ was killed (8^ber^-37.

THE EVIDENCE

pr.pl^t^ Two or three witnesses that the Sowe killed (8^ber^-37 had sume such black spott under the Eye & some cutts or ragges on the eare

pr. deft 1 This contradickted by more witnesses (w^ch^ yet may be reaconsiled by other witnesses of thee pl^ts^ (viz) that the defen^ts^ owne Sowe had sume such spott thereaboute in the skinne butt not in the haire & soe might not be easye to discerne when the haire was thick, butt apparent when the haire was off.

2 prvd by 6 or 7 wittnesses whoe then lived in the defen^ts^ famelye, but are all gone since (but one or two) y^t^ this Sowe was the defend^ts^ owne, & bought of one Houghton.

For the other Sowe w^ch^ was alive a yeare after pr.pl^t^ divers witnesses, that this Sowe had such markes as the pl^ts^

pr.def^tt^ 11 more witnesses (& of as good credytt) that this Sowe (which was the straye) had other markes & not such as the pl^t^ Claimed itt by

2 Itt was clearely prvd that this was the onely straye Sowe the defen^dt^ had, that this was offered to be shewed to the pl^ts^ wife before the first Sowe was killed though att another tyme denyed her, for some reasons then alledged by y^e^ defen^tt^ & that she was shewed itt after in thee defen^ts^ yeard & confidently disclaimed itt as none of hers, And now againe, upon her Oath in the Courtt did claime A Sowe by other markes & not such as this Sowe had.

For a 3 Sowe never spoaken of before this Courte pr.pl^t^ A witnesse or 2 that they sawe a 3^d^ Sowe in the defen^ts^ yarde.

pr.def^tt^ 1 This can be of noe waight against soe manye wittnesses to the contrarye.

2 This 3^d^ Sowe is not prvd to have such markes as the pl^ts^

3 This might be one of the broode of the other Sowes, or some Neigh^rs^ swine taken in the defen^tts^ garden & keept up wth his owne, till the owner fetched it awaye.

4 the pl^ts^ claime & the scope of his Evidence being for the Sowe killed about (8^ber^)-37- if he faile of that the Courte is not to seeke out a Sowe for him.

THE WHOLE EAVIDENCE IS THUS BALLANCED.

pr.pl^{t} The testimon^{y} consider agt amount to a pbable eavidence, that the defen^{tt} had & converted to his owne use the pl^{ts} Sowe.

Ball^{d} The testmonyes reaching noe further, maye albe true, &yett the defen^{tt} not guiltye, nor anye of these Sowes the pl^{ts}.

pr.def^{tt} The testimonyes (whether considered agtt or wth the other) afforde Evidence of Certaintye, raised upon certaine grownds, as occasion, oppertunity, familiaritye, freaquencye &c.

Ball^{d}. If this testimonye be true, Itt is not possible the defen^{tt} should be guiltye, or anye of these Sowes the pl^{ts}.

FOR INSTANCE

Joseph wanders alone in the wildernesse his Coate is founde torne & bloudie, he is never heard off for manye yeares: upon this pbable evidence, Jacob concluds that Joseph was devowred of a wilde beast: But when evidence of certaintye comes out of Aegipt that he was ther alive, & Lord of Egipe the former evidence was invailed & the Spirit of Jacob revived, & now he concluds he was living; though he knewe not how he should come thither, or how he should be soe advansed there, Now lett anye impartiall hande hold the scales while religion & sownde reason give Judgm^{t} in the case.

Yett (if neede weare) this might be added, that whereas the pl^{ts} wife was allowed to take her Oath for the markes of her Sowe, the defen^{dt} & his wife (being denyed the like libertye) come voluntarelye into y^{e} Court & solomelye in the preasence of god declared. 1. that y^{e} Sowe w^{ch} was first killed was there owne. 2. that y^{e} Sowe w^{ch} remained & was shewed the pl^{ts} wife & w^{ch} she disclaimed was the Straye Sowe. 3. that they never had anye other straye Sowe.

