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UNIVERSITY OF LOUISVILLE

DIRECT AND REPRESENTATIVE LEGISLATION
IN THE EARLY AMERICAN COLONIES

A Dissertation
Submitted to the Faculty
Of the Graduate School
Of the University of Louisville
In Partial Fulfillment of the
Requirements for the Degree
Of Master of Arts

Department of History

By

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INTRODUCTION

For the purpose of making political experiments, the American colonies offered one of the greatest fields in history. At the beginning of the period England had no definite colonial policy. She dealt with each settlement separately and, in most cases, differently. The fifteen or more colonies, with their various charters and patents and their changes in policies, offered unlimited opportunities for the trial of political ideas. With such a rich field, it is strange that very little has been written about the political ideas of the early colonies. Historians and political scientists seem to be more interested in the revolutionary period, and those who deal with the earlier years limit themselves for the most part to the subjects of theocracy, and the influence of the church on political theories. These subjects have been largely omitted in this study; in the few cases in which they are relevant they have been dealt with briefly. The purpose of this thesis is to discuss the direct and representative legislation in the early American colonies.

Direct legislation in this study is considered as any actual participation in legislation by the body of freemen or qualified voters. The first form is the primary assembly, and the second is participation in connection with representation. Following the above definition, whenever the body of freemen are given the power to review and repeal an act of the representatives it is called a referendum, and when the freemen are given the power to make a law it is called the initiative. In other words, broad principles are sought rather than any particular application of those principles. We are seeking first, the three forms, primary assembly, referendum, and initiative, and second, the use made of these forms.

The same principle is followed in dealing with representative legislation. The field covered in the latter subject is limited to four questions: Why were delegates, or representatives, elected? how did the assembly originate? what was the method of voting? what use was made of proxies? No consideration has been given to the number of qualified freemen actually participating in the government. In many cases they were very few compared to the whole number of inhabitants, but in this study, the "people" refers to the qualified voters.

It is not the purpose of this thesis to trace the evolution of these political ideas from colonial days to the present time, nor to prove that the modern ideas are based on those of the past. What has been found in the records is presented, no more and no less. Documents are quoted at length in an effort to let contemporary writers speak for themselves. The sources are mostly colonial records, with but very little taken from secondary works, for, with but a few exceptions, the secondary works have not proved of much value. The following chapters show the origin of representative legislation in seven colonies, and prove that direct legislation is old in American government.

CHAPTER I

VIRGINIA

The government of Virginia presents no instances of direct legislation. Devoid of compact towns, such as were found in New England, the primary assembly did not develop. Parish meetings were held, but these were not primarily political. Though lacking in direct legislation, Virginia is unique in representative legislation. It is here that we find the beginning of representative government and the first assembly of the delegates of a colony on this continent. "Every phase of colonial development, from the mixed system which existed under the patent of 1606 to the chartered proprietary company after 1609 and the royal province after 1624, is here illustrated."¹

In 1606 the King granted a patent to Sir Thomas Gates and others for plantations to be made in Virginia.² The patent shows that the investments were made solely by individuals and not by public stock. The "adventurers" had very little influence, even in commercial affairs. They elected the agents in London. The companies managed the goods sent out and looked after the profits. There may have been other duties, but the "Articles, Instructions and Orders for the Government of the Colonies" do not mention them.³ The government of Virginia was reserved to the King, who appointed a council of thirteen, resident in London. A second council, also of thirteen, resided in the colony, and was appointed by the council in London. The orders were given by the King and "signed with our hand or Sign Manual" and were to "pass under the Privy Seal of our Realm of England". The first instructions, issued to Captain Newport by the London council, show that the chief objects were to "receive the trade of the countries about", to discover minerals, and to

¹ Kingsbury, S. W., Records of the Virginia Company of London, I, 16

² Brown, A., Genesis of the United States, I, 52-62

³ Ibid., 64-75

find the passage to the western sea.⁴ No records for the company or council are extant for this period and so it is difficult to determine with accuracy how the enterprise was conducted.

The company settling Virginia was interested primarily in trade and exploration, but it is difficult to determine who controlled the trade. It may have been the companies, the council, or groups of adventurers.⁵ The missing court books no doubt give a statement of the relations of council, crown, and companies. Whoever controlled trade did not return satisfactory profits, for the gold and silver were not found and no new routes to the western sea had been discovered. A document found by Kingsbury shows that the crown had intentions of abandoning the new colony.⁶ The King's doubt as to the wisdom of continuing the adventure was caused by a desire to placate Spain, or by religious reasons.

A second charter, issued to a larger group in 1609, increased the number of stockholders and gave them greater control.⁷ The new charter created a body politic. The stockholders mentioned in the charter "and their Successors shall be known, called, and Incorporated by the name of, The Treasurer and Company of Adventurers and Planters of the City of London for the First Colony in Virginia". The new council was given controlling authority and acted in the name of the adventurers, or stockholders, rather than in the name of the King. The council in the colony was dissolved, and a governor was appointed to rule the planters. Lord Delaware, the first governor, was to have an advisory council of six, but these were not to limit his authority.⁸ Since he could not leave immediately, Sir Thomas Gates was sent to act in his stead until

⁴ Brown, I, 75-79 for Newport's Instructions

⁵ Kingsbury, I, 20

⁶ "Reasons against Publishing the King's Title to Virginia. A Justification for Planting Virginia", Ibid., 21

⁷ Thorpe, F. N., Federal and State Constitutions, VII, 3783-3789

⁸ Brown, I, 376-384, Delaware's Instructions

he should arrive later. Conditions went from bad to worse until Gates and the settlers decided to abandon the colony, but as they sailed down the river they were met by Delaware with provisions. They returned and started to rebuild Jamestown under their new governor.⁹

Lord Delaware, in 1611, was forced to return to England. From there he ruled through deputies, the most notorious of whom was Thomas Dale, who governed the colony as High Marshal. He administered military discipline and subjected the people to untold cruelties. Opinions differ as to the worth of his administration. According to Chitwood, "many of the settlers found the government intolerably; some of them committed suicide, while others hid themselves away in holes dug in the ground in order to escape its horrors".¹⁰ Dale was entirely too severe and cruel, but he had some excuse because of the nature of the settlers. The colony began to show improvement and land was granted to individuals.¹¹ Another ruler of almost as arbitrary nature was Argall, and the records of the Virginia Company contain many complaints against him.¹² "Under the harsh rule of Dale and Argall their (the planters') condition was little better than that of slaves."¹³

A more liberal form of government was provided in a new charter issued in 1612.¹⁴ The treasurer and stockholders were to hold meetings each week, and for more important business the council and company were to meet four times each year in general courts. The general court was to make laws not contrary to those of England, elect the council and the officers. Sir George Yeardley was appointed governor and his

⁹ Ibid., 400-413

¹⁰ History of Colonial America, 77. For defense of Dale see Jernegan, M. W., The American Colonies, 58.

¹¹ Tyler, L. G., Narratives of Early Virginia, 312

¹² Kingsbury, I, pass.

¹³ Chitwood, 79

¹⁴ Thorpe, 3802 et seq.

instructions called for a more liberal form of government with a representative body elected by the people. The commission for government called for two supreme councils, "I The Council of State, which was to consist for the present, of the Governor and his counsellors, II, The General Assembly, which was to consist, for the present, of the afore-said Council of State and two Burgesses chosen out of each Town Hundred or other particular plantation.¹⁵ That the colony was still in difficulties at that time is shown by some of the statements made in a letter by John Pory, later the first clerk of the Virginia Assembly. Yeardley was appointed in October, 1618, and in November Pory wrote: "Capt. Yeardley chosen governor of Virginia.... The greatest difficulties of that plantation overcome." "They begin now to enjoy both commodity and wealth."¹⁶ Pory's statement as to the wealth was slightly overdrawn.

In pursuance of his "General Instructions for the Better Establishment of a Commonwealth" Yeardley issued a proclamation calling for a general assembly. The original of the proclamation has been lost, but a contemporary account states "That all those that were resident here before the departure of Sir Thomas Dale should be freed and acquitted from such public services and labours which formerly they suffered, and those cruel laws by which we had so long been governed were now abrogated, and that we were now to be governed by those free laws which his Majesties subjects live under in Englande.... And that they might have a hand in the governing of themselves, it was granted that a General Assembly should be held yearly once, whereat were to be present the Governor and Counsell, with two Burgesses from each Plantation freely

¹⁵ Brown, A., *First Republic*, 293-309 gives part of the instructions

¹⁶ *Ibid.*, 290

to be elected by the inhabitants thereof; this assembly to have power to make and ordaine whatsoever lawes and orders should by them be thought good and profitable for our subsistence."

"In order to establish one equal and uniform kind of government over all Virginia, such as may be the greatest benefit and comfort of the people, each town, hundred, and plantation was to be incorporated into one body corporate (a borough), under like laws and orders with the rest; and in order to give the planters a hand in the governing of themselves each borough had the right to elect two burgesses to the General Assembly."¹⁷ The colony was divided into four large corporations consisting of eleven boroughs.¹⁸ Martin's Hundred was not allowed a seat and so the assembly consisted of the governor, the council, and twenty burgesses.¹⁹ No account is left of the order for the election, or of the elections themselves, and not even the exact date is known. The burgesses were "chosen by the inhabitants of each town" and "all principal officers in Virginia were to be chosen by ye balloting box".²⁰ The records of the assembly were kept by John Pory, the Speaker. The burgesses met in the Jamestown church on July 30, 1619, and representative government in America was born. The charter was withdrawn in 1624 and the colony was made a royal province, but the assembly was retained. The burgesses sat with the council as one house until 1680, when they separated. The House of Burgesses continued to meet until the last one was dissolved by the governor, Lord Dunmore, in 1775.

We have seen the development of the settlers of Virginia from servants of the company and crown to burgesses making their own laws. What

¹⁷ Quoted in Brown, First Republic, 312f

¹⁸⁻¹⁹ Tyler, 249-278

²⁰ Brown, First Republic, 315, evidently quoting contemporary records.

causes were at work to bring about representative government in the first colony? It is very difficult to find a satisfactory answer. Each charter and set of instructions issued was more liberal than the one preceding. It is evident that the primary purpose of the colony was to carry on trade and exploration, and that from these standpoints the enterprise was a failure. The improvements in government and the granting of additional liberties were apparently experiments to make the colony profitable as an investment. Economic reasons probably played a very important part.

