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Final Notes
on
Witchcraft in Massachusetts

by

George H. Moore, LL.D.

Hon. Charles H. Bell, LL.D.
With the Compliments of
E. H. Elliott

Exeter,
May 16. 1885.

FINAL NOTES

ON

WITCHCRAFT IN MASSACHUSETTS:

A SUMMARY VINDICATION, ETC.

PAMPHLETS HITHERTO ISSUED IN THIS DISCUSSION.

1. Notes on the History of Witchcraft in Massachusetts; with Illustrative Documents. From Proceedings at the Annual Meeting of the American Antiquarian Society, October 21, 1882. By George H. Moore. 8vo. pp. 32. Worcester: 1883.

2. Further Notes on the History of Witchcraft in Massachusetts, containing additional Evidence of the Passage of the Act of 1711, for reversing the Attainders of the Witches; also, affirming the Legality of the Special Court of Oyer and Terminer of 1692; with a Heliotype Plate of the Act of 1711, as printed in 1713, and an Appendix of Documents, etc. By Abner Cheney Goodell, Jr. Reprinted, with slight alterations, from the Proceedings of the Massachusetts Historical Society [June, 1883]. 8vo. pp. 52. Cambridge: 1884.

3. Supplementary Notes on Witchcraft in Massachusetts: A Critical Examination of the alleged Law of 1711 for reversing the Attainders of the Witches of 1692. By George H. Moore, LL.D., Corresponding Member of the Massachusetts Historical Society. From the Proceedings of the Society, March 13, 1884. 8vo. pp. 25. Cambridge: 1884.

4. Reasons for concluding that the Act of 1711, reversing the Attainders of the Persons convicted of Witchcraft in Massachusetts in the year 1692, became a Law. Being a Reply to Supplementary Notes, etc., by George H. Moore, LL.D. By Abner Cheney Goodell, Jr. Reprinted from the Proceedings of the Massachusetts Historical Society [March 13, 1884]. 8vo. pp. 21. Cambridge: 1884.

FINAL NOTES

ON

WITCHCRAFT IN MASSACHUSETTS:

A Summary Vindication

OF

THE LAWS AND LIBERTIES

CONCERNING

ATTAINDERS WITH CORRUPTION OF BLOOD,
ESCHEATS, FORFEITURES FOR CRIME,
AND PARDON OF OFFENDERS

IN REPLY TO THE

"Reasons," Etc., of Hon. Abner C. Goodell, Jr.

EDITOR OF THE PROVINCE LAWS OF MASSACHUSETTS.

BY

GEORGE H. MOORE, LL.D.

SUPERINTENDENT OF THE LENOX LIBRARY.

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WITCHCRAFT IN MASSACHUSETTS.

I VENTURE to offer the present pamphlet without introduction or apology to those who are interested in its subject. The main question hitherto, between Mr. Goodell and myself, has been whether an Act purporting to have been passed in 1711, a copy of which (printed in 1713) has come into his possession, reversing the attainders of several of those condemned for witchcraft in 1692, actually became a law. If it is thought that the discussion implies more importance in the enactment than it really possesses, yet the grave errors asserted and maintained in defence of this singular act make it a positive duty to continue the work of criticism. A mere contest for personal opinion has no charm for me, neither have I the disposition to prolong a controversy which requires the discovery of new materials of evidence for its absolute determination. But my learned and honored friend, very ably expanding his brief remarks after listening to my paper before the Massachusetts Historical Society, into "*Reasons for concluding that the Act of* 1711 . . . . *became a law*," has introduced certain assumptions whose validity is really, as matter

of historical interest, far more important than the decision of the question of fact which has occasioned our discussion. I should hardly follow him to note or correct mistakes relating only to the details of my own argument, which I do not care to repeat or reinforce; but his zeal and enthusiasm as the champion of the Act of 1711 has betrayed him into elaborate statements both of law and fact, which not only multiply the number of "exceptions to our uniform agreement on historical questions," but demand instant challenge and careful correction.

Before proceeding, however, to the examination of these statements, which are the chief occasion for the present publication, I will briefly notice the minor points alluded to in his reply to my "*Supplementary Notes*," etc.

His statement of the "issue as it stands" respecting the Act of 1711, may be abbreviated. It involves simply the truth of the assumption that the act was signed by the Governor, impressed with the Province Seal, and published with due formality.[1] The only evidence produced to sustain this assumption is a printed copy with the date 1713, which he thinks able to stand by itself, without any shadow of doubt. He gave no credit to the Salem MS. until after the discovery of this printed sheet. The contemporary notices adduced may all be referred without violence to another piece of legislation—leaving absolutely no support to the "only conclusive test of the passage of the Act" in question.[2]

[1] If any one should think that too great stress is laid on the necessity of sealing and publication, as well as signature by the Governor, let him turn to the *Province Laws:* iii., 939, 962–3, and find the Commissioner's notice of an act with perfect record of everything except the Province Seal, yet not recognized or admitted among the Statutes.

[2] Since my previous paper was printed I have met with and furnished to Mr. Goodell an additional contemporary reference to "the General Court having taken off the attainder," in Mr. Upham's extracts from the Salem

The reference made to bills of attainder (although they have nothing to do with the subject of discussion), reminds me of certain proceedings of the General Court of Massachusetts in 170–67, which curiously illustrate their conceit of authority and passion for imitating the Parliament of England. Bills of attainder and of pains and penalties were (as is well known) acts of Parliament for putting people to death, or for otherwise punishing them without trial in the usual form. In 1706, certain Boston traders having been engaged in an unlawful, if not treasonable intercourse with the French and Indian enemy, were held to answer at the Superior Court. The public mind having become greatly excited by the course of events in the war, the General Court resolved "that the Superior Court had no jurisdiction, and that a parliamentary inquiry was necessary." The criminals were arrested and committed by warrant of the Speaker of the house; and a formal impeachment, in the accustomed style of the House of Commons, was sent up to the Council, which was thus supposed to possess the judicial power of the House of Lords. The house was unable to support the impeachment; the accused were at last tried by the whole legislature, and judgment was rendered in six separate statutes, inflicting pains and penalties on each defendant. When they reached the Attorney General in England, he gave it as his opinion: "that the assembly have no power from their charter to act as they have done; though they may make laws, they cannot execute them; that these acts were not fit to be confirmed, because they would form a precedent of dangerous consequence." The acts were accordingly repealed by the Queen, who at the same time

Church Records, March 2, 1712, printed in his *Lectures*, etc. (1831), p. 124, and *History of Witchcraft:* ii., 483, which, like all those before mentioned in this discussion, I refer to the "Report" act, whose passage into a law no body doubts.

provided for the prosecution of the criminals in the ordinary courts of law. (Chalmers: *Introduction to History of the Colonies:* 309. Hutchinson: ii., 154 *et seq.*) In these cases Governor Dudley dared not refuse his approval, for he was himself charged with complicity in the transactions which had provoked public indignation.[1] It is proper to add that these were the only instances of such legislation in Massachusetts.

Mr. Goodell says that "bills to reverse or set aside attainders were classed with private acts, both in Old and New England." His list for Old England might be extended. To the cases of "William Russell, commonly called Lord Russell, Algernon Sidney, and Alicia Lisle, Widow," he might have added, besides many others before and after, that of Leisler, Milborne, and Gouverneur, noticed in my paper. But his range in New England is not a wide one, for the list of such acts is very brief—there being but one that can be mentioned besides the act in question! I have not claimed that this would have been a public act—but it is obvious that if any question involving its authority had ever come before a competent Court in Massachusetts, the judges would have been bound to take notice, at least of the last provision of the act, without pleading.[2]

I did *not* allege as even a formidable, much less an insuperable objection to the Act, that it did not appear to

[1] "His Excellency signed the six several Bills passed for the Punishment of Samuel Vetch, John Borland, Roger Lawson, William Rouse, John Phillips, Junr, and Ebenezer Coffin, respectively, Declaring that he gave his consent thereto, with a Saving of her Majesties Prerogative referring to the Fines, as he is commanded, and ordered that they pass the Seal."—*Gen. Court Records:* viii., 243 (September 4, 1706).

[2] *Private statutes* are those of which the judges will not take notice without pleading; such as concern only a particular species or person.

Public statutes are those of which the Courts will take judicial notice without pleading or proof. Bouvier: *Law Dictionary.*

have been laid before the ministers of the Crown. On the contrary, I was (then as now) well informed that it was "not usual to send copies of the Private Acts, the Titles and Purport of them being contained in the Minutes of the Assembly," *i.e.*, the General Court Records, which were regularly transmitted to the Board of Trade.[1] I said it was "measurably certain that neither the Act of 1703, nor

[1] *Province Laws:* ii., 94. It is not necessary here to inquire into the reasons why this method was pursued; but I may remark that it had grown up in direct violation of the instructions to the Governor and Secretary of the Province, which were very stringent in respect to the punctual transmission of the Laws required by the Charter.

The Governor was required

"To transmit authentic copies of all Laws within three months of their being enacted, with duplicates by the next conveyance, upon pain of the King's highest displeasure and of the forfeiture of a year's salary."

The Secretary was required

"To provide transcripts of all Laws and Journals of the Council and Assembly, to be transmitted to the King and Committee of Trade, upon pain of incurring the forfeiture of his (the Secretary's) place." *Colonial Entry Book:* No. 62, p. 395.

Governor Phips discharged the duty thus imposed upon him very punctually; for it appears that as early as February 20, 1693, he transmitted all the laws of the political year 1692–93, excepting the fourth session, in March. *Letter of Phips to the Earl of Nottingham:* February 20, 1693. The following document shows that the House of Representatives were not satisfied with the results of their labors, and desired to review them.

[Mass. Archives: xlvii: 141.]

THE *proposall of y^e^ House of Representatives to His Excellency y^e^ Gou^r^. & Councill.*

It was proposed to y^r^ Hon^rs^ y^e^ Last Session whether it might not be a meet expedient to stop y^e^ sending of our Late Laws till better considered and digested, finding many imperfections in y^m^.

It is still proposed to y^r^ Hon^rs^ y^t^ it may be, y^e^ Laws may yet be stop^t^. haueing upon y^e^ p^r^sall of them further found more and more cause for it.

These proposalls orderly read in the House of Representatives, and voted in y^e^ Affirmative and sent up for Consent.

WILLIAM BOND, *Speaker.*

March 9, $\frac{92}{3}$.

this alleged Act of 1711, ever came under the notice of the Privy Council," etc. I am still of this opinion, notwithstanding Mr. Goodell's assertion that "the constitutionality of the Act was not questioned by the Solicitor General of England, when the Act of 1703 was laid before him, by command of the Lords of Trade; a proceeding which Dr. Moore too hastily assumes could not have happened." If my friend has any evidence in his possession that the Act of 1703 was at any time "laid before" the law officer of the Crown, or ever came under his notice, "by command of the Lords of Trade," surely this was the time to have produced it. Again, Mr. Goodell says—"no list of the Acts of 1711 has been found in the British Archives," and "proof of the passage of three of the public acts of that year must rest upon the existence of a printed copy or copies," etc. Yet in his great work, the *Province Laws*, i. 902, he records the fact that there is "in the Public Record office, a list of Acts regularly sent to the Privy Council, containing the titles of the three Acts of 1711." Which statement is correct?

The category of the act in question is *not* identical in any of the particulars which are conclusive in determining the status of the other three acts named. "They were printed contemporaneously, in due course, and by regular official authority." As my critic cannot doubt any part of this statement, I wonder that he should attempt to evade its force. My knowledge was *not* derived from the same kind of evidence as that on which he founds the authority of the act in question. That act was *not* printed contemporaneously, in due course, or by regular official authority. Mr. Goodell admits that "it is not pretended that the printed act [in question] was one of a series of acts published by *authority*; but on the contrary, it is assumed to have been printed, a year or two after its passage, probably to meet the demands of persons interested,

who could not be so conveniently and cheaply supplied with manuscript copies."

He gives us no hint of any theory which would account for such an extraordinary demand in 1713 for copies of this act, which two years before, when the subject was in its highest tide of interest, had been entirely satisfied by one ordinary uncertified manuscript copy. The most careful research has revealed no other trace of a "great demand on the part of those interested."

If we suppose that there was at any time a genuine call for copies duly met by this publication in print, is it not passing strange? that among so many families to whom it might have been in all coming time a sort of patent or charter to rescue their names from perpetual infamy, but one copy should have been preserved, to be "signed," as Mr. Goodell expresses it, by a Salem wag, whose fame as a joker has survived almost all other knowledge and information of him or his ancestry. His autograph, evidently intended simply to indicate ownership, adds nothing of value or authenticity to the relic.

Mr. Goodell contradicts my statement that the act in question "differs entirely in its status" from other acts mentioned of the same year, and affirms that "the category of each is identical." So far from needing the apology he suggests for not going more fully into explanations supposed to be unnecessary, I offer no excuse, and find no "difficulty in the task" of showing the difference with respect to any of the laws mentioned. As my friend selects one in particular, I will follow his direction and endeavor to satisfy his desire for knowledge respecting that one, with such "fulness of illustration" as will make "cogency of reasoning" unnecessary.

"The act for enforcing the order of June 12, 1711," was passed July 20, 1711, and published by proclamation on the same day, printed by the official printer, as the order

had been printed previously. A further contemporaneous announcement of this act was made, in the following semi-official statement which appeared in the only newspaper of the day, the *Boston News-Letter:* No. 380, July 23 to July 30, 1711.

"*Boston.* On Tuesday last, the 24th currant, His Excellency was pleased to prorogue the General Assembly of this Province unto Wednesday the 22d of August next, after having given his Assent to 'An Act for further enforcing and enlarging the Act passed at their Session in May last, against Enticing, Harbouring, Concealing, or Conveying away any Soldiers, Mariners, or Sailors of Her Majesty's Land and Sea Forces from the Kingdom of Great Britain, or of those raised within this Province for the present Expedition.'"

This act did not appear in the supplement to the current edition of the laws, undoubtedly for the reason that it was a temporary act of very short continuance, being in force only a few weeks, until the last of the following October. Its history will be shown in the extracts which follow, from a volume in which I met with the law several years before the publication of the first volume of the Province Laws. It will be seen that the printed law found by Mr. Sainsbury, of which he transmitted a copy to Mr. Goodell in 1869, is unquestionably one of the original issue, like that which was copied *in extenso* in the Appendix to the volume which I quote. This is the *Journal of Sir Hovenden Walker, Kt.*, the naval commander in the great expedition against Canada, which sailed from Boston in the summer of 1711 and proved a complete failure, owing, it was said, to the unskilfulness of the pilots, by which eight ships and nearly a thousand men were lost in the River St. Lawrence. The volume was published in 1720.

In his *Journal*, under date of June 25, 1711, the writer, then in Boston, says: "The Government here, it

seems, have issued strict orders, for preventing Desertion from the Men-of-War and Land Forces." Under date of July 17, 1711, he further says: "I had a letter from the Governor [Dudley] with a printed Order concerning Deserters." The order is given in full in the Appendix to the volume (p. 198), with the imprint: "BOSTON. *Printed by* B. Green, *Printer to his Excellency the Governor and Council*, 1711." The original publication in print may be found in the *Massachusetts Archives*, lxxi., 784.

To this order, thus reprinted, the following note was appended by Walker:

"This order seem'd to me defective, because the Penalty of twenty Pounds is not said by whom, nor how to be levied, nor to whom to be paid, nor any Encouragement to the Informer; whereas I should have thought it more effectual, had the Penalty of twenty Pounds been to be paid to the Informer, and that any Sailor, Marine, or Soldier being concealed, upon Surrendering himself, should have the Reward of twenty Pounds, and whoever had trusted or entertained them, or lent them any Monies, or other Necessaries, should lose it."

July 2. The Governor issued a Proclamation to supply the Expedition with Provisions.

July 16. The Governor, by Proclamation, called out the Militia to apprehend Deserters.[1]

[1] The charge was very freely made that desertion was encouraged at Boston at this time. A very copious correspondence and other unpublished documents are preserved in England. Chalmers says of the arrival of the British soldiers and sailors of this expedition in Boston:—"When the western Christians first visited Constantinople on their way to rescue the holy city, their religion, their manners, and their reasonings did not appear in a more striking light to the Greeks than did those of the New English to the British officers." He quotes a letter of Colonel Richard King to Secretary St. John, from Boston, of July 25, 1711, describing what he saw and felt: "We have met with great difficulties, through the misfortune that the colonies were not in-

July 18. "This being the Day to which the General Assembly has been prorogued, they met, and we hope now to have all things settled relating to the Exchange and Deserters.

July 19. "Notwithstanding all that had hitherto been done, Men still desert, and several Houses and People are said to harbour them. The General Assembly have settled the Exchange of Monies at 40*l.* per cent., and are about an Act to prevent Desertion."

This act was passed, as stated before, July 20th, 1711, and issued on the same day in print, accompanied by a Proclamation of the Governor, both of which are reprinted in the Appendix to the volume, pp. 231 *et seq.*, with the imprint of the official printer.[1]

On the next day Walker was waited on by a Committee of the Council and Assembly, who presented a paper expressing their good intentions to forward her Majesty's service. Walker, in his reply, told them that he hoped they would make their good Intentions appear in the vigorous Prosecution of what they had lately enacted against such as had enticed, harbored, or concealed any Deserters, and forward them as well as Provisions after the Fleet had sailed.

July 29. He says, "the Act of Assembly for that purformed of our coming two months sooner, and through *the interestedness, the ill-nature, and sourness of these people, whose hypocrisy and canting are insupportable.* And no man living, but one of General Hill's good sense and good nature, could have managed with that patience and dexterity that he has done. But, if such a man *met with nothing he could depend on*, though vested with the Queen's royal authority, and supported by a number of troops [3,500 veterans] *sufficient to reduce by force all the colonies*, it is easy to determine the respect and obedience her Majesty may reasonably expect from them for the future." The acrimony of King arose from his conviction, that the New English designed to defeat the expedition, wherein he bore so respectable a command.—*Introd. to Hist. of the Colonies:* p. 324.

[1] Again reprinted in *Province Laws:* i., 902–3, without the imprint of the official printer.

pose has had little effect, for I still hear Complaints of Deserters."

On the following day, July 30, 1711, he sailed on his expedition.

Jeremiah Dummer, the agent of Massachusetts in England, made an earlier historical record of "the Act for enforcing the order of June 12, 1711," in his defence of New England against the charges already alluded to, which was printed in 1712 at London. Referring specifically to the statement that "as soon as the Fleet arrived, the People there [in Boston] debauch'd their Men from the Service, and conceal'd 'em in their Houses," —he goes on to say :

"That Seamen and Soldiers will desert whenever they have Opportunity is no new Thing, and that there should be found in all Countries some few ill People to encourage and harbour 'em, is as little strange. The Question therefore is, How the Assembly of the Province then sitting behav'd themselves on this occasion. Why, as soon as they were informed that such things were done, they immediately passed an Act wherein a special Court was erected to try all offenders of that kind; and a Penalty of fifty Pounds or a Twelve-months Imprisonment without Bail or Mainprize injoined for the Offence. And for the speedier Dispatch, the Sheriff was impowered to return the Jury (a thing never before done in that Province), and all Officers required to enter any Houses by Force where Soldiers or Sailors were suspected to be conceal'd. To impute a thing then to the Country in general, which they took these extraordinary methods to prevent, is not only untrue, but highly disingenuous." [1]

It is hardly necessary to add here more than the briefest

[1] A Letter to a Noble Lord, concerning the late Expedition to Canada. By Jer. Dummer. 8vo. London, 1712. Rep. Boston, 1746.

reference to Hutchinson's notice of the Act, which may be found in his second volume, with which all are familiar. *History of Massachusetts:* ii., 192.

I commend this brief history, embracing several "scraps" which indicate "official recognition" of "the Act enforcing the order of June 12, 1711," to my friend's careful study, with the assurance that if he can, by successful research or any skill of art or learning, put his favored "Act" into an "identical category," I shall be delighted with the result, and will accept it for *my* collection with due public as well as private acknowledgment.[1]

My estimate of the literary value of the statute-books of the early part of the last century is more favorable than that expressed by my friend. They are certainly superior both in style and matter to a great part of the theological rubbish of the day, and I find some good literature, good thoughts well expressed, in those quaint old laws—many of which were such as to justify the opinion of a very competent critic, who said that he "would rather seek for true intellectual harmony of language in an Act of Parliament—if any arduous matter of legislation be in hand—than in the productions of our popular writers, however lively and forcible. An Act of Parliament, in such subject matter, is studiously written, and expects to be diligently read."[2] The criticism, however, to which

[1] Mr. Goodell refers often and kindly to my collection of the printed records of Massachusetts Legislation, and I am happy in this opportunity to renew my thanks for constant sympathy, as well as frequent and liberal aid during my labors to make it complete. I accept with pleasure his congratulations on the success of my endeavors and the completeness of my volumes; but in reply to the suggestions made by him more than once to the contrary, I must repeat the language used before, that "I find not one act [or leaf] of legislation in the whole series so nearly without any support, so improbable in itself, or so questionable in shape as it now reaches us"—as his alleged Act of 1711.

[2] Henry Taylor: *Notes from Life*, p. 176.

Mr. Goodell refers, was not directed against the want of elegant diction or accurate punctuation, but was intended to emphasize other objections on the score of omission, imperfection, and general incompleteness. The comparison was with other and similar laws—*in pari materia*—not with the more exalted standards of literary criticism.

As respects my friend's acknowledgment of a fault in animadverting upon the legislative committee of 1710–11, he explains altogether too much. He says: "Though the illustration fails in this instance, the charge [of carelessness] is equally well sustained by their omission to report the name of Thomas Rich—Goodwife Corey's son by a former marriage. On referring to my notes, I find that this was the only omission I intended to point out; but in the hurry of composition I was in this particular led into a misinterpretation of my brief minutes, probably by noticing that the Christian name of the mother did not appear either in the act, or in the committee's list sent to Sewall."

I am unable to discover any possible reason why that Committee should have "reported the name of Thomas Rich." He was certainly not one of the "Sundry persons prosecuted for Witchcraft in y^e^ year 1692," and his name had no right to appear in either of the lists required by the legislature. It was my own criticism that the Christian name of the mother did not appear in the act; and its omission in the list sent to Sewall is not singular, for her name does not appear there at all! I may add here that I did not suggest any "refutation" of the declaration by the Committee that the claims had been abated, but simply called attention to the clear contradiction between the report of the Committee to the legislature, and the letter written by Jewett to Sewall, both printed by my friend, who now says: "Jewett, who acted as Chairman of the Committee, was probably responsible

for the omission in the act, as it is very likely that he drew the bill." Mr. Goodell furnishes no evidence that Jewett acted as Chairman of the Committee, or that he drew the bill, and to me it seems improbable that he did either—although it is evident that he was the principal "working" member of the Committee of Award and Distribution.

My friend's suggestions respecting the General Court Records throw no additional light upon their deficiencies; neither do they justify the "anachronism," as he calls it, which I pointed out in his statement that the act in question "had passed the several stages of legislation" before the report. The statement was not "obscure," but erroneous and misleading. There is a genuine "anachronism" in his further statement respecting the duplicate copies of the General Court Records made subsequently to the destruction of the originals by fire! If this were true, it would not be strange if they did "fail to contain some important passages originally entered."[1]

It is hardly necessary to say that my friend has entirely misapprehended the use of the Hutchinson extract of 1770. It was not at all what he represents it to be. The intention was simply to emphasize the fact that the condition of the paper which he produces requires *dehors* evidence to prove that it was ever at any time signed by the Governor, sealed with the Province Seal, or published with due formality.

He disposes of "the extraneous evidence" by ignoring the reference to Hutchinson, and saying that Parson Loring and Governor Belcher were just as ignorant of the appropriations as of the reversal of the attainders. I am now more than ever convinced that substantial remuneration was the great duty as well as desideratum, and therefore less disposed to press that part of the argument

[1] See APPENDIX : V.

against the Act; but I must remind my friend that while the demand by those gentlemen for further appropriations does not show that they were ignorant of those already made in 1711, the fact that they demanded restoration in point of character clearly proves that they looked upon the former proceedings as insufficient in that respect also.