This cause (after the best pt of 7 dayes spent in Examinatio & agitation) is by the breakeing up of the Courte dismissed not by occasion of A negative voate in y^{e} Magistrats (as is misreported) but by A fundamentall & Just lawe agreable to sounde reason as shall appeare (the Lord willinge) in due season: The lawe was made upon searious consideratiõ & advise wth all y^{e} Elders (1) 1635 to this effect.

Noe lawe Sentence &c shall passe as an act of the Courte, wthout the consent of the greater pt of the magistrats of the one pte & the greater number of the deaputies on the other parte.

There were p^{r}sent in y^{e} Courte, when ye voate was to be taken. 9. Magistrats & 30 Deaputies whoe had all heard the Cause examined and argued, soe as noe centance could be legally passed wthout Consent of 5 magistrats and 16 deaputies w^{ch} neither pl^{t} nor defen^{tt} had for there were but 2 magist^{rs} & 25 deput^{s} for the pl^{t} & 7 magist^{rs} & 8 deput^{s} for the defend^{t} the other 7 stood doubtfull. yett was there noe necessitye that the cause might not have bene brought to an issue, for eyther the Court might have Argued the Case againe (by w^{ch}) meanes some who were doubtfull might have come to a reasolut^{n} or others might have changed there Judgm^{ts} & soe have p^{r}ceeded to a new voate, or else Com̃ittyes might have bene Chosen, to order the Cause according to lawe.

That this is the true state of y^{e} Case for the substance of itt, as it hath beene Considered & allowed, by other of my breethren & Assotiats booth Magistrats & deaputies (wth our p^{r}seedings therein) w^{ch} we shall not be ashamed (by the Lords helpe) to avouch & maintaine, before all y^{e} world I doe heare affirme under my hand: Dated att Bost$\bar{o}$ this 5.-15-1642

JOHN WINTHROP ^{govr}

APPENDIX II

2 Winthrop's History of New England, 69-72.

1642, April 22.

At the same general court there fell out a great business upon a very small occasion. Anno 1636, there was a stray sow in Boston, which was brought to Captain Keayne: he had it cried divers times, and divers came to see it, but none made claim to it for near a year. He kept it in his yard with a sow of his own. Afterwards one Sherman's wife, having lost such a sow, laid claim to it, but came not to see it, till Captain Keayne had killed his own sow. After being showed the stray sow, and finding it to have other marks than she had claimed her sow by, she gave out that he had killed her sow.

The noise hereof being spread about the town, the matter was brought before the elders of the church as a case of offence; many witnesses were examined, and Captain Keayne was cleared. She, not being satisfied with this, by the instigation of one George[5] Story, a young merchant of London, who kept in her house, (her husband being then in England,) and had been brought before the governour upon complaint of Captain Keayne as living under suspicion, she brought the cause to the inferiour court at Boston, where, upon a full hearing, Captain Keayne was again cleared, and the jury gave him 3£ for his cost, and he bringing his action against Story and her for reporting about that he had stolen her sow, recovered £20 damages of either of them. Story upon this searcheth town and country to find matter against Captain Keayne about this stray sow, and got §one§ of his witnesses to come into Salem court and to confess there that he had forsworn himself; and upon this he petitions in Sherman's name, to this general court, to have the cause heard again, which was granted, and the best part of seven days were spent in examining of witnesses and debating of the cause; and yet it was not determined, for there being[6] ||nine magistrates|| and thirty deputies, no sentence could by law pass without the greater number of both, which neither plaintiff nor defendant had, for there were for the plaintiff two magistrates and fifteen deputies, §and for the defendant seven magistrates, and eight deputies[7]§, the other seven deputies stood doubtful. Much contention and earnestness there was, which indeed did mostly arise from the difficulty of the case, in regard of cross witnesses, §and some prejudices§ (as one ||[8] professed||) against the person, which blinded some men's judgments that they could not attend the true nature and course of the evidence. For all the plaintiff's witnesses amounted to no more but an evidence of probability, so as they might all swear true, and yet the sow in question might not be the plaintiff's. But the defendant's witnesses gave a certain evidence, upon their certain knowledge, and