The liberal views of some of the Council, notably their leader, Sir Edwin Sandys, had great influence. It was Sandys who led the "Country party" in the Council and secured the appointment of Yeardley and the liberal instructions given him. King James was having trouble with the independent group in Parliament and about one hundred members of the "Country party" of the Council were members of the obstreperous group in Parliament. The King considered Sandys his enemy, and forbade his election as treasurer, or president, of the Company in 1620. "Choose the devil if you will, but not Sir Edwin Sandys." Five hundred and more were at the meeting of the Company and they favored the reelection of Sandys, but the King sent a messenger strictly forbidding such action. The Earl of Southampton, a believer in the policies of the former treasurer, was elected by acclamation. This was a direct rebuff to the King, and the liberal policy of the Company was continued.²¹

The charter of 1609 was granted to adventurers and planters of the colony. All those over ten years of age who settled in the colony were

²¹ For the conflict between King and Sandys see Chitwood, 82 et seq., quoting Woodnoth, A., A Short Collection of Remarkable Passages; also Neill, E. D., History of the Virginia Company of London, 177f, 185, 189. For record of the election see Kingsbury, I, 384f.

to receive a share of stock, the same as those who bought stock. The stockholders were to control the government of the Company. The "planters" were to serve the Company for seven years, at the end of which time each planter was to receive one hundred acres of land for himself and each member of his family, as well as food, shelter, and clothing during the period. At the end of the seven years the possessions of the Company were to be divided among the stockholders, planters as well as adventurers, according to the amount of stock each held.²² This agreement expired in November 1616 and the Company ordered it to be carried out.²³ This was done by Yeardley when he arrived in 1619.²⁴ The planters were now freemen of the colony with the rights and immunities of Englishmen, as stated in the first charter. The reasons for representative government in Virginia may be briefly summarized as: a desire to improve the economic condition of the colony, the influence of the liberals, such as Sandys, and possibly the demand on the part of the planter-stockholders to have the rights and privileges demanded by their friends in England, who were gradually attempting to increase their power in Parliament.

²² Brown, *First Republic*, 103f

²³ *Ibid.*, 231ff, 244

²⁴ *Ibid.*, 324

CHAPTER II

NEW PLYMOUTH

The settlers of Plymouth secured a patent from the Virginia Company through Sir Edwin Sandys.¹ The actual settlement was north of the Virginia Company's grant and their patent was consequently of no value to the Pilgrims. A promise had been sought from King James to allow the settlers to practice their own religion, but the King would not give his approval. He promised, however, "that he would connive at them and not molest them, provided they carried themselves peaceably, But to allow or tolerate them by his publick authoritie, under his seal, they found it would not be".² In 1621 another patent was granted, this time by the Council for New England, and issued to the London partners of the enterprise.³ The Pilgrims were destined never to get a clearly legal title. No royal charter was ever issued. The Council for New England, in 1630, granted a new patent to the settlers themselves. The latter increased the land grant and set definite limits for the colony.⁴ It is doubtful whether the Council had authority to grant powers of government. New Plymouth, then, with three patents, had no legal rights to frame a government.

The history of the Pilgrims before they sailed on the Mayflower is so familiar that a review of it is unnecessary. It is sufficient to recall that the Pilgrims were primarily a church believing in the congregational type of government and emphasizing the idea of the covenant or compact. The Mayflower Compact was not a novel idea. The covenant had been known for a century to the Puritans; it was used by the guilds of England, and was the thing to be expected of the Pilgrims. The appeal

¹ Chitwood, 113

² Bradford, Wm., History of Plymouth Plantation, 51

³ Chitwood, 119

⁴ Brigham, Wm., New Plymouth Colony, 21

to the Virginia Company shows the covenant was very familiar to the settlers in Leyden. The petition drawn up by Elder Brewster and the pastor, John Robinson, shows that the organization was based on a compact. "We are knöt together", it says, "as a body in a most stricte & sacred bonde and covenante of the Lord, of the violation whereof we make great conscience, and by vertue whereof we doe hould our selves straitly tied to all care of each others Good, and of ye whole by every one and so mutually."⁵

Whatever business the New Plymouth colony entered into was added to its religious objects. It seems a platitude to say that the Mayflower Compact was adopted by a primary assembly. The Compact was not adopted by strictly a church congregation, since there were some among the settlers who were not members of the church. It was this group who furnished one of the reasons for the Compact. It was, Bradford relates, "occasioned partly by the discontented and mutinous speeches that some of the strangers amongst them had let fall from them in the ship - That when they came ashore they would use their owne libertie; for none had power to command them, the patente they had being for Virginia, and not for New-England, which belonged to an other Government, with which the Virginia Company had nothing to doe." And partly", continues Bradford, "that shuch an acte by them done (this their condition considered) might be as firme as any patent and in some respects more sure."⁶

A patent that was null and strangers that were mutinous helped to bring forth the Mayflower Compact. It is brief and for convenience is given here.

⁵ Bradford, 54f

⁶ Ibid., 106

"In the name of God, Amen. We whose names are under-written, the loyall subjects of our dread sovereigne Lord, King James, by the grace of God, of Great Britaine, France, and Ireland King, defender of the faith, etc., haveing undertaken, for the glorie of God, and advancemente of the Christian faith, and honour of our King and countrie, a voyage to plant the first colonie in the Northerne parts of Virginia, doe by these presents solemnly and mutually in the presence of God, and one of another, covenant and combine our selves together into a civill body politick, for our better ordering and preservation and furtherance of the ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just and equall lawes, ordinances, acts constitutions, and offices, from time to time, as shall be thought most meete and convenient for the generall good of the colonie, unto which we promise all due submission and obedience. In witness wherof we have hereunder subscribed our names at CapCodd the 11. of November, in the year of the raigne of our sovereigne lord, King James, of England, France, and Ireland the eighteenth, and of Scotland the fiftie fourth. An^o; Dom. 1620."⁷

The Mayflower Compact has been considered the first of the covenants of government, although, as has been stated above, the idea was old in Puritanism. That it set up an independent republic is also questioned by some.⁸ Here was, unquestionably, direct legislation in the ratification of a constitution. To all intents and purposes the Compact also established an independent republic. The actions of the Pilgrims themselves seems to justify such a claim. It is true that the signers of the

⁷ Ibid., 107

⁸ Chitwood, 120; Channing, E., History of the United States, I, 309

Compact called themselves "loyall subjects", but this phrase seems to be more a matter of form than of reality. Their loyalty could easily be questioned. The Pilgrims had been in Holland for twelve years. They had left England because of persecution, and had braved the dangers of America rather than return to England. In giving the reasons for removing to America Bradford does not mention any desire to serve the King or live under his laws.⁹ Instead he says of those who remained in England, "Alas, they admitted of bondage, ... yea, some preferred and chose the prisons in England rather than this libertie in Holland."¹⁰ Such statements do not indicate great loyalty.

Regarding a place to settle, some favored the "vast and unpeopled countries of America", others Guiana, and still others, Virginia. Some raised objections to Virginia on the grounds that, living under the English government there, or among the English, might be worse than living in England.¹¹ The conclusion was in favor of living under the general government of Virginia, but as a distinct body by themselves, with a special grant of religious freedom from the King. It has been shown that they failed to carry out the first and last of these three provisions, but did become a "distincte body by themselves". Here then is another example of the Pilgrim's lack of loyalty to the English King.

There can be no doubt that the settlers knew that they were without legal rights in forming a government. They knew that they had no title to the land settled as even the "strangers" on board the Mayflower pointed out.¹² They not only did not have a charter from the King, but he had positively refused to approve their religion. This refusal "made a dampe

⁹ Bradford, 44 et seq.

¹⁰ Ibid., 45

¹¹ Ibid., 50

¹² See above p. 11

in the business" and some feared that if they settled on such conditions it might be "but a sandie foundation". They finally decided to accept the King's statement that he would "connive" at them. Knowing before they left Holland that they were to have a "sandie foundation" without a royal charter, they must have known when they signed the Mayflower Compact that they were making an independent government. The "Civill body politick" was organized for the "generall good of the colonie," with no reference made to the general good of the King, as far as obedience was concerned. Truly they had been "well weaned from the delicate milke of our mother countrie".¹³ The matter of calling themselves loyal subjects may have been ritualistic or it may have been "good politics". In all probability they used the expression to emphasize the fact that they considered themselves Englishmen.

As far as its actual working was concerned, Plymouth was an independent, pure democracy. No hint is given that a Parliament in England is in existence, and except for the formal mention of the King in the Mayflower Compact the "dread Sovereigne" is ignored. The oath of the governor, adopted in 1636, contains the following requirement: "You shall sweare to be truly loyall to our Sovereigne Lord King Charles his heirs and successors." In the original these words are erased with the exception of "You shall swear to be truly loyall". In their place is interlined "the state and Government of England as it now stands", and these words are also erased. The same procedure is followed with several other oaths.¹⁴ Brigham gives no reasons for the erasures, but in other instances parts of laws that were repealed were erased in the original.¹⁵

¹³ Bradford, 54

¹⁴ Brigham, 38 and footnote

¹⁵ Ibid., 41

These particular erasures may have been due to the revolution in England, but the least that can be said is that the freemen of Plymouth showed their lack of desire to swear allegiance either to the King or to the government of England.

