

part of the library which was destroyed by fire in 1764, are now lost; and it is of course impossible to render the titles more perfect by inspection."

The above list was kindly sent to me by my lamented friend, Mr. Everett, while he was President of the University. It is printed here from the manuscript in his own hand, dated, Cambridge, May, 1849. I must not omit the concluding sentence of his note, which I certainly could not gainsay: "With a few exceptions, I think I may congratulate you that your honored ancestor did not transmit them to you."

XI.

ARBITRARY GOVERNMENT DESCRIBED: & THE GOVERNMENT OF THE MASSACHUSETTS VINDICATED FROM THAT ASPERSION.

(Referred to on p. 324.)

Arbitrary Government described, & the common mistakes about the same (both in the true nature thereof, & in the representation of the Government of the Massachusetts, under such a notion) fully cleared. (5) 1644.

ARBITRARY Government is, where a people have men sett ouer them, without their choyce, or allowance: who haue power to governe them, & Judge their Causes without a Rule.

God onely hathe this prerogatiue: whose Sovereintye is absolute, & whose will is a perfecte Rule, & Reason it selfe; so as for man to usurpe suche Aũt^{tye},¹ is tiranye, & impietye.

Where the people have Libt^{tye} to admitt, or reiect their Governours; & to require the Rule by which they shalbe governed & Judged, this is not an Arbitrary Gouvern^t.

That the Governm^t of the Massachusetts is such, will appeare, 1: by the foundation of it: 2: by the positive Lawes therof: 3: by the constant practice, which proues a custome, then which (when it is for common good) there is no Lawe of man more inviolable.

¹ Authority.

1: The Foundation of this Govern^t is the Kinges Ltres Patents: this gaue them their Forme & beinge, in disposinge a certaine number of persons into a bodye politike; whereby they became then (in suche a politike respecte) as one single person, consisting of severall members: & appointinge to eache its proper place: it regulates their power & motions as might best conduce to the preservation & good of the wholl bodye:

The parties or members of this bodye politike are reduced under 2: kinds, Gouvernor & Companye, or Freemen: to the Governor it adds a Deputye, & 18: Assistants: in these is the power of Authority placed, vnder thé name of the Governor (not as a person, but as a State) & in the other (which is named the Company) is placed the power of Liberty;—which is not a bare passive capacitye of freedom, or immunitye, but suche a Lib^{tye}, as hathe power to Acte vpon the chiefest meanes of its owne wellfare (yet in a way of Lib^{tye}, not of Authoritye) & that under 2: generall heads, election, & counsell: 1: they have libtye to electe yearly (or oftener if occasion require) all their Governors, & other their generall officers, viz: suche as should haue influence (either Juditiell or ministeriell) into all partes of the Jurisdiction. 2: They haue lib^{tye} of Counsell in all the gen^l Assemblies, so as wthout their counsell & consent, no Lawes, decrees, or orders, of any publike nature or concernment, nor any Taxes, impositious, impresses, or other burdens of what kinde soeuer, can be imposed upon them, their families or estates, by any Authoritye in the Government: which notwithstanding remaines still a distinct member, euen in those generall Assemblies: other wise our state should be a meer Democratie, if all were Gouvernors, or magistrates, & none lefte to be an obiecte of Governm^t which cant fall out in any kinde of Aristocratie.

To make this cleare, we will sett downe the verye words of the Patent.

1: The words of Constitution of this bodye politike are these A: B: C: & all such others as shall hereafter be admitted & made free of the Company & society hereafter mentioned shalbe &c: one Bodye politike & Corporate, in fact & name, by the name of the Governor & Company of the Mattachusetts Baye in N: E: And that from henceforth for euer there shalbe one Governor, one Deputye Governor, & 18: Assistants of the same Company, to be from tyme to tyme, constituted, elected, & chosen, out of the Freemen of the sayd Company for the tyme beinge; In such mañer & forme, as hereafter in these

presents is expressed, which said officers shall apply themselves to take care for the best disposing & ordering of the great business & Affaires of, for, & concerning the said lands & premises hereby mentioned to be granted, & the plantation thereof, & the Government of the people there.

2: The distribution of powre follows, in these words ensuing — That the Gouvern^r of the said Company for the tyme beinge or, in his absence by occasion of sicknesse or otherwise, the Deputie Gouv^r for the tyme beinge shall haue Authoritye from tyme to tyme, vpon all occasions, to giue order, for the Assemblinge of the said Company, & calling them together, to consult & Aduise of the businesses & Affaires of the said Company :

And that the said Gouvernor Deputye Gouvernor & Assistants of the said Company for the tyme beinge shall or may once euery month or oftner at their pleasures, Assemble & hold & keepe a Court, or Assembly of themselues, for the better orderinge & directing of their Affaires :

And that any 7 : or more persons of the Assistants, together with the Governor or Deputye Governor so Assembled shalbe said taken held & reputed to be, & shal be, a full & sufficient Court or Assembly of the said Company, for the handlinge orderinge & dispatchinge of all such businesses & occurrents, as shall from tyme to tyme happen touching or concerninge the said Company or plantation.

Then follows a Clause, whereby Libtye is granted to holde 4 : general Courts in the yeare, wherein (with the Advice & consent of the maior parte of the ffreemen) they may admitt others to the ffreedome of the Company, they may make all subordinate Officers, & make Lawes & constitutions, for their wellfare & good Government.

Then followeth a Clause for the Annuall Election of all their Officers in these words ensuinge —

That yearly once in the yeare foreuer, namely on the last Weddensdaye in Easter Terme yearly, the Gouvernor Deputy Gouvernor & Assistants of the said Company shalbe in the generall Court or Assembly, to be held for that day or tyme, newly chosen for the yeare ensuinge, by such greater parte of the said Company, for the tyme beinge, then & there present as is aforesaid.