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[5]My search for any traces of this man has been unsuccessful.
[6]||one magistrate||
[7]It is strange how the former editor could have suffered the mutilated sentence to pass.
[8]||protested||

that upon certain grounds, (and these as many and more and of as good credit as the others,) so as if this testimony were true, it was not possible the sow should be the plaintiff's. Besides, whereas the plaintiff's wife was admited to take her oath for the marks of her sow, the defendant and his wife (being a very godly sober woman) was denied the like, although propounded in the court by Mr. Cotton, upon that rule in the law he shall swear he hath not put his hands to his neighbour's goods. Yet they both in the open court solemnly, as in the presence of God, declared their innocency, &c. Further, if the case had been doubtful, yet the defendant's lawful possession ought to have been preferred to the plaintiff's doubtful title, for in *equali jure melior est conditio possidentis*. But the defendant being of ill report in the country for a hard dealer in his course of trading, and having been formerly censured in the court and in the church also, by admonition for such offences, carried many weak minds strongly against him. And the truth is, he was very worthy of blame in that kind, as divers others in the country were also in those times, though they were not detected as he was; yet to give every man his due, he was very useful to the country both by his hospitality and otherwise. But one dead fly spoils much good ointment.[9]

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[9]Frequent animadversions are found in our records on cases of real or supposed overcharge for labour and commodities. A ludicrous one, mentioned by Hubbard, 248, is more satisfactorily stated in our records of the colony I. 250, at a general court 22 of 3, 1639: "Edward Palmer, for his extortion, taking 1 pound 13.7, for the plank and woodwork of Boston stocks, is fined 5 pounds, and censured to be set an hour in the stocks." Afterwards the fine was "*remitted* to ten shillings." The remainder of the sentence, I fear, was executed. Our Ipswich chronicler is almost facetious about this part: he "had the honour to sit an hour in them himself, to warn others not to offend in the like kind."

The unhappy subject of the controversy in the text was exposed to very general blame, and several particular complaints. I have seen an original affidavit of Thomas Wiltshire, that for work done at Captain Keayne's house there was due to the deponent 38 shillings, and that K. sold him a piece of broad cloth, "which he said was Spanish broad cloth, and delivered for payment to this deponent at seventeen shillings per yard, the which cloth this deponent showed to Henry Shrimpton, and he said it was not worth above ten shillings per yard, for it was but cloth rash, and he said goodman Read, and his wife showed a waistcoat of the same kind of cloth, which cost but nine shillings per yard, and in this deponent's judgment was better cloth; and this deponent showed the same cloth to Mr. Rock, and he said it was worth but ten shillings per yard, for it was but cloth rash, and this deponent showed it also to Mr. Stoddard, and he said likewise that it was cloth rash, and was not worth above ten shillings per yard, and was dear enough of that price, or words to that effect." Such was the dangerous form and matter of judicial investigations in the early days.

2 History of New England by John Winthrop, pp. 69-72

There was great expectation in the country, by occasion of Story's clamours against him, that the cause would have passed against the captain, but falling out otherwise, gave occasion to many to speak unreverently of the court, especially of the magistrates, and the report went, that their negative voice had hindered the course of justice, and that these magistrates must be put out, that the power of the negative voice might be taken away. Thereupon it was thought fit by the governour and other of the magistrates to publish a declaration of the true state of the cause, that truth might not be condemned unknown. This was framed before the court brake up; for prevention whereof, the governour tendered a declaration in nature of a pacification, whereby it might have appeared, that, howsoever the members of the court dissented in judgment, yet they were the same in affection, and had a charitable opinion of each other; but this was opposed by some of the plaintiff's part, so it was laid by. And because there was much labouring in the country upon a false supposition, that the magistrate's negative voice stopped the plaintiff in the case of the sow, one of the magistrates published a declaration of the necessity of upholding the same. It may be here inserted, being but brief.

Appendix III

2 Winthrop's History of New England, 115-119.

1643.