No recognition is given to the vetoes, disallowances and parliamentary acts of restriction. It was enacted in 1636 "That the lawes and ordinance of the colony & for the Governmt of the same be made onely by the ffreemen of the Corporacon and noo other".¹⁶ The settlers evidently felt themselves capable of handling all affairs of government. The court did, in 1664, ask the governor to swear to uphold Parliament's Navigation act of 1660, but stipulated that it was required of the governors by the King's Privy Council.¹⁷

The history of Plymouth shows very little friction in the management of her government. The Mayflower Compact was the only frame of government for sixteen years. There were no laws regulating the election or duties of the governor and other officers. They performed their duties subject to revision by the primary assembly. There were no criminal laws and the trials were by jury, following the English common law.¹⁸ The jury system was introduced three years after the settlement was made.¹⁹ In 1636 the laws were revised and recorded and a simple form of government adopted. Before that time the settlers acted as a voluntary association,²⁰ and what few laws were passed were recorded, if at all, in the governor's notebook, which has been lost.²¹

When the Mayflower sailed from England John Carver was informally appointed governor of the body and was confirmed in that office follow-

16 Lobingier, C. S., *The People's Law*, 72, quoting *Records of the Colony of New Plymouth*, XI, 11

17 Brigham, 38

18 Lobingier, 71, quoting Goodwin, *The Pilgrim Republic*, 402

19 Brigham, 28

20 Ibid., viii

21, Goodwin, 399

ing the signing of the Compact.²² In 1621 the first governor died and Bradford was elected to succeed him. The strain of the first Winter had been so great that Bradford's health was injured and the Pilgrims elected Isack Allerton to assist him. According to Bradford the two "by renewed election every year, continued sundry years together which I hear note once for all".²³ At the election in 1624 the governor did not desire re-election, but consented and recommended a council of five assistants, which was created. The governor was given a double vote in the council, which, in 1633, was increased to seven members.²⁴ The governor and his council made laws and it is difficult to distinguish between laws made by the whole body of freemen and those made by the former. It is also difficult to tell the difference between laws and court orders or resolutions, since little regard was had for records before 1636.²⁵

The jurisdiction of the general court was almost unlimited. It met sometimes as a legislative body, sometimes as a court of justice, and at other times as a court of elections. All three functions could be exercised at the same session. It is difficult to determine at times whether the "General Court" refers to the primary assembly or the court of deputies and magistrates. The revised statutes of 1636 provided "That the lawes and ordinances of the Colony & for the government of the same be made onely by the freemen of the Corporation and no other".²⁶ The freemen met in quarterly courts, three times for legislation and other business and once for elections. No other method of making laws was used until 1638 when representative government was adopted.²⁷ In-

²² Bradford, 107

²³ He and Allerton served together three years. Bradford served as governor thirty-two times from 1621-1657. The other years he refused to serve. Bradford, 116

²⁴ Goodwin, 254f

²⁵ Brigham, viii

²⁷ See below p.

²⁶ Ibid., 42

stances of the primary assembly enacting laws are numerous. In 1627 the "full court" agreed on the division of the common lands.²⁸ The court, in 1637, enacted the liberal order that "six score and twelve fishes shall be accounted to the hundred of all sorts of fishes".²⁹ In 1638 the freemen instituted the system of deputies,³⁰ and though the latter moved the dissolution of their own court the representative form was continued from that date.³¹

Though the primary assembly for legislation lost its popularity after 1639, when the deputies took their seats, the idea of popular control did not diminish. The case cited above is but one example of the referendum. The revised laws of 1636 made possible a referendum on all laws. Laws passed by the general court had to be proposed one court and voted on at the next. The intervening time gave the town meetings opportunity to consider the proposed laws and to instruct their deputies. In case of emergency laws could be passed by the general court, but were subject to repeal by the next election court, which was a primary assembly.³² A general court, meeting in 1640, passed an act ordering the constables to call together the freemen of their town "when the committees [deputies] shall think it fitt as well to acquaint them with what is propounded or enacted at the Court, as to receive instructions for any other businesses they would have done".³³ Such statutes show clearly that deputies, as well as voters, believed that in all matters of importance in government the will of the freemen should be supreme.

With the introduction of the representative government provision was made, not only for the referendum, but also for the initiative. In

²⁸Brighan, 29

³⁰Ibid., 63

³² Ibid., 63

²⁹ Ibid., 57

³¹ Ibid., 90f

³³ Ibid., 68

the statute providing for deputies it was also enacted, "If any act shall be confirmed by the Bench and committees which upon further deliberation shall prove prejudicial to the whole, That the freemen at the next election Court after meeting together may repeal the same and enact any other useful for the whole".³⁴ That the statute proved popular is shown by the fact that it was re-enacted in the revised statutes of 1658.³⁵ The recall was made almost unnecessary by the annual election of officers, but provision was made for removal of unfit deputies. In the statute providing for the election of deputies it was enacted, "if and such committees shalbe insufficient or troublesome, that then the Bench [Governor and magistrates] and thother Comittees may dismisse them, and the Towne to choose other freemen in their place".³⁶ The same provision was made in 1658.³⁷

The referendum like the initiative, was found, for the most part, in the action of the primary assembly, but an interesting case is found of a more modern form. The acts regarding the making and repealing of laws at the election court in June were rendered with a "dubious interpretation". To settle the matter it was referred to the people in their town meetings. The result is given in a law of 1658: "This court having by propositions to the freemen of the several Townships desired their answers in order to the regulating thereof but not receiving any answer from sundry of them have seen cause to declare their owne sense thereof."³⁸ The interpretation given was subject to repeal by the election court, but was apparently satisfactory since no reference to its repeal is found. The following year a similar type of referendum met with better

³⁴ Brigham, 63

³⁶ Ibid., 63

³⁸ Ibid., 103

³⁵ Ibid., 108

³⁷ Ibid., 112

results. The question was raised in the court as to the desirability of repealing certain laws. The proposition was submitted to the towns to see if they thought it "Meete to summon the whole body of freemen to come together; that so the minds of the major pte of the freemen may be knowne aboute the premises and to send theire minds to the next October Court". The vote was 111 to 63 against the meeting of the primary assembly.³⁹

The Confederation of New England shows another example of the working of the referendum in Plymouth. In 1643 New Haven, Massachusetts, Connecticut, and Plymouth entered into a confederation under the name of the United Colonies of New England. The meeting of the delegates was held in Boston in May and ratified by Massachusetts, New Haven and Connecticut. The 12th Article states: "The commissioners for Plimoth having no commission to conclude, desired respite till they might advice with their Generall Courte;" The ratification of Plymouth was postponed until September when the next court met, and was then added to the Articles by the commissioners. The statement is: "it appearing that the Generall Courte of New-Plimoth and the severall townships thereof have read and considered and approved these Articles of Confederation, as appeareth by commission from their Generall Courte bearing date the 29. of August, 1643, to Mr. Edward Winslow and Mr. William Collier, to ratifie and confirme the same on their behalves".⁴⁰

The last use of the referendum occurred in 1690, when it was proposed that Plymouth be annexed to Massachusetts. The General Court ordered the constables to call the town meetings and lay the matter before the freemen that "they may consider thereof, and draw up their minds therein".⁴¹

³⁹ Ibid., 123

⁴⁰ Bradford, 387

⁴¹ Hart, A. B., American Hist. Told by Contemporaries, I, 364

Doomed to failure as an independent colony the freemen offered no strong resistance and were annexed to their larger neighbor in 1691, by royal charter.⁴²

The development of the representative system in Plymouth was peculiar in that the legislative consisted of only one house. Until the end of the colony's separate existence the deputies and magistrates sat together. The deputies, as stated above were elected in 1639. In 1638 the records state that "complaint was made that the freemen were put to many inconveniences and great expences by their continuall attendance at the courts" and provided for two deputies from each town except Plymouth, which was to send four.⁴³ These officers were to be elected by the freemen only.⁴⁴ In 1652 provision was made for the use of proxies in the election of the governor and the other officers of the colony. The freemen who did not care to attend the election sealed up his vote in the town meeting, and all of the votes of the town were sealed and taken by the deputies to the election court where they were opened publicly.⁴⁵ Another step toward representative government was taken in 1658. In the revised laws the magistrates and the deputies were given full power "as the body representative" to make and repeal laws. As in 1638 the freemen retained effective control. Laws were to "stand in full force till the whole body of freemen shall take further order therein". A majority of the freemen could call for a meeting of the primary assembly and the governor was to call the meeting at the first opportunity. The governor was also given the authority to call the primary assembly if he thought the matter important enough, or the complaints of the freemen sufficient. The free-

⁴² For charter see Thorpe, 1870-1886

⁴³ Brigham, 63

⁴⁴ Ibid., 37

⁴⁵ Ibid., 94

men could either attend such a meeting in person or send deputies to represent them.⁴⁶ A ratifying convention was thus made possible.

In the colony of New Plymouth we find the towns exercising direct control over the legislation. The town meeting did not get too large to prevent the primary assembly from being efficient. The initiative and referendum are found, but no trace of the recall. The statutes provided for voting by proxy, or sealed ballot. The people throughout their separate existence showed an active interest in political affairs and a firm belief that government should be in the hands of the people.

86 Brigham, 108f

In 1629 a fishing station was settled at Cape Ann patronized by a group of merchants known as the Pequotish Adventurers. Five years later a patent was obtained from the Council for New England by "The Company of Adventurers for New England in America". Since this gave the group an authority to govern, application was made for a royal charter, under the title "The Governor and Company of the Massachusetts Bay in New England" the charter was granted. It confirmed the former grant of land and added an outline of government. The charter created a "body corporate, sole and politic in fact and name" to be governed by a "Governor, and Deputy Governor, and eighteen Assistants ... to be from time to time ... chosen out of the freemen."

CHAPTER III

Among the provisions of the charter were the freedom of the plantations, and the right of the freemen to elect the Governor, Deputy Governor, and Assistants. The Governor, Deputy Governor, and Assistants were to have full power of government over the plantation. They could also give orders for the settling of the plantation, and the said Governor, Deputy Governor, and Assistants were to be sworn every month or oftener at their pleasure, separately, and their families, and keep a Court or Assembly of themselves, for the better ordering and directing their affairs. (Should be more exact history, with the Governor or Deputy Governor to be a Justice of the Peace.)

Four general assemblies a year are provided for "wherein the Governor or Deputy Governor and the Assistants, at the least to be chosen, shall have full power and authority to choose, nominate, and appoint such and so many others as they shall think fit, and that shall be able to accept the same, as be free of the said Company and Plantation, and shall be sworn to assist, and to execute and accomplish such affairs."

1. Jackson, J. L., *Massachusetts under the Charter of 1629*, 20.
2. For further see *Massachusetts, Records of the Governor and Company of Massachusetts Bay, 1629*. Most of the original patent is included in the charter.

In 1623 a fishing station was settled at Cape Ann sponsored by a group of merchants known as the Dorchester Adventurers. Five years later a patent was obtained from the Council for New England by "The Company of Adventurers for New England in America". Since this gave the group no authority to govern, application was made for a royal charter.¹ Under the title "The Governor and Company of the Massachusetts Bay in New England" the charter was granted. It confirmed the former grant of land and added an outline of government.² The charter created a "body corporate and politique in fact and name" to be governed by a "Governor, one Deputy Governor, and eighteen Assistants ... to be from tyme to tyme ... chosen out of the freemen of the plantation". The stockholders of the company, most of whom resided in England, were the freemen of the plantation. The governor and other officers were to have full power of government over the settlers. They could also give order for "the assembling of the Company. And the said Governor, Deputy Governor, and Assistants ... shall or maie once every month or oftener at their pleasure, assemble, and then houlde, and keepe a Courte or Assemblie of themselves, for the better ordering and directing their affairs. (Seven or more Assistants, with the Governor or Deputy Governor to be a sufficient Court.)"