I may note here, though a little out of its order, Mr. Goodell's dictum on the subject of authority to pass acts reversing attainders. He brushes aside all the legal authorities cited with a sweeping opinion of his own. "In this Province, of course, the General Court performed this Parliamentary function," *i.e.*, the removal of attainders. Why "of course"? If a case of corruption of blood had ever existed in Massachusetts, does my friend really imagine that the General Court, even if it had possessed "the high and transcendant power of Parliament," could have restored the blood of a convicted felon without the Royal sanction duly expressed? Does he suppose that a Governor, who (by his account) could not pardon an offender without express direction in the case from the King, could join the other branches of the legislature, to remove all the consequences of the judgment against him—King or no King? Such an opinion is certainly inconsistent, from Mr. Goodell's own stand-point; in view of the facts it is absurd.[1]

As respects the supposition that Governor Dudley may have found reason to withhold his approval from the Act of 1711, notwithstanding he had signed a similar act in

[1] Mr. Goodell says elsewhere, "At that time the supremacy of Parliament was generally recognized." When Increase Mather found it necessary in 1692 to defend himself and the new Province Charter by magnifying the powers which it conferred on the Legislature, the highest note he struck was "the General Court has, *with the King's approbation*, as much power in New England, as the King and Parliament have in England." My friend should remember that "the germ of that resistless band of patriots" to whom he refers can hardly be said to have sprouted as early as 1711.

sons, *was not only without but also directly against his Pastors advice;* All the *Ministers* then in the Neighborhood, will bear witness for me, that they know this to be a Falshood." *Some Few Remarks*, etc. 1701; p. 39. In his Life of Sir William Phips, reproduced in the "Magnalia," his statement is: "His Excellency first Reprieved and then Pardoned many of them that had been Condemned." *Pietas in Patriam.* 1697; p. 79. *Magnalia:* 1702; p. 63. And lastly in his memoirs of his father, published in 1724, after making the claim that Increase Mather's Cases of Conscience, etc., "gave the most Illumination to the Country, and a Turn to the Tide" against the delusion, he says: "Upon this, the Governour pardoned such as had been condemned, and the Spirit of the Country ran Violently upon Acquitting all the Accused." *Parentator.* 1724; p. 166. Compare the English Abridgment, with preface by Calamy, printed in London. 1725; p. 63.

Neal (*History of New England.* Second Edition, vol. ii., 164) says: "Sir William Phips after some time pardoned all that were under sentence of condemnation."

The only contemporary authority which comes short of the full statement of the fact of pardon, is that of Hale, who says in his work: "Sir *William Phips*, Governour, Reprieved all that were Condemned, even the Confessors, as well as others." *Modest Enquiry*, etc. 1702; p. 36.

Here it is well to remember that of the thirty-one condemned, twenty had been executed — nineteen by hanging and one "pressed" to death—two at least had died, one of them in jail,[1] and three had been exonerated by the Act of 1703, so that there could have been no more than six survivors in 1711, to be referred to as "lying under the Sentence of the Court and liable to

[1] Anne Foster, whose son was obliged to pay £2 16s. to obtain possession of her body for burial. Upham, ii., 351, 384.

have the same executed upon them." There is no evidence that any one of them apprehended any danger on that account.

On the other hand, is it possible? that among the people of Massachusetts, after what Mr. Palfrey calls "the drunken fever fit was over, and with returning sobriety came profound contrition and disgust . . . compassion for the bitter misery which had been inflicted, and . . a sense of the hard and reckless unfairness with which the designated victims had been judged and doomed"—is it credible? that the authorities of the Province "still held out against the return of reason" so stubbornly as to keep any one of the small company of condemned survivors without final and absolute relief from the death sentence—under the threatening shadow of the gallows—for nearly twenty years!

Yet the authorities I have quoted, as well as similar statements repeated in the petitions for redress at various times subsequently, which are referred to by Mr. Goodell himself, are all thrust aside by his declaration that "the unsupported testimony of all of them would be entirely insufficient to prove that Governor Phips violated his instructions and set an example which was never followed by his successors"!

Mr. Goodell further demands record evidence of what and how many pardons were granted? when were they pleaded? and how were they communicated after sentence? I will not undertake to gratify his curiosity respecting these details—neither shall I call upon him to produce the records of the Court to prove that they were condemned; but what record evidence, or evidence of any kind has he, to show that in pardoning the condemned survivors, as Calef and Cotton Mather expressly state that he did, Governor Phips violated his instructions? Or that his successors never followed his example? Or for

the statements concerning the conditions and limitations of the pardoning power in Massachusetts?

"The pardon of felonies" was never at any period in the history of that Colony or Province a "prerogative specially reserved by the Crown," excepting in cases of treason and murder; neither was it under greater limitation and restraint there than in other colonies. The Colony charter conferred full and absolute authority to pardon, as well as to correct and punish offenders, agreeably to the laws to be established by the government; and under these laws, the Genearl Court only had power to pardon a condemned malefactor, though the Governour and Deputy Governour jointly agreeing, or any three Assistants consenting, had power out of Court to grant a reprieve till the next Court of Assistants or General Court.[1]

The commissions to Phips and his successors contained the usual grant to the representatives of their Majesties of full power and authority to pardon offenders, and remit their fines and forfeitures before or after sentence given—excepting in cases of treason and wilful murder.[2] And notwithstanding the construction put upon it by my friend —the royal instruction limiting this power in the matter of fines, forfeitures, and escheats, had nothing to do with

[1] *Mass. Charter:* Ed. 1689, p. 23. *Laws:* Ed. 1660, p. 22. Ed. 1672, p. 35.

[2] "And we do hereby give and grant unto you full power and authority, where you shall see cause and shall judge any offender or offenders in capitall or criminal matters, or for any fines or forfeitures due unto us, fitt objects of our Mercy, to pardon all such offenders and to remit such fines and forfeitures, Treason and wilfull Murther excepted, in which cases you shall likewise have power upon Extraordinary Occasions to grant Reprieves to the offenders therein to the end and untill Our pleasure be further known," etc., December 12, 1691. *P. R. O. Col. Entry Book, No. 62, page* 353. Bellomont's commission contains the same words. *P. R. O. New England, B. T., Vol. 36, p.* 252. I am indebted to Mr. Goodell for the opportunity to use his copies of these commissions.

the deputed prerogative of clemency and mercy,[1] which was duly "delegated in express language" to the Governor.

In pardoning the "witches," therefore, Governor Phips violated no instruction or instructions whatever, and his successors undoubtedly followed his example frequently in exercising their lawful authority to pardon offenders in all cases excepting treason and murder.

What authority has Mr. Goodell for his intimation that Abigail Faulkner was "pardoned after a reprieve, by royal charter or mandate"? Her petition states expressly that "it pleased God to put it into the heart of his Excellency, Sir William Phips, to grant me a reprieve and att length a pardon; the insufficiency of y^e^ proofe being in y^e^ s^d^ Pardon Exprest as the Inducement to y^e^ granting thereof."[2]

Hutchinson,[3] ii. 61, says: "Those [three condemned

[1] Mr. Goodell has strangely mistaken the intention and operation of the instruction to which he refers. It was "not to remit fines or forfeitures above the sum of Ten Pounds, or dispose of Escheats without H. M.'s direction." *Col. Entry Book*, *No.* 62, *pp.* 365 *et seq.* This instruction was not, as he evidently seems to believe, peculiar to Massachusetts, but is found in all the royal commissions or instructions to the colonial or provincial governors—or certainly in all I have ever seen. The application which he has made of it is without warrant, not to say absurd. Hutchinson "unquestionably understood this branch of the prerogative," but no utterance of his can be quoted to sustain my friend's unique interpretation and use of the instruction referred to. And if it could be justified, it would not be applicable in the witchcraft cases, for reasons which will soon appear in further examination of Mr. Goodell's exposition of the laws of Massachusetts concerning attainders and the practice under them in all periods of her history.

[2] *Mass. Archives*, cxxxv. 113–14. In another document in the same volume, she estimates the "money payd the Sheriffe, Keeper, King's Attorney, prison fees, court charges and for bonds, *and for my reprieve and pardon*, £10." *Ib.* 154.

[3] In the original MS. of this part of Hutchinson's History, preserved among the Archives of Massachusetts, this is written: "They were all but three acquitted by the petty jury, and these three were pardoned by the Governor." Mr. Poole, who edited this part of the MS., expresses the opinion that "in

in January, 1693] the governor reprieved for the King's mercy. All that were not brought upon trial he ordered to be discharged." This conventional phraseology does not indicate any intention to remit the cases to England—in all cases it was "the King's mercy," or "His Majesty's gracious pardon" dispensed by his representative under the authority of his royal commission. A letter from Phips to Nottingham, February 21, 1693, speaks of the condemned as being "reprieved till their Majesties' pleasure be known." Not necessarily their Majesties' pleasure about individual pardons, but the proceedings generally, including spectre testimony, etc. Not a scintilla of evidence has ever been produced to show that a single case out of the whole thirty-one condemned was remitted to England for consideration, at any time.

The suggestion that "the *pardon* which Calef refers to, and the *discharge* mentioned by others, were probably one and the same thing," is wholly without warrant. They were not the same thing in law or in fact. The receding tide of the delusion left eleven condemned but not executed, one hundred and fifty in prison, and more than two hundred accused.[1] Is not Mr. Goodell familiar

matters of fact the earlier draft is often more precise and accurate than the printed text, for the author doubtless prepared it with the original authorities before him." *N. E. Hist. Gen. Register*, October, 1870.

[1] Calef: p. 41. The number of those accused was estimated to be much larger by other contemporaries. Thomas Maule, in his *Truth Held Forth and Maintained*, etc., makes the following statements:

"As Judgment increaseth against Sin, so Sin in *New England* increaseth against Judgment, until the hight of Sin at this time is of that hight and nature, that there is no less of the Priests and their Church-Members, with others of their hearers, than five hundred accused of Witchcraft; but some of them called Witches, with some of the afflicted Evidences (as they say), do give an account of Seven Hundred, all being by them accused for Witches, of which Number there is now this present year 1692, one hundred and twenty, which are apprehended for Witchcraft, of which there are 20 put to Death, and about twenty were condemned to dye, but by Reason that the Spectre or

with the fact that some of these poor wretches were long kept in prison because, having been literally stripped of everything, they could not pay the fees on discharge?[1]

And does he mean to say that a Governor and Commander-in-Chief, who had no authority to pardon, could let loose from the jails an army of convicts and persons held for trial upon charges of capital crimes? That would indeed have been a peculiar jail-delivery, whether Hutchinson commented on it, or not!

Mr. Goodell is astonished at my assertion that the act in question has no provision or provisions in favor of the sufferers or their representatives respecting their estates. I too am astonished—at his astonishment—and propose, in view of it, to astonish him still further.

The Fathers of Massachusetts, in their Body of Liberties, 1641—the CHARTA MAJOR of America, the grandest monument extant of their supreme wisdom and sagacity—set forth "the Civil Privileges of the Inhabitants of this Colony" in the following words, "the swelling prologue of the imperial theme" of American freedom, which ought to be more familiar than it is to their descendants.

"The free fruition of such Liberties, Immunities, and Priviledges, as Humanitie, Civilitie, and Christianitie call for, as due to every Man in his Place and Proportion, without Impeachment and Infringement, hath ever bene, and ever will be, the Tranquillitie and Stabilitie of Churches and Commonwealths. And the deniall or deprivall thereof, the disturbance, if not ruine of both.

"We hould it therefore our dutie and safetie whilst we

Apparition hath accused some Priests, and others accorded eminent, the Rulers have abated in their Speedy work." *Chap.* xxix.: pp. 181–2.

I am indebted to my friend, Samuel S. Purple, M.D., for this extract from his copy of this extremely rare book. See proceedings against Maule and his book in *General Court Records:* vi., 436.

[1] Upham: ii., 351–354.

are about the further establishing of this Government to collect and expresse all such freedomes as for present we foresee may concerne us, and our posteritie after us. And to ratify them with our sollemne consent.

"We doe therefore this day religiously and unanimously decree and confirme these following *Rites, liberties, and priviledges* concerning our Churches, and Civill State *to be respectively impartiallie and inviolably enjoyed and observed throughout our jurisdiction for ever.*"

The first[1] of these "rites, liberties, and privileges" is as follows:

"1. No man's life shall be taken away, *no mans honour or good name shall be stayned*, no mans person shall be arested, restrayned, banished, dismembred, nor any wayes punished, no man shall be deprived of his wife or children, *no man's goods or estaite shall be taken away from him, nor any way indammaged under colour of law or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country waranting the same, established by a generall Court and sufficiently published, or in case of the defect of a law in any partecular case by the word of God.* And in Capitall cases, or in cases concerning dismembring or banishment according to that word to be judged by the Generall Court."

I have italicized the words by which in effect that little company of exiles from their native land absolutely forbade "throughout their jurisdiction forever" all the exactions of feudal tyranny, which had been consecrated for centuries in the English law; and swept away the burdensome ceremonies and grievances which still rested on

[1] That this law was neither forgotten nor misunderstood in 1692, is evident from one of the "*Observations upon the Laws of Massachusetts—October*, 1692," printed in *Province Laws*: i., 109, referring to the act containing the local laws: "the first of those locall Lawes in the Massachusetts Law forbids any process in the Law without a Law in that Book warrant the same."

the greater part of the broad acres of their ancient home. This prohibition is more definitely expressed in the tenth and eleventh "Liberties," which established their construction of the Charter—the warrant of the same: by which their tenure of lands was—

"TO BE HOLDEN *of vs, our Heirs and Successors, as of our Mannor of East* Greenwich, *in our County of* Kent, *within our Realm of* England; *in free and common Soccage, and not in Capite, nor by Knight's service,*" etc. *Charter; Ed.* 1689: p. 10.

"10. All our Lands and heritages shall be free from all fines and licenses upon Alienations, and from all hariots, wardships, Liveries, Primer-seizins, yeare, day, and wast, Escheats[1] and forfeitures upon the deathes of Parents or Ancestors, naturall, casuall or Juditiall."

"11. All persons which are of the age of twenty-one yeares, and of right understanding and meamories, whether excommunicate,[2] or condemned, shall have full power and libertie, to make their Wills and Testaments, and other lawfull Alienations of their Lands and Estates."

These words constituted the magical formula, by which corruption of blood, escheats, and forfeitures upon at-

[1] Their subsequent enactment respecting "Escheats" also shows that the only escheats recognized or allowed were for want of heirs or owners. It provided that "where no heire or owner of houses, lands, tenements, goods, or chattels can be found, they shall be seized to the public Treasury, till such heires or owners shall make due claims thereto; unto whom they shall be restored upon just and reasonable tearmes. [1646.]" *Mass. Laws: Ed.* 1660: p. 30. *Ed.* 1672: p. 49.

[2] "The excommunicate is held *as an Heathen and Publican.*"—Lechford: *Plain Dealing:* p. 13. Yet he rested under no such civil disabilities as in England, where the spiritual courts continued to exist without alteration from the period of the Reformation to the present century in all their ancient rigor, full of characteristic abuses. The excommunication of the New England Churches was but a feeble parody of that of England, by which the culprit was deprived of every civil right, and put out of the pale and protection of the law. *Speeches of Sir Samuel Romilly:* i., 374.

tainder for crime were not only excluded thenceforth forever from the limits of Massachusetts, but in due time disappeared before the fundamental law of all English America, now the United States. Although this land-tenure ennobled by freedom was common to other colonies founded by England in America, under the great original patents granted by King James I., and confirmed by his successors, the Colony of the Massachusetts Bay in America was the first to introduce its appropriate and most valuable incidents into direct and positive legislation, so as to fix and maintain them in everyday life and practice. This statute law of Massachusetts, through all her history, never once gave way to the English doctrine concerning the consequences of judgment in felony or attainder in outlawry, which was never recognized or admitted in that Colony, Province, or State.[1] So far from making the laws of England the ground-work of their code, they preferred the law of Moses, in that branch of law, more especially, which was distinguished by the name of crown law, and their disregard of the rules of the common law is too notorious to need comment here. Their adoption of the Jewish criminal law involved the rejection of the theories and practice which were rooted and grounded in "the old laws of England;" so that the crimes and their punishments which were defined and established under those laws were widely different from those in Massachusetts, where felony,[2] as a crime which

[1] The entire proceedings of the special Commission of Oyer and Terminer, in 1692, must be regarded as an exceptional series of unlawful acts on the part of each and all the officials concerned. See APPENDIX: I.

[2] The word *felony* being *vocabulum artis*, we must have recourse to the common law for an explanation of the nature of it; which tells us that it is an offence punishable with death, with forfeiture of goods, with corruption of blood, as a consequence whereof the land will escheat to the lord (*pro defectu hæredis*, and not as an immediate forfeiture) in all places, except in *Kent*, etc. Robinson's *Law of Kent*, Wilson's Ed., p. 294.

involved the punishment of forfeiture, was, strictly speaking, unknown.

Hutchinson says: "Traitors and felons might dispose of their estates, real and personal, by will, after sentence, and if they died intestate, distribution was made, as in other cases, there being no forfeitures.[1] They held their lands, as of the manor of East Greenwich, in the County of Kent, in free and common socage, and not in Capite, nor by Knight service. They strangely[2] supposed that socage tenure included all the properties and customs of gavelkind, one of which is

> 'The father to the bough,
> The son to the plough.'"

According to some copies of the *Custumal* of Kent, the verses were

> "The fader to the bonde,
> And the son to the londe."[3]

Until the contrary was proved, all land in Kent was presumed to be holden by this tenure, which is more correctly described as socage tenure, subject to the custom of gavelkind, the incidents of which were a part of the law and custom of Kent—a remnant of Saxon liberty. "If lands are alleged to be in Kent, it shall be intended

[1] In another place, Hutchinson says, referring to the case of Mistress Ann Hibbins, executed for witchcraft in 1656, "there was no forfeiture of goods for felony." *Hist. of Mass.:* i., 188.

[2] This word "strangely" shows that Hutchinson knew less about the matter than the men whom he criticised. They were right and he was wrong. Some of the incidents of gavelkind were not in use in Massachusetts, and among them doubtless were those referred to by Winthrop, in the *Declaration of the General Court*, in 1646, which mentions "Laws of Gavelkind in Kent, more repugnant to the common laws of England than any of ours." *Hutchinson Papers:* 210.

[3] MS. copy of the *Consuetudines Kanciæ*, in Lincoln's Inn Library, quoted in Robinson's *Law of Kent:* Wilson's Ed., p. 289. Cf. Hasted's *History of the County of Kent:* I., cxli–ii., 14.

that they are gavelkind, if the contrary doth not appear." 2 *Sid.*, 153. By Hale, Ch. J., gavelkind is the law of Kent, and is never pleaded but presumed; and it has been held that the Superior Court may take notice of gavelkind generally without pleading. 1 *Mod.*, 98; *Cro. Car.*, 562. Under this law children inherit their father's land, though convicted of felony, or even murder, though not treason. The custom runs with the land. The custom of Kent is that gavelkind land is not forfeited nor escheated for felony, etc. Bacon: *Use of the Law. Works*, xiv. 407.

NATHANIEL WARD, the "Simple Cobler of Agawam," the law-giver of the Puritan Colony, at one time a beneficiary and "daily beadsman"[1] of Sir Francis Bacon, needed no instructor as to the customary law of England, or what liberties and privileges were warranted by the King's charter. In that inimitable book, the Cobler, best known of all his writings, he tells us that he had "read almost all the Common Law of England and some statutes," and his greatest work, the Body of Liberties itself, vindicates his just claim to exalted rank as a lawyer, a statesman, and a patriot. There was no want of knowledge of law among the founders of Massachusetts. In Winthrop's famous reply to Sir Henry Vane, in 1637, the old Governor says that he had "reade over all the laws of England, and all the generall customs and privileges of the kings subjects there."[2] *Hutchinson Papers:* 92. They knew what they were doing, when they proceeded to execute the powers of the charter, and even Chalmers notices "how much" their "dexterity extracted from it." *Introduction to His-*

[1] Epistle Dedicatory to "*Jethro's Justice of Peace*," by Samuel Ward. Lond., 1623.

[2] See also Winthrop's masterly comparison of the "Fundamentalls" of Massachusetts with Magna Charta and the "Common Lawes of England." *Hutchinson Papers:* 201. "All lands and hereditaments shall be free from all fines, forfeitures, &c. Liberty 10," among the "Fundamentalls," etc.

tory, etc., p. 38. Their wisdom and prudence were nowhere more conspicuous than in their cautious and careful settlement of the laws for their government. I trust that it will not be thought travelling too far out of the record, to mention the fact in this place, that the sixteenth article of the Body of Liberties was expressly designed, by the declaration of a great principle of public right, to abolish the forest laws, the game laws, and the laws securing several and exclusive fisheries, and to make them all free. 7 *Cushing*, 68. It is interesting also to recall, at this point, the disposition among the founders of Massachusetts to destroy all the leading distinctions recognized in England between real and personal property, and to place land on the same footing with goods. Had the extent of their authority been equal to their wisdom in affairs, the world would not now be waiting for the last reform in the same direction in breaking down "the artificial and absurd barrier between real and personal property."

Their methods were not forgotten in those later evil days which came upon their successors towards the end of the Stuart dynasty, when they declared, "our growing up to such an orderly settlement hath bin the genuine offspring of his Majesty's charter granted to us under the greate seale of England . . . and his Majesty's charter being under God, our only security against the malice of our adversaries in this respect, any little breach in the wall would endainger the whole, and therefore as his Maj^ty^ hath bin pleased by his gratious letters sent unto us again and again to confirm the same, wee would not that by any concessions of ours . . . that any the least stone should be put out of the wall. *Mass. Records:* v. 202.

Here was still something of the tone and temper of the "ancient days, in the generations of old." They had not yet quite forgotten how "to do the first works"

—although it was to this period that Increase Mather afterwards referred the beginning of the "great decay of the power of religion throughout all New England," and the lamentable "apostasy" in the churches.

In Edward Randolph's "Answer to severall heads of Enquiry," etc., October 12, 1676—he placed in the forefront of his list of "the lawes most derogatory and contradictory to those of England," the following: "All persons of the age of 21 years, being excommunicate or condemned, have liberty to make wills and dispose of lands and estates." *Hutchinson Papers:* 482.

It was in accordance with this suggestion, no doubt, that the King's Attorney General included it among his objections to the laws of Massachusetts in 1678. The General Court responded with confidence on this point:

"As to what is objected against persons Condemned making wills, &c., *wee conceive it to be according to our patent; and its originall*, viz^t^ that of East Greenwitch, according unto which, as wee conceive, notw^th^standing the father's crime, yet the children are to possesse the estate." *Mass. Records:* v. 199.

This prompt reply silenced the attack, which does not appear to have been renewed even during the subsequent fatal assaults upon the charter itself.

I may remark here that I do not expect any son of Massachusetts or of New England to attempt, nor any "outside barbarian or foreign devil" to succeed in the attempt, to prove that any part of the recognized law of Massachusetts was void, however apparently "repugnant to the laws of England." There was a vitality in that legislation unquestionably born of the confidence which its authors reposed in the "rules of righteousness" and "the law of God;" and it is one of the marvellous things in the colonial history that appeals to England were so rarely, if ever, successful.

I find no traces of judicial recognition of the common law forfeitures, or the early statutes creating like forfeitures, and I do not believe that the record can be produced of a single case of actual forfeiture and corruption of blood whether for treason or felony, within the limits of Massachusetts. I have the highest authority to sustain me here.

NATHAN DANE, "the great legal antiquary of Massachusetts," says, referring to the law of 1641, and the practice of Massachusetts: "Our practice has always been on the principles of this law; hence, there has been no forfeiture on one's death on conviction, or suicide,[1] unless enacted by some particular statute creating the crime." *Abridg. Am. Law: Chap.* 136, *Art.* 2, § 4.

Again—"except this clause . . . there is no statute or clause of a statute . . . [of the Colony or Province] of Massachusetts, that respects the forfeiture of estates, real or personal, for crimes.[2] . . . Whether the Colony law has been considered as in force in the Prov-

[1] See APPENDIX: II., for notices of law and customs, both English and American, respecting suicide.

[2] There is an exception to be noted here, in a statute which evidently escaped the attention of Mr. Dane. In 1751, upon occasion of popular disorders in and near Boston, growing out of the currency question, the Legislature of Massachusetts passed an act to prevent riots; founded upon the British Riot Act, but changing the penalty from death to other severe and infamous punishment, including "forfeiture of lands and tenements, goods, and chattels," etc. This was a temporary act, but continued by several renewals to 1770. *Temporary Laws:* Ed. 1742: pp. 339, 396. Ed. 1755: pp. 91, 348, 552. Ed. 1763: p. 73. Cf. *Hutchinson*, iii. 9, and *Province Laws:* iii. 561, note to chap. 17.

"The breach of any penall law, or any other misdemeanor, the forfeiture whereof belongs to the Country" is also mentioned in the Colony Law; Title, "Inditements." Ed. 1660: 43, Ed. 1672: 79, but here and in other places in the same code, the word forfeitures is used as the equivalent of fines, and refers to no confiscation of the estate, real or personal, of any offender, except so far as certain statutes declare certain parts of it forfeited, as statute penalties for violation of law.

ince or State, or not, certain it is, our practice has been in conformity to it." *Ib.* Ch. 148. Art. 9. § 3.