The sow business not being yet digested in the country, many of the elders being yet unsatisfied, and the more by reason of a new case stated by some of the plaintiff's side and delivered to the elders, wherein they dealt very ||[10]partially||, for they drew out all the evidence which made for the plaintiff, and thereupon framed their conclusion without mentioning any of the defendant's evidence. This being delivered to the elders, and by them imparted to some of the other side, an answer was presently drawn, which occasioned the elders to take a view of all the evidence on both parties, and a meeting

[10]||particularly||

being procured both of magistrates and elders (near all in the jurisdiction) and some of the deputies, the elders there declared, that notwithstanding their former opinions, yet, upon examination of all the testimonies, they found ||[11]such|| contrariety and crossing of testimonies, as they did not see any ground for the court to proceed to judgment in the case, and therefore earnestly desired that the court might never be more troubled with it. To this all consented except ||[12]Mr. Bellingham|| who still maintained his former opinion, and would have the magistrates lay down their negative voice, and so the cause to be heard again. This stiffness of his and singularity in opinion was very unpleasing to all the company, but they went on notwithstanding, and because a principal end of the meeting was to reconcile differences and take away offences, which were risen between some of the magistrates by occasion of this sow business and the treatise of Mr. Saltonstall against the council, so as Mr. Bellingham and he stood divided from the rest, which occasioned much opposition even in open court, and much partaking in the country, but by the wisdom and faithfulness of the elders, Mr. Saltonstall was brought to see his failings in that treatise, which he did ingenuously acknowledge and bewail, and so he was reconciled with the rest of the magistrates. They laboured also to make a perfect reconciliation between the governour and Mr. Bellingham. The governour offered himself ready to it, but the other was not forward, whereby it rested in a manner as it was. * * * The deputies, also, who were present at this meeting and had voted for the plaintiff in the case of the sow, seemed now to be satisfied, and the elders agreed to deal with the deputies of their several towns, to the end that that cause might never trouble the court more. But all this notwithstanding, the plaintiff, (or rather one G. Story ||[13]her|| solicitor,) being of an unsatisfied spirit, and animated, or at least too much countenanced, by some of the court, preferred a petition at the court of elections * * * it was returned that the greater part of them did conceive the cause should be heard again, and some

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[11] ||much||
[12] ||blank||
[13] ||his||

others in the court declared themselves of the same judgment, which caused others to be much grieved to see such a spirit in godly men, that neither the judgment of near all the magistrates, nor the concurrence of the elders and their mediation, nor the loss of time and charge, nor the settling of peace in court and country could prevail with §them§ to let such a cause fall, (as in ordinary course of justice it ought,) as nothing could be found in, by any one testimony, to be of criminal nature, nor could the matter of the suit, with all damages, have amounted to forty shillings. But two things appeared to carry men on in this course as it were in captivity. One was, the deputies stood only upon this, that their towns were not satisfied in the cause (which by the way shows plainly the democratical spirit which acts our deputies, &c.) The other was, the desire of the name of victory; whereas on the other side the magistrates, &c. were content for peace sake, and upon the elders' advice, to decline that advantage, and to let the cause fall for want of advice to sway it either way.

Now that which made the people so unsatisfied, and unwilling the cause should rest as it stood, was the 20 pounds which the defendant had recovered against the plaintiff in an action of slander for saying he had stolen the sow, &c. and many of them could not distinguish this from the principal cause, as if she had been adjudged to pay 20 pounds for demanding her sow, and yet the defendant never took of this more than 3 pounds, for his charges of witnesses, &c. and offered to remit the whole, if she would have acknowledged the wrong she had done him. But he being accounted a rich man, and she a poor woman, this so wrought with the people, as being blinded with unreasonable compassion, they could not see, or not allow justice her reasonable course. This being found out by some of the court, a motion was made, that some who had interest in the defendant would undertake to persuade him to restore the plaintiff the 3 pounds (or whatever it were) he took upon that judgment, and likewise to refer other matters to reference which were between the said Story and him. This the court were satisfied with, and proceeded no further.