Four general assemblies a year are provided for "whereof the Governor or Deputy Governor and six Assistants, at the least to be seaven, shall have full power and authority to choose, nominate, and appointe such and so many others as they shall think fitt, and that shall be willing to accept the same, to be free of the said Company and Body, and them into the same to admitt, and to elect and constitute such offices

1 Jameson, J. F., Johnson's Wonder-Working Providence, 69

2 For charter see Shurtleff, Records of the Governor and Company of Massachusetts Bay, I, 3-19. Most of the original patent is included in the charter.

as they shall thinke fitt and requisite for the ordering, managing, and dispatching of the affairs of the saide Governor and Company and their successors". The right to admit freemen gave the original group great power over the colony, and they were reluctant to add to the number of citizens.

The charter placed almost unlimited power to make laws in the hands of the freemen. They were given the authority to "make lawes and ordinances for the good and welfare of the saide Company, and for the government and ordering of the saide lands and plantacon, and the people inhabiting and to inhabit the same, as to them from tyme to tyme shall be thought meete. Soe as such lawes and ordinances be not contrarie or repugnant to the lawes and statutes of this our realme of England". The charter thus granted was very liberal in most respects. It was not at all unreasonable for the freemen to be required to act according to the laws of the mother country. The government could be either a very strict aristocracy or, on the other hand, a very liberal democracy. In the course of events the former was the one favored.

As has been noticed, the charter was granted to a company of London stockholders, but no mention is made that the headquarters must be in England. Some prominent Puritans, among them John Winthrop, agreed to go to the new colony provided the control of the company was turned over to them. The conditions, set forth in the Cambridge Agreement, were accepted by the stockholders in 1629. In the future the meetings of the company were to be held in New England, rather than in Old England.³

John Winthrop was chosen Governor and led the migration to the new plantation. For the next quarter of a century the history of Winthrop is the

³ Shurtleff, I, 49 et seq., 58-61

history of Massachusetts. By an agreement among the stockholders, the charter whose provisions were intended for a trading company in England, now became the charter of a body of colonists in the new world. Through a queer turn of affairs they have received almost unlimited authority to govern themselves. The one restriction was, in time, to be forgotten.

The general court of Massachusetts was a primary assembly, consisting, as it did, of all the freemen. The freemen, however, were few in number. In October, 1630, after the deaths or return to England of several, there were only ten freemen, including the Governor.⁴ By the end of the same year there were two thousand settlers. With such proportions it is difficult to consider the general court as a primary assembly, though technically it has to be considered as such. On the above date the first meeting of the general court was held and a petition was presented to the body asking that one hundred and eighteen new freemen be admitted.⁵ The naturalization of so many new citizens might jeopardize the control of the old leaders and so a compromise was arranged. It would seem that the officers had taken absolute control of the government, for the freemen voted to accept a part of the powers granted to them by the charter. "It was p[ro]posed if it were not the best course that the freemen should have the power of choosing the Assistants when there are to be chosen, & the Assistants from amongst themselves to choose a Gou[ver]neur & Deputy Gou[ver]neur, whoe w[ith] the Assistants should have the power of making lawes & choosing officers to execute the same. This was fully assented to by the genall vote of the people, & ereccion of hands".⁶

⁴ Chitwood, 134, citing Young, A., Chronicles of Massachusetts, 319

⁵ Shurtleff, I, 79f

⁶ Ibid.

The "people" at this time apparently consisted of the few freemen; the one hundred and eighteen new applicants were not admitted until seven months later (May 18, 1631).⁷

The exclusive power granted to the assistants did not last long. Winthrop records on May 8, 1632, that a general court met at Boston. After repeating the law given above he adds, "the whole court agreed now, that the governor and assistants should all be new chosen every year by the general court, (the governor to be always chosen out of the assistants;) and accordingly the old governor, John Winthrop, was chosen;"⁸ At the same court deputies were provided for. Winthrop says, "Every town chose two men to be at the next court, to advise with the governor and assistants about the raising of a public stock, so as what they should agree upon should bind all, etc."⁹ Even though most of the power was placed in the hands of the few officers, the people, meaning the freemen, retained the right of election. They were expected to be very faithful in exercising what rights they did have. In 1635 it was ordered "that the Genall Court, to be holden in May nexte, for election of magistrates, &c, shalbe holden att Boston, & that the towns of Ipswich, Neweberry, Salem, Saugus, Waymothe, & Hingham shall have liberty to stay soe many of their ffreemen att home, for their safty of the towne, as they judge needeful, & that the saide ffreemen that are appoynted by the towne to stay att home shall have the liberty for this Court to send their voices by pxy."¹⁰ The right of voting was considered one that should not be neglected. If the freemen could not be present in person he could send his vote, and in this provision we find also a very im-

⁷ Shurtleff, I, 366

⁸ Journal, I, 79

⁹ See below p.

¹⁰ Shurtleff, I, 166

portant reason for the substitution of proxy government for direct control. It was not safe to have all of the freemen leave their homes to go to a court of elections, because of danger from the Indians.

The deputies were elected in order that the towns might be bound, and popular participation in law making was probably used for the same reason. At the general court held in 1637/38 the following record appears among the proceedings: "For the well ordering of these plantations now in the begining thereof, it having bene found by the little time of experience wee have had, that the want of written laws have put the court into many doubts & much trouble in many particular cases, this Court hath therefore ordered that the freemen of every towne (or some part thereof chosen by the rest) within this jurisdiction shall assemble together in their severall townes, & collect the heads of such necessary & fundamentall lawes as may bee sutable to the times and places whear God by his pvidence hath cast us, & the heads of such lawes to deliver in writing to the Governor for the time being before the 5th day of the 4th month, called June, next, to the intent that the same Governor, together with the rest of the standing counsell, & ... elders of several churches, ... or the major part of them, may upon the survey of such heads of lawes make a compendius abrigment of the same by the Generall Court in Autumn next, adding yet to the same or detracting therefrom what in their wisdomes shall seem meete, that so the whole worke being pperfected to the best of thei: skill, it may bee psented to the Generall Court for confirmation or relection, as the court shall adjudge."¹¹

The right to propose a code of laws gave the people the right of initiative to a certain extent. The court was not bound to accept the

¹¹ Ibid., 222

laws suggested by the freemen, and the governor and council, with a few friends, reserved the right to revise and amend them. It shows, however that the heads of the government recognized the fact that laws to be effective must be supported by the people. They no doubt believed that laws popularly initiated, even though revised before enactment, would receive popular approval. Such instances of direct participation in government were rare in the Bay Colony. One example of a form of the referendum is found in connection with the making of a body of laws. In 1639 it was ordered "that the Governor, Deputy Governor, Treasurer, & Mr. Stoughton, or any three of them, with two or more of the deputies of Boston, Charlestowne, or Roxberry shall peruse all those modellis, wch have bene, or shalbee further psented to this court, or themselves, concerning a forme of government, & lawes to bee established, & shall drawe vp into one body, (altering, ading, or omitting what they shall thinke fir,) & shall take order that the same shalbee coppted out & sent to the severall townes, that the elders of the churches & freemen may consider of them against the next General Court, & the charges thereof to bee defrayed by the Treasurer."¹² In 1641 appears the following entry: "At this court, the bodye of lawes formerly sent forth amonge the ffreemen, &c, was voted to stand in force, &c."¹³ Except for the initiation and ratification of this body of laws the people took no part in legislation.

✓ The attitude of the leaders toward direct legislation is well stated by Winthrop. In 1639 at a court of elections, the court voted to reduce the number of deputies from each town to two, instead of three. There was some serious objection to this proposal since the towns feared the

¹² Ibid., I, 279

¹³ Ibid., 346

magistrates were seeking too much power. After the statute was passed the reasons for its enactment were sent to the dissatisfied towns, with the request that they present their reasons for the repeal of the order at the next court. "The hands of some of the elders (learned and godly men) were to this petition," says Winthrop, "although suddenly drawn in, and without due consideration, for the lawfulness of it may be well questioned: for when the people have chosen men to be their rulers, and to make their laws, and bound themselves by oath to submit thereto, now to combine together (a lesser part of them) in a public petition to have any order repealed, which is not repugnant to the law of God, savors of resisting an ordinance of God; for the people, having deputed others, have no power to make or alter laws, but are to be subject; and if any such order seem unlawful or inconvenient, they were better prefer some reasons etc., to the court, with the manifestation of their desire to move them to review, then peremptorily to petition to have it repealed, which amounts to a plain reproof of those whom God hath set over them, and putting dishonor on them, against the tenor of the fifth commandment."¹⁴ The Governor's opinion was not unusual for his time. He no doubt expresses the view of practically all of the theocrats of his day. With such ideas of government and religion, it is not surprising that the rulers resented any questioning of their authority or wisdom.

At a later time Winthrop wrote, "The best part of a community is always the least, and of that best part the wiser is always the lesser."¹⁵ In keeping with this opinion he and the assistants continued to usurp authority until stopped by the freemen. Deputies were elected from each town in 1632 to meet with the Governor and assistants, but no rec-

¹⁴ Journal, 303

¹⁵ See below p

ord is found of their meeting and it is doubtful that they ever met. In 1634, before the meeting of the general court, the towns elected deputies to meet with them. The deputies having met, "desired a sight of the patent and, conceiving thereby that all their laws should be made at the general court, repaired to the governor to advise with him about it, He told them that, when the patent was granted, the number of freemen was supposed to be ... so few, as theywell might join in making laws; but now they were grown to so great a body, as it was not possible for them to make or execute laws, but they must choose others for that purpose; and that howsoever it would be necessary hereafter to have a select company to intend that work, yet for the present they were not furnished with a sufficient number of men qualified for such a business, neither could the commonwealth bear the loss of time of so many as must intend it. Yet this they might do at present, viz., they might at the general court, make an order, that, once in the year, a certain number should be appointed (upon summons from the governor) to revise all the laws, etc., and to reform what they found amiss therein; but not to make any new laws, but prefer their grievances to the court of assistants; and that no assessment should be laid upon the country without the consent of such a committee."¹⁶

The desire of Winthrop to restrict the power of the freemen did not materialize. Having discovered their rights they proceeded to assume them. The record of the court provides for the election of two or three deputies from each town who were to meet with the court, and who should "have the full power and voice of all the said freemen derived to them for the making and establishing of laws, granting of lands, etc., and to

¹⁶ Winthrop, I, 122f

deal in all other affairs of the commonwealth, wherein the freemen have to do, the matter of the election of magistrates and other officers only excepted, wherein every freeman is to give his own voice."¹⁷ The power of the freemen was gradually growing.