Then follows another branch, whereby, in any of their generall Courts, any insufficient, or delinquent Officer (of what sorte soever) may be removed, & another forthwith putt in place.

The last clause is for the Governinge of the Inhabitants within the Plantation. For it beinge the manner for such as procured

Patents for Virginia, Bermudas & the Weste Indies, to keepe the chiefe Governm^t in the hands of the Company residinge in England (& so this was intended & with much difficulty we gott it absconded) this clause is inserted in this & all other Patents wherby the Company in England might establish a Governm^t & Officers here in any forme vsed in England, as Gov^r & Counsell, Iustices of Peace, Maior, Baylyfs &c, & accordingly Mr. Endicott & others with him, were established a Gov^r & Councell heer, before the Governm^t was transferred hither: & that clause is expressed in these words:—

It shall & may be lawfull, to & for the Gouvernor &c: & such of the Freemen of the said Company for the tyme beinge, as shalbe assembled in any of their Generall Courts aforesaid, or in any other Courts to be specially summoned & assembled for that purpose, or the greater part of them, whereof the Gouvernor or Dep^{ty} Gov^r, & 6: of the Assistants to be alwayes 7: from tyme to tyme, to make, ordaine, & establish all maner of wholesome & reasonable orders Lawes statutes & ordinances directions & instructions, not contrarye to the Lawes of this our Realme of England: as well for settinge of the formes & Ceremonies of Governm^t & Magistracie, fitt & necessarye for the said Plantation, & Inhabitants there, & for naminge & stilinge of all sorts of Officers, both Superio^r & inferio^r, which they shall finde needfull for that Governm^t & Plantation; & the distinguishinge & settinge forth of the severall duties, powers & limitts of every such office &c. for disposinge & orderinge the Elections of such of the said Officers as shalbe annuall &c: & for settinge downe formes of Oathes & for ministeringe of them &c: & for the directinge Rulinge & disposinge all other matters & thinges, whereby our said people inhabitants there, may be so religiously, peaceably & civily governed, &c:

Thus it appeares that this Governm^t is not Arbitrary in the foundation of it, but Regulated in all the partes of it.

2: It wilbe yet further found by the positive Lawes thereof:

And first by that of (3) 14-1634: where it is declared, that The generall Court only may make ffreemen: make Lawes: choose Generall officers, as Governor, Dep^{ty}, Assistants, treasurer, &c: remove suche: sett out their power & dutye: rayse monyes: dispose of lands in proprietyes: not to be dissolved but by consent of the maior parte. The ffreemen of the severall Townes may send their dep^{ty} to euery generall Court who may doe all that the bodye of ffreemen might doe, except in Election of magistrates & officers.

And in the 67: Lib^{tye}, it is thus described viz — It is the constant Lib^{tye} of the freemen, to choose yearly, at the Court of Election, out of the freemen, all the generall Officers of this Iurisdiction. If they please to discharge them at the Court of Elections, by vote, they may doe it without shewing Cause: but if at any other generall Court, we hould it due Iustice, that the Reasons thereof be alledged & proved. By Generall officers, we meane our Governor, Dep^{tye} Gov^r, Assistants, Treasurer, Generall of our Warres, & our Admirall at Sea; & suche as are, or may be hereafter, of like generall nature.

3: Accordinge to these fundamentall Rules, & positie Lawes, the Course of Govern^{mt} hath been carried on in the practice of publicke Administrations to this verye daye, & where any considerable obliquitye hath been discerned, it hath been soone brought to the Rule & redressed: for it is not possible in the infancye of a plantation, subiecte to so many & variable occurrents, to holde so exactly to Rules, as when a state is once settled.

By what hath been allreadye manifested, this Govern^{mt} is freed from any semblance of Arbitrarinesse either in the forme of it, or the generall officers in it, which is the first branche in the description of Arbitrary Govern^{mt}.

The other Branche (wherein the maine question lyes) is concerninge the Rule: so as if it shall appeare also, that the Governor & other officers are prescribed suche a Rule, as may be required of them in all their Administrations, then it must needs be granted, that this Govern^{mt} (even in the present state thereof) is, in no respect, Arbitrarye.

I might shewe a cleare Rule out of the Patent it selfe, but seeing it is more particularly (& as it were *membratim*) deliniated in later Lawes, I will beginne there (3) 25–1636: It was Ordered, that untill a bodye of fundamentall Lawes (Agreeable to the word of God) were established, all causes should be heard & determined, accordinge to the Lawes allreadye in force: & where no Lawe is, there as neere the Lawe of God as maybe. To omitt many particular Lawes enacted uppon occasion, I will sett downe onely the first Auty^e in the Lib^{ties}: which is as heere followeth — No mans life shalbe taken awaye: no mans honor or good name shalbe stayned: No mans person shalbe arrested, restrained, banished, dismembred, or any wayes punished: No man shalbe deprived of his wife or children: No mans goods or estate shalbe taken awaye from him: or any waye endamaged, under colour of Lawe or Countenance of Auty^e: unlesse it be by the vertue or equitye of some expresse Lawe of the Country^e, warrantinge the

same, established by a generall Court & sufficiently published : or, in case of the defecte of a Lawe in any particular case, by the worde of God, and in capitall cases, or in cases concerninge dismembriage or Banishment, accordinge to that worde, to be Iudged by the Generall Court.

By these it appeares, that the Officers of this Bodye politick haue a Rule to walke by, in all their administrations, which Rule is the Worde of God, & such conclusions & deductions, as are, or shalbe, regularly drawne from thence.