There was yet one offence which the elders desired might also be removed, and for that end some of them moved the

governour in it, and he easily consented to them so far as they had convinced him of his failing therein. The matter was this. The governour had published a writing about the case of the sow, as is herein before declared, wherein some passages gave offence, which he being willing to remove, so soon as he came into the general court, he spake as followeth, (his speech is set down verbatim to prevent misrepresentation, as if he had retracted what he had wrote in the point of the case:) "I understand divers have taken offence at a writing I set forth about the sow business; I desire to remove it, and to begin my year in a reconciled estate with all. The writing is of two parts, the matter and the manner. In the former I had the concurrence of others of my brethren, both magistrates and deputies; but for the other, viz. the manner, that was wholly mine own, so as whatsoever was blame-worthy in it I must take it to myself. The matter is point of judgment, which is not at my own disposing. I have examined it over and again by such light as God hath afforded me from the rules of religion, reason, and common practice, and truly I can find no ground to retract any thing in that, therefore I desire I may enjoy my liberty herein, as every of yourselves do, and justly may. But for the manner, whatsoever I might allege for my justification before men, I now pass it over: I now set myself before another judgment seat. I will first speak to the manner in general, and then to two particulars. For the general. Howsoever that which I wrote was upon great provocation by some of the adverse party, and upon invitation from others to vindicate ourselves from that aspersion which was cast upon us, yet that was no sufficient warrant for me to break out into any distemper. I confess I was too prodigal of my brethren's reputation: I might have obtained the cause I had in hand without casting such blemish upon others as I did. For the particulars. 1. For the conclusion, viz. now let religion and sound reason give judgment in the case; whereby I might seem to conclude the other side to be void of both religion and reason. It is true a man may (as the case may be) appeal to the judgment of religion and reason, but, as I there carried it, I did arrogate too much to myself and ascribe too little to others. The other particular was the profession I

made of maintaining what I wrote before all the world, which, though it may modestly be professed, (as the case may require,) yet I confess it was now not so beseeming me, but was indeed a fruit of the pride of mine own spirit. These are all the Lord hath brought me to consider of, wherein I acknowledge my failings, and humbly intreat you will pardon and pass them by; if you please to accept my request, your silence shall be a sufficient testimony thereof unto me, and I hope I shall be more wise and watchful hereafter."

The sow business had started another question about the magistrates' negative vote in the general court. The deputies generally were very earnest to have it taken away; whereupon one of the magistrates wrote a small treatise, wherein he laid down the original of it from the patent, and the establishing of it by order of the general court in 1634, showing thereby how it was fundamental to our government, which, if it were taken away, would be a mere democracy. He showed also the necessity and usefulness of it by many arguments from scripture, reason, and common practice, &c. Yet this would not satisfy, but the deputies and common people would have it taken away; and yet it was apparent (as some of the deputies themselves confessed) the most did not understand it. An answer also was written (by one of the magistrates as was conceived) to the said treatise, undertaking to avoid all the arguments both from the patent and from the order, &c. This the deputies made great use of in this court, supposing they had now enough to carry the cause clearly with them, so as they pressed earnestly to have it presently determined. But the magistrates told them the matter was of great concernment, even to the very frame of our government; it had been established upon serious consultation and consent of all the elders; it had been continued without any inconvenience or apparent mischief these fourteen years, therefore it would not be safe nor of good report to alter on such a sudden, and without the advice of the elders: offering withal, that if upon such advice and consideration it should appear to be inconvenient, or not warranted by the patent and the said order, &c. they should be ready to join with them in taking it away. Upon these propositions they were stilled, and so an

order was drawn up to this effect, that it was desired that every member of the court would take advice, &c. and that it should be no offence for any, either publicly or privately, to declare their opinion in the case, so it were modestly, &c. and that the elders should be desired to give their advice before the next meeting of this court. It was the magistrates' only care to gain time, that so the people's heat might be abated, for then they knew they would hear reason, and that the advice of the elders might be interposed; and that might there be liberty to reply to the answer, which was very long and tedious, which accordingly was done soon after the court, and[14] published to good satisfaction. One of the elders also wrote a small treatise, wherein scholastically and religiously he handled the question, laying down the several forms of government both simple and mixt, and the true form of our government, and the unavoidable change into a democracy, if the negative voice were taken away; and answered all objections, and so concluded for the continuance of it, so as the deputies and the people also, having their heat moderated by time, and their judgments better informed by what they had learned about it, let the cause fall, and he who had written the answer to the first defence, appeared no further in it.

Appendix IV

2 Winthrop's History of New England, 160.

1644.