The two houses met as one body at first. The deputies, being the more numerous, could outvote the assistants. In 1634 the people of Newtown asked permission to leave and settle on the Connecticut River and a majority of the deputies were in favor of granting the permission, but a majority of the assistants were opposed. It was finally settled after a day of fasting and a sermon by Mr. Cotton. Possibly both combined silenced the deputies, for it was agreed that a majority vote of both branches was necessary, "Although all were not satisfied about the negative voice to be left to the magistrates, yet no man moved aught about it".¹⁸ The final step in dividing the houses occurred in 1644. At the general court in 1642 there "fell out a great business upon a very small occasion", to quote Winthrop. A suit arose over a sow belonging to a Mrs. Sherman. She sued a wealthy man to recover her property, and the case was finally appealed to the general court. The majority of the assistants held for the defendant, while the deputies cast their votes for the plaintiff.¹⁹ After two years of bitter controversy the case was settled out of court and a bicameral legislature was established.²⁰

The method of electing by primary assembly and proxies did not prove entirely satisfactory. The general court in October 1638 proposed a referendum looking toward a solution of the matter. The suggested law called for a system of electors, the freemen in the towns to choose one

¹⁷ Shurtleff, I, 115

¹⁹ Ibid., II, 64ff

¹⁸ Winthrop, I, 132ff

²⁰ Ibid., 116 et seq., Shurtleff, II, 58f

elector for ten citizens. These electors were to have "power to make election for all the rest, & in this way to be at liberty whether they will loyne altogether or vote severally, or to vote so as e very one that hath 10 votes shalbee an elector, & matrats & eldrs to put in their votes as other freemen." The system was sent to the towns by the deputies, but no record is found of any action ever being taken on it, and elections continued as usual.²¹

Massachusetts furnishes a very interesting example of New England theocracy. Failure to accept the authority of the rulers made the offender liable to charges of heresy, infidelity, or worse. The charter, intended primarily for a small trading company in England, was twisted so as to establish a religious oligarchy. The presence of a large body of independent land owners forced an extension of the suffrage, but it was so restricted and the assistants retained such powers that, with the aid of the clergy, they remained the dominant power unto the end of the old charter (1686). The "business of the sow" gave Massachusetts the credit for the first bicameral legislature in America, but more significantly it established the veto power of the assistants. The usurpation of authority by Winthrop and his associates was for religious and practical reasons, according to the Governor. Whatever the reasons, the struggle on the part of the freemen to gain their rights presents the usual picture of the people gradually taking control of the government under which they live, yet until Massachusetts received a new charter in 1691 it was the least democratic of the New England colonies.

²¹ Shurtleff, I, 333f

CHAPTER IV

CONNECTICUT

The title to the land of Connecticut was vague. A patent from Robert, Earl of Warwick, dated March 19, 1631 (o.s.) was given to "William Viscount Say and Seal, Robert Lord Brooke, [and ten others] their heirs and assigns, and their associates forevermore". The boundaries were very indefinite, based more on imagination than on geography. The privileges granted were more inclusive, if possible, than the land boundaries, including "all jurisdictions rights and royalties, liberties, freedoms, immunities, powers, franchises, preeminences, and comodities whatsoever", except a fifthe part of the gold and silver ore.¹ During 1635 and 1637 people from the Bay Colony moved to Connecticut and settled Wethersfield, Windsor and Hartford. The principal settlers were the congregations of the churches at Dorchester, Watertown, and Newtown. The latter congregation which settled at Hartford was under the able leadership of Thomas Hooker.²

Hooker's attitude toward democracy is plainly shown in a letter to Winthrop. In 1638 the Massachusetts governor wrote to Hooker complaining about the "divers scores men" who had part in the government of Connecticut. He also says, "I expostulated about the unwarrantableness and unsafeness of referring matter of counsel or judicature to the body of the people, quia the best part is always the least, and of that best part the wiser part is always the lesser".³ To this complaint Hooker replied, "in matters of greater consequence which concern the common good a general counsel, chosen by all, to transact businesses which concern all, I conceive, under favour, most suitable to rule and most safe for

¹ Hinman, R. R., Letters From English Kings and Queens, 14

² Winthrop, Journal, 132-135

³ Ibid., 290

relief of the whole".⁴ This attitude on the part of the leader had great influence on the government of Connecticut.

The boundaries and title of Connecticut both being vague, the general court of Massachusetts Bay in session on March 3, 1635/6 decided that the settlers of the river towns would need some type of government. The court issued a commission to Roger Ludlowe and seven others to govern the towns. Provision was made to recall the commission and surrender the claim to control if the settlers adopted a form of government which was agreeable to Massachusetts.⁵ In May 1637/8 the inhabitants of the three towns, Windsor, Hartford, and Wethersfield, met in their towns and sent representatives to a general court at Hartford. The court consisted of six assistants and nine representatives. No reference to the election of these delegates is made in the records, but the court for May 1637 gives the names in the organization. The six assistants are the same as those who had held office before, under the appointment of Massachusetts.⁶

On the 14th of January, 1638/9 the free inhabitants of the towns met again at Hartford and adopted the Fundamental Orders. Most historians hold that the constitution was adopted by a primary assembly. Some, however believe that it could have been ratified by the assistants and representatives elected by the towns in the preceding year.⁷ The statement in the preamble, "We the inhabitants of Windsor, Hartford and Wethersfield..." is not conclusive one way or the other. Andrews's only argument is that such action would seem unnecessary, as the court was a representative body, and unlikely, as the time of year was not favorable for holding a mass meeting at Hartford". The argument is not convincing. The

⁴ Wright, B.F., Jr., Source Book of Am. Pol. Theory,

⁵ Shurtleff, Recs. of Mass., I, 170f

⁶ Trumbull, JH., Public Records of the Colony Of Connecticut, I, 9

⁷ Andrews, C. M., Fathers of New England, 622-623

towns were close together and congregational meetings were customary. Until better evidence is produced to the contrary it seems safe to say that this was the "first written political constitution in which the functions of government are formulated in detail",⁸ and also the first popularly ratified constitution in America.⁹ The popular ratification is by no means impossible. The Fundamental Orders are based on the town meetings. The records show other instances of popular ratification of amendments, which will be discussed later. The sixth order plainly states that the final and supreme authority shall rest with the majority of the freemen. It is more than likely that this provision was made by the freemen themselves.

The wording of the Fundamental Orders shows that no outside force, whether King, church or government was recognized. There is no reference in the governors oath to the King.¹⁰ The eleven articles each begin with the phrase, "It is ordered sentenced and decreed...." "The conventional phrase 'Be it enacted' as traditionally prefixed to each section of a parliamentary statute bore originally a meaning of petition; may it be enacted, i. e. by the sovereign. This phrase those men of Wetherfield, Windsor and Hartford rejected, substituting for it in every instance 'it is ordered, sentenced and decreed' and they must have done it intelligently and as signifying that they held their action subject to no review confirmation or veto by any outside authority."¹¹ Connecticut placed a very high estimate on her political rights and her ability to exercise them.

The constitution provides for two courts; one, a general court com-

⁸ Channing, I, 403

⁹ Lobingier, 91

¹⁰ Hinman, 26

¹¹ Lobingier, 90f, quoting Twitchell's Historical Address at the Celebration of the Two Hundred and Fiftieth Anniversary.

posed of twelve deputies, four from each town, the six magistrates, (or assistants) and the governor, was to meet in September of each year. This was the legislative body. The election court meeting in April, was a primary assembly composed of all the freemen of the colony. The governor and assistants were to be elected by the freemen only. The deputies were elected by all the admitted inhabitants of the towns. This is a peculiar provision. Those who are inhabitants, but not yet admitted as freemen, have an indirect voice in the election of officers and the making of laws, but no part in the election of the governor and assistants.

The assistants were to be nominated by the deputies in the general court in September and were voted on in the election court in April. Each town, through its deputies, was allowed to nominate two, and the court could add as many as desired. Further recognition of the sovereignty of the towns is shown by a decision handed down in 1643. The question was evidently brought before them as to who had the authority to pass on the qualifications of inhabitants for the election of deputies. The seventh order is not clear in providing that "Deputies shall be chosen by all that are admitted inhabitants in the several Townes and have taken the oath of fidelity". The general court followed the rule given in the first order which provided for the election of the governor. The electors were to be freemen who had taken the oath of fidelity, lived within the jurisdiction, "(Having been admitted inhabitants by the major part of the Towne wherein they live) or the major part of such as shall be then present." In their decision the court declares their judgment that such only shall be counted admitted inhabitants who are admitted by a general voate of the major pte of the Towne that receaveth them".¹² The question

¹² Trumbull, I, 96

was thus referred to the town meeting, unquestionably a primary assembly, for settlement of qualification of voters.

While the Connecticut constitution makes no definite provision for amendments, the general court has given supreme power "to make laws or repeal them". Notwithstanding the power of the general court to repeal laws, the first important change in the Fundamental Orders was made by the freemen. According to the first order the court of elections was to be held the second Thursday in April. This date was observed for several years, but in 1646 "The freemen finding it inconvenient to attend the Court of Election the second Thursday in April have ordered it for hereafter to be kept the third Thursday in May, and the Magistrate to hold until that day".¹³ Here is an amendment probably made by a primary assembly, and certainly a clear case of popular ratification.