All Commonwealthes haue had some principles, or fundamentalls, from which they haue framed deductions to particular cases, as occasion hathe required. And thoughe no Commonwealthe euer had, or can haue, a particular positive Rule, to dispence power, or Iustice by in every single case, yet where the fundamentalls, or generall Rule holde forth such directiō, as no great damage or injurye can befall, either the whol, or any particular parte, by any uniuert sentence, or disorderlye proceedinge, without manifest breache of suche generall Rule, there the Rule may be required, & so the Governm^t is regular & not Arbitrarye.

The fundamentalls which God gave to the Commonwealth of Israell, were a sufficient Rule to them, to guide all their Affaires : we hauinge the same, with all the Additions, explanations & deductions, which haue followed : it is not possible we should want a Rule in any case : if God give wisdom to discern it.

There are some fewe cases onely (beside the Capitalls) wherein the penalty is prescribed : And the Lord could haue done the like in others, if he had so pleased ; but hauinge appointed Gov^{ts} upon earthe, to be his vicegerents, he hathe given them those fewe as presidents, to directe them, & to exercise his guiftes in them : Deut 17 : 9 : 10 : 11 : In the moste difficult cases, the Iudges in Supreme Auty^e, were to shewe the sentence of the Lawe : whence 3 : thinges may be observed : 1 : this Sentence was to be declared out of the Lawe established : thoughe not obuious to comon understandinge 2 : this was to be expected in that ordinance : therefore v : 19 : the Kinge was to haue a Cotype of the Lawe, & to reade them all the dayes of his life : 3 : Suche a sentence was not ordained to be provided before the Case fell out, but *pro re nata*, when occation required, God promised to be present in his owne Ordinance, to improue suche gifts as he should please to conferre upon suche as he should call to place of Governm^t. In the Scripture there are some formes of Prayers & of Sermons sett downe : yet no

man will inferre from thence that m̃rs should haue Sermons & prayers prescribed them for every occasion: for that would destroye the Ordinance of the ministry, i.e. a Readinge Priest might serve in that office, without any learninge or other gifts of the Spirit. So if all penalties were prescribed, the Iurye should state the case, & the booke holde forthe the sentence & any Schoolboye might pronounce it: then what need were there of any speciall wisdom, learninge, Courage, zeale, or faithfulness in a Iudge?

This beinge so great a question now on foote, about prescript penalties [*much erased matter here*] it wilbe of use to search as deepe into it as we may by the light of Scripture, approued patternes & other Rationall Arguments: not tyeinge our discourse to methode, but layinge downe thinges as they come to hande.

England in the right constitution, is not an Arbitrary Governm^t, nor is ours of the Massachusetts: yet Iuries, both there & heer, give damages, which (in vulgar sence) are Arbitrary, in most cases: as in Actions of Slander, Trespasse, Batterye, Breach of Covenant, &c: all which concerne the Peoples Lib^{ties}, no lesse than ffines & other penalties: And if 12: men, who haue no Callinge to Office, may (in expectation of Gods Assistance) be trusted with mens estates in a way of distributive Iustice without a prescript Rule etc. why may not those whose callinge & Office hathe promise of Assistance, have like trust reposed in them, in vindictive Iustice?

In the Libties enacted heere of purpose to prevent Arbitrary Governm^t, there are neer 40: Lawes, to the violation whereof no penaltye is prescribed: nor was ever moved.

God may pronounce Sentence against an Offender, before the offence be committed, bothe by his absolute Soveraintye, & allso because he foreseeeth all ffacts, with all their Circumstances: & besides the least degree of the same offence deserves more then that full punishment before his Iustice: but man must proceede accordinge to his Commission: by which he cannot sentence another before he hathe offended, & the offence examined, proved, layd to the Rule, and weighed by all considerable circumstances, & Lib^{tye} given to the partye to answeare for himselfe: nor is there anythinge more preiudiciall to a subjects Lib^{tye}, then to be sentenced before his cause be hearde.

England is a State of long standing, yet we haue had more positive & more holesome Lawes enacted in our shorte tyme, than they had in many hundred yeares. They haue indeed some Lawes with prescribed penalties annexed, but they are for the most parte so small as doe

vnder value the least degree of those Offences: they haue xij^d for an Oathe: 5^s for Drunkenesse &c, but for all great Offences & misdemeanors, as periurye, fforgerye, Conspiracyes, Cousenages, oppression, Riott, Batteryes, & other breaches of the Peace &c: there is no penaltye prescribed: how it is in other States in Europe, I cannot relate (because we knowe not their Lawes) otherwise than what appears in their Histories, where we finde Some great offences punished, by the discretion of their Iudges.

Iustice ought to render to everye man accordinge to his deservinge, eye for eye, hand for hand, etc: & Luk: 12: 47: the servant, who transgressed ag^{te} knowledge was to be beaten with more stripes than he who transgressed of ignorance: If we had a Lawe, that every lye should be punished 40^s, & 2 offenders should be convicte at the same tyme: the one a youthe of Honest conversation, never known to lye before: & now suddainly surprized with feare of some discredit, had tould a lye wherein was no danger of harm to any other: The other an olde notorious lyar: & his lye contrived of purpose for a pernicious ende: It were not juste to punish bothe these alike. As 40^s were too little for the one, soe it were too muche for the other. Besides penalties (we knowe) cōminge of *pæna*, should cause paine or greife to the offenders. It must be an Affliction, yet not a destruction except in capitall or other haynous Crimes: but in prescript penalties Auty^e shoots at adventure; if the same penalty hitti a Riche man, it paines him not, it is no Affliction to him; but if it lights vpon a poore man, it breakes his back.