Still further—"Nothing of outlawry appears in the Colony or Province laws of Massachusetts. But the first we find of this process in our statutes is a clause in our treason act of 1777." *Ib.* Ch. 220. Art. 7. § 1. *Mass. Act* 1777. *s.* 7.

"I should readily infer this process of outlawry did not lie in any English colony, in which there was no colony statute to regulate it. But yet we have seen there was in 1777 no such statute in Massachusetts, yet our legislature, in passing the then treason act directed the offender to be outlawed, which certainly presupposed *prima facie* that there was then existing a process of outlawry in the state of Massachusetts. The Colony legislature had no inducements to favor outlawries on English principles; because on them the goods and chattels of the party outlawed were forfeited to the King. And it is believed that there never were any such forfeitures in America by implication; that no man ever forfeited *all his goods and chattels* for any misconduct, without some express statute, English or American, passed for the purpose . . . on the whole it seems that no process of outlawry was provided in Massachusetts, till 1782."[1] *Ib.* Ch. 220. Art. 8, § 1.

"The English law does not apply. Attainder corrupts

[1] Mr. Dane's comments on the subject, for the illustration of which these extracts are introduced, lose nothing of their force from an error in the text to which I have now to call attention. As early as 1646, a process of outlawry was established in Massachusetts, by the following statute, which thenceforth found a place among the "Capital Laws" of the colony code.

"If any pson shall be indicted of any capitall crime, who is not then in durance, and shall refuse to render his pson to some magist w^th^in one moneth after three pclamations publickely made in the toune where he vsually abides, there being a moneth betwixt proclamaçon and pclamaçon, his lands and goods shall be seized on to y^e^ vse of y^e^ comon treasury till he makes his lawfull appearance, and such w^th^drawing of himselfe shall stand insteade of one

the blood on *feudal* principles, therefore attainder or judgment of death for heresy, or piracy, by course of the civil law,[1] corrupts not the blood; and this is the case in our law, for even in treason, the traitor is inherited by his heirs." *Ib.* ch. 193. Art. 36. § 2.

I have only to add here, on this last point of inheritance, a few words from the great master of the common law. Coke says: 3 *Inst.* cap. 6, "Also where the saving is to the heir, it is well saved by the name of the heir, because notwithstanding the forfeiture implied in the judgment, his inheritance is saved, and by consequent *the blood not corrupted, for if the blood were corrupted, he could not inherit as heir.*"

The illustrations and authorities which I have cited will doubtless satisfy my friend that it is not without reason that he is called upon to "believe that no forfeiture and no escheat followed the attainders of 1692." He will no longer be "compelled to confess ignorance of the authority" for this belief, or to "express his regret that I have passed over the subject so lightly in my paper." But my task is not yet finished.

My friend darkens counsel by his reference to an Act of 1692. That "Act setting forth General Privileges," which was a piece of legislation reflecting no credit on its

witnes to pve his crime, vnlesse he can make it appeare to y^e^ Courte y^t^ he was necessarily hindered from such appearance."

The original marginal abstract is "An out lawe;" in printed editions, "Non-appearance in a capitall crime." *Records of Mass.*: iii. 104. *Laws*: 1660: p. 9. 1672: p. 14.

The fact that this law was existing in effect and practice in Massachusetts in 1777 is another conspicuous illustration of the continuous, direct, and permanent influence and recognition of the Colony Laws under the Province Charter, and even the State government.

[1] Some of the English authorities intimate that in "cases of Heresie, Conjuration, Witchcraft, Sodomy, &c., there shall be no forfeiture of lands, &c., for that the offenses be spiritual. 1 *Jac.* c. 12. *Finch*: 71." *Dalton's Office of Sheriffs*: (1682) Cap. 14. Fol. 69.

promoters[1] in any respect, excepting, *possibly*, good intentions to excuse bad judgment, violated the fundamental law of Massachusetts respecting escheats and forfeitures by excepting cases of high treason; and in the further enactment of the same session for the punishing criminal offenders, that law was again violated by adding to the death penalty, "loss and forfeiture as in cases of High Treason," probably having in view the English law.[2] The former act, therefore, instead of being as he calls it "an act by which escheats and forfeitures were abolished," was an act by which escheats and forfeitures were to be established, in cases of high treason. It is, however, of little importance in this discussion, for as Mr. Goodell himself substantially admits, the provisions of that act had nothing whatever to do with the witchcraft cases,—and both acts were disallowed by the Privy Council, August 22d, 1695.

The reasons given by the Privy Council for the repeal of these acts did not affect the recognized status of this subject in Massachusetts. Chalmers says the former Act "was dissented to by those who ruled in the absence of William for a singular reason: Having exempted lands from escheat or forfeiture, which with other privileges having never been granted by his Majesty, it was not fit in his absence to allow." *Continuation: p.* 112. Nobody will say now that "those who ruled in the absence of William" had authority to terminate by a rejection of this act, any of the privileges which (notwithstanding their denial) *had been "granted* by His Majesty," or to deprive the colonists of any of their rights as Englishmen. The perform-

[1] There were no Winthrops or Wards or Cottons among the people of that generation. Their public men were such as Dudley and Stoughton, the Mathers and Phips; men of an entirely different stamp in religion and politics, "provincials, narrow in thought, in culture, in creed."

[2] It is worth noticing here, that by the Treason Act of 1696, the trials were to be according to the Law of England, 7 William III. c. 3. *Province Laws*: i. 255.

ance of the Privy Council in 1695 did not shake the principle or the practice under what had then become the common law of Massachusetts—where want of faith in the first charter and the Colony laws ought still to be regarded as historical high treason among those who are

> " . . . native *there*
> And to the manner born."

I have shown as I think pretty clearly what " notion " on this topic prevailed in Massachusetts, and that which was accepted at Whitehall may be inferred from the fact that no instance is known in which any successful attempt was made to enforce the doctrine or practice of English law on this subject within the charter limits of the Colony or Province.[1] At all events I think it safe to challenge the production of such an instance.

[1] The only proposition I have ever met with looking towards such a result was in a letter of Edward Randolph, dated Whitehall, August 19th, 1683, to Sir Robert Southwell, in which he says: " I have discovered a tract of land granted to and a long time in the possession of Hugh Peters, since disposed of by his Agent—it's worth two or three hundred pounds, and is forfeited by his Treason to the King, and the grant of it would be a Kindness to my children." The records of Massachusetts show a grant of five hundred acres of land to Hugh Peters in 1639. The town of Salem had made a grant in the previous year (November 12, 1638), which was laid out June 15, 1674, being then in the possession of Capt. John Corwin; sold by Mrs. Margaret Corwin to Henry Brown, May 22, 1693. Upham: i, xxiii, 55. Mr. Upham's account of the matter is very interesting, but I doubt the accuracy of his statements that "*the daughter of Mr. Peters came over to America shortly after his death, bringing with her her mother*, who for many years, had been subject to derangement. They were kindly received; and *some o his property*, particularly a valuable farm in the vicinity of Marblehead, which the daughter sold to the American ancestor of the Devereux family, *was recovered from the effect of his attainder.*" *Ib.* 57.

All that was ever recovered was from *squatters*, who defended, only too successfully in many cases, their holdings " by the law of possession." Some of these gentry seem to have been persons of high consideration in Salem society at that time. In 1677 the widow was living, almost destitute, in London, having been wholly dependent upon one of the independent churches there

Yet my learned friend declares that he knows of no reason for doubting that the inseparable incidents of attainders everywhere throughout the realm and other dominions of England, followed the judgments pronounced against the persons convicted of witchcraft by the Court of Oyer and Terminer, etc., in Massachusetts. He says they "not only involved the forfeiture of all lands and other corporeal hereditaments, 'for a year and a day, and waste,' but the real estate of the condemned escheated to the king, who . . . was the immediate lord. This escheat, moreover, though not strictly a forfeiture, was an absolute sequestration of the realty; and . . . the estates of those who were attainted were . . . forever liable to seizure, unless a pardon specially restoring the

"ever since her husband suffered," in 1660. *Hutchinson Papers:* 514. From a document preserved in H. M. Public Record Office, it appears that he conveyed all his estate by deed in writing, November 1, 1659, to his daughter, Elizabeth: and that upon her petition soon after her father's death, the King ordered the goods of her father to be restored to her. The lands in New England were never seized for the Crown, and as late as the year 1703, she was trying to obtain from the government an order to Governor Dudley to assist her in recovering them. *Treasury Papers:* lxxxv: 145. *Notes and Queries:* II. ix., 400. Letters preserved among the Curwen Papers in the possession of the American Antiquarian Society show that the great regicide's daughter had begun the effort to secure her rights in Massachusetts as early as the year 1670. One of the letters to her from John Higginson, dated at Salem, August 10, 1670, expresses his sympathy: "Truly I can say y^t y^e Remembrance of your good Father doth so continue with me & y^e acknowledgm^t of much kindness y^t I received from him in my younger time doth so Farre oblige me, y^t I should not be wanting in anything y^t lies in my power to help Forward y^t you may have right done you in y^e case. Onely as to y^e active p^t as an Attorney &^c it is not fitt for a Minister to appear in these times—*this place w^ch is very much altered from what it was of y^e greatest hereabouts.*" The claimant secured the services of Major Stephen Sewall among others in seeking her own, and apparently recovered something, but she was still in the vocative in July, 1707, when she wrote to him, "had I thought it would be soe long before I received any good I should hardly have disturbed them." The whole correspondence ought to be printed.

escheated lands should be granted by the crown, or unless the attainder should be removed by an act of the legislature.

"Until the enactment of a proper bill of reversal and restitution, however, the blood of the condemned remained 'corrupted,' so that neither could he be the vehicle for the transmission of property by descent, nor his posterity take from him by inheritance. A pardon, whatever effect it might have had when granted with apt words and a special design to waive the escheat, could never avail to restore the forfeiture, or purge the blood of its corruption.

"Nor did attainders operate solely to the injury of the condemned and his kindred, for as they invariably had relation 'to the time of the fact committed,' they avoided all subsequent conveyances and encumbrances of real estate by the condemned; and as some of the diabolical practices alleged in the indictments in 1692 dated back many years, the attainders may have subverted the intervening titles of creditors and innocent purchasers."

Mr. Goodell's admirable summary of "the direful effects of this terrible ban" is well calculated to introduce with dramatic effect the clinch of his argument in citing the case of Giles Corey, "who (he says) to avoid the lasting and ruinous consequences of attainder, bravely accepted the awful alternative of the *peine forte et dure*."

Everybody is familiar with this tale, which professes to reveal the motives of the victim for "standing mute," but nobody seems to have noticed the fact that it is entirely of modern origin, not to say, recent manufacture.[1] Not

[1] The myth is of much later date than Hutchinson, who (*Hist. of Mass.*: ii. 59) evidently follows the authority of Calef. Mr. Washburn (*Judicial History of Mass.* (1840) p. 142) if not himself the author of the fable, gives the earliest form of it I have met with, and his remarks have been amplified by subsequent writers. Mr. Upham, who seems not to have heard of it in

a scrap of contemporary authority has ever been produced to warrant or justify it, and I doubt whether there was any color even of tradition for its invention, which was evidently suggested by some doings under the English law by which, as is well known, goods and chattels only, not lands (except the offence was treason), were forfeited for standing mute or refusing to be tried by the country. Chamberlayne, in his *Anglia Notitia*, refers to this "pressing to death," etc. "Which grievous kind of death some stout fellows have sometimes chosen that so not being tried and convicted of their Crimes, their Estates may not be forfeited to the King, but descend to their children."

No such motive as that alleged could have inspired the action of Giles Corey on that occasion. We have the clear, straightforward and distinct statement of Calef on this matter, the only contemporary evidence extant, so far as I know; and to my mind, it is enough.

"Giles Cory pleaded not Guilty to his Indictment, but would not put himself on Tryal by the Jury,[1] *they having*

1831 (*Lectures on Witchcraft:* 31, 35, 88,) furnishes full particulars in 1867 (*Salem Witchcraft:* ii, 334, etc.) but gives no authorities. The topic was largely discussed at a field meeting of the Essex Institute, August 4, 1870, reported in the *Bulletin*, ii, 117–127. On that occasion, one of the speakers intimated his want of respect for the memory of Giles Corey as "one who had obstinately defied the laws" and probably "died a fool's death"! The orator ought to have quoted Parson Noyes's record of the old man's excommunication from the First Church in Salem, to support his opinion. See Upham: ii., 344, 483–4, for full particulars of the very disreputable transactions of the Church, in 1712 as well as 1692.

[1] That is, having pleaded not guilty to the indictment, upon being asked "How will you be tried?" he would not reply, "By God and my Country." Sacramental importance was attached for centuries to the speaking of these words. If a prisoner would not say them, and even if he wilfully omitted either "By God," or "by my Country," he was said to stand mute, and a jury was sworn to say whether he stood "mute of malice," or "mute by the visitation of God." If they found him mute by the visitation of God, the trial proceeded. But if they found him mute of malice, if he was accused of treason or misdemeanour, he was taken to have pleaded guilty, and was

cleared none upon Tryal, and Knowing there would be the same Witnesses against him, rather chose to undergo what Death they would put him to. In pressing, his Tongue being prest out of his Mouth, the Sheriff with his Cane forced it in again when he was dying. He was the first in New England that ever was prest to Death." *More Wonders*, etc., p. 106.

If it were proper to imagine the motives which governed that resolute old man in his supreme hour of trial, I should say that, with all his righteous indignation and disgust against the Court and its methods, he *might* have had some reliance upon his rights as a man in Massachusetts, perhaps some faint but flattering hope that his neighbors would relent before his agony was ended—and so his life might be spared. He did not know beforehand by what devils in human form he was surrounded—still less could he anticipate that in all coming time the story of his rough life and wretched fate would become the nucleus of crystallization of tearful, tender and pitying sympathies to the world's end.

Although no other instance is known in which "this English legal barbarity" was ever inflicted in America, the sufferer was not the first in the Colony of the Massachusetts Bay, who "stood mute" refusing to plead or put himself or herself upon the country. A wretched woman who seems to have been distracted was condemned and hung in Boston in the winter of 1638–39, for the murder of her child, a daughter three years old. Although she had "confessed upon her apprehension, yet, at her arraignment, *she stood mute a good space, till the Governor*

dealt with accordingly. If he was accused of felony, he was condemned, after much exhortation, to the *peine forte et dure*, that is, to be stretched, naked, on his back, and to have "iron laid upon him as much as he could bear and more," and so to continue fed on bad bread and stagnant water on alternate days, till he either pleaded or died. Stephen: *History of the Criminal Law of England*: i., 298.

told her she should be pressed to death, and then she confessed the indictment." *Mass. Records:* ii. 246. Winthrop's *History of New England:* i. 279. It should be observed that this was before the establishment of the Code of Liberties.

The difficulty of dealing with such cases had commanded the attention of the General Court, as early as 1681, when, at the session of the 12th October in that year, the following question appears as having been brought before the Court for decision:

"Q: Whither a person complajned of or indicted for any criminall or capitall offence, & refusing to put himself vpon tryall, according to the vsuall custome, shall (that not^{with}standing) be proceeded with to tryall & judgment vpon the evidence that shall be produced against him." *Mass. Records:* v. 323.

No record appears of any "resolution" of this question by the Court at that or any other time. The journal of proceedings is silent, and the printed laws, as they appear in the supplements to the edition of 1672, do not justify the conclusion that the question of 12th October, 1681, was decided in the affirmative.[1] If we could be allowed to presume that it was so determined, according to the spirit and intention of the laws of the Colony, and that Massachusetts by express enactment led the way in this humane relaxation of the common law rule, which was in England only partly and imperfectly reached in 1772, and not really established there until 1827;[2] we should still be obliged to acknowledge with regret, that so honorable a

[1] *Mass. Laws*, Ed. 1672: Supplements, pp. 87–88.

[2] In the year 1772, the statute 12 Geo. III. c. 20 made standing mute in cases of felony equivalent to a conviction. In 1827, it was enacted by 7 & 8 Geo. IV. c. 28, s. 2, that in such cases, a plea of not guilty should be entered for the persons accused. Stephen: *Hist. of the Criminal Law of England:* i. 298.

provision was entirely disregarded in the case of Giles Corey. Yet it should not be forgotten that the English custom of "pressing to death" was at that time clearly illegal in Massachusetts. Not only because no authority could be found for it in any "express law of the country," or "the word of God," but also that it was in direct violation of a provision in the Body of Liberties, viz.: "46. For bodilie punishments we allow amongst us none that are inhumane, Barbarous or Cruel." By another provision in the same code, torture was forbidden before conviction, and even then the methods were not to be barbarous and inhuman. 2 *Coll. M. H. S.* viii. 224. *Mass. Laws*, Ed. 1660; p. 67. Ed. 1672; p. 129.

But to return—if my learned friend's theory on this subject has any foundation whatever, except the almost unanimous ignorance or neglect of the historians and "every lawyer" to whom he refers—when was it (may I ask) that these dreadful consequences of attainder began? When did they cease? When were they first heard of or known in the Colony, Province, or State of Massachusetts? At what period in her history did these baleful shadows first darken the land? When did they disappear from the inheritances of her people? When did the obstructed channels of descent and distribution begin to flow freely? Or were there never any felons or outlaws in that part of the world who had estates, real or personal, and left children or next of kin?[1] If he is right—the English doctrine of attainder with all its incidents has existed in Massachusetts down to a time within the

[1] If the following story is true, the county of Essex in Massachusetts had a remarkable exemption from capital crimes during the century following the Witchcraft Tragedies. The *New London* [Connecticut] *Gazette*, November 22, 1771, under date of "Salem, November 12," gives an account of the trial and conviction of one Bryan Sheehan, for rape, etc., adding: "This Bryan Sheehan (who has not received his sentence) is the first person, as far as we can learn, that has been convicted of felony, in this large County, since

memory of our own grandfathers—and traces of it ought to be manifest in the records of every court in the Commonwealth, especially in those courts in which he has won distinction as an officer. Is there even *one* entry concerning "lands and heritages" in the Registry of Deeds and Wills, or Records of the Court of Probate in Essex County, which bears the slightest taint of escheat or forfeiture upon attainder for felony by any possessor thereof at any time? My friend must have been long familiar with the records which would show all the facts necessary to illustrate this part of the subject, and nobody is more competent to produce them.

Who was the escheator in Essex in 1692? Can his "office" be "found" in law or in fact in that or any other county in Massachusetts? Or any trace whatever of his or similar duties performed by any other official? When was an inquisition made to the King's (or Colony's or Province's) use of anything, by virtue of the office of him who inquired, and the inquisition found, so as to constitute an "office found"?

George Jacobs of Salem was executed on the 19th of August, 1692. We learn from the historian of Salem witchcraft —that he "is the only one among the victims of the witchcraft prosecutions, the precise spot of whose burial is absolutely ascertained," and that "it is an observable fact, that he rests in his own ground still. He had lived for a great length of time on that spot; and it remains in his family and in his name to this day (1867) having come down by direct descent." If it did not pass by his will or by lawful inheritance to his male descendants, how can this be true?

the memorable year 1692, commonly called WITCH TIME." "The last words and dying speech" of this criminal are mentioned in the Preface to Royall Tyler's story of "*The Algerine Captive*," etc., p. vi., as a part of the sensational literature of the day.

Again, the very earliest petition from any one of the sufferers, to the General Court for redress, preserved in the Witchcraft volume of the Massachusetts Archives, is that of Elizabeth Procter, "widow and relict of John Procter, deceased," which bears the endorsement that it was "Read 10th June, 1696, in council."

[Mass. Archives; cxxxv: 109.]

To the Honourable Generall Court Asembled at Boston may twenty seuenth 1696:

the humble petetion of Elizabeth procter widow and Relect of John procter of Salem decesed Humbly Shew-eth that in the yere of our Lord 1692 when many persons in Salem and in other towns ther about were accused by som euill disposed or strangly Influenced persons, as be-ing witches or for being guilty of acting witchcraft my s[d] Husband John procter and my selfe were accused as such and we both; my sd Husband and my selfe were soe farr proceded against that we were Condemned but *in that sad time of darknes before my said husband was executed it is euident som body had Contriued awill and brought it to him to signe*[1] *wher in his wholl estat is disposed of not hauing Regard to acontract or wrighting mad with me befor mariag with him; but* soe it pleased god to order by his prouidenc that although the sentanc was ex-ecuted on my dere husband yet through gods great good-nes to your petetioner I am yet aliue; *sinc my husbands death the sd will is proued and aproued by the Judg of probate and by that kind of desposall the wholl Estat is disposed of;* and although god hath Granted my life yet *those that Claime my sd husbands estate by that which*

[1] There is an intimation here of conspiracy among the "wreckers" of the estates of those accused of witchcraft, a clue which may well be followed up by future historians of these events.

thay call awill will not suffer me to haue one peny of the Estat nither vpon the acount of my husbands contract with me before mariage nor yet vpon the acount of the dowr which as I humbly conceiue doth belong or ought to belong to me by the law *for thay say that I am dead in the law* and therfore my humble Request and petetion to this Honoured Generall Court is that by an act of this honoured Court as god hath Contenewed my life and through gods goodnes without feare of being put to death vpon that sentanc yow would be pleased to put me Into acapacity to mak vse of the law to Recouer that which of Right by law I ought to haue for my nessesary suple and support that as I your petetioner am one of his majestyes subjects I may haue the benifett of his laws soe Humbly prayeng that god would direct your honnours in all things to doe that which may be well pleasing to him I subscrib your honnours humble petetioner

ELIZABETH PROCTER
widow

[Endorsed:]

Read 10th June, 1696, in Council.

This poor woman appears to have been imposed upon by the fiction of her civil death, evidently suggested by those who had availed themselves of the helpless condition of both husband and wife when under condemnation four years before. The imputation that she was *civiliter mortuus*, "dead in the law," was false, for her pardon had unquestionably restored her legal existence. If any proceedings were had upon her petition, no record of them has come to my knowledge; and it is perhaps fair to presume that there were none, because they were unnecessary.

The petition itself, however, furnishes indubitable evidence of the regular probate of a will executed by one

of the condemned "witches," or wizards, while himself awaiting the service of the hangman.[1] I have no doubt examples might be multiplied among the victims of that bloody special court at Salem, but I am remote from the records and other necessary materials for full illustration of the subject, which we may justly expect from the candor and ability of my esteemed and honored friend, whose life is spent in the very theatre of the historical tragedy, and whose distinguished reputation will always be identified with the laws and history of Massachusetts.

A great part of the "Reasons," etc., is devoted to a jeremiad over my incidental allusion to "the wretched remnants" of the families destroyed in the Witch Persecution. I have little fear that the character and direction of my sympathies in this matter will be mistaken. Nobody can put a worse construction upon my words than that of my friend, or contrive a more interesting gloss upon them than his. The pain which they have given him will not be generally felt, and the pleasure which all must enjoy in the mild atmosphere of sentiment into which he has been able to transfer a very repulsive subject reconciles me to his use (I will not say abuse) of my expressions. "The ray of solace and of beauty" which he has managed to extract from "the painful details of that

[1] An earlier instance is famous in the history of Massachusetts. In the case of Mrs. Ann Hibbins, tried and convicted for witchcraft by the Great and General Court itself, duly sentenced, and hung on the 19th June, 1656, it is recorded that she disposed of her estate by will, executed May 27, 1656, and a codicil, dated June 16th in the same year. The proceedings against her began in the lower Court in 1655.

An original deed, by which she conveyed to one Mathew Coy, of Boston, her "dwelling house near unto the spring, and next the house where I now dwell," executed August 14, 1655, was "Entered and Recorded 16 July, 1656. Edw. Rawson, Record'r." It has recently come into the possession of the Massachusetts Historical Society. *Proceedings M. H. S.*, May, 1884, p. 186.

picture of early provincial life" is not a very great, direct or concentrated ray; but it may help to light up the sombre pages of that part of our colonial history which led a famous writer and critic to record his judgment that "as a story of witchcraft, without any poetry in it, without anything to amuse the imagination, or interest the fancy, but hard, prosy, and accompanied with all that is wretched, pitiful, and withering, perhaps the well-known history of the New England Witchcraft surpasses everything else upon record." Godwin, *Lives of the Necromancers*, 454.