The credit for the origin of the modern referendum must go to Connecticut. It has been held by some that the modern referendum originated with the Connecticut constitution of 1818.¹⁴ Other colonies of New England referred laws and amendments to the voters, but the referenda were to the primary assemblies of the towns or the colony, and not by ballot. In 1660 the court of Connecticut clearly established the referendum in connection with the ballot. The first and fourth of the Fundamental Orders declare that the governor shall be elected for one year and not more than one in two. The people of Connecticut were so well pleased with the administration of John Winthrop, Jr., that they desired his reelection. On April 11, 1660, the proceedings of the general court reported: "This court considering the necessity of altering that particular in

¹³ Trumbull, I, 140

¹⁴ Lobingier, 93, citing Borgeaud on American Constitutions

ye 3^d Law,¹⁵ respecting the choice of a Gouvernor, vidz: That noe person be chosen Gour. above once in two yeares, have thought meet to propound it to ye consideration of ye freemen of this collony and doe order the Secretary to insert the same in the Warrts for ye choice of Deputies, and request the return of ye remote plantas: (yt vse to send Proxies at ye Election by their deputies. And it is desired that their proxies may be ordered according to what may be concluded on about ye orde foremenyioned."¹⁶

Here is an instance of the legislative body framing an amendment and then submitting the proposed change to the freemen directly. The record of the election court held May 17, 1660, gives the ratification. "It was voted by the freemen that ye perticular in ye 4th Law respecting the choice of the Gouvernor, should be altrd, and that for future there shall be liberty of a free choice yearly, either of ye same person or another, as may be thought meet, without priudice to ye law, or breach thereof".¹⁷ The fact that this referendum was included in the warrants was unique for that time. All the inhabitants of the towns voted for the deputies and the inclusion of the referendum in the ballot presented the question to all the inhabitants of the colony, but was to be voted on by the freemen only. The power to repeal laws, granted to the general court was not exercised, at least in these two amendments. Such action seems to indicate that the people of Connecticut believed a majority of the freemen were supreme in legislation.

The modern forms of direct legislation, initiative and referendum, are not found complete in Connecticut. The instances of referendum have

¹⁵ Should read 4th. Correct in the record of the vote.

¹⁶ Trumbull, I, 346

¹⁷ Ibid., 347

been shown. The initiative and the recall are provided for, but only indirectly. The system of deputies, elected annually by the towns practically guaranteed responsible government and made unnecessary the initiative and recall. The deputy could be instructed or reprimanded, as the case might be, at the annual town meeting. The constitution made provision however for the people to take direct control if the governor and magistrates should go too far toward arbitrary government. It was not a matter of impeachment, but of the people themselves reassuming the powers of government. The sixth order reads in part: "And if the Gournor and Mayor prte of Magestrate shall ether neglect or refuse to ca ll the two Generall standing Courts or ether of them, as also at other tymes when the occations for the Comonwelth require, the Freemen thereof, or the mayor prte of them, sh ll petition to them see to doe; if then yt be ether denyed or neglected the said Freemen or the Mayor prte of them shall have power to give order to the constables of the seuerall Townes to doe the same, and so may meete together, and chuse to themselves a moderator, and may proceed to do any Acte of power wch any other Generall Courte may."

As to the power of the general court the tenth order provides: "In wch said Generall Courts shall consist the supreme power of the Commonwelth, and they only shall have power to make laws or repeale them... and also shall have power to call ether Courte or Magestrate or any other person whatsoever into questi n for any misdemeanor, and may for just causes displace or deale otherwise according to the nature of the offence".

It is hard to imagine government more responsible to the voters than that founded by the Fundamental Orders. The initiation of legislation

could be effected through the instruction of the deputies in the town meetings, and through the election of the governor and magistrates in the court of election which was a primary assembly. There was but one loop-hole; the governor and assistants could refuse to call for a meeting of the courts. In such an event the freemen, or a majority of them, could take over the government and call a meeting of the primary assembly. In this general court was the supreme power of the Commonwealth, and it could initiate legislation, repeal laws, and recall, or displace any officer, and "call ether court...into question for any misdemeanor".

In spite of the provisions made for direct legislation, the colony depended for the most part on representative legislation. The system of representatives was not a development from the primary assembly, which was limited to elections and to cases of rare emergency. The people of Connecticut were accustomed to delegated powers. Massachusetts had developed a system of representation and we find it transplanted in Connecticut. Before the adoption of the Fundamental Orders the towns had elected delegates to replace the commission appointed by Massachusetts.

Connecticut, like Plymouth, believed in the power of the people to rule. To this colony we must give credit for the first written constitution, the first constitution popularly ratified, and the first use of the referendum in connection with the ballot. Another unusual feature is the right of the people, in the form of a primary assembly, to re-assume the powers of government in case of an emergency. A wonderful system of government was developed, to be marred by Connecticut theology.

The settlers of the 'Little Commonwealth' were from Boston, but not of Boston. A strictly Puritan group, fresh, Stephen's parish in London, they dropped to Boston in 1637. Their intention was to found a Puritan commonwealth and in the following spring they pushed over to Long Island Sound and settled at a place the Indians called Quinnipiac. The land was purchased from the natives after the town had been settled, and the title thus obtained was the only one possessed by the settlers.¹ They, like Connecticut, had no charter, and, unlike the neighbor colony, did not have a patent. The title from the Indians was not recognized in England.² With no legal claim to the land, or right to govern the country, it is not surprising

CHAPTER V

NEW HAVEN

The colony consisted at first of only the town. In 1642 more land was bought from the Indians and the towns of Greenwich, Stamford, and Saybrook were settled. Outside this territory Guilford and Milford were founded.³ In 1648 Stamford and Saybrook joined New Haven. Guilford was added to the colony in 1649, but Greenwich remained separate until 1656. The others joined with New Haven in 1654, chiefly through the formation of the New England Confederation.⁴ These towns, more or less united, formed the colony of New Haven. It was not a federation of towns, nor was it a pure union. The peculiar formation gave rise to many of the peculiarities of government.

¹ Cf. the settlement of Quinnipiac, the principle of discovery was not applied. Cf. *Journal of the Connecticut Colony in the 17th Century*, p. 102.
² *Ibid.*, p. 102.
³ *Ibid.*, p. 102.
⁴ *Ibid.*, p. 102.

The settlers of the "Bible Commonwealth" were from Boston, but not of Boston. A strictly Puritan group, from St. Stephen's Parish in London, they stopped at Boston in 1637. Their intention was to found a Puritan commonwealth and in the following Spring they pushed on to Long Island Sound and settled at a place the Indians called Quinnipiack. The land was purchased from the natives after the town had been settled, and the title thus obtained was the only one possessed by the settlers.¹ They, like Connecticut, had no charter, and, unlike the neighbor colony, did not have a patent. The title from the Indians was not recognized in English law.² With no legal claim to the land, or right to form a government, it is not surprising that New Haven did not hold allegiance to King, Parliament, or any other outside authority. They formed, with Connecticut and Plymouth, the third independent squatter colony.

The colony consisted at first of only the town. In 1640 more land was bought from the Indians and the towns of Greenwich, Stamford, and Southold were settled. Outside this territory Guilford and Milford were founded.³ In 1642 Stamford and Southold joined New Haven.^{3a} Guilford came into the colony in 1640, but Greenwich remained separate until 1656. The others joined with New Haven in 1643, chiefly through the formation of the New England Confederation.^{3b} These towns, more or less related, formed the colony of New Haven. It was not a federation of towns, nor was it a pure union. Its peculiar formation gave rise to many of its provisions of government.

To the settlers of Quinnipiack, the principle of democracy was not

¹ Osgood, H. L., American Colonies in the 17th Century, I, 323

² Chitwood, 158

³ Osgood, I, 324

^{3a} Hoadley, New Haven Colonial Records, I, 70, 78

^{3b} Ibid., 96, et, seq.

new. Like the colonists of Plymouth, they were familiar with the congregational polity before they left England. As members of the church of St. Stephens they had the privilege of electing their own pastor by popular vote. On October 6, 1624, they elected as their vicar, John Davenport, and with Theophilus Eaton, Davenport led in the founding of the new colony.

At the time of the settlement the freemen entered into a covenant or contract. The covenant has been lost, but a record of the following year gives the character of the first compact. "Whereas there was a covt. solemnly made by the whole assembly of free planters of this plantation the first day of extraordinary humiliation wch we had after we came together, thatt, as in matters that concerne the gathering and ordering of a church, so likewise in all publique offices wch concerne civill order, as choyce of magistrates and officers, making and repealing of lawes deviding allotments of inheritance, and all things of like nature, we would be ordered by those rules which the scriptures hold forth to us"⁴ It seems probably that this record gives a complete summary of the plantation covenant. It was adopted by a primary assembly. Little else can be said for it. To be held by the rules which the scriptures hold forth is an extremely vague contract. The interpreter of the scriptures becomes the maker of the laws. Such actually was the case under the government adopted by the freemen. With such a provision the word of the law maker becomes sacred. A violation of the civil law is a violation of God's law, and doubt as to the wisdom of a judicial decision or a legislative enactment takes the form of heresy.

The New Haven Fundamental Agreement was entered into on June 4, 1639.⁵

⁴ Ibid., 639

⁵ Ibid., 11-17

On that day the free planters met in a barn "for the establishment of such civil order as might be most pleasing unto God, and for the choosing the fittest men for the foundation work of a church to be gathered." The meeting was led by John Davenport who seems to have had the agreement prepared in advance. He presented six "Quaeries" upon which the freemen voted by show of hands. After the vote the query was again read with the record of the vote and the freemen again voted that such was their decision. The six propositions were passed by unanimous vote.

Mr. Davenport first propounded the question, do the scriptures hold forth a perfect rule for government, including commonwealths? The plantation covenant referred to above was then reaffirmed by all. The third resolution called for a vote of all those who wanted to be received as free planters and church members. The planters then voted that they were responsible for forming a civil government according to the will of God. The fifth query asked "Whether free burgesses shall be chosen out of church members, they that are in the foundation work of the church being actually free burgesses, and to choose to themselves out of the like estate of church fellowship; and the power of choosing magistrates and officers from among themselves, and the power of making and repealing laws according to the word, and dividing of inheritances and deciding of differences that may arise and all the businesses of like nature are to be transacted by these free burgesses." This agreement was accepted by the entire body, using the double vote.