Everye Lawe must be Iust in everye pte of it, but if the penaltye anixed be uniust, how can it be held forthe as a Iust Lawe? To prescribe a penaltye, must be by some Rule, other wise it is an vsurpation of Gods prerogative: but where the Lawe makers, or Declarers canot finde a Rule for prescribinge a penaltye, if it come before the Iudges *pro re nata*, there it is determinable by a certaine Rule, viz: by an ordinance sett up of God for that purpose, w^{ch} hathe a sure promise of Divine assistance, Exo: 21: 22: Deut: 16: 18: Iudges & Officers shalt thou make &c, & they shall Iudge the people wth Iust Iudgm^t: Deut: 25: 1: 2: & 17: 9: 10: 11. If a Lawe were made that if any man were founde drunken he should be punished by the Iudges according to the meritt of his offence: this is a Just Lawe, because it is warranted by a Rule: but if a certaine penaltye were prescribed, this would not be iust, because it wants a Rule, but when suche a case is brought before the Iudges, & the qualitye of the pson & other circumstances consid-

ered, they shall finde a Rule to Iudge by; as if Naball, & Uriah, & one of the stronge drunkards of Ephraim, were all 3: together accused before the Iudges for drunkenesse, they could so proportion their severall sentences, accordinge to the severall natures & degrees of their offences, as a Iust & Divine sentence might appeare in them all: for a divine sentence is in the lippes of the Kinge, his mouth transgresseth not in Iudgm^t Pro: 16: but no suche promise was ever made to a paper Sentence of humane Aut^{yo} or Invention. He who hath promised his servants to teache them what to Answere, euen in that houer, when they shalbe brought before Iudgm^t seats, etc. will also teache his ministers the Iudges what sentence to pronounce, if they will allso observe his worde, & trust in him. Care not for the morrowe, &c, is a Rule of Gen^{ll} extent, to all cases where o^r providence may either crosse wth some Rule or Ordinance of his, or may occasion us to relye more upon o^r owne strengthe & meanes, than upon his grace & blessinge. In the Sentence w^{ch} Solomon gave betweene the 2: Harlots: 1: Kings: 3: 28: It is sayd All Israell heard of the Iudgm^t w^{ch} the Kinge had Judged: & they feared the Kinge, for they sawe that the wisdome of God was in him to doe Iudgm^t. See heer, how the wisdome of God was glorified, & the Aut^{yo} of the Iudge strengthened, by this sentence: whereas in mens prescript sentences, neither of these can be attained, but if the sentence hitt right, all is ascribed to the wisdome of o^r ancestors, if otherwise, it is endured as a necessary evill, since it may not be altered.

Prescript penaltyes take away the use of Admonition, w^{ch} is allso a Divine Sentence & an Ordinance of God, warranted by Scripture, as appeares in Solomons Admonition to Adonijah, & Nehemiahs to those that brake the Sabbaoth: Eccl: 12: 11: 12: the words of the wise are as goads, & as nayles fastened by the masters of Assemblys — by these (my sonne) be admonished, Pro: 29: 1: Isay 11: 4: Prov. 17: 10: A reproofe entereth more into a wise man, than 100 stripes into a foole.

Iudges are Gods upon earthe: therefore, in their Administrations, they are to holde forthe the wisdome & mercye of God, (w^{ch} are his Attributes) as well as his Iustice: as occasiō shall require either in respecte of the qualite of the person, or for a more gen^{ll} good, or euident repentance, in some cases of less public consequence, or avoydinge imminent danger to the State, & suche like prevalent Considerations. Exo: 22: 8: 9: for thefte & suche like Trespasses, double restitution was appointed by the Lawe: but Lev: 6: 2: 5: in such cases, if the

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ptye Confessed his sinne & brought his offeringe, he should onely restore the principall, & adde a fifthe pte thereto. Adultery & incest deserved deathe, by the Lawe, in Iacobs tyme (as appeares by Iuda his sentence, in the case of Thamar): yet Ruben was punished onely wth losse of his Birthright, because he was a Patriark. David his life was not taken away for his Adultery & murder, (but he was otherwise punished) in respect of publ^e interest & advantage, he was valued at 10000: comon men. Bathsheba was not putt to deathe for her Adultery, because the Kings desire had wth her the force of a Lawe. Abiathar was not putt to deathe for his Treason, because of his former good service, & faithfulness. Shemei was Reprived for a tyme, & had his pardon in his owne power, because of his profession of Repentance in such a season. Those w^{ch} brake the Sabbaothe in Nehemiah his tyme, were not putt to deathe, but first admonished, because the state was not settled, etc. Ioab was not putt to deathe for his murders, in Davids tyme, for avoydinge iminent publ^e danger, the sonnes of Zeruah had the advantage of David, by their interest in the men of Warre: & the Com: W: could not yet spare them. But if Iudges be tyed to a prescript punishment, & no lib^{tye} lefte for dispensation or mitigation in any case, heer is no place lefte for wisdome or mercye: whereas Solⁿ saythe Prov: 20: 28: mercy & truth preserve the Kinge; & his throne is vpholden by mercye.

I would knowe by what Rule we may take vpon vs, to prescribe penaltyes, where God prescribes none. If it be Answ: from Gods example, I might replie 1: God prescribes none except capital, but onely in suche cases as are betweene party & party, & that is rather in a waye of satisfaction to the pty wronged, then to Iustice & intention. 2. Gods examples are not warrants for us, to goe ag^t Gods Rules: o^r Rule is to give a Iust Sentence, w^{ch} we cant doe (in most cases) before the Offence is committed etc. 5^s now may be more then 20^s heerafter & *e contra*. if examples in Scripture be warr^t for us to proceed agst Rule, then we may passe by Murders, Adulteryes, Idolatryes, etc; wthout capitall punishments: then we might putt the Children to deathe for parents offences, etc:

If we should enq^r: also of the ende of prescribing penaltyes, it can be no other but this, to prevent oppression of the people, by uniuert Sentences: then I am againe to seeke of a Rule to weaken the power & Iustice of an Ordinance of God, through distruste of his providence: & promise of Assistance in his owne Ordinance: who must give the Lawe makers wisdome etc. to prescribe Sentences? must not God? &

may we not then trust him, to give as muche wisdome etc. to suche Iudges, as he shall sett up after us? it is s^d [*blank*] when they had Iudges by Gods appointm^t, God was wth the Iudge. So may we still believe that if our posterity shall choose Iudges according to God, he wilbe wth o^r Judges in tyme to come, as well as wth the present.