But to what purpose were all these now "faded, perhaps tear-stained, petitions still in the public files," which so stir the sympathy and stiffen "the true historical method" of my acute and learned friend? What was the benefit of the act, which they were so eager to secure? They were in fact resting under no disability in law. Excepting the poverty and low estate into which some of them had been driven by their savage persecution, their only disadvantage was the disgrace of record, which they thought or felt that an official public declaration from the highest authority alone could "deface," "obliterate," "expunge," or stamp as absolutely erroneous, undue, and illegal, and therefore unjust and void. The petition of Abigail Faulkner, already quoted, shows the situation distinctly. "Living only as a malefactor, convict upon record of y^e^ most heinous crimes that mankind can be supposed guilty of," she prays the Court to "order the defacing of the record against" her. It must not be forgotten that this was after her pardon. All their prayers were in effect for relief from the "infamy and reproach" to which their names were exposed, while their trial and condemnation stood upon public record.

Their petitions solicit, by the reversal of the attainders, simply and only formal exoneration of record by due

authority, "defacing previous record," "wiping out the disgraceful record;" and the fact that there is no mention in any of those petitions, of escheats, or forfeitures, or corruption of blood upon attainder for the crime of which they or those whom they represented had been adjudged guilty, plainly shows that no such things existed in Massachusetts in that day and generation.

Although Mr. Goodell declares his opinion that the act in question was necessary "to secure immunity from the terrible ban," etc., in the year 1711, it seems to me impossible that the legislature of that year could have been ignorant of the law and the facts, or could have entertained any such belief; and I am obliged for that reason to regard that act with less favor than ever, whether it "became a law" or not. My friend's language here is suggestive. He says:

"If, then, I am right in my opinion that the act in question was necessary (and it is not material whether this necessity existed or not, if the legislature believed it did) to secure immunity from this terrible ban, the 'quietus,' as Dr. Moore calls it, which the last paragraph of the act contains . . . is by no means 'the most important provision of the whole act.' Nor is that exemption from lawsuits, even, to be condemned as inequitable, if the purposes of the act in other respects were fully carried out; since the grant of full compensation to the sufferers would unquestionably be good ground for denying them any further remedy."

Now, in my judgment, the "exemption" was not only "inequitable," but iniquitous—not only the *most* important, but the *only* important provision in the whole act, made expressly to protect the guilty officials against any and all demands for restitution, and save the survivors and representatives of a ruthless gang of fanatics, thieves, and plunderers from the just and lawful consequences of their

villanous acts. After having neglected for nearly twenty years these claimants for justice, turning a deaf ear to the prayers and complaints of the sufferers, their children, and representatives, the contrivers of this act drove a hard bargain with a part of them, in order to secure the guilty authors of all these atrocities, their executors, administrators, and assigns, against any punishment, every claim for restitution, and all further legal responsibility.

If these people were not conscious of the wrongs they had inflicted on the innocent and of undue proceedings, why was this provision inserted? Who and what were behind this extraordinary protection? Who had any motive for procuring such an enactment? Certainly not the sufferers, their representatives, or friends. What was its effect, if it became a law? Not only to take away the benefit of the universally recognized doctrine of damages, but of an express statute of Massachusetts in that matter by which it was declared that, "If any Officer shall doe injury to any by Colour of his Office, in these or any other Cases, he shall be Liable upon Complaint of the Partie wronged, by Action or information, to make full restitution."[1] *Mass. Laws: Ed.* 1660, p. 54. *Ed.* 1672, p. 104.

The Report of the Committee of 1711, when enacted into a law, substantially relieved from the attainder or disgrace of the conviction all the persons named in the subsequent Act. That Act, if it became a law, added nothing, in point of fact, to the relief thus already given, but took away from them as well as the other sufferers and their representatives all right to pursue any legal remedy. The Act of 1711, therefore, worthless and unnecessary so far as the sufferers were concerned, appears in the end to have been promoted chiefly for the benefit of their op-

[1] The Fathers of Massachusetts did not point out any statute of limitations in "the law of God" against crimes, or prescribing a limit of time to the duty of restitution.

pressors and the contingent interest of the Salem Lobby. It had no other purpose or purposes, and no significance whatever beyond these, excepting to repeat in needless technical detail, imitating the English precedent, the formal restoration to which I have referred—in point of law and fact already determined by the enactment of the Report, which preceded it.

As for "the grant of full compensation," with which Mr. Goodell justifies "the exemption from law-suits" (as he calls it), the appropriation made (not by the Act, but by the Report) was nothing of the sort. That it was not so regarded at the time is proved by the express terms of the receipt from the claimants so carefully drawn by the Committee of Award and Distribution, which acknowledges the respective dividends as "some considerable alowance towards restitution with respect to what they suffered in their Estates at that sorrowful time."[1] That it has never been so regarded at any time since is proved by all the testimony and opinions which can be produced, excepting those of my friend.

In the "Reasons," etc., he says, "the sums finally awarded to them seem miserably small and inadequate; but there is evidence directly tending to show that even this pittance, they themselves proposed, or *cheerfully agreed to*, as a full reparation of personal damages, *in consideration of the additional favor of a reversal of the attainders*"! The reversal was or was not a simple act of justice. How does such trading it off in percentages of assessed damages appear to the "candid descendants," in considering "THIS INSTRUMENT," this "ACT OF LEGISLATION WITHOUT PRECEDENT OR PARALLEL," as a "singular instance of the justice and generosity" of their "honorable ancestors"?

[1] Hutchinson: ii. 62, refers to these "grants made for and in consideration of the losses sustained," adding emphatically, "but the petitioners alledged, that they bore no proportion to the real damage."

In his first paper, Mr. Goodell declared it to have been "a noble and generous act of the legislature, however long postponed, to restore the whole of what, though forcibly taken from the accused, had enured to the crown for the use of the Province, under the forms of law, and in strict accordance with the established practice in cases of felony, and for which, therefore, the petitioners had no legal redress."

But how does this "noble and generous act" look, in the light of the facts: that nothing had enured to the crown for the use of the Province; that they did not restore the whole of what they had taken by force; that many, if not all the seizures and appropriations thus made "under the forms of law" were pure and simple robbery and pillage, with waste and destruction, having no precedent in the established practice of Massachusetts in cases of crime, but arbitrarily and most unjustly invented, adapted or borrowed for the occasion; and that the right to legal redress was perfect under the law of Massachusetts?[1]

The scattered fragments of this awful record indicate wanton cruelty in the officials, as unnecessary as it was unlawful. It would seem that during the delusion, uncertainty was the condition of all things, law as well as gospel, legal rights as well as the obligations of Christian sympathy. Life, liberty, and property were all in jeopardy from an insane and ferocious fanaticism which had paralyzed humanity itself and converted a majority of the magistrates, ministers,[2] and people into a grave, solemn, and

[1] If, as Mr. Goodell alleges, "they had no legal redress" or remedy, why were they to be debarred from its prosecution, by that significant clause in the Act of 1711, which he describes as an "exemption from law-suits." Compare p. 52, *ante*.

[2] The reference in the "Fast" proclamation of December, 1696, *Mass. Archives:* xi. 122, to the Mistakes fallen into "either by the body of this People or any *Orders of Men*" is very significant. Nobody knew better

professedly religious mob; whose tender mercies were cruel, and who, in their pious and ignorant rage against Satan, became themselves fit emblems and instruments of his wrath.

It was only a few days after the last of the executions and the adjournment of the Court, when the height and heat of the delusion had hardly begun to abate and Cotton Mather was busily engaged in his design of "lifting up a standard against the infernal enemy," by writing up his records of "Enchantments Encountered," "The Wonders of the Invisible World," and "The Devil Discovered," that Thomas Brattle, one of the few then and there who "had a great Veneration for the Church of England" although he was a nonconformist, wrote these words of warning prophecy: "What will be the issues of these troubles God only knows. I am afraid that ages will not wear off that reproach and those stains which these things will leave behind them upon our land."[1]

It is quite true that in the confusion of the times during the transition from the old to the new charter, the community may have been demoralized by the uncertainty which grew out of an artfully suggested conflict between the well-known, established and recognized laws of Massachusetts and the laws of England.[2]

than Justice Sewall, the writer of that proclamation, what "*orders of men*" were primarily responsible. Mr. Upham was mistaken in attributing the authorship of this paper to Stoughton. *Reply to Poole:* 66. First reprinted by Calef, p. 143, it has been reproduced many times. In 5 *Mass. Hist. Coll.:* v. 440, it is printed ostensibly from the original draft, with a studiously inaccurate note founded on a blunder of the copyist in the passage here referred to, who wrote it "orders of *then*," instead of "orders of *men*."

[1] Letter of October 8th, 1692, in 1 *Coll. Mass. Hist. Soc.:* v. 79. Obituary notice of Brattle in *Boston News Letter*, No. 475, May 18–25, 1713.

[2] "The return of the ministers, consulted by his Excellency and the honorable Council upon the present witchcraft in Salem village, Boston, June 15th, 1692," recommended "the speedy and vigorous prosecution of such as had rendered themselves obnoxious, according to the directions given in the laws

This is in some degree indicated by their legislative action. The very first act of the first assembly of the General Court under the new charter was that to continue the former laws. And yet after the storm of witchcraft had abated, they re-enacted the statute of 1 James I., chapter 12, to reinforce their own law. As I have shown elsewhere,[1] they had law enough, but instead of proceeding calmly upon that law, they imported into it, upon imperfect

of God, and *the wholesome statutes of the English nation*, for the detection of witchcrafts." This document was written by Cotton Mather. I leave it to others to estimate the degree of responsibility incurred by the men who first urged the application of these statutes of England; but I venture to call attention to Mr. Longfellow's extraordinary poetical license in giving Cotton Mather the credit of clear and consistent opposition not only to the use of the spectral evidence, but the English law! *N. E. Tragedies:* ii. *Giles Corey of the Salem Farms.* Cotton Mather's appreciation of "the wholesome statutes of the English nation" was further expressed in one of his deliverances printed in the *Wonders of the Invisible World*, written in the height of the delusion, or as he himself says, "my Book of the *Invisible World*, written in the *highest Ferment* of those Troubles." *Some Few Remarks*, etc., 1701, p. 38. Recalling among other sins of the "children of New England," "the lesser *Sorceries*," said to have been "frequent in our Land," "Detestable Conjurations, with *Sieves* and *Keyes*, and *Pease* and *Nails*, and *Horse-Shooes*, and I know not what other Implements," he adds with unmistakable and hearty emphasis, "'tis Pitty but the Laws of the English Nation whereby the Incorrigible Repetition of those *Tricks* is made *Felony*, were Severely Executed." *Wonders of the Invisible World:* 1693. pp. 66-67, 151. What was the temper in which the awful penalties of the English laws against felony were invoked to punish the harmless pranks of heedless children? There is another contemporary reference to these popular "tricks" in the letter of Thomas Brattle, conceived and expressed in a very different tone. Upon reports of sorcery in the town of Andover, the Reverend Elders made inquiry—"but the whole of naughtiness, that they could discover and find out, was only this, that two or three girls had foolishly made use of the sieve and scissors, as children have done in other towns. This method of the girls I do not justify in any measure; but yet I think it very hard and unreasonable, that a town should lie under the blemish and scandal of sorceries and conjuration, merely for the inconsiderate practices of two or three girls in the said town." Letter of October 8th, 1692, in 1 *Coll. M. H. S.*, v. 72.

[1] *Notes on the History of Witchcraft*, etc., pp. 1-11.

knowledge and information, processes of injustice and instruments of tyranny without precedent or excuse. The Laws and Liberties of Massachusetts were grossly violated in many particulars, notably that noble summary of personal rights in the first article,[1] which, by the way, had been singularly reinforced by the 19th instruction to Phips.[2]

It has been too amiably said that "the conduct of the officials was in accordance with usage and instructions."[3] There had been no such usages in Massachusetts, though without doubt there were at this time instructions in abundance, arbitrary and illegal, all the way from the highest to the lowest of those armed with authority. But, to say nothing of the constitution of the court itself, or the action of its members, can any authority in law be shown for the proceedings of the Sheriff and "that furious Marshall" of the Court of Oyer and Terminer in Essex in 1692, or their rascally associates among the neighbors of the alleged witches?[4] I am well aware that malefactors committed to prison were to be conveyed thither at their own charge, if they were able, and that they were liable for the cost of their maintenance, and even their own execution, and that officers had power to levy for necessary charges:[5] but it will be impossible to justify by these or similar provisions

[1] *Ante*, p. 28.

[2] "19. To take care that no man's life, member, freehold or goods be taken away or harmed otherwise than by established and known laws not repugnant to, but as near as may be agreeable to the laws of this our kingdom of England." *Colonial Entry Book:* No. 62: pp. 365 *et seq.*

[3] *History of Salem Witchcraft:* ii. 471.

[4] See Mr. Goodell's notice of the case of Philip English, where he says: "It is evident from the records of certain suits successfully prosecuted by him against some of his neighbors for helping themselves to his property during his absence that the officers of the law were not the only trespassers upon the goods of the fugitive merchant." *Proc. M. H. S.*; xx., 296. Compare also Calef: 41, and Matters of Fact, *passim.*

[5] Mass. Laws: Ed. 1672: pp. 104, 126, 128.

of law, the havoc wrought by "the officials" among the estates of the sufferers, before as well as after conviction —although this was "a special Court of Oyer and Terminer where *all fees are doubled.*"[1]

If there was anything settled in English law at that time it was that there could be no forfeiture before conviction, and that always where any forfeiture was of any felon's goods, it ought to appear of record.[2]

Almost a century before these outrages, Coke reported the determination of "all the Judges of England" on this subject:

"Wee are also of opinion, that it is inconvenient, that the forfeitures upon penall lawes, or others of like nature should be granted to any, before the same be recovered or vested in his Majestie by due and lawfull proceeding: for that in our experience it maketh the more violent and undue proceeding against the subject, to the scandall of Justice, and the offence of many."[3]

Yet John Procter, in his courageous and manly appeal from his prison, before his trial, addressed to five of the clergy and setting forth the shocking outrages connected with the prosecutions, says, "they have already undone us in our estates."[4]

In all this scene of judicial delusion and legal abuse, the action of the Chief Judge of the Court, Stoughton, also Lieutenant Governor, whose heart and hand had been so constant and ready in these terrible proceedings, evoked a significant notice from his chief in the government. Phips, writing to Nottingham, February 21, 1693,

[1] Thomas Newton's bill for his services in the New York court, which tried Leisler and his partisans in the previous year, has preserved this interesting item of legal practice at that time.—*Calendar of English MSS.* among the New York Archives at Albany.

[2] Co. 5. 110. Dalton's *Office of Sheriffs:* Ed. 1682, Cap. xiv., 70, 75.

[3] *Reports:* Part vii. 1608, p. 36. Penall Statutes.

[4] *Calef:* 105. Upham: *History of Salem Witchcraft;* ii. 311.

said: "The Lieutenant Governor, . . . indeed, hath from the beginning hurried on these matters with great precipitancy, and by his warrant hath caused the estates, goods, and chattels of the executed to be seized and disposed of without my knowledge or consent."[1] He might have added, without color of right, justice, or law!

I think I have made it apparent that acts for the reversal of attainders were entirely without significance in Massachusetts, excepting as a more or less impressive form of acknowledgment that the proceedings in criminal cases to which they related had been such as to demand reversal in the Court of highest jurisdiction—so that, in fact, there was no "*raison d'etre*," or "color of necessity" for the Act of 1703, and still less that of 1711.[2]

It does not appear that this mode of review and decision on appeal was ever proposed excepting in these two instances, both of which relate to the same proceedings in the same lower court against the same persons, resulting in convictions upon indictments for witchcraft.

On the first occasion, in 1703, the petitions of the parties interested as sufferers, or those who sympathized with them, having been duly considered in the popular branch of the General Court, it was determined by the House that, inasmuch as it was the opinion of many worthy and pious persons that the evidence admitted against the condemned was weak and insufficient to warrant the action of the court below, a bill should be drawn up for

[1] See APPENDIX: III., for the letter of Phips, a most interesting document, hitherto unpublished entire. I owe this copy to Mr. Goodell's liberal kindness. Mr. Palfrey printed extracts from it in his *History of N. E.*, iv. 113 note.

[2] Mr. Goodell furnishes an inscription which he thinks appropriate for this act: "*Stat mole sua; nullus esse potest ambigendi locus.*" The verse of Horace, a little changed, seems to me much more appropriate:

"*Lex* consili expers mole ruit suâ."

preventing the like procedure for the future, and that no Spectre Evidence should be thereafter accounted valid, or sufficient to take away the life or good name of any person or persons within the Province, and that the infamy, and reproach, cast on the names and posterity of those who had been accused and condemned should thus in some measure be rolled away. When this proposition came before the Council for their concurrence, the whole scene changed. So far from agreeing to the order of the House, which substantially, and with great and honorable justice, denounced the Spectre Evidence and the doings of the lower court, and provided for the future protection of the people against such outrages—they passed an order to acquit the petitioners severally of the penalties to which they were liable, and reinstate them in their just credit and reputation.[1] Partial and inadequate as it was—this order was promptly agreed to by the House, probably as the best they could do; and the Act of 1703 reversing the Attainders of Abigail Faulkner, Sarah Wardwell, and Elizabeth Procter, went through all the stages of legislation and became a law.

In form and expression, the act was closely modelled on the Parliamentary Act of 6 and 7 William III., for reversing the Attainders of Jacob Leisler and others. That bill was drawn by Constantine Phips, afterwards Lord Chancellor of Ireland, who was at that time one of the agents of Massachusetts in England: and all the proceedings were full of interest to those who were prominent in the affairs of the Province. A comparison of the original with its two imitations will show some suggestive and perhaps instructive differences—particularly that there is no reference in either of the Massachusetts acts to "Lands, Tenements, or Hereditaments," as subject to forfeiture, and

[1] This order was devised by Governor Dudley, and is still extant in his handwriting. *Notes on the History of Witchcraft*, etc., p. 23.

also that the provision against "Corruption of Blood," which is repeated from the English model in the Act of 1703, disappears and finds no place in that of 1711.

English Act of 1695.	*Mass. Act of* 1703.	*Mass. Act of* 1711.
"arraigned . . . and convicted and attainted of High Treason and Felony . . .	"arraigned, convicted and attainted of Felony for practising Witchcraft . . .	"severally Indicted, Convicted and Attainted of Witchcraft, and some of them put to Death, others lying still under the like sentence of the said Court, and liable to have the same Executed upon them . . .
"And be it enacted . . That the said several Convictions, Judgments, and Attainders . . and every of them, be, and are repealed, reversed, made and declared null and void to all Intents, Constructions and Purposes whatsoever, as if no such Convictions, Judgments, or Attainders had ever been had or given, and that no Corruption of Blood, or other Penalties or Forfeitures of Goods, Chattles, Lands, Tenements or Hereditaments, be by the said Convictions and Attainders, or either of them incurred; any Law, Usage or Custom to the Contrary notwithstanding."	"And be it declared and enacted . . . That the said several Convictions, Judgments, and Attainders . . . and every of them be, and are repealed, reversed, made and declared null and void to all Intents, Constructions and Purposes whatsoever; as if no such Convictions, Judgments or Attainders had ever been had or given. And that no Corruption of Blood, pains, penalties or Forfeitures of Goods or Chattels be by the said Convictions and Attainders or any of them incurred. But that the said persons and every of them be and hereby are reinstated in their just Credit and reputation. Any Law, Usage or Custom to the Contrary notwithstanding."	"Be it Declared and Enacted . . . That the several Convictions, Judgments and Attainders . . . and every of them be and hereby are Reversed, Made and Declared to be Null and Void to all Intents, Constructions and Purposes whatsoever, as if no such Convictions, Judgments or Attainders had ever been had or given. And that no Penalties or Forfeitures of Goods or Chattels be by the said Judgments and Attainders, or either of them had or incurred. Any Law, Usage or Custom to the Contrary notwithstanding. "*And that no Sheriff, Constable, Goaler, or other Officer shall be liable to any Prosecution in the Law for anything they then Legally did in the Execution of their respective offices.*"

The proceedings upon the second occasion referred to have been very fully illustrated in our former dis-

cussion; in which the final question whether the Act of 1711 became a law awaits decision until some new and conclusive evidence is produced to show without doubt that the bill was signed by the Governor, sealed with the Province Seal, and duly published.

It is remarkable that all the results of legislation embodied in both acts, of 1703 and 1711, came so far short of the first deliverance of the House of Representatives in 1703—but the materials known to me are hardly sufficient to warrant any attempt to explain what was done, much less what was not done. The history of witchcraft in Massachusetts needs to be rewritten, and it will be an honorable service to vindicate the men who were "in the opposition" throughout the whole period of the delusion, an opposition which made itself known in the outset, although speedily overborne by the torrent of wickedness and folly which rushed madly on until it was spent. The "Sadducees" of 1692 in Massachusetts were a very considerable, if not numerous class. It is a grave mistake to think there was no resistance to the high-handed proceedings of the authorities.[1] Even in the height of the delusion there was an able and resolute minority, whose courageous protests soon made themselves felt, and whose influence presently mitigated the fierceness of fanaticism.

The sober second thought of some who were earnestly engaged in the earliest proceedings at Salem, led them afterward to sympathize with the opposition. Deputy-Governor Danforth was a notable instance of this change; and his zeal and activity in the business of witch-finding at the outset became even more conspicuous afterward in the other direction. When the courts were lawfully con-

[1] The whole matter has been treated as though nobody objected to these proceedings at the time, excepting, perhaps, the victims, who naturally and of course did not like to be hung!

stituted by the act of the legislature, he was appointed one of the Judges, and it soon became evident that he did not share, but was distinctly opposed to, the cruel fanaticism of the Chief Judge Stoughton. It is not unlikely that his was the voice from the bench of the Special Court at Salem, in January, 1693, which directed the jury, upon inquiry as to the value of the spectral evidence, to regard it as much as they would "*chips in wort.*"[1] He presided in the following court at Charlestown, after Stoughton had left the bench in a rage of passionate anger, on hearing that Governor Phips had interfered to save eight of those condemned from the gallows:[2] and when he died in 1699, the diary of a contemporary stone-mason in Boston recorded what was doubtless the popular estimate of him, as one "who had a cheif hand under God in puting an end to the troubles under which the Country Groaned anno 1692."[3]

Judge Sewall, whose confession is the most honorable document of all that have been preserved, in behalf of any one of the prominent actors in the tragedy, seems to have been unable to recall the events of that time without a shudder and evidently bitter pangs of remorse. If the reticence of the whole community on the subject were not so striking a feature of its history, the scantiness of his records would be more remarkable. Not a single allusion to any of the efforts to obtain restitution is to be found among the numerous notices of legislative proceedings scattered through his diary. But he did, at some day of his after-life, add in a marginal note near the beginning of his contemporary entries during that fatal year 1692, a Latin quotation, which sums up in one ominous word what

[1] Calef: *More Wonders*, etc., p. 141.

[2] "The warrant was sent and the *graves digged*" for them. *A Further Account*, etc.: Lond., 1693, p. 10.

[3] *Proceedings Mass. Hist. Soc.*, April, 1884, p. 154.

has been and must be the final judgment of posterity upon the whole affair.

> "Attonitus tamen est ingens discrimine parvo
> Committi potuisse NEFAS."[1]

With regard to the Act of 1711, Mr. Goodell has emphasized the fact of its apparent origin in the Council,[2] and has given his guess at the motives of action in both branches of the Court. I will not follow him upon the unknown sea of speculation, but it is evident on the face of the record that the majority of the Council recoiled from the action of the Representatives on both occasions. If they were not decidedly averse to any action, they were certainly in no haste to respond favorably to the private and public demonstrations, of which evidence in one form or another is still to be found, which were constantly pressing upon them from without. On the other hand, it appears that a large minority, if not a majority, of the House were ready to sympathize fully and act up to their sympathies with the sufferers and their representatives.

[1] Ovid: *Metamorphoses:* vii. 426–7. Compare Upham's *Reply to Poole:* xiii. p. 57, with 5 *Mass. Hist. Soc. Coll.* v. *Sewall Papers:* i. 355, and *MS. Original Diary* now in the possession of the M. H. S. pp. 216–17. Mr. Upham's use of the quotation was correct, and the Editors of the Diary made a ludicrous mistake—leaving it in doubt whether the writer intended to reinforce St. Paul with Ovid or Ovid with St. Paul. What "*nefas*" there was that anybody could see in the poor old woman's choking to death, even if she was "in a temper," is a mystery, not likely to be solved.

[2] The fact that the General Court Records make it to come from the Council does not prove that it really did begin there. In my first "*Notes*," etc., p. 23, I have shown with respect to the former act in 1703, that although the Records indicate that the action of the Court originated with the Council, the original documents preserved among the Archives prove that it was founded on the previous action of the House, which is not noticed in the Records. It is a great misfortune that the separate journals, especially of the House, were not preserved from the beginning.