After the vote one man stood up and dissented from the opinion of the freemen. He agreed with all of the proposition, "only at this he stuck, that free burgesses planters ought not to give this power out of their hands". He refused to give his reasons on the grounds that he voted for

the agreement, but wished to express his disapproval. He contended that "all the free planters ought to resume this power into their own hands again if things were not orderly carried...." Those favoring the surrender of power did so feeling that they were exercising their power in giving consent to its delegation. Others argued that all in turn hoped to be in power themselves. Theophilus Eaton gave as a precedent the companies in London. Mr. Davenport called for another vote which was unanimous as before. It was ordered that all the planters in the future must sign this agreement before becoming free burgesses. Thus the people surrendered their powers to the elect by unanimous vote and with but one dissenting voice. "The free planters of Quinnipiac had voluntarily renounced their sovereign rights and transformed their democracy into an aristocracy."⁶

The last query provides for the election of twelve burgesses who are to select from among themselves for the "foundation work" not more than seven. Provision was made that in the future all planters admitted to the plantation must sign the Fundamental Agreement. In these queries power is delegated absolutely and no provision for the referendum or initiative is made. Direct control was exercised, if at all, in the town meeting which gathered for the election of magistrates and deputies. The lone voice that cried for popular control was unheard.

The agreement of the town of New Haven became the compact for the other towns forming the "Combination" called New Haven. On the 23d of October, 1643, a general court was held for the town of New Haven. The record recounts the blessings enjoyed under the aristocracy.⁷ With regard to the other towns in the combination the record continues: "Whereas

⁶ Lobingier, 97, quoting Levermore, The Republic of New Haven, 18

⁷ Hoadley, I, 240

Stamforde, Guilforde, Yennicoock, have upon the same foundations and engagements entered into combination with us...", thus clearly showing that the whole colony admitted only recognized church members as free burgesses. A peculiar situation arose over Milford. Again citing the record of the town meeting: "of late there have been some meetings and treaties between some of Milforde and Mr. Eaton, about a combination by which it appeareth that Milforde hath formerly taken in as free burgesses six planters who are not in the church membership, which hath bred some difficulty in the passages of this treaty, but, at present it stands thus: the deputies for Milforde have offered, in the name both of the church and the town, First, that the present six free burgesses who are not church members shall not at any time hereafter be chosen either deputies, or into any public trust for the combination. Secondly that they shall neither personally nor by proxy, vote at any time in the election of magistrates. And, thirdly, that none shall be admitted freemen or free burgesses hereafter at Milforde, but such as are church members, according to the practice of New Haven. Thus far they granted, but in two particulars they and their said six freemen desire liberty, first that the said six freemen being already admitted by them, may continue to act in all proper particular town business wherein the combination is not interested, And, secondly, that they may vote for the deputies to be sent to the general courts for the combination or jurisdiction, which deputies so to be chosen and sent shall always be church members."

The agreement was accepted by the whole court. The six freemen thus had the distinction of being citizens of Milforde, but not of the colony. Their suffrage was limited to voting for deputies and "all proper

particular town business" wherein the town is the only one interested. A clear distinction is thus made between the jurisdiction of the colony and that of the town. Dual citizenship is recognized, though in an emergency, it is true. These men were free burgesses in Milforde, but only planters in the colony of New Haven. At a court held for the "jurisdiction" the same day the general court shows its supreme authority. "It was agreed and concluded as a fundamental order not to be disputed or questioned hereafter, that none shall be admitted to be free burgesses in any of the plantations within this jurisdiction for the future, but such planters as are members of some or other of the approved churches in New England, nor shall any but such free burgesses have any vote in any election, (the six present freemen at Milforde enjoying the liberty with the cautions agreed,) nor shall any power or trust in the ordering of any civil affairs be at any time put into the hands of any other than such church members, though as free planters, all have right to their inheritance and to commerce, according to such grants, orders and laws as shall be made concerning the same."⁸ In the future, citizenship was to be under the jurisdiction of the colony.

At the same general court the plan of government was outlined. The burgesses were to meet once a year in an election court. Besides other officers, they were to "choose so many magistrates for each plantation as the affairs may require, and as they shall find fit men for that trust". The court of magistrates met twice each year to try cases appealed from the plantation courts and those over which the lower courts had no jurisdiction. The magistrates court had no legislative power. Each plantation was allowed two deputies, elected annually by the primary assemblies.

⁸ Hoadley, I, 241 et seq.

These deputies, with the governor, deputy governor, and magistrates, formed the general court which met at New Haven in April and October.

The general court was the true legislative body. It had "power to make and repeal laws, and, while they are in force, to require execution of them in all the several plantations". The general court also served as a supreme court. The fifth article granted them the right "to hear and determine all causes, whether civil or criminal, which by appeal or complaint shall be orderly brought unto them from any of the other courts, or from any of the other plantations". The upper and lower groups met as one body, but voted separately. The above mentioned article provides: "In all which... they shall proceed according to the scriptures, which is the rule of all righteous law and sentences, and nothing shall pass as an act of the general court but by the consent of the major part of magistrates, and the greater part of deputies".

The power of initiative in legislation was not provided and could not have been used to any great extent. It is probable that issues were discussed in the town meetings for election of deputies and also in the annual election court for the general elections. No reference is found to such actions and it must be concluded that the people of the colony were not interested in direct control of their government. They did however consider voting a duty and make provisions for the proxy. The third article states, "for the ease of those free burgesses, especially in the more remote plantations, they may by proxy vote in these elections, though absent, their votes being sealed up in the presence of the free burgesses themselves, that their several liberties may be preserved, and their votes directed according to their own particular light...." It is interesting to notice that in the little colony suffrage was a liberty

worthy of being preserved.

The New Haven general court seems to have been a very powerful body, exercising legislative, executive, and judicial functions without limit. The magistrates served as associate judges in their local plantation courts, heard cases appealed from them in the court of magistrates, and became supreme judges as well as law makers in the general court. Truly magistrates, who had the power to assist in hearing a case three times and then to take part in repealing the law by which it was tried, should be "fit men".

The "Bible Commonwealth" preferred an aristocracy to a democracy. Their trust in the "foundation" members of the colony was evidently based on personal acquaintance. New Haven is unusual in that the rights of the people are definitely and permanently delegated by a primary assembly to a small group. Again, theology was used to mar a direct, responsible, government.

The settlement of Rhode Island is too familiar to need much recounting. The banished Roger Williams has become legendary and many of the accounts of his life are of the same nature. In 1636 he proceeded, with five or six associates, to Narragansett Bay and founded the town of Providence. In a letter to Governor Winthrop, written the same year, Williams says: "The sanitation of myself & these few families have planting with us, you know full well; we have no potent; nor with the face of a legislative writ with our present sanitation. Moreover, the masters of Providence have not more a fortnight & consulted about our common peace, which, & plantings and mutual consent hath finished all matters with speed and peace".¹ It

is evident from this letter **CHAPTER VI** ment of a simple nation was established soon after the settlement, but without any charter or legal rights to the land. **RHODE ISLAND**

Williams purchased the land from his friends, the Narragansetts, and then divided the title with eleven associates.² One of the twelve, William Harris, wrote in 1677: "It was about 40 years since, for we have possessed it ever since 1637 or 38 or rather before, before there was any other English in these parts here we were, Rhode Island was purchased after we had been settled & planted & yet their grant bears date 1637, but Mr. Williams and the King's power cast him out, & he did not know whether the King would give him, so he took a date of his own, & so making his disposition we were unwilling to strive, & his date was from his plantation, not from the gift of our Lord, nor King then, according like that of the long since planting with Oakes, followed by the Children the people that thence

¹ Osgood, R. I., Documentary History of Rhode Island, 32

² Jernegan, 159

The settlement of Rhode Island is too familiar to need much recounting. The banished Roger Williams has become legendary and many of the accounts of his life are of the same nature. In 1636 he proceeded, with five or six associates, to Narragansett Bay and founded the town of Providence. In a letter to Governor Winthrop, written the same year, Williams says: "The condition of myself & these few families here planting with me, you know full well: we have no patent; nor doth the face of a Magistracie suite with our present condition. Hitherto, the masters of families have met once a fortnight & consulted about our common peace, watch, & planting; and mutual consent hath finished all matters with speed and peace".¹ It is evident from this letter that a town government of a simple nature was established soon after the settlement, but without any charter or legal rights to the land.

Williams purchased the land from his friends, the Narragansetts, and then divided the title with eleven associates.² One of the twelve, William Harris, wrote in 1677: "It was about 40 years since, for we have possessed it ever since 1637 or 38 or rather before, before there was any other English in these parts here we were, Rhode Island was purchased after we had been settled & planted & yet their grant bears date 1637, but Mr. Williams and the Kings power cast him out, & he did not know whether the King would own him, so he took a date of his own, & we seeing his disposition we were unwilling to strive, & his date was from his plantation, not from the year of our Lord, nor King then, somewhat like that of the long since piping ratt Catcher, followed by the Children the people there thence

¹ Chapin, H. M., Documentary History of Rhode Island, 32

² Jernegan, 135

tooke theyr date, oures not being so memorable forgot."³ The difference in dates is thus explained. It was 1636 and not 1637.

That Williams was legally without rights and knew it is also shown by the letter of 1636 quoted above, in which he uses the phrase, "Vntil we heare further of the Kings Royall pleasure concerning ourselves". Notwithstanding the legal technicalities the town went ahead with its organization. By the end of the Summer the civic community allowed the practice of any religion not interfering with the common good. Land had been purchased from the Indians and distributed among the families, probably by oral deeds. One man, called the officer, had been appointed to act as chairman of the fortnightly meeting of the "howseholders". This body of masters of families managed the public affairs, and, according to Williams, "mutual consent finished all matters with speede & peace". The town of Providence became the model for the other towns which later made up the colony of Rhode Island.

As was usual in New England, the compacts of the various towns later composing Rhode Island were ratified by primary assemblies. The twelve associates at Providence found other settlers seeking the franchise and equality. In Williams' important letter to Winthrop he explains the situation. "Now of late some young men, single persons (of whom we have much neede) being admitted to freedom of inhabitation, and promising to be subject to the orders made by the consent of the howseholders, are discontented with their estate, & seek the freedome of the vote also, & equality, &c. ... Beside, our dangers (in the midst of these dens of lyons) now especially, call vpon vs to be compact in a civil way & vpon power.

³ Chapin, 36

"I have therefore had thoughts of propounding to my neighbors a double subscription, concerning which I shall humble crave your helpe.