It may be further demanded, what power we haue ouer the property & estates of the succeeding generations? If we should now prescribe, where o^r posteritye should dwell: what quantityes of land they should till: what places they should tende unto: what diet they should use, what Clothes they should weare etc: by what Rule could we challenge this power? Yet we haue example for some of these in Scripture, as of Ionadab the sonne of Rechab: etc: but no man will take these as warrants for us to laye suche iniunctions upon those w^{ch} come after us, because they are to haue the same interest & freedome in their estates & prop^y that we haue in o^rs.

And for preventinge of oppression, &c, is there no waye to helpe that, but by breache of Rule? Shall we runne into manifest iniustice, for feare of I knowe not what future danger of it? is there not a cleare waye of helpe in suche cases, by Appeal, or Petition, to the highest Auth^{ty}? If this will not releiue, in a pticular case, we shall then be in a very ill case, for all o^r prescript penaltyes. Besides, there may be suche a gen^l Lawe made (as in Magna Charta) that may prevent the ouerthrowinge of mens estates, or lands, etc, by ffines, etc. (and I think it as needfull, as any Lawe or Lib^{ty}e we haue,) whereby the Iudges may be restrayned, wthin certaine limitts, w^{ch}, (if occasion should require to exceede,) may be referred to the Gen^l Court. And in Cap^l punishm^{ts}, a Lib^{ty}e in suche & suche cases, to redeeme them at a certaine rate. This would sufficiently assure the proper psons & estates, from any great oppression, if wthall, o^r Courts of Iudicature, were kept but by 3: or 5: magistrates at most, w^{ch} may well be ordered, wthout any deviation from o^r Patent. & so the greater number of magistrates should be free from ingagem^t in any case, w^{ch} might come to a review upon Appeal or Petition.

It is an error so to conceite of Lawes, as if they could not be pfecte wthout penaltyes annexed, for they are as truely distinct as light & darknesse: Lawe was created wth & in man, & so is naturall to him: but penaltye is positiue & accidentall. Lawe is *bonum simpliciter*, but *pœna* is *simpliciter malum in subiecto*: therefore Lawes may be declared & given wthout any penaltyes annexed.

Isay. 10: 1: Woe to them that Decree unrighteous Decrees: &

write grievousnesse, w^{ch} they haue prescribed: so that where the penaltye proues greivous by the unrighteousnesse of a prescript Decree, it will drawe a woe after it, as well as unrighteous sentences: Deut: 25: 15: thou shalt haue a pfect & a iust weight & measure: If God be so stricte in Comūtative Iustice, that every Acte therein must be by a iust & pfecte Rule, what warrant haue we, to think that we maye dispence distributive or vindictive Iustice to o^r brethren by gesse, when we prescribe a certaine measure to an uncertaine meritt.

But it wilbe objected: *volenti non fit injuria*: the people giuinge us power to make lawes to binde them, they doe implicitly give their Consent to them. To this it may be Answered: that where they putt themselves into o^r power to binde them to Lawes & penaltyes, they can intende no other but suche as are iust & righteous: & althoughe their implicit Consent may binde them to outward obedience, yet it neither tyes them to satisfaction, nor frees suche Lawmakers from vnrighteousnesse, nor the Law itself from iniustice, nor will suche a Lawe be a sufficient warrant to the Conscience of the Iudge, to pronounce suche a sentence, as he knowes to be apparently disproportionable to the offence brought before him.

Althoughe my argum^t conclude ag^t prescript penaltyes indefinitely, yet I doe not deny but they may be lawfull in some cases: for an uniuersall affirmative pposition may be true, though it comprehend not euerye p^tic^r, as when we saye, All the Country was rated to suche a charge, no man will conceiue that euerye p^{son} & every womⁿ etc, was rated; & when we saye suche an one was cast out by the wholl church, this is a true Speche (to co^mon intendm^t) though every p^tic^r member did not consent. Where any penalty may be prescribed by a Rule, so as the Iudge may pronounce a Iust Sentence, I haue formerly, & shall still ioyne in it.

We will now Answer such objections as are made, ag^t the lib^{tye} required to be left to Iudges, in their Sentences.

1: ob: Iudges are subject to Temptations, if their sentences be not prescribed.

Answ 1: We may not transgresse Rules, to avoyde temptations: for God will haue his servants exercised wth temptations, that the power of his grace may be made manifest in man's Infirmitye: A master will not sende his servant about his businesse in a darke night, to avoyde temptations of ill companie or the like w^{ch} he may possibly meet wth in the daye tyme: nor will any Christian man take in his Corne or haye before it be readye, for avoyding a Temptation of tak-

inge it in upon the Sabbaothe : we doe not forbidd wine to be brought to us, though we knowe it is a great occasiō of Temptation to sinne.

2 : Those who make Lawes & prescribe penaltyes are allso men subiect to Temptations : & may allso miscarrye through Ignorance, heedlesnesse, or sinister respects : & it is not hard to prove, that the Lawe makers, in all states, have comitted more, & more punitious errors than the Judges : & there is good reason for it : 1 : they supposinge themselves tyed to no Rule, nor lyable to any accompt are in the more danger of beinge misledd : 2 : he who prescribes a punishm^t in a case, wherein no pson stands before him to be judged, cañot be so warye of shedding innocent blood, or sparing a guilty pson, or comittinge other iniustice, as the Iudge who hathe the pson & cause before him. when Saule prescribed that Capitall sentence agst suche as should tast ought before night, if Ionathans case had then been before him he would haue Iudged otherwise. 3 : Lawe makers haue not so cleare a Calling, in prescribinge penaltyes, as Iudges have in passinge sentences, & therefore there cañot be expected the like blessinge of Assistance from God. Iudges are necessariye tyed to give Sentence in a Cause before them but Lawe makers are not so bounde to prescribe Sentences.