Both these attempts at reversal seem to have been things "done in a corner." All the three women who were exonerated by the first act in 1703 appear to have been ignorant or oblivious of the fact and were represented in the later petitions to the legislature which gave rise to the action of 1711. The obscurity which has veiled the history of the latter from that day to this shrouds the whole subject in darkness which has been well nigh impenetrable, and still hovers around it.

The men who manipulated all these legislative proceedings throughout were either actors in the tragedy, or their immediate representatives and apologists, and the Act of 1711 was a performance in the same strain of "confession and avoidance." The draughtsman of this bill had before him the letter of 15th April, 1693, sent by her Majesty's command to Governor Phips, which was in itself an empty echo of official approbation by a tardy reply. Phips's letter of the 14th October, 1692, was inspired by Cotton Mather, if indeed it was not written by him, and the recitals in the preamble to the bill seem to have been made off the same piece. The letter was published by Mr. Goodell in the *Historical Collections of the Essex Institute* in 1868: 2d Series, Vol. I. Part ii. pp. 86–90. The documents which accompany it indicate its origin. Upon the communication of Governor Phips's letter of October 14th, 1692, to His Majesty in Council, January 26th, 1693, the Earl of Nottingham was directed to prepare letters for His Majesty's signature to be sent to Phips, "signifying His Majesty's approbation of his proceedings in this behalf, and further to direct that in all Proceedings for the future against Persons accused for witchcraft or being possessed by the Devill the greatest moderation and all due circumspection be used so far as the same may be without impediment to the ordinary course of justice within the said Province." King William having in the meantime gone

to Holland, the letter of the 15th April, 1693, was forwarded by command of the Queen.[1]

There is an earlier echo of Phips's letter in the entry of John Evelyn, in his Diary, under date of 4th February, 169⅔ : viz :

"Unheard of stories of the universal increase of witches in New England; men, women and children devoting themselves to the devil, so as to threaten the subversion of the government."

Evelyn had been a member of the Council for Foreign Plantations under the late King, and was in the way of information respecting strange things abroad for which he was eager. The Royal Council, so far from being unduly excited by the untoward circumstances of their remote Province thus beset by devils, etc., apparently viewed the distant warfare with great indifference.[2]

The reader of these notes will not think it strange that I fail to sympathize in the extravagant eulogium upon the Act of 1711, with which Mr. Goodell finishes his "Reasons," etc. If that performance were in truth so grand a trophy of Massachusetts legislation, it would seem very strange that so wonderful a statute has been thus carefully concealed through all these years, waiting to be rescued from oblivion by his triumphing hand and pen, and presented, for the first time in all its glory, to this remote

[1] Compare Phips's Letter of 21 February, 1693, in APPENDIX III.

[2] Writers on the Salem Witchcraft have suggested as a reason for failure in the movements towards redress, that "some power blocked the way," "some adverse influence which seemed to prevail against it," and that "there is some reason to conjecture that it was the influence of the home government." The reader will have no difficulty in understanding that there was a great "power" behind all those obstructions; but nothing can be more absurd than the idea that the "home government" had anything to do with it. The British government has enough to answer for without being held responsible for either witchcraft or slavery in Massachusetts. Cf. Upham: ii. 476, 480.

generation. Few political communities like Massachusetts can be charged with such invincible modesty or so striking a resemblance to that honest man in the play, who "lacked iniquity to do himself service" or historical justice.

I confess that I do not look upon the "little candle" of 1711, which my friend holds up so stoutly and makes to shine like "a good deed in the naughty world" of witchcraft in Massachusetts, as furnishing anything like "a great light" to rule the day or the night of her history. To compare it, even if it became a law, with the Statute of 1641, which I have attempted to vindicate in these notes, would be like comparing the rushlight and pine knot or tallow-dip of that elder time with the electric flash that has been subdued to the steady and continuous service of modern illumination.

Yet my learned friend, to save this paltry act of 1711, sacrifices without hesitation the noblest achievement of legislation in Massachusetts, making void and of no effect the greatest, the wisest, most far-reaching and widely beneficent of all her statutes, a statute which long before the abolition of feudal tenures[1] by the Act of Parliament 12 Charles II, released forever all her lands and people from the burdens and incidents of feudal bondage, leaving not one surviving hardship of feudal habits as a badge of servitude; so that the real sting of feudalism was never per-

[1] See Mr. Justice Blackstone's remarks on this auspicious event in the history of English law. *Commentaries:* Bk. IV. Chap. 33. Sect. v. The effects of the Act of 12 Charles II., however, fell far short of the radical changes wrought by that of Massachusetts in 1641; and it was not until nearly two centuries and a half later that the criminal law of England was purged of the fearful incidents of treason and felony which had their source in the feudal theory. They prevailed from the earliest time till the year 1870 when they were abolished by the statute 33 and 34 Victoria: c. 23, s. 1, except in the case of a forfeiture consequent upon an outlawry. Stephen: *Hist. Crim. Law:* i. 488.

sonally felt by any of her people, who have thus always possessed the right to enjoy, without restraint or disparagement, the priceless powers of Alienation, and disposal by Will, as well as the rights of Inheritance and Distribution, of and in any and all their estates, both real and personal.

Mr. Goodell is not alone in his apparent indifference to this noble statute. He shares it with other historical writers of New England, who have evidently failed to comprehend its significance or appreciate its importance in the history not only of Massachusetts but the whole country. Historians and orators, who have delighted to dwell upon the "first things" of the Pilgrim and Puritan annals, have exhausted their vocabularies of admiration, wonder and praise upon the document signed in the cabin of the May Flower, by which the Plymouth settlers, declaring themselves the "loyal subjects of their dread, sovereign Lord, King James," provided some restraint of government among their company—being without the limits of their patent and afraid of discontent and mutiny in the inferior class of "strangers among them," who had already manifested an unruly and factious disposition.[1]

This simple and obviously necessary act of self-preservation has been exalted into an historico-political fetich of the largest dimensions. "In the cabin of the May Flower, humanity recovered its rights . . . democratic liberty . . . started into being." This passion for magnifying the Compact of 1620 and making its narrow limits the seed-plot of universal democracy, which has found such large and constantly recurring exposition of late at "New England dinners," and other celebrations of "Forefathers' Day," is second only to that Fourth of

[1] Cf. Bradford: 89. Hutchinson: i. 455. Young's *Chronicles of the Pilgrims*: 120.

July inspiration which has consecrated the "glittering and sounding generalities" of the Declaration of Independence as the fundamental law and everlasting gospel of Liberty, Equality and Fraternity. How strong is the contrast between all these dazzling historical fireworks and the scanty appreciation, if not absolute neglect of the Statute of 1641, even by professed historians, who have failed to discern in its masterly provisions, which have leavened the law of a whole continent, the results well and surely wrought out of that extraordinary feature in the great original grants under which English North America was first permanently colonized and settled—the *habendum et tenendum*, the having and the holding, under which the rights of constitutional freedom have been gradually asserted, securely established, and firmly maintained.

The great Puritan leaders of Massachusetts recognized its significance and fully understood its value from the outset of their enterprise. They knew how to extricate the most precious roots of the Common Law of England from the mischievous growth of feudalism and hierarchy in which they were choked; and the separation of the church order of New England was not more thorough than that of its civil state, from the abuses of and in both, which had made the ancient home of their fathers no longer sanctuary for them, and were already sweeping its altars and its throne into the abyss of Civil War.

APPENDIX.

I.—The Special Court of Oyer and Terminer at Salem in 1692.

(Read before the Massachusetts Historical Society, March 12, 1885.)

The Special Court of Oyer and Terminer, which was opened at Salem, on the 2d June, 1692, has been denounced as an illegal tribunal, from that day to this. Historians and lawyers alike have agreed in denying the validity of the Court, as constituted solely by commission of the Governor, although few have used much ceremony of argument or explanation to demonstrate or sustain their position. That position, however, has never been seriously doubted or disputed, until a few months ago; when, at a meeting of this Society, Mr. Goodell set forth, with characteristic ability, the novel grounds on which he defends the legality of the Court, as erected by the Governor. It is my purpose to maintain that, in this instance, the right is with the majority, and to show that it is not in the power of any man to justify the constitution of the Court or its proceedings, which were framed and conducted without regard to the rights of the people guaranteed by the common law of the Colony and Province founded on the charters. A very little attention will convince you that, for the history of the Salem Witchcraft, there are not only sources of knowledge hitherto undeveloped, but that materials well known and frequently used have not been exhausted by the learned scholars and able critics who have already handled them.

The doubt respecting the legality of the Court was not "started," but revived, by Hutchinson. *Hist. of Mass.*, ii. 49. Doubts of its authority existed from the first. Before the end of

the month following its establishment, immediately after its first session and the execution of its first victim, the discontent and indignation of some of the people found expression in earnest remonstrances directed to the legislature then in session, "*containing very high reflections upon the administration of public justice*" in the Province. The author of these papers was promptly arrested by the Sheriff upon warrant of the Governor, and brought before Phips and his Council. Upon examination, having owned that he wrote the papers and subscribed his name to one of them, he was forthwith ordered to be committed to prison, or give bond of £200, with two sureties, to answer at next Superior Court,[1] for framing, contriving, writing, and publishing the said seditious and scandalous papers or writings, and in the mean time to be of good behaviour. *Notes on the History of Witchcraft in Massachusetts*: 12.

It is a great misfortune that these papers have disappeared. They were "*Inscribed to the Grave and Judicious Members of the General Court*," and would throw much needed light upon the transactions to which they referred—which must have been the constitution of the Special Commission itself, or the proceedings at its first session, or both. There was nothing else in the administration of public justice in Massachusetts at that time to challenge such criticism or provoke such hostility, and the promptness and severity with which Phips and his Council manifested their resentment, proves that it was their own work which was thus "scandalized" by these "seditious papers."

Their author was William Milborne, a brother of Jacob Milborne, who with his father-in-law, Jacob Leisler, had been prosecuted to death in the previous year at New York, by the same Thomas Newton,[2] the young English lawyer who, in the capacity of King's attorney, inaugurated the proceedings at Salem. There

[1] Why could not the witches have been tried at "next Superiour Court?" This document itself shows that the former courts were continuing in use and authority, and effectually disposes of the chief argument for the necessity of the Special Court. And why was the new establishment of Courts delayed?!

[2] See Appendix IV. There can be no doubt that Newton was largely concerned in the introduction of "the law and custom of England" into this business.

can be no doubt that these performances in the administration of public justice would have a peculiar interest for this "noisy Anabaptist minister," as Milborne had been already designated, but no evidence now appears of further activity on his part. The inference is obvious. He undoubtedly found it necessary very soon to provide for his own safety, by avoiding the public notice he had so rashly, however justly, challenged.[1] The atmosphere was not healthy for any "Witch-advocate," or "Sadducee," still less so for one who was also an "Anabaptist;" and in that tornado of passionate religious excitement, wisdom was justified of her children, when with close mouth and quiet tongue

> "The boldest held his breath,
> For a time."

Calef also, as early as 1697, called attention to the fact that the Special Court "*had no other foundation than the Governour's Commission.*" *More Wonders:* etc., 110. This may have been the source of Hutchinson's suggestion, to which the origin of all the modern doubts has been attributed. It has been an open question to this day whether the action of Phips was justifiable. If he had authority by his commission and instructions to erect courts, he might grant a commission of Oyer and Terminer for trial of offences; but unless expressly thus empowered, it is difficult to see whence he could derive any right whatever to do so. His authority rested on his commission and his instructions, by which, with the powers granted in the charter of the Province, it was limited and defined; and never, at any period in the history of Massachusetts, was the doctrine admitted that any court could be "erected or constituted," excepting by an act of the legislature. On this point, public opinion was unanimous throughout all the colonies from a very early day.

The power given to the Governor with the Council to appoint commissioners, did not carry with it any authority to erect a court

[1] Nothing further appears concerning Milborne at that time, and I have been unable to trace his subsequent career; but Dr. Farmer says that one of the same name died at Boston, in August, 1699. *Genealogical Register*, Author's copy, with his MS. corrections, in the Library of the New Hampshire Historical Society.

by issuing a commission, of Oyer and Terminer. It might as well be argued that the power to appoint judges implied authority to erect the courts in which they were to sit. That authority was granted to the whole legislature with respect to all courts, except that the Governor with the Council was to have the probate of wills and granting administrations, and that all admiralty powers and jurisdiction were reserved to the Crown. The argument that Phips had the power to erect the court because he exercised it, is based upon too violent a presumption that he would not have acted without authority, and a natural desire for some explanation of what he did.

The action of Phips, however, may be easily accounted for. The explanation is not far to seek. When Joseph Dudley as President, with his Council, took possession of the government in 1686, arrangements were made for the administration of justice to proceed generally in accordance with the ancient forms. "The courts of justice remained nearly on the former plan."[1] Nevertheless, the erection of courts being expressly authorized by the Commission of Dudley, as well as that of his successor, Andros, Commissions of Oyer and Terminer, which had been unknown in Massachusetts under the Colony Charter, became familiar in the years which followed its revocation, and were in frequent use down to the time of the arrival of Phips with the Province Charter. The famous trial of the Ipswich men, with

[1] Chalmers *Political Annals:* 418. His reference is to *New England Entries:* ii. 266. A copy of the Commission of James II. (October 8, 1685), for the Government of his Territory and Dominion in New England, which Mr. Palfrey says (iii. 485) that he had not been able to find, is among the Connecticut Archives. *Miscellaneous Papers:* i. 6. I am indebted to Mr. C. J. Hoadley, of Hartford, for copious extracts from it. While these sheets are passing through the press, a volume of the Trumbull Papers has come to hand, in which the whole document is printed "for the first time." 5 *Coll. M. H. S.:* ix. 145. It seems strange that so important a paper should have remained hidden so long from the diligent antiquaries of Massachusetts.

President Dudley's ordinance establishing Courts, etc., June 10. 1686, is printed in the *Collections of the N. H. Hist. Soc.:* viii. 278, as well as the Commission of his successor, Sir Edmund Andros, *ib.* 268, which also appears in the *N. Y. Col. Doc.:* iii. 537.

John Wise at their head, in 1687, was before a special Court of Oyer and Terminer in Boston. Stoughton was a member of that court, as well as Dudley, and both were fully equipped with influence and advice for the new Governor's administration.[1]

Here was a tool or engine of arbitrary power ready at hand, and the men were not wanting to use it. If they had rested in such use (even the most arbitrary) as had been made of it during "the Usurpation," as it was called, their crime would have been less. But in setting on Phips to take it up, they not only advised the Commission, but a Commission "*to inquire of, hear and determine for this time,* ACCORDING TO THE LAW AND CUSTOM OF ENGLAND,[2] *and of this their Majesties Province,* ALL AND ALL MANNER OF CRIMES," etc. *Council Records:* ii. 176. And this, right in the face of the fact, perfectly well known to him and his advisers, that the new Charter had substantially restored and confirmed former rights, liberties, and privileges—the common law of

[1] Stoughton was Lieutenant-Governor, and a member of the Council; and Dudley was much interested in the witchcrafts. He had been Chief Justice in New York, and it was through him that the ministers of Boston sought such support as they could get from the pastors of the various churches in New York, "English, Dutch, and French." Four years before, in company with Stoughton, he had first fleshed his judicial sword upon poor old "Goody Glover," executed (November 16, 1688) as a witch for afflicting the Goodwin children, whose performances upon the superstitious vanity of Cotton Mather became so famous. Dudley was Chief Judge upon her trial, and it is not improbable that she was tried by a special Commission of Oyer and Terminer. *Magnalia:* 1702; ii. p. 61. 5 *Coll. M. H. S. Sewall Papers:* i. 236. His escape from being a member of the Witch Court in 1692, was probably due to the fact that he was still a member of the Council and Chief Justice in New York when that Court was appointed, although he never appeared in Council or on the bench in that Colony after the 23d April of that year. On the arrival of Governor Fletcher (August 30, 1692), he was promptly suspended, and soon removed from both offices as a non-resident. *Journal N. Y. Legislative Council:* i. 1–15; *N. Y. Col. Doc.:* iii. 847–8. Order in Council: 16th February, 169$\frac{2}{3}$, printed in 4 *Coll. M. H. S.:* ii. 304.

[2] Under this Commission all crimes and punishments known to the law and custom of England in the year 1692, might be recognized and enforced in Massachusetts; and Governor Phips thus attempted to introduce, upon his individual personal authority, the entire system of English criminal jurisprudence, with all its incidents and belongings.

Massachusetts! Although, while disfranchised under an arbitrary personal government, the people of that colony had fallen back in despair upon their rights as Englishmen under the old laws of England, these were the last standards of justice to which they would resort, under the privileges of their charter, which was their ægis of protection for life, liberty, and property.

Samuel Sewall's famous "Confession" in the "Bill put up by him on the Fast Day" in 1697, acknowledges "the Guilt contracted *upon the opening* of the late Commission of Oyer and Terminer at Salem," etc. Had the ordinary methods in Massachusetts of procedure in cases of crime been observed, no such guilt would have been incurred. Sewall also declared that he was, "upon many accounts, more concerned than any that he knows of," manfully "desiring to take the blame and shame of it." It should not be forgotten that very soon after the erection of the court, "when," as Calef expressly states, "*authority found themselves almost nonplust in such prosecutions*" (*More Wonders*: 92), the Reverend Elders were called upon to advise and direct the action of the Magistrates, doubtless on purpose to overawe the malcontents who presumed to doubt or question the propriety of the measures in progress. Hutchinson (ii. 50) refers to this call as "an old charter practice." But the old charter Puritans and statesmen were gone. H. F. Uhden, the German historian of "The New England Theocracy," to whose interesting work Neander contributed a preface, very keenly and truly says of the Salem Witchcraft, "it may well be maintained, that the sound sense and the living religious sentiment of the earlier time would have arrayed themselves decidedly against such an infatuation." *Conant's Translation*: 222.

It was the last conspicuous struggle of the expiring theocracy of Massachusetts,[1] in which it seized the weapons of the very

[1] The subsequent attempts of the Mathers and their coadjutors to re-establish the ancient "power of the keys" were dismal failures. The old spiritual authority was too much broken and scattered, and the efforts towards organization to restore it are now chiefly memorable for having elicited the stirring satire of John Wise in opposition to any and all schemes of centralization among the New England Churches, whose "Incurable Separation" distressed Richard Baxter so much, and even promoted "a great inclination to Episcopal

tyranny which destroyed it, making use of legal and judicial apparatus which never found any, even the smallest, place or countenance under the charters. Excepting under "the absolute commission government" during the interval between the two charters, when unrestrained by the provisions of either, the most impudent tyranny ascribed to Sir Edmund Andros and his minions, and the most ambitious scheming of Edward Randolph, "the Evil Genius of New England," would never have dared to grasp or exercise an authority like this—to hear and determine in such a tribunal questions involving the liberty, property and lives of the people of Massachusetts, "*according to the law and custom of England.*" Had *they* done so, there was still left among that people, enough of "the old leaven," to have swept them all into the deepest waters of that historic Harbor, which, less than a century later, became "black with unexpected tea," upon much less provocation!

But the "Magistrates and Ministers" of 1692, the chosen "Orders of Men," who engineered this witchcraft business, were the trusted leaders of the people. Habitually trusted without question by the great majority, whose weakness they thus betrayed into "a state of affairs, hardly conceivable in any community of Englishmen out of Bedlam." Do we think it strange that they were not themselves overwhelmed with remorseful shame and confusion of face, or, stranger still, that they escaped immediate judgment? Is it not strangest of all

—That they managed, nevertheless, to cling to the advantages of position and authority they had gained?

—That they persisted in maintaining the superstitions by which they were fortified?

—That their chief, Stoughton, and his party, retained power enough to the day of his death, to repress any, even the slight-

Government" among the best people in the land. One of Cotton Mather's characterizations of his lively antagonist is pithy and expressive enough: "A furious Man, whose name is John Wise, of whom we have not so much assurance that he has *cor bonum*, as we have that he has *caput non bene regulatum.*" Letter of 17th September, 1715. Cf. his *Ratio Disciplinæ Fratrum Nov-Anglorum:* 184, and *Sewall Papers:* iii. 51.

est, motion towards redress and restitution, so that nothing of the kind appeared until after that event?

—That the same influences conspired to discourage the duty and frustrate the design, of every subsequent effort in behalf of the sufferers or their representatives?

—That whenever the rising tide of retribution became too great for resistance, it was conducted through channels of safety, skilfully contrived to protect those who were really responsible for all these calamities? And, finally,

—That, after the lapse of nearly two centuries, the *penumbra* of that ancient eclipse of justice still lingers (must I say, even in these halls?), obscuring the vision and clouding the judgment of many, to darken the record of History?

Yet, strange as they appear, these are some of the facts hitherto unrecognized, to be considered by future writers on Witchcraft in Massachusetts.[1]

Doubts were rife about the continuance of the Court as early as the 7th October, when Parson Torrey, of Weymouth, fortified Judge Sewall, who was visiting him with Mr. Willard, by his opinion that the Court should go on, "regulating anything that may have been amiss when certainly found to be so." On the 15th October, at Cambridge, Sewall visited Danforth, and dis-

[1] Hutchinson's summary of the whole affair, published in 1767, ought not to be forgotten here. He says: "The opinion which prevailed in New England, for many years after this tragedy, that there was something preternatural in it, and that it was not all the effect of fraud and imposture, proceeded from the reluctance in human nature to reject errors once imbibed. As the principal actors went off the stage, this opinion has gradually lessened, and perhaps it is owing to a respect to the memory of their immediate ancestors that many do not yet seem to be fully convinced. There are a great number of persons who are willing to suppose the accusers to have been under bodily disorders which affected their imaginations. This is kind and charitable, but seems to be winking the truth out of sight. *A little attention must force the conclusion that the whole was a scene of fraud and imposture*, etc. *History of Mass.*, ii. 62.

Dr. Douglass is the only authority of an early date, known to me, who seems to have represented the medico-metaphysical theory referred to by Hutchinson; although I understand that it has been revived by some modern specialists in psychological medicine. *Summary*, etc., i. 450.

coursed with him about the Witchcraft—who "thinks there cannot be a procedure in the Court, except there be some better consent of Ministry and People."[1]

Meantime, the *fiat* had been recorded. The last trace of official action by the Court is in the entry of Sewall, that "Oct. 10, 1692. The Court of Oyer and Terminer is opened at Boston to trie a French Malatta for shooting dead an English youth." On the 14th, Phips wrote to the Earl of Nottingham, in England, that he had "put a stop to the proceedings of the Court, and they are now stopt till their Majesties pleasure be known."

What sort of authority these judges themselves thought they were acting upon, may be inferred from the express statement by one of them, that the Court counted themselves dismissed when it was voted by the House of Representatives (only 33 to 29), that a Fast should be appointed, and a Convocation of Ministers to seek the Divine direction in the right way as to the Witchcrafts, a vote in which the Council refused to concur. Was ever such a thing heard of before or since? The members of a solemn judicial tribunal, purporting to be duly and lawfully established, counting themselves dismissed by a trifling majority vote in the popular branch of the Legislature, intimating the opinion that a concert of prayer seemed to be needed in their behalf! Such a Court as that certainly needed some help, divine or human, in office or out of it! A little knowledge of the modern use of injunctions, or methods of procedure in cases of contempt, might have taught them—to enjoin the House of Representatives, and if, after that, they ventured to pray for the Court, they might have been imprisoned for contempt! But the topic is too serious for irony! There was something else in that vote.

The proposition of the House which so shocked the Court "by the season and manner of doing it," was carried on the 26th October. It is printed in my "*Notes*," etc., p. 13, and it shows conclusively that the Representatives in the General Court had taken notice of the fact that "a Special Commission hath been granted to certaine Gentlemen of the Council and *thereby a Court*

[1] That is, better agreement between the Ministry, who were sustaining the prosecutions, and the People, who no longer approved them.

erected by those persons," etc. A good report of the discussions which resulted in this deliverance on the part of the House in those latter days of October, 1692, would give us great illumination here, but these few words, solitary as they seem to be, are full of significance, when carefully considered. Four days before, Phips had issued his second Commission of Oyer and Terminer, to be executed in the County of York—but he gave no more commissions of that sort during the remainder of his term of office. It was reserved for his original advisers, Stoughton and Dudley, who first learned the trick of special Commissions of Oyer and Terminer during "the Usurpation," to complete the brief list of such courts said to have been erected without legislative authority in Massachusetts, by issuing six commissions in the course of their respective administrations, between 1694 and 1713. All but one of these were for the trial of Indians for murder.[1] *Further Notes*, etc., Appendix I.

Notwithstanding all their discouragements, the members of the Court were still reluctant to abandon the holy war against the Devil and his angels, who had, as Cotton Mather expressed it, come down in such great wrath upon "poor New England." But a better spirit was prevailing in many minds, and there is no mistaking the significance of the few and brief entries in the Diary of Sewall, our chief authority here.