At the same court in the first month, upon the motion of the deputies, it was ordered, that the court should be divided in their consultations, the magistrates by themselves, and the deputies by themselves, what the one agreed upon they should send to the other, and if both agreed, then to pass, &c. This order determined the great contention about the negative voice.

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[14] Publishing does not here mean printing. The tract, written for circulation by Winthrop, is in Our [Mass.] Historical Society's library, dated 5 of 4th mo, 1643. It contains sixteen pages, and is among the Hutchinson MSS.

Appendix V

2 Records of Massachusetts, 3.
1642.

"George Story undertook for Rich^d Sherman that if he shalbee cast, what cost shalbee ceased he will beare it."

Appendix VI

2 Records of Massachusetts, 12.
1642, June 14.

In the case between Rich^d Sherman & Capt. Keayne, this was ppounded to vote: Whether the defend^t bee found to *have bene possest of the plaintiff's sowe, & converted her to his owne use, or not: it was voted by 2 ma^trats & 15 deputies for the plaintiffe, & by 7 ma^trats & 8 deputies for the defend^t, & 7 deputies were newters.

Appendix VII

2 Records of Massachusetts, 51.
1643, October 17.

Mr. Stories petition is answered thus: Wee conceive that hee can blam none but hemselfe that his causes were not tryed the last Quarter Co^rt; & therefore hee must stay till the Co^rt come againe, unlesse in the mean time Capt. Keayne & hee come to an agreem^t betwixt themselues, w^ch wee much desire.

Goodm̃ Shermans petition is answered thus: Wee conceive that if Capt̃. Keayne bee willing, & accordingly shall pforme what was undertaken for him in the first session of this Co^rt, that then Sherman shall give him a discharge for all differences & controversies concerning the sowe; w^ch if hee refuse to do, hee shall bee debarred any further hearing forever; but if Capt̃ Keayne refuse, Goodm̃ Sherman may take the benefit of the lawe.

Appendix VIII

2 Records of the Court of Assistants Colony of Massachusetts Bay, 119.

1642, December 20.

George Story appearing is discharged of his Bond for appearance to answer Capteine Keayne this Co^rt.

Appendix IX

Hubbard's History of New England, 382-383.

1642.

In the same year [1642] fell out a new occasion of starting the old question about the negative vote in the magistrates; for the country, and all the Courts thereof, (General and Particular,) in a manner, were filled with much trouble, about something[15] that strayed from a poor man's possession in the year 1636; but in this year were revived so many controversies about the true title thereof, as engaged all the wisdom and religion in the country to put an end thereunto. The poor man's cause is like to engage the multitude with a kind of compassion, against which, as well as against the bribes of the rich, the law of God doth caution judges. It proved almost as long and chargeable as *Arrestum Parliamenti Tholosanni*, in the case of Martin Guerra,[16] to find who was the right owner of the thing in controversy.[17] It is much to see the restless and unreasonable striving in the spirit of man, that a lessor Court, that hath power to determine an action of an hundred or a thousand pounds, could not put an issue to a matter of so small a value. It proceeded so far at the last, (through some prejudice taken up against the defendant,) that the very foundations of the whole authority of the country were in danger to be blown up thereby; a report being taken up by the common people of the country that the negative vote of the magistrates (who did in that, as they should in all cases, look more to the nature of the evidence than any preoccupating notion or prejudice to or against the plaintiff or defendant) had hindered the course of justice. On that occasion it was strongly moved

[15]First written, *a swine*, which was, in truth, the "something." See Sav. Win. II. 69.—H.

[16]The "thing in controversy," in this case, was a woman, whom two individuals claimed as wife.—H.