3 : If a Iudge should sometymes erre in his sentence, through misprision or Temptatiō : the error or fault is his owne : & the iniurye or damage extends not farr : but an error in the Lawe resteth upon the ordinance itselfe, & the hurte of it may reache far, even to posteritye. there is more unrighteousnesse & dishonor in one uniust Lawe then in many uniust Sentences.

2 : ob : God prescribed some certaine penaltyes : & that in cases where offences doe usually varye in their degree & meritt :

Answ : 1 : *We haue shewed before, how God might doe it,* in regard of his absolute Soveraintye.

2 : It is no Iniustice in him, because the least degree of the smalest offence, (before his Iudgm^t Seate) deserves the highest degree of punishm^t.

3 : In some of these (as in Theft) he varieth the punishm^{ts} according to the measure & nature of the offence. In others as deathe, perpetuall servitude, etc : beinge the Just Reward of suche offences in their simple nature, they haue not a fitt Subiecte, for an increase of punishm^t to take place upon : he who is putt to deathe for Adultery, cañot dye againe for Incest concurringe therewth. & he who is adiudged to ppetuall servitude for stealinge 100^{li} cannot be capeable of a further sentence, for batterye.

4: In all, or most of those offences, the penalty was in waye of satisfaction, to suche as were damnified therewith & in such cases, Iustice will not allowe a Iudge any Lib^{ty}: to alter or remitt any thinge: nor can any circumstance leade to qualification: a Riche man hathe the same right of satisfaction for his goods stollen from him, as a poore man: & the poorest mans life is the life of man, as well as a princes:

5: These Presedents were given to the Iudges, not wth direction to prescribe penaltyes to other Lawes that had none: but wth Comāndment to give Iudgem^t in all cases, by the equity of these: (there are some formes of prayer & sermons in scripture, but this dothe not prove erg^o: all etc.)

3: ob: If the determinatiō of the Lawe were lefte to the Iudges, that were Arbitrary Governm^t: & is it not in reason the same, if the punishm^t of the Transgressⁿ of the Lawe, be comitted to them?

Answ, The Reason is not alike in bothe cases.

1: The determinatiō of Lawe belonges prop^{ly} to God: he is the onely Lawgiver: but he hathe given power & giftes to men to interpret his Lawes: & this belonges principally to the highest Auth^{ty}: in a Com: W: & subordinately to other magistrates & Iudges accordinge to their severall places.

2: The Lawe is allwayes the same, & not changeable by any circumstances of aggravation or extenuation, as the penaltye is: & therefore drawes a certaine guilt upon every transgressor, whither he sinne of Ignorance, or ag^t knowledge, or presumptuously: & therefore Lawes or the Interpretations of them, may be prescribed wthout any danger, because no event can alter the Reason, or Iustice of them; as it may of punishments.

3: The Lawe is more gen^l., & lyeth as a burden upon all psons & at all tymes: but the penaltye reaches to none, but transgressors: & to suche, onely when they are brought under sentence, & not before.

4: It is needfull that all men should knowe the Lawes, & their true meanings, because they are bound to them, & the safety & wellfare of the Com: W: consists in the observatiō of them: therefore it is needfull they should be stated & declared, as soone as is possible; but there is not the like necessitye or use of declaringe their penaltyes before hande, for they who are godly & vertuous, will observe them, for Conscience & Vertues sake: & for suche as must be helde in by feare of punishment, it is better they should be kept in feare of a greater punishm^t: then to take lib^{ty}: to transgresse, throughe the Contempt of a smaller.

4: ob: It is safe for the Com: W: to haue penaltyes prescribed, because we know not what Magistrates or Iudges we may haue heer-after.

Answ: 1: God foresawe, that there would be corrupt Iudges in Israel, yet he lefte most penaltyes, to their determinatiō.

2: There is no wisdome of any State can so provide, but that in many thinges of greatest concernment, they must confide in some men: & so it is in all humane Affaires: the wisest merchants, & the most warye, are forced to repose great trust in the wisdome & faithfulnessse of their servants, ffactors, masters of their Shippes, etc. All States, in their Gener^{ls} of Warre, Admiralls, Embassadors, Treasurers, etc: & these are causes of more pub^{lc} consequence, than the Sentence of a Iudge in matters of misdemeanor, or other smaler offences.

3: When we have provided against all comōn, & probable events, we may & ought to trust God for safety from suche dangers, as are onely possible, but not likely, to come vpon vs: especially when o^r striving to prevent suche possible dangers, may hazard the deprivation, or weakninge of a present good: or may drawe those, or other evils, neerer vpon vs.

This discourse is runne out to more length than was intended: the Conclusion is this: The Gouverment of the Massachusetts consists of Magistrates & Freemen: in the one is placed the Auth^{ty}, in the other the Lib^{ty} of the Com: W: either hath power to Acte, both alone, & both together, yet by a distinct power, the one of Lib^{ty}, the other of Auth^{ty}: the Freemen Act of themselves in Electinge their Magistrates & Officers: The Magistrates Acte alone in all occurrences out of Court: & both Acte together in the Gen^l Court: yet all limited by certaine Rules, bothe in the greater & smaller affaires: so as the Governm^t is Regular in a mixt Aristocratie, & no wayes Arbitrary.

The Returnes of the Committee of the house of Dep: concerning the Book about Arbitrary Governm^t, in the examⁿ: thereof: & the votes of the house passed upon each pticular, viz:

In the 1: pte thereof

1: Concerninge the Definitiō, therein made, we conceive it is defective.