The Court had been adjourned to meet again at Salem on the first Tuesday in November, and no change of this appointment appears to have been made at the session held in Boston for

[1] We have no journal of the doings of the House of Representatives for this period, and the notorious imperfections of the General Court Records make it impossible to say whether there was or was not any previous action of the House in these cases: but if, upon final research, it should be absolutely demonstrated as certain that there was no color of legislative authority for these courts, we may fairly infer that the solitary white man who was subjected to such a tribunal must have enjoyed unusual satisfaction in his acquittal. The Indians tried were mostly nameless and probably friendless; and it is not too much to say that people in those days, even in Massachusetts, were indifferent to the personal rights or fate of Indians or Negroes or other outlaws; and were not likely to object to proceedings which were in their nature an economical disposition of such criminals, however irregular.

the murder trial, October 10th, 1692. On the 28th, Sewall says: "In the afternoon, as had done several times before, desired to have the advice of the Governor and Council as to the Sitting of the Court of Oyer and Terminer next week; said should move it no more; great silence, as if should say do not go." "The next day, October 29th, Mr. Russel asked whether the Court of Oyer and Terminer should sit, expressing some fear of inconvenience by its fall. Governor said *it must fall.*" Though the doubts of many days had been anxious, and the silence of the day before in that grave Council was embarrassing as well as ominous—all was cleared and finished by these three words from the Governor, and that Court of Oyer and Terminer, happily for the country, met no more. Its books were closed. On the crimsoned balance-sheet of this infamous court, it stands charged forever with the murder of twenty innocent victims—without one single acquittal to its credit! It consigned one octogenarian to the torture and death of the *peine forte et dure* for defying its injustice! It rejected the one only righteous verdict of the jury, which declared an aged Christian matron "not guilty"! There is not one redeeming feature in its history! The only assets left after its disastrous failure were the cowardly confessions of those weak and wicked liars, who perjured themselves to destroy others or save their own worthless lives, and the undiminished and never-failing capital stock of selfish and heartless hypocrisy, which (after its kind), when called to account in later years, sought to disarm the resentment of man, and avert the wrath of God, by public prayers and fasting, without one thought of restitution which would involve any real personal sacrifice.

The primary sanction of that dreadful tribunal came from the magistrates and ministers, but its necessary support had been in the madness of the people, the poisoned breath of the mob. The first indication of returning sanity, the first gleam of sunshine upon the pestilential fog, warned the members of the Court that its foundations were sinking beneath them. Public opinion could no longer tolerate the outrage of its existence, stained with the blood of so many victims of a foul and degrading superstition, alike unsatiated and insatiable.

Thus ended the most odious court ever known in New England—a court as unnecessary as it was odious—and with it the only considerable attempt to break down the great principles of the common law of Massachusetts which I have tried to vindicate in the foregoing paper.

The overthrow of the Court has been even more obscure than its establishment. Its fall is not to be accounted for by the appearance of another court of competent jurisdiction within the same judicial district. The Act establishing Courts of Justice throughout the Province was not passed until the 25th of November, 1692,[1] and the Act for a special court of assize and general gaol delivery within the County of Essex followed on the 16th of December.[2] This court, which owed its necessity to the great

[1] Although this bill was sent up to the Council from the House of Representatives on the 21st June, 1692, when it was "read, debated, and ordered a further debate for amendments" (*Gen. Court Records:* vi. 230), no further progress was permitted during that session; and it was not until after the Court of Oyer and Terminer had been abandoned, and nearly three weeks of the second session had passed, that the bill was again considered. On the 31st of October, it was "read and debated and some alterations made." *Ib.*, 246. On the 7th of November, it was "again read and debated." *Ib.*, 249. On the 16th it was "again read and argued." *Ib.*, 253. On the 19th it "was argued." *Ib.*, 255. And finally, on the 25th it "was read, voted, ordered to be engrossed and pass into an Act, and is consented to" by the Governor. *Ib.*, 256. So slow and reluctant was the action of that Council.

[2] On Friday, December 16th, 1692, the record respecting the Bill authorizing the special court is as follows: "Upon consideration of many Persons now in Custody within the County of Essex, charged as capital offenders and the time prefixed for the Sitting of the Superior Court within that County according to the Act for establishing of Courts being past, A Bill for enabling of the Justices of sd. Superior Court, to hold a Court of Assize, and General Gaol Delivery within said County *pro hâc vice*, on Tuesday the Third day of January next, was Read, Voted, and Ordered to be Enacted. And is consented unto. William Phips." *Gen. Court Records:* vi. 264.

It should not be forgotten that two days before the passage of this Act, the English statute, 1 James I., Chap. 12, was substantially re-enacted by the same legislature "for more particular direction in the execution of the law against witchcraft." Stoughton and his party undoubtedly procured the passage of this act, in order to reinforce the local law to which they were remitted by the overthrow of the Commission of Oyer and Terminer, with its arbitrary and illegal authority to proceed "according to the law and custom of England."

number of persons still awaiting trial for witchcraft in that County, was appointed to be held on the third of January, 1693: and it had not been even proposed until nearly two months after the fate of the Oyer and Terminer was determined. Its sanction by the Governor was based upon the express promise of the Judges "to proceed after another method," no longer laying stress upon the spectral evidence or the ordeals of sight and touch, which the opinion of "Increase Mather and several other divines" had by that time discredited.[1] *Phips's Letter of February* 21, 1693.

The question here arises, why did the Legislature pass and why did Governor Phips consent to the act for this special court of assize and general gaol delivery, expressly in order to finish the work before assigned to the Oyer and Terminer, unless they were satisfied that the latter court was unlawful? It is incredible that a man of his make should have yielded without resistance any portion of the authority delegated to him by the charter or the Royal Commission, and it is absurd to suppose that he would have countenanced the General Court in such an act at that time, or given his consent to it, unless he was convinced that he had been misled in his previous action.

The Court of Oyer and Terminer was abandoned at a time when the reasons originally alleged for its establishment not only continued to exist, but were even more imperative than before. The first reason was, the great number of people accused and committed. That multitude was greater than ever. The second reason was, the near approach of the hot season of the year. When the Court was stopped, the approaching winter was no less threatening, and if we may accept Phips's express statement, proved more distressing to the unfortunates who thronged the jails. The third and last reason assigned, that no judicatories

[1] Increase Mather's *Cases of Conscience*, to which is prefixed an Address to the Reader signifying the consent and concurrence of fourteen other clergymen, contains the opinions referred to by Phips. It is the same upon which Cotton Mather claimed for his father the credit of "turning the tide against the delusion." Unhappily, it was too late—not having been published until after the bloody work of the Court was done: and the Court abandoned.

or courts of justice were yet established, remained in full force, whatever that may have been. Nevertheless, the special Court of Oyer and Terminer was abandoned—literally abandoned.

Its abandonment was a confession of error, an acknowledgment of its want of sufficient authority, which is emphasized by the fact that the new court authorized by the legislature, was held by judges who, with one exception, had sat in the obnoxious tribunal itself. It was stopped by the same hand that set it in motion—the hand of Sir William Phips, Governor; and the last action was no less arbitrary than the first. "*I* gave a commission of Oyer and Terminer" and "*I* put an end to the Court." Public clamor, aroused and stimulated by the action and appeals of the magistrates and ministers, prevailed with him to give it. Public dissatisfaction with its results quickened his own apprehension of danger, and reinforced his plain common sense to put an end to it, notwithstanding the constant urgency of the same "orders of men" to continue the crusade. They, or many of them, still remained steadfast,[1] but the mass of the people whom they had misled, were falling out of the ranks, and no longer blindly and madly followed their direction.

Similar revolutions in opinion have not been novelties in any of the centuries of recorded human history, but it has rarely happened that leaders so plainly responsible have so nearly escaped judgment not only in their own day, but before the tribunals of history. "*Quicquid multis peccatur, inultum,*" is a maxim as true now as in the days of Nero, but the judgments of posterity ought to echo in tones of thunder, the faintest whispers of helpless contemporary indignation at injustice and cruelty—whether of Kaisers or Consuls, Popes or Puritans, fanatics or fools, knaves or nobodies—in authority.

[1] *Their* ranks were first broken, when some of themselves or their own families were accused, and as one of them frankly admitted: "it was evidently seen, that there must be a Stop put, or the Generation of the Children of God would fall under that Condemnation"! *Magnalia:* 1702; vi. 82. "The Accusations of these [Vile Varlets], from their Spectral Sight, being the chief against those that Suffered. In which Accusations they were upheld by both Magistrates and Ministers, *so long as they Apprehended themselves in no Danger.*" Calef: *More Wonders:* Preface, vi.

The Reverend Mr. Samuel Parris himself, the minister of Salem Village, in whose family "the calamity first broke out," epitomized the changing conditions of public sentiment, in that singular document called an "acknowledgment," by which he vainly strove to mitigate the stern and invincible personal hostility of the people in his church and parish, in November, 1694. He says, referring to the whole series of events from the beginning of the witchcraft in his own house: "in which dark and difficult dispensations, we have been *all or most of us of one mind for a time; and afterwards of differring apprehensions.* And at last, we are but *in the dark*, upon serious thoughts of *all.*" *Calef:* 57.

He was in the dark, and his light, whatever it may have been, seems to have gone out in darkness, but this was not true of all. The darkness, first lifted and lighted up by the destruction of the Special Court and its diabolical methods, never again brooded over all that land. The cloud of Superstition and the tempest of Fanaticism were past. Simple, straightforward common sense was the intellectual and moral explosive which scattered forever the vain shadows in which that unfortunate community had been walking and disquieting themselves in vain. They lingered awhile during a few disturbed and anxious months, but their awful and instant terror was gone. They soon disappeared and no person was ever afterwards called to answer in Court in Massachusetts to an accusation of witchcraft. The ghostly and ghastly apparatus of the seekers "unto them that have familiar spirits, and unto wizards that peep and mutter" of devilish inspirations, was relegated to the private practice of a few of the ministers, and never was brought into court again. "And so the land had rest," for more than the fourscore years which comforted the chosen people after Moab was subdued under the hand of Israel; even unto this day, in which every man ought to thank God that his lot is cast in an age of faith in the *spectrum analysis*, rather than the *spectral evidence.*

NOTE.—Although the same laws concerning witchcraft which existed in Massachusetts when the trials and executions took place at Salem continued in force during the whole provincial

period, and perhaps longer, I know of no prosecutions for witchcraft in that Province later than those at the May Term of the Superior Court, at Ipswich, in 1693, when Sarah Post of Andover was tried upon charges "that she made covenant with the Devil and signed the Devil's book," "was baptized by the Devil and promised to serve the Devil," etc. She was found "not guilty," as were also Eunice Fry, Mary Bridges, Jr., Mary Barker and William Barker, upon about the same charges. *Records of the Superior Court:* 1692–1695: pp. 53–60.

The Act of December 14, 1692, before alluded to, p. 82, *note*, was disallowed by the Privy Council, August 22, 1695, as was also the previous Act of October 29th, in the same year, by which witchcraft was punishable with death. This left the law of Massachusetts in precisely the same state as it had been during all the proceedings of the Court of Oyer and Terminer. The trials in 1693 only were held while the above laws were in force. Intelligence of their repeal was received in Boston on the 12th July, 1696 (*Sewall Papers:* i. 429), in the interval between the first and second sessions of the General Court of that year. At the third session, which met November 18th, Stoughton and his party in the Council, made the last attempt at legislation against witchcraft in Massachusetts; and on the 24th November, 1696—

"A Bill against Conjuration and Witchcraft and Dealing with evill and Wicked Spirits, was read Several Times, Voted, and Sent down to the House of Representatives for Concurrance." *Gen. Court Records:* vi. 487.

The response from the popular branch of the legislature came a week later, when on the 1st December—

"The Bill against Conjuration, Witchcraft, &c. was brought up from the House of Representatives, with a Non-concurrance thereunto." *Ib.* 490.

The people seem to have had enough of it and evidently regarded the old Colony Law and the common law of Massachusetts as amply sufficient for all their need.

The sequence of dates and notices in the Diary of Sewall and elsewhere may add some color to the very bare and naked records which exist. Mrs. Proctor's petition (*ante*, p. 47) was dated

27th May and read in Council June 10th, 1696. On the 16th September, the Governor, Council and Assembly kept a day of Prayer in the East end of the Town House. Sewall, who records this fact for us, states further that "Mr. Willard preached —If God be with us, who can be against us? *Spake smartly* AT LAST *about the Salem Witchcrafts, and that no order had been suffer'd to come forth by Authority to ask God's pardon.*"

The Fast ordered on the 17th December to take place on the 14th January, 1697, was the first public demonstration "by Authority" of any deference to the popular sentiment; and many weary years were yet to elapse before the first note of preparation towards restitution was sounded.

In the latter part of the year 1696, there was a very anxious condition of public sentiment, in view of the disasters which were accumulating upon the country. All the proceedings to which I have referred and the differences between the Council and House of Representatives which preceded the final action respecting the Fast, are full of significance; but I know of nothing so thoroughly illustrative as one of the occasional sermons of Increase Mather, preached at Harvard College, on the 6th December, 1696; from which I copy the following extracts:

"We had seen Peace for many years together, but now the sound of the Trumpet and the Alarum of War, and how long shall we hear it! A long War has afflicted us now for eight years together. Our Land has been changed from Plenty to Scarcity; we were wont to supply other Plantations, but these two last years we stood in need of supplies from other places. What the Lord will do with us for the future we know not: . . . There are awful symptoms upon us . . . I know there is a blessed day to the visible Church not far off; but it is the Judgment of very Learned men, that in the Glorious Times promised to the Church on Earth, *America* will be Hell. And although there is a number of the Elect of God yet to be born here, I am verily afraid, that in the process of Time, *New England* will be the wofullest place in all *America*, as some other parts of the World once famous for Religion, are now the dolefullest on the Earth, perfect Emblems and Pictures of Hell."

The same discourse furnishes evidence that its author had not changed his position with reference to the witchcraft business, nor lost any of his bitterness against George Burroughs, the minister and graduate of Harvard College, at whose trial he had been present, and who had been hanged for witchcraft in 1692. Denouncing "cursed Fortune Tellers" and "Judicial Astrologers" and other "Practitioners in this Iniquity," and mourning "that ever any person should dare to do thus in *New England*," he adds: "Time was, when the Air of *New England* was intollerable to such Vipers . . . and it deserves to be Lamented with tears of Blood, that ever any one that has had a standing in this *Colledge*, should be found in the number of those horrid Creatures."

II. The Law against Suicide.

"*Felo de se*, that is one who wittingly killeth himself; is to be buried out of *Christian* burial with a Stake driven thorow the Corps, and to forfeit his Goods." *Chamberlayne:* 1669 et seqq. "Also, *felo de se* shall forfeit his goods, yet never was attainted." Dalton's *Office of Sheriffs:* Cap. 14, 70.

This custom formerly prevailed in England, although the most learned in the law seem to know of no legal authority for it. In *Bracton's* time, a person who committed suicide in order to avoid conviction for a crime forfeited his lands. Other suicides forfeited their goods only. This distinction was forgotten before the time of *Staundforde*. The law in other respects remained unaltered till 1870, when forfeitures for felony were abolished by 33 *and* 34 *Vic. c.* 23. The custom referred to is not mentioned by any of the authors cited as a consequence of the verdict of *felo de se*, nor does *Blackstone* refer to it. "Probably, like the custom of gibbeting, which certainly existed long before the statute 25 *Geo.* 2, *c.* 37, it originated, without any legal warrant, in circumstances now forgotten. It was, however, abolished in 1823 by 4 *Geo.* 4, *c.* 52, which enacted that thenceforth it should not be lawful for any coroner to issue his warrant for the inter-

ment of a *felo de se* 'in any public highway.' He was to order the body to be privately buried in a churchyard or other burial ground, 'without any stake being driven through the body,' between nine and twelve at night, and without any religious rites. This has been further altered by 45 *and* 46 *Vic. c.* 19 (1882), which provides that the body of a suicide may be buried in any way authorized by 43 *and* 44 *Vic. c.* 41, *i.e.*, either silently or with such Christian and orderly religious service at the grave as the person having charge of the body thinks fit. The act is so worded as to lead any ordinary reader to suppose that till it passed suicides were buried at a cross road with a stake through their bodies. Stephen: *Hist. Crim. Law:* iii. 104.

The Massachusetts law on this subject was more humane. It was as follows:

"*SELF-MURTHER.*

"*This Court considering how far Satan doth prevail upon several persons within this Jurisdiction, to make away themselves, judgeth that God calls them to bear testimony against such wicked and unnatural practises, that others may be deterred therefrom;*

"Do therefore Order, That from henceforth, if any person Inhabitant or Stranger, shall at any time be found by any Jury to lay violent hands on themselves, or be wilfully guilty of their own Death, every such person shall be denied the privilege of being Buried in the Common Burying place of Christians, but shall be Buried in some Common High-way where the Select-men of the Town where such person did inhabit shall appoint, and a Cart-load of Stones laid upon the Grave as a Brand of Infamy, and as a warning to others to beware of the like Damnable practises. [1660.]" *Laws:* 1672, 137.

This law remained in force in Massachusetts until 1824, when it was formally repealed by the Act, Chap. CLXIII., of that year, which is reprinted in *Notes on the History of Witchcraft*, etc., page 8.

It is quite probable that the rule of English law may have prevailed extensively in this country during the colonial period, but

I have met with a single instance only in America of the English fashion of dealing with suicides, in the following case:

"At a Court of Admiralty held by virtue of a Special Commission for the trial of Pirates, &c. in New York, on Friday the 19th May, 1769, Stephen Porter, Mariner, was to have been tried for Murder on board a British ship on the High Seas on the Coast of Guinea in 1766. But on the Officer's going to bring him before the Court, he found him hanging to one of the Bars of the Prison Window, quite dead, having made use of a String by which he supported his Irons. The Coroner's Inquest brought in their Verdict Self Murder, and he was sentenced to be buried in the High Way at the upper End of the Bowry Lane, with a Stake stuck through his Body, which Sentence was executed accordingly." Holt's *New York Journal:* No. 1377, May 25, 1769.

The Diary of Chief Justice Sewall records a case which comes very near being a violation of the humane law of Massachusetts. In 1688, October 5th, he notes the fact that "About 9 night, Thomas, an Indian and very useful Servant of Mr. Oliver, hang'd himself in the Brewhouse. Satterday, Oct. 6. The Coroner sat on him, having a Jury, and ordered his burial by the Highway with a *Stake through his Grave.*" 5 *Coll. M. H. S. Sewall Papers:* i. 229–30. This was in the time of Andros.

III. Letter of Sir William Phips to the Earl of Nottingham.

P. R. O. America & W. Ind. No. 591. N.B.—There is a Copy of this letter in Colonial Entry Book, No. 62, p. 426.

Boston in New England, Febry 21st 1692/3.

May it please yor Lordshp

By the Capn of ye Samuell & Henry I gave an account that att my arrivall here I found ye Prisons full of people comitted upon suspicion of witchcraft & that continuall complaints were made to me that many persons were grievously tormented by witches & that they cryed out upon severall persons by name, as ye cause of their torments ye number of these complaints in-

creasing every day, by advice of y^e^ Lieut. Gov^r^ & y^e^ Councill I gave a Comission of Oyer and Terminer to try y^e^ suspected witches & *at that time* the generality of y^e^ People represented y^e^ matter to me as reall witchcraft & gave very strange instances of the same. The first in Comission was y^e^ Lieut. Gov^r^ & y^e^ rest persons of y^e^ best prudence & figure that could then be pitched upon & I depended upon y^e^ Court for a right method of proceeding in cases of witchcraft; at that time I went to command and the army at y^e^ Eastern part of the Province for y^e^ French and Indians had made an attack upon some of our Frontier Towns, I continued there for some time but *when I returned I found people much disatisfied at y^e^ proceedings of y^e^ Court* for about Twenty persons were condemned & executed of which number *some* were *thought by many persons to be innocent.* The *Court still proceeded in y^e^ same method of trying them,* which was by y^e^ evidence of y^e^ afflicted persons who when they were brought into y^e^ Court as soon as the suspected witches looked upon them instantly fell to y^e^ ground in strange agonies & grievous torments, but when touched by them upon y^e^ arme or some other part of their flesh they imediately revived & came to themselves, upon [which] they made oath that y^e^ Prisoner at y^e^ Bar did afflict them & that they saw their shape or spectre come from their bodies which put them to such paines & torments: When I enquired into y^e^ matter I was enformed by y^e^ Judges that they begun with this, but had humane testimony against such as were condemned & undoubted proof of their being witches, but at length I found that the Devill did take upon him y^e^ shape of innocent persons & some were accused of whose innocency I was well assured & *many considerable persons* of unblameable life & conversation were cried out upon as witches & wizards *the Deputy Gov^r^* notwithstanding *persisted vigorously in y^e^ same method to y^e^ great disatisfaction & disturbance of y^e^ people* untill I put an end to y^e^ Court & stopped y^e^ proceedings which I did because I saw many innocent persons might otherwise perish & at that time I thought it my duty to give an account thereof that their Ma^tes^ pleasure might be signified hoping that for the better ordering thereof y^e^ *Judges learned in the*

law in England might give such rules & directions as have been practised in England for proceedings in so difficult & so nice a point; When I put an end to y^e^ Court there were at least fifty persons in prison *in great misery by reason of the extreme cold & their poverty* most of them having only spectre evidence against them & their mittimusses being defective I caused some of them to be lett out upon bayle & put y^e^ Judges upon considering of a way to reliefe others & *prevent them from perishing in prison, upon which some of them were convinced & acknowledged that their former proceedings were too violent & not grounded upon a right foundation but that if they might sit againe they would proceed after another method* & whereas M^r^ Increase Mather & severall other Divines did give it as their Judgment that y^e^ Devill might afflict in y^e^ shape of an innocent person & that y^e^ look & y^e^ touch of y^e^ suspected persons was not sufficient proofe against them, these things had not y^e^ same stress layd upon them as before & upon this consideration I permitted[1] a speciall Superior Court to be held at Salem in y^e^ County of Essex on y^e^ third day of January y^e^ Lieut. Gov^r^ being Chief Judge their method of proceeding being altered, all that were brought to tryall to y^e^ number of fifety two, were cleared saving three & *I was enformed by the Kings Attorny Generall that some of y^e^ cleared and y^e^ condemned were under y^e^ same circumstances* or that there was y^e^ same reason to clear y^e^ three condemned as y^e^ rest acording to his Judgment.[2] The Deputy Gov^r^ signed a Warrant for their speedy execucon & also of five others who were condemned at y^e^ former Court of Oyer and terminer but considering how y^e^ matter had been managed I sent a reprieve whereby y^e^ execucon was stopped untill their Maj. pleasure be

[1] That is, he consented to the special Act of the General Court, of the 16th December, 1692, for the purpose named. *Province Laws:* i. 100.

[2] Anthony Checkley was at this time the King's Attorney General. Mr. Savage, in his account of Thomas Newton says that "his [Newton's] opinion must have led to the cure of the infernal delusion, for in January, 1693, he wrote to Gov. Phips, that of the 52 charged at Salem that Court, the three convicts should have been acquitted like the rest." Unless Mr. Savage was mistaken in attributing such writing to Newton, there must have been a remarkable coincidence of opinion between the two attorneys.

signified & declared *the Lieut. Gov. upon this occasion was inraged & filled with passionate anger & refused to sitt upon y^e^ bench in a Superior Court then held* [Tuesday, January 31, 1693] *at Charles Towne & indeed hath from the beginning hurried on these matters with great precipitancy & by his warrant hath caused the estates, goods & chattles of y^e^ executed to be seized & disposed of without my knowledge or consent, the stop put to y^e^ first method* of proceedings hath dissipated y^e^ blak cloud that threatened this Province with destruccon; for whereas this delusion of y^e^ Devill did spread & its dismall effects touched y^e^ lives & estates of many of their Ma^tes^ Subjects & y^e^ reputacon of *some of y^e^ principall persons here* & indeed unhappily clogged and interrupted their Ma^tes^ affaires which hath been a great vexation to me! I have no new complaints but *peoples minds before divided and distracted by differing opinions* concerning this matter are now well composed.

I am Yo^r^ Lordships most faithfull humble Servant

WILLIAM PHIPS.

[*Addressed*] To the Rt. Hon^ble^ the Earle of Nottingham, att Whitehall, London.

[*Indorsed*] R May 24. 93—ab^t^ Witches.

This important letter, written and forwarded by Phips, before he had received any reply to his letter of 14th October, 1692 [1] (*ante*, p. 65) was not received in England until more than a month after "the Queen's letter" had been sent to him—which is referred to in the Act of 1711. The entire correspondence of Phips with the home government ought to be sought out and printed: for it cannot fail to throw much additional light on the important period of his administration, as well as the organization of the provincial government under the second charter. It is hardly to be expected, however, that any document will be produced, of greater interest and value than the foregoing letter.