[17]First written, *of the said swine*.—H.

that the said negative vote might be taken away; for, by the Patent, no matter should pass in the General Court, without the concurrence of six of the magistrates, at the least, with the Governor or Deputy, which, in this case, could not be found; therefore was it the more on this account solicitously endeavored that the power of the negative vote in the General Court might be taken away. And it was so impetuously now carried on, that there was scarce any possibility to resist the torrent of common fame, jealousy,[18] * * * * and prejudice of minds, so as at the last, for peace sake, and quieting the minds of the people in the present exigence of the said[19] business, the magistrates yielded to a private reference, as to some circumstances of the action; and the defendant was persuaded to return the poor woman her charges, i. e. what he had received upon the account of a former action, viz., £3, as part of £20, that was granted by the jury; which was done rather out of charity, and respect to the public good, than out of conviction of duty in point of justice, as wise men always apprehended the case. But for the negative vote, it will more naturally fall to be spoken to afterwards.

Appendix X

Hubbard's History of New England, 389-391.

1643.

But this business of the book against the Standing Council was no sooner ended, but another controversy was revived about the negative vote, upon occasion of the forementioned controversy, which at this time, in the year 1643, was, by the restless importunity of some, that liked to labor in the fire, called over again; and this caused the same question to be moved afresh, about the magistrates' negative vote in the General Court. The deputies were very earnest to have it taken away. Whereupon one of the magistrates wrote a small treatise, wherein he laid down the original of it from the Patent, and the establishing of it by order of the General Court, in the year 1634; showing thereby how it was funda-

[18]MSS. illegible.—Ed. I am obliged to acknowledge it.—H.

[19]First written *sow*.—H.

mental to the government, which, if it were taken away, would be a mere democracy. He showed also the necessity and usefulness of it, from Scripture, reason, and common practice, &c. Yet this would not satisfy, but the deputies were earnest to have it taken away; and yet it was apparent, (as some of the deputies themselves confessed,) the most did not understand it. But where men's affections are once engaged upon any design, whether reason persuade to it or not, it is usually with great earnestness pressed on. Those that were, at this time, inclined that way were much strengthened in their purpose by a discourse that fell into their hands, (drawn up by one of the magistrates, as was conceived;) supposing they had now enough clearly to carry the cause, and avoid the danger of all arguments and reasons laid down in the former treatise, and therefore pressed earnestly to have the matter presently determined. But the magistrates told them the matter was of great concernment, even to the very frame of their government, and that it had been established upon serious consultation and consent of all the ministers, and had been continued without any apparent mischief and inconvenience now these fourteen years; therefore it would not be safe nor convenient to alter on such a sudden, and without the advice of the ministers of the country, offering withal that if, upon such advice and consideration, it should appear to be inconvenient, and not warranted by the Patent and by the said order, &c., they should be ready to join with them in the taking it away. Upon these propositions their heat was moderated, and an order drawn up that every member of the Court should take advice; and that it should be no offense for any, either publicly or privately, with modesty to declare their opinion in the case; and that the ministers should be desired to give their advice, before the next meeting of the Court. It was the magistrates' only care to gain this, that so the people's minds might be the more easily quieted; for they knew the ministers would hear reason, and that so there might be liberty to reply to the said answer of one of the magistrates, (very long and tedious, but not with that strength of reason, as was by some apprehended,) which accordingly was done soon after the Court, and published to good satisfaction. One of the ministers also

wrote a small treatise, wherein he, both scholastically and religiously, handled the question, laying down the several forms of government, both simple and mixed, and the true form of the Massachusetts government, and the unavoidable change of the government into a democracy, if the negative vote were taken away.

Thus the deputies, and the people also, having the heat of their spirits allayed by time, and their judgments better informed by what they had learned about it, let the cause fall, and the gentleman who had written the answer to the first defence, &c., appeared no further in it for that time; and it was conceived that there would have been a final end put to that controversy by an Order made in the next Court, March 25, 1644, when there was a motion of the deputies that the Court should sit apart in their consultations, the magistrates by themselves, and the deputies by themselves, and what the one agreed upon they should send to the other, and if both agreed, then to pass, &c. But the controversy could not be so easily determined, so it was laid aside for that time; but afterwards it was agreed that, in case the major part of the deputies, and also of the magistrates, did not unite in the same conclusion in any matter of judicature, that then, the whole Court being met together, the vote of the major part should put an issue to the case; which establishment continued for a long time after.

Appendix XI

1 Hutchinson's History of Massachusetts Bay, 142-144.

1645.