2: Concerninge the distinction therein made of the bodye Polit^k, & the members thereof, in attributing Autye to the one, & onely Lib^{ty} to the other: we finde not any suche distinctiō in the Patent.

3: Concerning the Clause recited therein (respecting the gen^l Court) w^{ch} gives onely Lib^{tye} to the ffreemen, to advise & Counsell, instead of power & Autye (w^{ch} the Patent allowes) we conceive it a takinge awaye of the power & priviledges of the ffreemen.

In the 2: pte of the Booke, w^{ch} concernes the Rule by w^{ch} a people should be governed, we finde these dangerous positions.

1: That gen^l Rules are sufficient to cleare a state from Arbitrary Governm^t.

2: That Iudges ought to haue Lib^{tye} to varye from such gen^l Rules when they see Cause.

In the followinge of the first of those 2: positions there are many dangerous passages, & bitter censurings of all penall Lawes. As

1: That they are paper Sentences of humane Autye & inventiō.

2: That mens prescript Sentences doe denye & exclude bothe the wisdome of God, & the Aut^{ye} of the Iudge.

3: That to prescribe Lawes wth certaine penalties is an Usurpinge of God's Aut^{ye}.

4: That a Sentence ought not to be provided before the case fall out, but imēdiate Assistance to be expected.

5: That ptic^lr Lawes includinge certaine penalties, are not Iust, wanting Rule —

The Introduction of ptic^lr Instances w^{ch} are brought to prove this second position, wth the Reasons & consequences, are pⁿicious & dangerous.

p ROBT BRIDGES

By order etc.

Governor Winthrop's comments on this Report, as indorsed by him on the same sheet on which he had carefully copied it, are as follows: —

Answere, the Com^{tee} have been mistaken in most of their objections.

1: The Title shewes that the Author intended not any Definitiō but a descriptiō onely, & to make it the more full & clear, he layes it downe both Affirmatively & negatively: yet a logitian may frame it into a Definitiō, — thus Arb. Gov. is a Gov. exercised wthout a Rule, — but the description is fal^s by the causes & by the effects.

2: There is no suche distinction as is observed, betweene the bodye Politick & the members thereof, for that were to distinguish betweene the wholl & the pts: but the distinction betweene the members of

that bodye, givinge Aut^{ty} to the one & power of lib^{ty} to the other, is warranted by the Patent (as in other places so) ptic^{ly} in that clause, w^{ch} sayeth that the Govern^t etc, shall call the ffreemen to consult & Advise etc, w^{ch} is an acte of Lib^{ty} & not of Auth^{ty}. & for the other pte. of their power, w^{ch} is matter of Electiō, the late Bodie of Lib^{ty} sayth it is their constant Lib^{ty}, not Auth^{ty}.

In the 2: pte

1: We finde not any suche positiō that Gen^l Rules are sufficient to cleare a State from Arbitrary Govm^t: but we finde that the worde of God & the Lawes heer established being appointed by order of Court as a Rule for the present, are suche a Rule as may be required by the Iudges in all their Administrations, because a Rule may from thence be derived (if God give wisdome to discernue it) in any partiē. case w^h may fall out: otherwise the Law of God were not p.fect, & from what better grounds shall the Lawe makers drawe all future Lawes & prescribed penaltyes:

But if the Author had expressed himselfe in the verye words of the position, yet it will admitt a safe construction, for all Lawes (not limited to ptic^l pties or occasions) are gen^l Rules, & may be so called though they have a certaine penaltye annexed.

2: Nor will the bōoke owne the 2^d position in the words expressed, but this the Iudges bothe from their office (beinge Gods vicegerents) & from diverse examples in Scripture, wh. seem to hold forthe so muche, that some lib^{ty} ought to be left to Iudges, in some cases, upon speciall occasions to hold forthe the mercye of God, as well as his Justice: nor doe we consider, that either in the Com: W: of Israell, or in any other, the Iudges haue been wholly restreyned of suche Lib^{ty}.

In the followinge Argum^t. —

If the Committee had founde suche dangerous passages, as they intimate, they should have doone well to haue imparted their ptic^l observations therein unto us, that we might haue considered of them, for want whereof it cant be expected, we should deliver any opinion about them. The like we may saye for suche bitter censurings as they mentiō: onely it is usuall for men to call suche thinges bitter, w^h themselues disrelishe, though they may be harmlesse & wholesome not w^hstandinge.

ffor the 5: ptic^l mentioned, they are delivuered as Argum^t or the Consectaryes thereof, so as the Argum^t must first be avoyded, before any Iudgm^t can be given about them.

The examples w^h the Author alledgethe out of Scripture, are onely

to shoue how God hathe sometymes (in his wisdome & mercye) dispensed wth the rigor of his owne Lawe: & that Princes haue sometymes doone the like, upon publick or other prevalent considerations, w^h cant be denyed to be a truethe: & for the warrant they had for it, beinge (at the most) disputable, it was as free for him to deliuer them in his owne & some other learned & godly mens apprehensions, as it is for others who differ therein: & there can be no more danger in this, then in other bookes & Sermons, where the same or other passages of Scripture are truely reported, though not applyed to the sense of every godly man, as if one should reason thus: Daid putt the Amorites to torture, therefore, in some cases it is lawfull so to doe: this will not be iudged a pnitious doctrine though some godly men doe question the warrantableness of the example. The like may be said of all suche examples in scripture as are controverted amonge godly & learned men: but it is otherwise in suche places as are not questionable, as if a man should reason thus: Daid sentensed Mephibosheth before he heard him: therefore it is lawfull for a Iudge so to doe, — this might truly be sayd to be a pnitious doctrine; or if one should argue thus: Saul made a lawe wth a prescript penaltye of deathe to him that should transgresse it, therefore it had been iust, that Ionathan should have bene putt to deathe for transgressinge that lawe: or therefore it is lawfull for Princes etc: to prescribe penaltyes at their own pleasures; — these might be iudged to be pnitious doctrines; because the example is unquestionable, etc.