[1] The winter passages westward were very long in those days. An entry in the records of the General Court of March 13, 1693, notices the receipt on the day before by the America from London of Her Majesty's letter of October 11th, 1692. *Gen. Court Records:* vi. 275.

IV. Thomas Newton, King's Attorney, Etc.

It is a matter of some importance that the connection of Thomas Newton with the witch prosecutions in 1692, should be more thoroughly understood. As an English lawyer, fresh from the Inns of Court in London, with his name and fortune to make in a new country, his prompt employment in this business was less strange than his sudden disappearance in the height of proceedings of the Court of Oyer and Terminer, which has never been explained hitherto. In a previous paper I pointed out his connection with these proceedings to correct the often repeated statement that no "regular lawyer" was concerned in them, and gave a brief notice of the man—which I will now enlarge.

Thomas Newton, born in England 10 June, 1660, died in Boston, May 28th, 1721, in his sixty-first year, and was interred on the 1st June following. He is noticed in Sewall's Diary as a new-comer and sworn an attorney in 1688.

"Thursday, June 7. Mr. Dudley and Stoughton call here. In comes Mr. West and hath one Mr. Newton a new comer sworn an Attorney. Mr. Dudley asked for a Bible. I asked if it might not better be done without. He laughed and seeing a Bible by accident rose up and took it." 5 *Mass. Hist. Coll.*: v. 216. We catch another glimpse of him in 1689 upon the arrival of Sir William Phips in the Prudent Sarah, when he went to Phips to demand Sir Edmund Andros's letters. *N. Y. Col. Doc.* III. 588. Early in 1690, he endeavored to make interest at Court through Capt. Nicholson and John Usher, both then in London, to obtain employment in "the Attorney Generalls or some other place that I am able to serve his Majesty in here"—a scheme in which "his Excellency [Sir Edmund Andros] has promised me all the Kindness he can effect for me in that behalf." This appears from a letter to Usher, dated in Boston, January 29, 1690, in which he also desires Usher to bring with him on his return a collection of books, of which the list is given below, together with such others as Usher should think might be convenient for him. In 1690, May 26th, he wrote to Capt.

Nicholson in New York, the opinion that His Majesty's letter gave the authorities in Boston "according to my apprehension," only power to preserve the peace till further orders. *Ib.*, 720. He was commissioned and took the oaths as Attorney General in New York, on the 23d March, 1691, *Council Minutes:* vi. 5, and was present at the organization of the First Legislature in New York under William and Mary, *Jour. Assembly:* i. 3. His chief service in this capacity was in conducting the trial of Leisler, Milborne, and others at a special Court of Oyer and Terminer in April of that year. He was assisted in this business by George Farewell and others appointed King's Counsel to prepare evidence, etc. On the 16th of April, "Mr. Newton being for to go to Boston, the Governor delivers him His Majesty's letter for such as administer the Government of Massachusetts Bay." *Council Minutes:* vi. 15. He thereupon attended the House of Representatives and desired leave to go to Boston on some affairs, which the House denied him; telling him it was his duty and business to attend the House during the sessions. *Jour. Assembly:* i. 5. On the next day the Attorney General was ordered by the House to draw up a Bill for settling Courts, &c., *Ibid.*, and on the day following, Saturday, April 18, a List of Bills to be drawn up was sent to the Attorney General. *Ibid.*, p. 7. On Monday following, Mr. George Farewell was sent by his Excellency to attend the House *in order to supply the Attorney General's place in drawing up Bills*, etc. *Ibid.* The Journal of the Legislative Council says, "Mr. Farewell was appointed to doe the office of Attorney General to the House." *Journal:* p. 5. His service was not satisfactory, and the Clerk of the House was sent to the Governor to remonstrate, who responded that he was much troubled that the Attorney General should depart this place, and not take better care to leave a person to attend the House. *Journal Assembly:* i. 8.

Other assistants were called in to the aid of the House, Mr. Emott, and the Speaker, James Graham—and on the 8th of May, the Governor disclaimed having suffered Newton to go to Boston without their leave. The House thereupon passed a vote of censure upon "whoever advised the Governor to send the At-

torney General out of this Province during ye sessions of ye Assembly." *Journal:* p. 12.

The Governor considering this a censure upon him retorted that he did not find it to be the duty of the Attorney General to attend the House—an opinion in which the House failed to concur. *Ibid.* Graham seems to have acted as Attorney General, *Council Minutes:* v. 29, and was sworn in and received his Commission as such September 12, 1692. *Ibid.* vi. 128.

Newton was evidently passing frequently between New York and Boston in 1691, on public business. On the 11th July, a packet for Connecticut was delivered to "Mr. Newtowne" and £6. ordered paid him for his Journey. *Council Minutes:* vi. 51. On the 3d September, £20 were allowed Thomas Newton for bringing the Records from Boston. *Ibid.* These were the New York Records carried to Boston by Andros, and restored by order of King William.[1]

Upon the arrival of John Usher with the commission of Lieutenant Governor of New Hampshire in the summer of 1692, Newton became the Secretary of that Province. Usher took upon him the command on the 13th day of August, and Thomas Newton appears as Secretary as early as the 15th of the same month. The minutes of the Council from 29th September to 5th October are in his handwriting, and subscribed by him in that capacity. His successor Thomas Davis was "admitted and sworn Secretary of this Province and Clerk of the Councill," at a meeting of that body on the 3d January, 1693.

On the 22d October, 1692, he was appointed one of the Commissioners of the Court of Oyer and Terminer then constituted for the County of York, in the Province of Maine, *Council Records:* ii. 196.

These official occupations in the neighboring Provinces are

[1] Governor Sloughters' letter of 16th April, 1691, transmitting the King's order for the return of the records, as well as Governor Bradstreet's reply, May 8th, from Boston, that the records were delivered to Mr. Newton, and the account of Thomas Newton, of expenses for bringing the New York records from Boston, are all among the MSS. at Albany. *Calendar of English MSS.* Compare also Bradstreet's letter to Lord Nottingham, of May 8th, 1691, in *N. Y. Col. MSS.* iii. 769.

sufficient to account for his abandonment of the prosecution of the witches at Salem—in which he was succeeded by the Attorney General' of Massachusetts, Anthony Checkley—who was assigned to that duty by an order of the Council on the 26th July, 1692. His commission, dated 27th July, 1692, is in *Mass. Archives:* xl. 264.

Another letter of Newton to Lieutenant Governor John Usher of New Hampshire, dated at Boston, 15th May, 1693, mentions a proposition of Colonel Dudley to have Newton "chose an Assemblyman, whereof (he says) I am very indifferent, unless it may be for the Countrey's service, and leave it to yo^r hono^rs discretion, whether you will move the matter or not." [2]

On the 23d November, 1693, a memorial from Thomas Newton, barrister, praying to be appointed Attorney General for New England, was before the Lords of Trade in England. *Colonial Papers*, quoted by Palfrey: iv. 523 note. And some time before September 10, 1696, Edward Randolph had recommended

[1] His petition (June, 1693) sets forth that he was in 1689 chosen their Majesties' Attorney General by the Governor, Council and Assembly, and re-appointed under Phips. *Mass. Archives:* xl. 278. Another petition, May 29, 1695, states that he was chosen as before and continued to this day. *Ibid*, 324. Still another petition, May 27, 1696, *Ibid.* 370, and a fourth, dated March 13, 1700, reiterate the same statements. *Ibid.* 610. The following extract from the printed records of the House refers to those in the Secretary's office destroyed by fire in 1747:

"In October, 1692, which was the year the Charter arrived, at a Day appointed for the Nomination of Civil Officers, Mr. *Anthony Checkley* was nominated and appointed by the Governour and Council to be the King's *Attorney General*, and had a Commission in Form for that Purpose, which is to be found in the Records of the Secretary's Office; and in the Year following the Governour and Council without any preceding Vote of the Representatives, ordered the said *Checkley* a Payment of Sixty Pounds for his Service as *Attorney General*. Nor was this Payment complained of as any Grievance by the Representatives; and he continued in the Execution of that office until the year 1702, when *Paul Dudley*, Eq., was nominated and appointed by the Governour with the Advice and Consent of the Council, to be *Attorney General*." *Journal H. of R.* 1729: p. 175.

[2] For copies of both the letters to John Usher, referred to in these notes, I am indebted to Mr. Wm. Lloyd Jeffries, of Boston, among whose family papers they are preserved.

Newton for the post, representing "that Anthony Checkley, the present Attorney General of the Massachusetts Bay is not only ignorant of the laws of England, but has been himself an illegal trader." *Ibid.* 524 note.

Newton was frequently employed in behalf of the province. He was authorized, 15th November, 1695, to appear as attorney for Isaac Goodridge. *Records:* lxii. 84. The case of Daniel Eaton, Little Compton, etc., is noted in the Council Records, March 26, 1696, as also an allowance of £6 for his services as King's Counsel, September 18th, 1696. He had been one of the Commissioners to administer the oath to the Governor of New Hampshire, which his commission was dated 30 April, 9 William III. [1696.]

The Earl of Bellomont, who advised with him as a lawyer "reputed the best that's in the country," August 24, 1699, *N. Y. Col. Doc.* iv. 551, soon afterwards wrote to the Lords of the Admiralty, September 7, 1699, that he had appointed for King's Advocate in the Admiralty Courts of New Hampshire and Rhode Island, "Thomas Newton, an Englishman born, which I confess is one quality I shall always desire to meet with in men that I recommend to employment in these plantations." *Palfrey:* iv. 177 note. He was appointed Deputy Judge in Admiralty and produced his commission (under the hand and seal of William Atwood, Esq., bearing date 10 November, 13 William III.) at Hampton, N. H., 17th February, 1702, and took the oaths of allegiance and supremacy, and repeated and subscribed the Declaration and Association. He had appeared as counsel in sundry suits in New Hampshire in August, 1699.

He was, at one time, of the party opposed to Governor Dudley, and not only signed a petition for his removal, *Hutchinson*, ii., 159, but furnished an affidavit of a grievance of his own, which was printed in a *Memorial of the Present Deplorable State of New England*, 1707, pp. 26, 27, Cf. *A Modest Enquiry*, etc., in reply: p. 20. These papers were produced while Newton was in London, whither he seems to have gone about 1706–7: and after his return he was called to answer before the Council respecting them. The following extract gives the proceedings on

that occasion—where the matter seems to have ended, notwithstanding Increase Mather's use of Newton's affidavit in his famous letter to Governor Dudley a few weeks later. *M. H. S. Coll.* iii. 126.

"TUESDAY, *Novem*r. 25, 1707. Mr. Thomas Newton was convented before the Council, and Examined about a Petition lately offer'd her Majesty against his Excellency, Sign'd with several Names, and amongst others, Tho. Newton;

"Mr. Newton own'd he set his Hand to that Petition, Did it upon a Provocation which he conceived upon an Insinuation, that the Govr. had written a Letter to England against him, And that the Allegations in the Petition of the Governours Corresponding and Trading with her Majesties Enemies, he knew Nothing of, but had it only by Information from Cpt. Calley: That he had already ask'd his Excellencies Pardon, And is sorry he set his Hand to that Petition."[1] *Gen. Court Records:* viii. 335.

He was chosen Attorney General by the House of Representatives, on the 20th June, 1715, but the Council refused to act in the matter. *Journal:* p. 32. The controversy respecting the right to appoint that officer, in which this was an incident, is one of the most interesting parts of the legal history of Massachusetts, but this is not the place to attempt even an abstract of it.

On the 19th July, 1720, Thomas Newton was duly chosen Attorney General, "by a major part of the voters" in both branches

[1] It is a fact worthy of notice here that Cotton Mather was at the same time "enquired of" by the Council respecting his demonstrations of hostility to Governor Dudley. On *Tuesday*, November 25, 1707, Voted, that the Secry., Eliakim Hutchinson, Penn Townsend, Andrew Belcher, and John Cushing Esqrs., Visit Mr. Cotton Mather, and made Enquiry of him concerning a Letter subscribed with his Name, Directed to Sir Charles Hobby in England, Bearing Date the second of Octobr. 1706, Containing Insinuations against his Excellency, and an attested Copy thereof by John Povey, Esqr. One of the Clerks of her Majesties Most Honble privy Council, with the Extracts of several Letters to his Excy. from the said Mr. Mather of After Dates were committed to the Secry. to carry with him. *General Court Records:* viii. 335.

Wednesday, November 26, 1707. The Gentlemen appointed yesterday to visit Mr. Mather and make Inquiry about a Letter of his, Reported to the Board the Conference had with him. *Ibid:* 336.

of the legislature, *Journal:* p. 13, thus reaching after thirty years what seems to have been the goal of his professional ambition.

Mr. Newton became the Comptroller of his Majesty's Customs for the port of Boston, somewhere before November 10, 1707, when Governor Dudley reported his arrival in Boston from England by the mast fleet. *Calendar of Treasury Papers:* 1702–1707, p. 547. In 1720, December 6, his Memorial was presented to the House of Representatives, requesting that his fees of office might be augmented, for reasons duly set forth therein. It was read and committed, and on the 8th of the same month, upon further consideration and the report of the Committee, the memorial was dismissed. *Journal:* pp. 60, 65.

On the 26th June, 1721, a letter from Christian Newton, Widow, was presented in the House, Praying, that as her Husband, Thomas Newton, Esq^r^ Deceased, performed the Office of Attorney General the space of one Year, she may be allowed for his Service, &^c^

Resolved, That the Sum of Five Pounds, be allowed and Paid out of the Publick Treasury, to Christian Newton, in full of her Husband's service in that Office. Sent up for Concurrence. *Journal:* p. 43. The resolution was concurred in by the Council and consented to by Governor Samuel Shute on the same day. *General Court Records:* xi. 171.

Mr. Newton was an early promoter of the Church of England in Massachusetts, and one of the founders of King's Chapel, Boston, of which he became a vestryman and warden. A mural monument was erected to his memory, in that church, by the Hon. Edward Augustus Newton, a lineal descendant, who was himself a distinguished citizen of Massachusetts. He died August 18, 1862.

The will of Thomas Newton, "dated 6th March, 1720, was proved 5th June, 1721, in which he mentions his wife Christian, son Hibbert Newton, and daughters Elizabeth, Christian, and Hannah. His wife's will, proved 10th February, 1730, mentions daughter Thompson, daughters Christian Wainwright and Elizabeth Newton. She also mentions her estate at 'Plastow in Old England,' and says her son Hibbert had had his share therein,

which property she received from her father. She also mentions grandson Thomas Newton." *Heraldic Journal:* ii. 10. Further particulars respecting the family may be found in the *N. E. Historic Genealogical Register:* xvii. 184.

The following notices, printed in the chief newspaper of the day, supply some interesting facts which I consider worthy of preservation:

The Boston News-Letter. Numb. 900. From Monday May 29 to Monday June 5, 1721.

On Thursday last the first Currant, was Honourably Interred here, Thomas Newton Esq; His Majesty's Attorney General of this Province, Comptroler of His Majesty's Customs, had been Judge of the Admiralty, Justice of the Peace, and for many Years one of the Chief Lawyers of this Place: He was a Gentleman born in England the 10th of June 1660, being Whitsunday, and Died on the Lords Day the 28th past being also Whitsunday, in the 61 Year of his Age; He was Educated there, and intirely beloved both there and here by all that knew him, one who carryed himself very handsomely, just and well in every Station and Post which he sustained, being Affable and Courteous, of a Circumspect Walk and Deportment, and inoffensive Conversation, of Strict Devotion towards God, exemplary for Family Government, as well as Humanity to all his Fellow Creatures, A Lover of all Good Men, and therefore the more Lamented at his Death. His Funeral was Attended by His Excellency the Governour, Gentlemen of His Majesty's Council, with other principal Gentlemen, Merchants and others.

The Boston News-Letter. Numb. 906. From Thursday June 22. to Monday June 26. 1721.

All Persons Indebted to the Estate of Thomas Newton, of Boston, Esq; lately Deceased, are hereby desired to pay in the same unto Madam Christian Newton sole Administratrix on said Estate And any Person or Persons that have any Bonds, Bills, Books, Papers or Accompts in his hands, are likewise de-

sired to repair to the said Administratrix and receive them. As also all Persons that have any Claims on said Estate are desired to bring them in to the said Administratrix at her House in *Queen-Street*, Boston.

This notice is also found in the News-Letter, Numb. 909 Monday July 3. to Thursday July 6. 1721. Also, Numb. 910. Thursday July 6. to Monday July 10. 1721.

The Boston News-Letter. Numb. 911. From Monday July 10. to Monday July 17. 1721.

A VERY Convenient Stable, with other Accommodations, to be Let Inquire of Madam CHRISTIAN NEWTON in *Queen-Street*, Boston.

The Boston News-Letter. Numb. 914. From Monday July 31. to Monday August 7. 1721.

SEVERAL Books being missing in the late Mr. NEWTON's Library which were Lent out in his Life time: All Persons possessed thereof or any of them, are desired to return the same to his Widow, at her House in *Queen Street*, Boston.

The Boston News-Letter. Numb. 915. From Monday August 7. to Monday August 14. 1721.

To be Sold by Auction upon the Third Tuesday of October next, being the 17th Day of the said Month, A very curious and valuable Collection of Books, being the Library of the late THOMAS NEWTON, Esq., of Boston, Deceased, consisting of Divinity, History, but mostly of the Law (being the greatest and best Collection of Law Books that ever was exposed to Sale in this Country.) The Sale is to be at the House where his Widow now dwells in *Queen-Street, Opposite to the Prison* in Boston, and begins at Four a Clock in the afternoon, and so *de Die in Diem* till all are Sold. The Books may be seen Fourteen Days before the Sale, and Catalogues may be had gratis at the said House.

The foregoing advertisement was repeated in No. 920. of the News Letter—from Monday, September 11 to Monday Septem. 18, 1721 and in No. 923—from Monday October 2 to Monday October 9, 1721.

The Boston News-Letter. Numb. 924. From Monday October 9. to Monday, October 16. 1721.

By reason of the Small Pox, the Publick Sale of the Library of the late Thomas Newton of Boston, Esq; Deceased, that was to be on Tuesday next, is at present put off to a more convenient Season; and in the interim, any Gentlemen may be accommodated with what Books they want till the Publick Sale.

Note. The following list is a copy of that sent to Usher, in January, 1690, referred to above: p. 94. It furnishes an interesting indication of the character and extent of the library.

Books.

Coke's Reports
Coke's Entryes
His Institutes 12th part
Croke's Reports
Shep: Grand: Abridgemt.
Office of an Execr.
Brownlow's Reports
Robinson's Entryes
Pemberton's Reports
Noyes Reports
Winch's (?) Entryes
Book of Oaths
Liber placitandi
March's Accont of
Standing Arbitramt.
Choice Cases in Canc.
Swinburne of Wills
Touchist of Wills
Rastall's Entryes
Tryall's per pais
Register of Writts
Thesaurus Breve
Tothill Transacions
of the Chancery
Noy's Treatise of the grounds &
Maxims of the Laws of England
Shep for declaracions
Clerke of Asst're his office
Clerke of the Peace
A treatise of the Attorn: and Sol-
licitor for Genal. office or any other
books relating thereto
A treatise of the proceedings in the
Admiralty.
A new Comon prayer book.

V. The General Court Records of Massachusetts.

The Records of the General Court of Massachusetts are the backbone of the legislative history of the Commonwealth. The separate journals of both branches of the legislature being imperfect or wanting for long periods, the continuity of that history depends absolutely on the existence of the records made up contemporaneously from those journals and their respective files. These records are preserved in duplicate manuscript volumes, of which one series is to be found in the office of the Secretary of State and the other in the State Library. Neither of them is the complete original record prior to September 30, 1746, and those of the period between the 5th July, 1737, and the 30th September, 1746, were not to be found in Massachusetts after the fire which destroyed the Court House in 1747, until 1846, when they were restored by copies from the English archives, after an absence of a century.

According to the statements made by Secretary Willard in his report to the legislature, and his letter to the Colony Agents after the fire of 1747, collated with the other contemporary accounts of that disaster, all the original records of the General Court were destroyed with the Court House, and copies only which were in the hands of the Secretary kept at his dwelling were preserved. The copies, "from the First Planting to 1686," were probably all made before the coming of the Province Charter, and were undoubtedly to a great extent in the handwriting of Secretary Rawson, who was in office when the order of 1672 (hereafter noticed) provided for them; and although no order appears for subsequent continuation, his handwriting in the volumes indicates that he finished them to the end of the colonial period. The notices are scanty and meagre, but it is fair to infer that the authorities of the Colony were solicitous about the safety of their records, not only on account of danger from fire, but also from the new rulers who were put over them after the cancellation of their charter.

It is a pleasure to commemorate the early efforts for the secu-

rity and preservation of the noble records of legislative action in Massachusetts, which as materials of history, are second only in importance to the laws themselves which were the results of that action; and it is to be hoped that neither may ever be at the mercy of official ignorance or indifference in regard to the value of these precious stones which are the foundations of the political constitution of the Commonwealth.

The Massachusetts colonists, from the beginning of their enterprise, showed a commendable zeal for the preservation of full and copious records of all their doings. They provided for such records of every marriage, birth and death of every person within their jurisdiction, of men's houses and lands, and all the purchases of the natives—and at an early date, "decreed that hencefforward every judgment [in their Courts] with all the evidence bee recorded in a booke, to bee kept to posterity." *Records:* i. 275. This was in 1639, when "Mr. Steven Winthrope was chosen *to record things.*"

In 1647, further provision was made for preserving the records "for the good of the present and succeeding ages," by having "a strong presse made of very firm oake planks, with rabbit joints one into another, about 6 foote high, 5 foote long, 3 foote broad, from out to out, well bound, with three strong locks, of several workes . . . in which presse there shall be divers coberds," etc. This was the receptacle of the principal records at Boston, and similar provision was ordered to be made for every Court of Record. *Records:* ii. 208.

I have little doubt that the difficulties experienced in the research found necessary, even within twenty years of "the beginning," in order to produce the "Booke of Lawes, of the first Impression," led to the following careful determinations of the Court, on the subject of its records.

In 1648, at the October Session, the General Court passed the following orders:

"For the better carriing on the occasions of the General Court, & to the end that the records of the same, together w^th^ what shall be presented by way of petition, etc. or passes by way of vote, either amongst the magistrates or deputies, may

hereafter be more exactly recorded, & kept for publike use,—

"It is hereby ordered, that as there is a secretary amongst the magistrates, (who is the gen^rall officer of the comon wealth, for the keeping the publike records of the same,) so there shall be a clarke amongst the deputies, to be chosen by them, from time to time; that (by the Co^rte of Elections, and then the officers to begin their entryes, & their recompence accordingly) there be provided, by the auditor, four large paper bookes, in folio, bound up with velum and pastboard, two whereof to be delivered to the secretary, & two to the clarke of the House of Deputies, one to be a journall to each of them, the other for the faire entry of all lawes, acts & orders, etc. that shall passe the magistrates & deputies, *that of the secretaries to be the publike record of the country*, that of the clarkes to be a booke only of copies.

"That the secretary and clarke for the deputies shall briefly enter into their journals, respectively, the titles of all bills, orders, lawes, petitions, &c, w^ch^ shall be presented & read amongst them, what are refer'd to committees, & what are voted negatively or affirmatively, & so for any additions or alterations.

"That all bills, lawes, petitions, &c, w^ch^ shal be last concluded amongst the magistrates, shall remaine with the Governor till the latter end of that session & such as are last assented to by the deputies shall remaine with the speaker till the said time, when the whole Co^rte shall meet together, or a committee of magistrates and deputies, to consider what hath passed that session, where the secretary and clarke shall be present, & by their journals call for such bills, &c. as hath passed either house, & such as shall appeare to have passed the magistrates and deputies shall be delivered to the secretary to record, who shall record the same within one month after every session, which being done, the clarke of the deputies shall have liberty, for one month after, to transcribe the same into his booke; & such bills, orders, &c that hath only passed the magistrates, shall be delivered to the secretary to keepe upon file, & such as have only passed the deputies shall be delivered to their clarke to be

kept upon file, in like manner, or otherwise disposed of, as the whole Co^rte shall appoint; that all lawes, orders & acts of Co^rte contained in the ould bookes, that are of force, & not ordered to be printed, be transcribed in some alphabeticall or methodical way, by direction of some committee that this Corte shall please to appoint, & delivered to the secretary to record in the first place, in the saide booke of records, & then the acts of the other sessions in order accordingly, and a coppy of all to be transcribed by the clarke of the deputies, as aforesaid.