About this time [1645] there was another struggle for power between the assistants or magistrates, and the deputies. The latter could not bear their votes should lose their effect by the non-concurrence of the former who were so much fewer in number; but, by the firmness of Mr. Winthrop, the assistants maintained their right at this time, and (March 25, 1644) the deputies, not,being able to prevail, moved that the two houses might sit apart, and from that time votes were sent in a parlimentary way from one house to the other, and the consent of both was necessary to an act of the court. This continued a

short time, without any further provision, but finally the magistrates consented, that in appeals from the lower courts and all judicial proceedings, if the two houses differed the major vote of the whole should determine. The deputies also looked with envy upon the powers exercised by the magistrates in the recess of the general court, and sent up a vote or bill to join some of their number with the magistrates, who should receive a commission from the court, but this was refused as an innovation upon the charter. The house then desired the magistrates would suspend the exercise of their executive power until the next session. They answered that they must act as occasion required according to the trust reposed in them. The speaker told them they would not be obeyed. The court broke up in this temper. But, disturbances happening with the Indians, it was called together again in a short time, and the deputies voted that (*salvo jure*) for the peace and safety of the colony the governor and assistants should take order for the welfare of the people, in all sudden cases which may happen within the jurisdiction, until the next session of the court. By agreement, all the ministers were called in at the next session, in order to give their opinion upon the point in difference. They determined that the governor, deputy governor, and assistants were invested with the magistratical power, (the nature and extent of this power is left in the dark,) and that they do not derive it from the people, who were only to design such persons as they thought fit for the exercise of those powers. Several other points were referred to the ministers at the same time, and all agreed to by both houses with some small amendment.

The controversy between the two houses at this time, was occasioned by a difference in sentiment upon the identity of a swine, which was claimed by a poor woman as having strayed from her some years before, and her title being disputed by a person of more consequence, divided not the court only but the whole country. The identity of Martin Guerre was not more controverted in France. Pity and compassion for the poor woman prevailed with the common people against right. At last those magistrates who had been in favour of the other side, for the magistrates were divided too,

Dudley on one side and Bellingham the other, persuaded the person who they supposed had a good title, and who had recovered below, to relinquish it, that the public peace might be restored.

Appendix XII

Mass. Archives, Vol. 38B, p. 214 a.

The Humble Peticeon of Richard Shearman Humbly Sheweth That:

Wheareas yo^{r} Petio^{r} at the last Court did humbly Peticeon that an issue might bee put to the differrance depending betwixt Cap^{t} Keayne & himselfe since w^{ch} tyme in answeare therevnto the wor^{ppll} M^{r} Hibbins resolud your Petic^{r} that he was sent as from that Honrd Court to tender his goods againe (and that the Petic^{r} should receiue them as full satisfacon and thervpon discharge the Captaine from all former contraversies &c the w^{ch} he could not doe (because therein he should not onely wronge his owne conscience but alsoe as much as in him Lyeth condemne the vote of the Gennerall Courte, (And if the cause doth remayne Dubious in the Highest Courte yo^{r} Petice^{r} knoweth not how the former Act of an inferrio^{r} Court can rest certaine or that it is Lawfull for the Captaine to keepe his goods.

Wherefore yo^{r} Petic^{r} haueing ben damnifyed aboue 30^{l}: in expence & lose of tyme by waiting for Justice Doth humbly supplicate that he maye nowe obtaine the same and not suffer for some speeches of his wifes any longer Seing the wittness Against her haue erred in there testimonyes & since doe confesse that she vttered not those words as he shall pue before this Honrd Courte.

Maye it therefore please this Honoured Courte tenderly to Compasionate the condiceon of yo^{r} poore Petic^{r} and to releiue him therein According to the wayes of Justice

And yo^{r} Petic^{r} shall praye &c

Wee conceaue that if Capt Keayne be willing & accordingly shall pforme w^{t} was vndertaken for him in the first sessione of this Court that then Sherman shall giue him a discharge for

all differences & controversies concerneing the sowe w^{ch} if hee refuse to doe hee shalbee debarrd any furth^{r} heareing fo^{r}euer but if Capt Keayne refuse Sherm̃ may take the benefitt of the lawe.

Appendix XIII

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