THE AUTHOR'S REVIEW OF HIS WRITING.

That w^{ch} gave me occasion first to enq^r after a Rule for prescript penaltyes, was the inequality I sawe in some prescribed sentences upon the breache of diverse morall Lawes: & proceedinge in this enquirye, I kept my intention still upon that subiect, wthout respect to suche Lawes as are meerly positive, havinge their Auth^{ty} onely & wholly from human^e Institutions: therefore you shall find that all my instances are of that kinde, & all my Arguments looke that waye, as in the Instances I bringe of the Lawes of Engl^d. If I had intended the positive & Statute Lawes, it had been a great mistake, for I know well that most of the later Statute Lawes haue their penaltyes pscribed, & it must needs be so, for suche as are meerly positieue; for a Iudge can haue no Rule for his Sentence upon the breache of suche a Lawe, except he haue it from the Lawe itself: as, for instance, if the Lawe

w^{ch} forbidds any man to kill an hare or partridge wth a gunne, had not allso sett downe the penaltye, the Iudge could not haue founde out any, w^{ch} might haue been iust, because no Lawe of God or nature makes suche an Acte any offence or transgression. But for the Cōmon Lawes of Engl^d (w^{ch} are the Ancient Lawes & of farre more esteeme for their wisdome & equitye then the Statute Lawes) they had no penaltyes prescribed, & it may be conceiued that for suche of them as were grounded upon the worde of God, & the light of nature, there must needs be that in the same Worde & in the same light of nature (especially where the image of God in man is in pte renewed by Christ) w^{ch} may lead us to a iust punishm^t for the Transgressor of such a Lawe. Nor doe I oppose all prescript penaltyes in morall cases but onely suche as doe crosse some cleare Rules in the worde of God, as will appeare by all my Arguments. And for avoydinge all danger to the subiect for want of prescript penaltyes in some Cases you may see that to require some suche Lawe to be made, as may limitt Iudges wthin suche bounds of moderatiō, as may prevent such dangers, & [it] is one of my expresse conclusions in the first page, that Iudges ought to be tyed to a Rule & suche a Rule, as may be required of them in all their Administrations, & therefore upon what grounde I should be charged to assert Arbitrarye Governm^t, & that Iudges should haue Lib^{tye} to doe what they maye, I leaue to your judg^t.

As for Lawes, you shall finde allso, that I conclude the necessitye of declaringe & statinge them, so as all the people may knowe them, for I euer held it uniuert, to require of men the obedience to any Lawe, w^{ch} they may not (by cōmon Intendm^t) take notice off. Answearable thereunto hathe been my practice. All the usefull Lawes we haue, had my consent, & suche poore helpe as the Lord enabled me, to yield to them: some of w^{ch} haue prescribed penaltyes, & where I haue wthhelde my consent to any suche penaltyes, I haue giuen my reasons for it, w^{ch} haue been suche as in some Cases haue satisfied the Court, & therein I haue taken no more lib^{tye} then is allowed to euery member of the Court. I will not justifie every passage in my booke: there are 2: or 3: words that offence hathe been taken at, & althoughe I can giue a safe account of them, yet I must confesse they doe not nowe please me, but when the matter is good, & the intention of the writer honest, the Lorde forbidds us to make a man an Offender in word.

Whatsoever is erroneous (I say as I did from the first) I shall leaue it to its due censure: but for all that is of God, & of the truth, or the sincerity of my intentions herein to the publ^c weale, or

the Lib^{tye} I had by my place to propounde suche considerations to the Court, if these be questioned I must stande & fall wth them.

JO: WINTHROP.

XII.

ROUGH DRAFT OF GOVERNOR WINTHROP'S LETTER TO THE EARL OF WARWICK.

(Referred to on p. 329.)

R^T. HON^{BLE} & MY VERY GOOD LORDE,

Your Lo^{pps} lettres by Mr. W: I rec^d the 7th of July, w^h were occasion of comfort to me, bothe for your Lo^{pps} wellfare, & for y^r constant hearty affection to o^r Colony, & y^r undeserved favor to my selfe, yo^r most unworthy servant, w^h shall so farre oblige me to y^r good Lo^{pp}, as my poore prayers & indeavors shalbe euer improved for yo^r honor & wellfare.

Now knowinge that w^h yo^r Lo^{pp} desires to be satisfied in, I shall truely relate to you the state of the Country & o^r present condition therein, so fully & faithfully as you shall not need to inquire any further thereabout.

For the Country, it is for the most pte a light soyle, black earth above & sand beneath: it is very well watered wth rivers, brookes & springs, wth faire levels of good meadowe in many places, but much of it is full of hassocks & wett for want of drayninge.

The Timber is Oak & pine, wth some elme & ashe in the swampes, w^{ch} are not bogge as in Ireland, but in the summer they are dry & fine lande. By the Sea Coast there is store of salt marsh, w^{ch} is for 3: 4 or 5 foote a meere Turfe, w^{ch} will burne well, yet it beares very fine benty grasse, w^{ch} will maintain cattle well both in summer & winter.

The grounde is most apte for Rye & su^mer wheate w^{ch} afford sometymes 30: or 40 ſs of an acre, yet after 2: or 3: Croppes not aboue halfe so much, except cost be bestowed upon it. Diverse haue found by experience that 2: or 3: Croppes of Rye will come of one Seedinge, & wthout any nue ploughinge. There is allso this yeare great store of pease & barley, as good as I haue seen ordinarily in England.