"That the secretary be alowed, for his paines, twenty marks per annum, & the clarke of the deputies ten pounds per annum, to be paid out of the treasury, till the Co^rte shall appoint their recompence by fees, or otherwise." *Records:* ii. 259–60. iii. 141–2. For a modification of a part of these orders, compare *Ib.* iv. (Part I.): 3, and iii. 183–4.

The manner of keeping the public records thus minutely prescribed furnishes a key to the origin of the volumes in which the history of the legislation of Massachusetts has been preserved to this day—and accounts for the method which continued to prevail long after the old Colony and Province were transformed into an independent State.

The following extracts from the proceedings of the legislature will show how carefully the Great and General Court continued to provide for the security and preservation of its records, and how signally these wise precautions have been rewarded.

In 1653, it was "ordered that the secretary shall take care that the old booke of reccords shall be fairely written out, for which he shall have satisfaction by the page, as the Court allows." *Records:* iv. Pt. I., 180.

1672. May 15. "This Court doeth order that all the *reccords of this Court* AND *of the Council*, from the first begining thereof, be fairely transcribed in a legible hand, so as there maybe a faire coppy thereof besids the originall, that in case of fier or other accidents the country may not suffer so great a damage as the losse of their records would be; and the Treasurer and Secretary are ordered to procure the same to be donn tjmely, and on as reasonable termes as they can; and the comparers (who shall be

appointed by this Court) shall, vpon their oathes, declare the copie transcribed to be a true coppy." *Records:* iv. part ii. 509–10.

1674. October 7. The matter is further noticed in the allowance to the Secretary [Edward Rawson] of seventy pounds for transcribing the records, etc.:

"The Court, having pervsed what hath binn presented by the Secretary in transcribing the reccords, buying of bookes, &c., approove thereof, and doo order that it be finished in comparing or otherwise, according to Court order, and that he be allowed for his service therein seuenty pounds, the one halfe in money, the other half in country pay, which is in full satisfaction of what is due vpon that account, and that Mr. Joseph Dudley is hereby desired and appointed to be helpfull in comparing of what is yet not finished." *Records:* v. 23.

Under the second or Province Charter, additional obligations were imposed upon the Governor and Secretary, as well as the Legislature, by the royal instructions, which required copies of the Journals of the Council and Assembly to be transmitted to the King and Board of Trade. *Ante:* p. 9, note. Under these instructions, the Minutes of the Council in their executive capacity and the Records of the General Assembly or General Court were so transmitted. The separate Journals of the House were not sent, and from the beginning of legislation under the Province Charter, the Minutes of the Council in their legislative capacity, supplemented by the addition of the business completed in the House, became, and continued to be, represented and regarded as the Records of the General Court; and they furnish, more or less perfectly, the only continuous record of the completed legislation of the Province. They were, in fact, Minutes of the Council, but they were also more than that, and would be much less correctly described by such a designation than that which they have hitherto generally borne. It is evident that, to some extent, they were made up with a view to the necessity of their transmission to England, and therefore not without caution and reserve, even in the methods of business, to avoid unnecessary revelations inviting scrutiny by the home

government.[1] After the House began in 1715 to print their Journals, it was not long before the Colony agent in London questioned the prudence of thus challenging attention to the active and ambitious proceedings of this little colonial parliament.

No complete record of the legislation of both branches of the Court is known to exist, excepting for the period subsequent to 1714, in which the printed Journals supply most, if not all deficiencies, and compel us to constant regret that we have no such guide and authority for all the earlier time.

Doubtless, the separate Journals of the House[2] were faithfully kept and preserved in manuscript up to the year 1715, but none prior to that date excepting that printed as Vol. III. of the Colony Records, has been seen or known to exist since the fire of 1747, and it may be regarded as doubtful whether the originals were preserved, from and after the time in which copies were multiplied by being printed.

The name of Josiah Willard must always be remembered with reverent and grateful regard, by all who value or have occasion to use the records of Massachusetts. He became Secretary of the Province in 1717, and continued in that office until his death, on the 7th December, 1756, in the 76th year of his age. Hutchinson says of him: "He was not an officer merely without reproach, but had always distinguished himself by his diligence, integrity and fidelity to his trust, and by a courteous, obliging behaviour to all whose business called them to his office. He depended on the people for his support, which was very moderate; but his dependence, as secretary, had no influence on his votes as councillor, in which capacity, though he was subject to an annual election, and often voted contrary to the mind of the majority of the house, he was so upright, that even the malice of party seldom struck at him. Sometimes he did not wholly escape attempts, made without success, to remove him. He was commonly mentioned with the epithet of 'the good secretary.'" *History of Mass.*: iii. 50. Cf. ii. 223. Mr. Willard was also

[1] See *Mass. Archives*: xi. 122, printed in my *Notes*, etc., pp. 18–19.

[2] Note Sewall's reference to the record by the Deputies in "their Booke." *Sewall Papers*: i. 440.

Judge of Probate for the County of Suffolk, which office he resigned some years before his death, as he did his place at the Council Board the year before. He was a son of the Rev. Dr. Samuel Willard, and educated at Harvard College. Obituary in *Boston Gazette:* December 13, 1756.

1719. Dec. 8. Josiah Willard was voted (by H. of R.) Fifty Pounds additional to his salary of £100 for extraordinary Services "and his making an Index for several Books of *the Records of this Court.*"

1720. November 15. "*Whereas the Preservation of the Publick* RECORDS (more especially *of the General Assembly*) *is of great Importance, and the Destruction of them by Fire* (to which they are exposed while they are single) *would be an irreparable Loss to this Province: And whereas there is a* DUPLICATE OF THE SAID RECORDS, FROM THE FIRST PLANTING OF THIS PROVINCE TO THE YEAR 1686, *and no further.*

"*Ordered*, That the Secretary be directed with all convenient Speed, to prepare a *Duplicate of the Records of the General Assembly, from the Year* 1686, *to this present Time*, the same with the Duplicate of the Preceding Time to be kept where the House of Representatives, for the Time being shall direct. Sent up for concurrence." *Journal:* pp. 23–4.

Nov. 18. The Council, offended at the exclusive claim suggested in the last clause, sent down an Amendment, viz.: instead of the words "where the H. of R., for the Time being shall direct," the following words, viz: "In a distinct and separate Place, according to the Direction of the General Assembly." The House "read and non-concurred," and "*Voted*, That the House adhere to their vote sent up." *Ib.* p. 30.

Nov. 19. The Council concurred the Vote of this House for a *Duplicate of the Records of this Court. Ib.* p. 34.

The vote was consented to by Governor Samuel Shute on the same day. Compare *Gen. Court Records:* xi. 58, 62.

Hutchinson, who refers to the records of the Colony as "Massachusetts Records," throughout his first volume, says of this proceeding (*Hist.* ii. 242):

"The public records of the general court are always open to

the inspection of any of the members, but, that the house might have them under their more immediate view and charge, they passed a vote, that the secretary should make duplicates of all public records, and that one set should be lodged in such place as the house should appoint. The council, willing to have duplicates for greater security, concurred with an amendment, viz.: in such place as the general assembly should direct, but this amendment the house rejected." Cf. Hutchinson's additional references to these manuscripts, *History*, etc. ii. 136: 160 (where he refers to the Council Records): 233 (where the Journal of the House and the General Court Records are compared): 235 (council books burned in 1747): 242 (as above): 344 (large quotations) and 364 (Mass. Gen. Court Records).

1721. Nov. 11. Secretary Willard upon his petition for some allowance, and for a Clerk to assist him in the office, was voted *l.* 150 for his extraordinary Service in the year past. Sent up for concurrence, *Journal: p.* 9, same day, concurred and consented to: *G. C. R.* xi. 248.

1722. March 9. He is allowed *l.* 22. 15 "for entering the Records from August 24th to November 7th and the Entries in the Council Book." Sent up for concurrence, *Journal: p.* 10. Same day: concurred & consented to. *G. C. R.* xi. 271.

1722–3. January 15. Willard allowed £140 for his Extraordinary Service the year past. And a further sum of £40 also. *Journal:* p. 80. G. C. R. xi. 492.

1723. June 21. Accompt of Sec. Willard for Transcribing the *Records of the General Assembly* from the beginning of the Session in May, 1699, to March 10th, 1702, and from the beginning of the Session in November, 1716, to June 4th, 1719, amounting to the Sum of *l*53.19*s*. Read and ordered paid &c. Sent up for concurrence, *Journal:* p. 49. *G. C. R.* xi. 560.

1724. June 13. "An Accompt of Mr. Secretary *Willard*, amounting to £46. 11*s* for Transcribing *the Records of the General Court* from the 10th day of *March*, 1702 to the End of the Session held *May* 29th, 1706, and from the 4th day of *June*, 1719, to the beginning of the Session held *May* 25, 1720, with Two Tables, by Order of the Court. Read and committed to Mr.

Clark and Mr. *Lewis* to examine the same and compare it with *the Records* therein referred to, and report their Opinion thereon. *Journal:* p. 39.

June 17. Mr. Clark reported the result of the Committee's examination of "*the Records* and Tables," etc. in favor of allowing the accompt—and a resolve was past to that effect and sent up for concurrence. *Ib.* p. 45. "The charge is according to the Establishment," *i.e.* the fees established by statute. *G. C. R.* xii. 210.

1725. December 7. A memorial of Mr. Secretary *Willard*, praying that the order of this Court may pass for appointing a place for the safe-keeping a Duplicate of *the Records* so far as they are compleated, and also that he may know the Pleasure of the Court, whither they would have a Duplicate of *the Records of the General Court* further continued and made out. Read and *ordered:* That Mr. Secretary *Willard* be and hereby is Impowred and Directed to make out a Duplicate of *the Records of this Court* up to this time, to be lodged as the Court shall order. Sent up for Concurrence,[1] *Journal: p.* 56. *G. C. R.* xiii. 61.

1734. December 5. A Memorial of Mr. Secretary *Willard*, shewing that he has perfected a duplicate of the *Records of the General Assembly* to the end of the Session held November 3d, 1725, praying for further direction as to the continuation of this work. Read and

Ordered, That Mr. Secretary *Willard* be and hereby is impowred and directed to make out a duplicate of the *Records of this Court* up to the end of this Session, to be lodged with the other duplicate. Sent up for concurrence, and concurred, etc. *G. C. R.* xvi. 77.

1736. December 7. A Petition of *Josiah Willard*, Esq; Secretary of this Province, shewing that for many years past he has laboured under languishing Illness, whereby he has been much impaired and taken off from Writing in his Office, much to his

[1] In the General Court Records, November 17, 1725, there is the notice of a report on the "sorting y^e^ Papers and recommending *safe*," etc., when a committee was also appointed, who reported on the 10th December following. Compare G. C. R. xiii. 22, 72.

Loss; and forasmuch as his broken State of Health seems to be owing to his indefatigable Labour for near nineteen Years in the publick Service, praying he may have suitable Provision for his Assistance and Relief, as to the Wisdom of this Court shall seem meet. Read. *Journal: p.* 33.

1736/7. February 1. Petition read again and *Ordered*, That *Twenty Pounds* of the new projected Bills be granted and allowed to be paid out of the publick Treasury to Mr. Secretary *Willard* for his Assistance and Relief, in Consideration of his broken state of Health for some time past, which still continues. Sent up for Concurrence. *Ib. p.* 139.

1743. 23 June. There having been presented to this Court a large and correct Alphabetical Index to each of the five first Books of Records of this Province, prepared with great Pains and Care by the honourable *Francis Foxcroft*, Esq., and the Court being sensible that the said Index will be of great Use and Service, gratefully accept the same: and the Secretary is directed to Cause such Index to be bound up with the respective Books for which they are prepared accordingly. Sent up for concurrence. *Journal:* p. 69.

1743. 4 *November*. A Memorial of *Josiah Willard*, Esq. Secretary of the Province of the *Massachusetts Bay*, showing that he has pursuant to the orders of this Court, brought up the Duplicate of the *Records of the General Assembly* to the End of the Session in 1734, and now waits for the further order of this Court relating to that affair. *Ordered*, That Mr. Secretary be and hereby is impowered and directed to make out a Duplicate of the *Records of this Court* up to the End of this Session, to be lodged with the other Duplicates. Sent up for Concurrence. Concurred, etc. *Journal:* p. 119. *G. C. R.* xvii. 4. 193.

At this time it became necessary to provide more room for the accommodation of the increasing bulk of the records, and the following proceedings took place in the House:

1743. November 5. *It being represented to this House that the Secretary's office is too small to contain the Records of the Province:* Therefore

Voted, That Mr. *Hutchinson*, Mr. *Oliver* and Mr. *Prout*, be

directed to cause the said office to be enlarged, so as to take in one Window more on the North Side of the Court House, the Charge to be defrayed by the Province. Sent up for concurrence. *Journal:* p. 119.

At the time of the Fire of 1747, Secretary Willard had completed the duplicate of the Records to 1740, but none were saved later than the 5th July, 1737, the end of the first session of the General Court of the political year 1737–38. From that date to the 30th September, 1746, there was no record extant after the fire, excepting the copies which had been sent to the Board of Trade. The Book which began at that date and included the subsequent transactions was "accidentally saved out of the Fire when the Court House was burnt," &c. *Province Laws:* iii. 341.

1747. Dec. 11. "Josiah Willard, Esq., from the Committee of both Houses appointed to consider the circumstances of the Province in relation to the Desolation of the Court House— gave in the following Report: viz.:

"The Committee appointed to consider what may be proper for this Court to do with Respect to the circumstances the public affairs of the Province are brought into by the late Burning of the Court House, &c. Report as their opinion that the Secretary be directed forthwith to get the Duplicate of the *General Court Books*, now in his Hands fairly transcribed & when finished that they be kept in a separate Place from the said Duplicate: That forasmuch as the said Duplicate reaches no further than the fifth of July, 1737, the Agents of this Province in London be directed to procure if possible from the Lords Commissioners of Trade and Plantations, the copies of the said *General Court Books* from the said fifth of July, 1737, to the fourteenth of February last, now lying in their office, the said Agents leaving Copys thereof in the said office, to be drawn in the cheapest manner they can, by employing some other Persons than the Clerks of that office, if that may be allow'd; but if the said Copys now laying in that office cannot be obtained, that then the Copys taken from them, as above, being first examined and attested by the said Agents, be bound up in three volumes, leaving in each Book a number

of Leaves for a Table, and transmitted here as soon as may be—That the Agents be also directed to enquire into the state of the *Minutes of Council of this Province from the Year* 1692 to the End of February last (supposed to ly in the said Plantation office) whether they are compleat, and if so at what Expence they may be procured? and inform this Court as soon as may be—That the Secretary record in his Office the first or Old Charter of this Province And the Charter of King William and Queen Mary with the Commissions of the Governour, Lieut. Governour Justices of the Superior Court and his Own.

"That the Clerks of the Peace be directed to send into the Secretary's office, perfect Lists of the Justices of the Peace (distinguishing those that are in the Quorum) and the Justices of the Inferiour Court & Common Pleas in their respective Countys.

"In the Name of the Committee. J. WILLARD."

"In the House of Representatives Read and Ordered that this Report be accepted. In Council: Read and concur'd, and Consented to by the Governour." *Province Laws:* iii. 384. *Records:* xviii. 262.

On the same day, the Secretary was "directed to improve as many Clerks as he shall judge necessary for drawing Duplicates of the Records of the General Court of the Province." *Journal H. of R.* p. 186. *G. C. Records:* xviii. 263.

A few days later, Secretary Willard wrote the following letter to the Colony Agents in London: a copy of which, not signed, but endorsed in his handwriting "Secrys Letter to the Agents, Dec. 21, 1747," is preserved in the *Mass. Archives:* lxxxviii., 405–7:

Boston, Dec^{r} 21, 1747.

Gentlemen

I am now to give you the Sorrowful News of the grievous & surprising Rebuke of Divine Providence on the Governm^{t} of this Province in the Destruction of the Court House by Fire which happened in the Morning of the ninth Instant. It was generally concluded to have begun in the Floor under the chimneys of the Council Chamber & House of Represent^{ves} & was not discovered till it was greatly increased: *All the Books of the*

General Court Govern^r & Council & House of Represent^ves then in the House were wholly lost without saving one, & all the Books of Commiss^ns & other Instrum^ts as well from the Crown as the Governm^t of the Province with most of y^e original Papers are likewise consumed. *As I found a Duplicate of the Books of the General Court under the old Charter I thought it a wise Provision & such as ought to be imitated, & accordingly by the Direction I had obtained from the Court, I made out a Duplicate of the General Court Books from the Year* 1699, *to* 1740, *& which (Except the Case which was carried to the Council Chamber a few days before the Fire for finishing of the Table & so was lost with the rest) are* ALL SAVED IN MY HOUSE: And as the Copies of the General Court Books (as well as those of the Council) have been constantly transmitted by me & I suppose by my Predecessors from the Year 1692, to the Board of Trade, & none of mine have ever miscarried that I know of; I am ordered by the General Court to signify their Desires and Directions to you to procure if possible from the Lords Commissioners of Trade and Plantations the Copies of the General Court Books from the 5th of July, 1737 to the 30th of Sep^t 1746, now lying in their Office you leaving Copies thereof in the said office to be drawn in the cheapest manner you can by your employing some other Persons than the Clerks in that Office, if that may be allowed; but if the Copies now lying in the said Office cannot be obtained for this Governm^t, that Copies taken from them (as above) being first examined and attested by you be bound up in three Volumes leaving in each Book a Number of Leaves (ten will be sufficient) for a Table, & transmit them hither as soon as may be; And that you inquire into the State of the Minutes of Council of this Province from the Year 1692 to the End of Feb'ry last (supposed to ly in the said Plantation Office, Whether they are compleat And if so at what Expence they may be procured & inform the Court as soon as may be.

"I herewith inclose a Petition of the two Houses to the House of Commons on the Affair of the Expence incur'd by the Expedition against Cape Breton. There were no particular Orders to you Voted respecting the Presentm^t. But I think it may be

easily collected that it is the Intention of the Court to leave it to your Discretion to judge of the Necessity and Expediency of presenting it.

"I am, Gentlemen, Your very humble Serv^{t}

"Christopher Kilby & W^{m}. Bollan, Esq^{r}."

The following newspaper account of the destruction of the Court House, gives some interesting particulars of the disaster:

From the Boston Gazette, or Weekly Journal: No. 1343. *Tuesday, December* 15, 1747.

"Last Wednesday Morning this Town was exceedingly surprised by a most terrible Fire which broke out at the Court House, whereby that spacious and beautiful *Building, except the bare walls, was entirely destroyed:* The Rise and Progress of which, according to the best Information we can get, is as follows, viz.: The Day before being very cold, and the General Court sitting, there had been two fierce Fires In the *Chimnies* of the *Chambers both of the Council and Representatives;* and from those Chimnies between them the Fire seems to have been kindled, and to have been lurking all Night in one of the Beams beneath them, till it first broke out in the Deal or Cedar Wainscot *passage between the Doors of those Chambers,* which were of Deal or Cedar Wainscot also.

"For at Six in the Morning the Watch at the East End of the Town House broke up; and between five and ten Minutes after, the Rays of the Fire first discover'd it in *the said Passage* through *the great Window against it,* by glancing into the Chambers of the Houses on the North side of the Town-House, where two or three People were awake; and running to the Windows first saw it *There;* but it quickly broke into the Council Chamber, and run up the Deal Wainscot *Stairs into the Loft and Lanthorn above,* and set them *all in a Blaze, before the People came either to manage the Engines, or save the Province Records, Books, Papers, Plans, Pictures, or anything else in the Chambers or Apartments, to the inestimable Loss of the Province.*

"But thro' the Mercy of GOD the County Records under the *Western Staircase below* and Part of the Province Records under

the *Eastern Staircase below*, as also COPIES OF THE MINUTES OF COUNCIL FROM THE BEGINNING TO 1737, *being at the Secretary's dwelling House, are happily saved.*

"In the *Cellars* which were *hired by several Persons*, a great Quantity of Wines and other Liquors, were lost, to the amount of several Thousand Pounds. The Vehemence of the Flames occasion'd such a great Heat as to set the Roofs of some of the opposite Houses on Fire, notwithstanding they had been covered with Snow, and were extinguished with much Difficulty."

Pursuant to the order of the Court, Secretary Willard prepared the second set of duplicates from the copies which survived the fire in which the originals were destroyed. These two sets of copies have been much confused by the mutations of the various offices in which they have been kept; but they may be readily distinguished in case of need, by the *single* or *double* certificate of the Secretary.

A century passed away, however, before the great gap in the records of the General Court was filled by procuring the necessary copies from Her Majesty's State Paper Office in London. In 1846, they were thus supplied from the British archives to complete the series in the office of the Secretary of State—where they are now to be found in five books, Volumes XVII (1 to 5).

Vol. XVIII. is the volume accidentally saved, beginning with September 30th, 1746. The proceedings up to the time of the fire filled a little more than half the volume.

1750. 9 October. The Council passed an Order directing the Secretary to record certain Votes "immediately after this vote" in the General Court's Books, and sent it down for concurrence —whereupon in the House it was "Read and non-concurred." *Journal:* p. 91.

This and other similar proceedings throw additional light on the character and authority of these records. If they had been simply those of the Council in their legislative capacity, that body certainly need not have asked the consent or regarded the refusal of the House of Representatives in any matters of amendment or addition. *Journal:* 1727: p. 18.

1763. February 4. Andrew Oliver's Memorial sets forth his extraordinary services, etc., in his office of Secretary of the Province. He notices "that he had the Misfortune of having *the General Court's Minutes* for the greater Part of a Year taken by the Enemy (a Circumstance which he hath been told never happened to his Predecessor) and he hath been obliged at a considerable Expence, to have Copies of the same made out, to be again forwarded to the Board of Trade." *Journal:* pp. 209–10.

In January, 1764, the current files of the General Court and the Council Minute Book were consumed by fire, with the College at Cambridge, where the legislature was then sitting. On the 26th of that month the following resolution was adopted:

"Whereas the Files of the General Court, and the Minutes of Council for the present Session are consumed by Fire:

"*Resolved*, That there be allowed and paid out of the publick Treasury all such Grants and Allowances as shall appear upon the Journal of the House of Representatives, to have been made by them before the 25th Instant, and which shall not appear to have been Nonconcurred by the Board, or refused by the Governor, and for which Warrants have not been already issued.

"*Resolved also*, That the Records of the General Court for the Time aforesaid, be made from the said Journal, and laid before the General Court at the next *May* Session for their Correction or Approbation. Sent up for Concurrence." *Journal:* pp. 227–8.

Accordingly on the 5th June, 1764, it appears that the record was by the Secretary laid before the Court, and due proceedings had to complete and establish the same. *Journal:* pp. 27–8.

The old method of constructing the General Court Records was continued after the adoption of the State Constitution, and to a comparatively recent period. When Alden Bradford came into the office of Secretary of State in 1802, he found that "the Records of the General Court (which are made in the Secretary's office) were three sessions in arrears." Under his administration they were speedily brought up, and the records of each respective session were duly finished by the next succeeding session of the Legislature. Bradford's *Report:* 1821, page 1. They gradually became the somewhat mechanical result of the traditions of the

Secretary's office in the later years. They appear to have been regarded as of slight interest or importance in the presence of regular continuous journals of both branches of the legislature, and were discontinued, apparently without notice, from and after March 28, 1833.

In 1853–54, the Colony Records were printed by order of the legislature, from the manuscript volumes in the office of the Secretary of State. The series is supplemented by the addition of one volume of the records of the House of Deputies interpolated as the third volume. It is somewhat remarkable that in the prefaces which introduced the volumes of this publication, only the slightest hint is given of the existence of the series of duplicate copies in the State Library, or the triplicate copy of the second volume made by the Rev. Thaddeus Mason Harris in 1839, and preserved in the Secretary's office. The editor does not seem to have been disturbed by any doubts whether the volumes he used were in fact the original records; indeed the question does not appear to have occurred to him, although he found occasion to make important corrections and additions for a second edition of the first and second volumes, which was silently issued after the "most precious" MS., now in the possession of Mr. Samuel L. M. Barlow of New York was brought back from England to Massachusetts by the late Colonel Thomas Aspinwall. If that volume should yet turn out to be the only one extant of the original records of the Colony of Massachusetts, its preservation might be accounted for, if it should appear to have been in the possession of the historian of Massachusetts (then Speaker of the House of Representatives) at the time of that disastrous fire in 1747, in which all the originals were said to have been destroyed.

The subject deserves critical attention from some of the many competent scholars within easy reach of these interesting volumes, which form a continuous record of two centuries of legislation in Massachusetts, a record which, notwithstanding all its defects, has no parallel in any other American State.