"The first concerning our selues, the masters of families: thus,

"We whose names are here vnder written, late inhabitants of the Massachusetts, vpon occasion of some differences of conscience,) sic being permitted to depart from the limits of that Pattent, vnder the which we came over into these parts, & being cast by the Providence of our God of Heaven, remote from others of our cuntrymen amongst the barbarous in this towne of New Providence, doe with free & joynt consent promise each unto other, that, for our common peace & wellfare (vntill we heare further of the Kings Royall pleasure concerning our selues) we will from time to time subject ourselues in active and passive obedience to such orders & agreements, as shall be made by the greater number of the present howseholders, & such as shall hereafter be admitted by their consent into the same privilege & consent in our ordinarie meeting. In witness whereof we herovnto subscribe, &c.

"Concerning these few young men, & any who shall hereafter (by your favorable connivance) desire to plant with us, thus,-

"We whose names are herevnder written, being desirous of inhabiting in this towne of New Providence, doe promise to subject^x ourselves in active or passive obedience to such orders and agreements as shall be made from time to time, by the greatest number of the present howseholders of this towne, & such whome they shall admit into the same felowship and privilege. In witness whereof, &c."⁴ There is no contemporary account of the adoption of the first proposal by the householders, or heads of families, but the second was ratified in 1638 to 1640.⁵ Since the second

⁴ Chapin, 37f

⁵ Ibid., 97

is dependent upon the first it is very likely that both were ratified by the settlers.

In 1638 the town of Portsmouth was founded and the following compact was signed by the inhabitants: "We whose names are underwritten do here solemnly in the presence of Jehovah incorporate ourselves into a Bodie Politick and as he shall help, will submit our persons lives and estates unto our Lord Jesus Christ, the King of Kings and Lord of Lords and to all those perfect and most absolute laws of his given in his holy word of truth, to be guided and judged thereby".⁶

A primary assembly of the settlers of Newport, in 1639, before the actual settlement, adopted a compact in which they agreed that "our deliberations shall be by major voice of judge and elders".⁷ In 1641 a general court held at Portsmouth legislated for both Portsmouth and Newport, situated on the same island. As to their government they declared, "It is ordered and unanimously agreed upon, that the Government which this Bodie Politick doth attend unto in this Island and the Jurisdiction thereof, in favor of our Prince, is a Democracie or Popular Government; that is to say, It is in the power of the body of Freemen, orderly assembled or the major part of them to make or constitute Just Lawes, by which they will be regulated, and executed between Man and Man."⁸ Democracy in its pure form was thus familiar to the towns before they joined together to form the colony.

The idea of the referendum also was known in the town of Providence. With the arrival of more settlers in 1639 and 1640, the general town meeting became too cumbersome for the transaction of all business. For

⁶ Lobingier, quoting Rec. of the Colony of R. I., I, 52

⁷ Ibid., 80, Recs., I, 87

⁸ Ibid., 112

the purpose of settling differences, the town meeting chose four arbitrators. In 1640 the arbitrators presented a body of laws called "The Combination". According to the "Combination" the arbitrators were to serve as a jury or court. The legislative and executive affairs were to be in the hands of five "desposers" elected by the town meeting. According to Agreement Eight, "The five desposers shall from the date hereof meete Every month day upon Generall thinges; and at the quarter day to yeld to a new choise and give up theire old accountes...."⁹ The general court met every quarter and appeal was allowed from the desposers to the town meeting. "Also we agree tht if any of our Neighbors doe apprehend himself wronged: by these; or any of these: five desposers: tht at the Gennerall Towne meeting hee may have a Triall:.... Agreement 6, that if any man have a difference with any of the Five desposers: which cannot be deffered till Generall meeting of the Towns: hee may have the clarke call the towne together at his ocational tyme for a Triall."¹⁰ Here we find an unusual use of the referendum, in which decisions of a court are referred to the people.

The towns of Rhode Island continued until 1643 without any legal grant from the King. In that year Williams went to England and returned with a charter. According to it the Commissioners "give grant and confirme to the aforesaid inhabitants of the Townes of Providence Portsmouth & Newport, A free & absolute Charter of Civill Incorporation to be known by the name of the Incorporati n of Providence Plantacions in the Naragen-setts Bay in New England together with full power & authority to Govern & rule themselves & such others as shall hereafter Inhabite within any part of the said tract of land by such a form of Civil Government as by

⁹ Chapin, 112f

¹⁰ Ibid.

voluntary consent of all or the greatest part of them shall be found most suitable to their estates & Conditions, & to that end to make & ordaine such Civil Lawes & Constitutions & to inflict such punishments upon the transgressors, & for the execution thereof so to place and dispose officers of Justice as they or the greatest part of them shall by free consent agree unto. Provided nevertheless that the said lawes Constitutions & punishments for the Civil Government of the said plantation be conformable to the Lawes of England so farr as the nature & Constitution of tht place will admit."¹¹

A more liberal charter could not be imagined, but it was four years before the towns united to accept it. In 1647 the towns of Providence, Newport, Warwick, and Portsmouth met in a general court and adopted a code of laws. "It was unanimously agreed, That we do all owne and submit to the Lawes as they are contracted in the Bulke with the Administration of Justice, according thereto, which are to stand in force till the next Generall Court of Election, and every towne to have a Coppie of them, and then to present what shall appear therein not to be suitable to the Constitution of the place, and then to amend it."¹² Here we find the principle of repeal by the primary assembly, in this case a court of elections. Initiative and referendum were emphasized, with clearer details than in any other colony. In the code of laws mentioned above the methods of legislation are stated as follows:

"II. It is ordered, that all cases presented, concerning General Matters for the Colony, shall be first stated in the townes, Vigd't, That is when a case is propounded...The Towne where it is propounded shall agitate and fully discuss the matter in their Towne Meetings and conclude

¹¹ Ibid., 213

¹² Lobingier, 81, quoting Records, I, 148

by vote; and then shall the Recorder of the Towne or Towne Clarke, send a copy of the agreement¹³ to every of the other three Townes, who shall agitate the case likewise in each Towne and vote it and collect the votes. Then shall they commend it to the Committee for the General Courte (then a meeting called), who being assembled and finding the Major parte of the colonie concurring in the case it shall stand for a Law till the next Generall Assembly of all the people, when and there to be considered whether any longer to stand, yea or no: Further it is agreed, that six men of each Towne shall be the number of the Committee premised, and to be freely chosen. And further it is agreed, That when the General Courte thus assembled shall determine the cases before hand thus presented, It shall also be lawful for the said General Court, and hereby are they authorized, that if unto them or any of them some case or cases shall be presented that may be deemed necessary for the public weale and good of the whole, they shall fully debate, discuss and determine ye matter among themselves; and then shall each Committee returning to their Towne declare what they have done in the case or cases premised. The Townes then debating and concluding the votes shall be collected and sealed up, and then by the Towne Clarke of each Towne shall be sent with speed to the General Recorder, who, in the presence of the President shall open the vote; and if the major vote determine the case, it shall stand as a law till the next General Assemblie then or there to be confirmed or nullified."¹³ Such a system may have been slow and cumbersome, but it expressed the "sense of the people" in a very thorough way.

In 1650, a general court meeting at Newport delegated its authority to a representative body, consisting of six representatives from each

¹³ Ibid., 143f

town. With the election of a Committee to carry out legislation the towns did not give up their part in the ratification of laws. In the same year of their election this body presented the following law which repealed the one passed in 1647, as given above. "It is ordered that from henceforth the representatives committee being assembled and having enacted law or lawes, the said lawes shall be returned within six dayes after the breaking up or adjournment of that Assemblie; and then within three dayes after the chiefe officer of the towne shall call the Towne to the hearing of the Lawes so made; and if any of the Freemen shall mislike any law then made they shall send their votes with their names fixed thereunto vnto the General Recorder within tenn dayes after the reading of those lawes and no longer. And if it appeare that the major part vote within that time prefixed, shall come in and declare it a nullity, then shall the Recorder signifie to ye Townes that such or such lawes is a null, and the silence to the rest shall be taken for approbation and confirmation of the lawes made:...."¹⁴

As to the initiative, it was decreed by the Representative Committee in 1653 that "all orders made by the townes, either joyntly or apart, by authority of the charter, be authorized to be in force until by a General Assemblie repealed".¹⁵ In 1658 the court extended the time to twenty days after the adjournment of the legislature and made it clear that a majority of each town was necessary to annul a law.¹⁶ Again the time was extended in 1660, being made three months, or "fower score and six daies" after the laws were sent to the towns. It was also enacted that the laws could be repealed by a majority of all the voters, rather than a majority

¹⁴ Ibid., 229

¹⁵ Ibid., 260

¹⁶ Ibid., 401f

of each town. By this law the towns lost some of their federal power since the vote of a town was not considered if it were in the minority.¹⁷

A new charter was granted in 1663 by Charles II. This charter gave power to the assembly to "make, ordeyne, constitute or repeal laws, statutes, orders and ordinances, fformes and ceremonies of government and magistracies as to them shall seeme meete for the good and wellfare of the sayd gouvernour and company".¹⁸ The assembly evidently took upon itself the exclusive right to legislate, for in the following year they enacted: "That whereas ther are several lawes extant amongst our former lawes inconsistent with the present Government, as houlding of Courts of Comitions, and repealing of the acts of the General Assemblies by votings in town meetings together with several other of like natuer, which are contradictory to the forme of the present government, erected by his Majesties and gracious letters pattent, that all such lawes be declaredd null and voyd, and that all other lawes be of force vntil some other course be taken by a Generall Assembly for better provition herein."¹⁹ The charter continued as a colonial and state constitution until 1842. While not strictly suitable as a modern state constitution, the state did not see fit to make any change, preferring to interpret the charter in modern terms.

The history of Rhode Island shows many interesting features. The separation of church and state has not been discussed since it is not relevant. Another outstanding feature is the liberal charter and the length of time it was in force, coming down almost to the Civil War. The initiative and referendum were very thoroughly described and used with

¹⁷ Ibid., 429

¹⁸ Macdonald, W., Select Charters, 126-133

¹⁹ Lobingier, 85f, quoting Records, II, 27

great satisfaction for over a century and a quarter, both with and without representative government. Recall is not found and was probably not needed. The annual election of officers by an election court, so common in the colonies, made recall almost unnecessary. Everything considered Rhode Island furnishes one of the most fruitful studies of direct legislation to be found in the colonial governments.

CHAPTER VII

MARYLAND

The province of Maryland was given to Cecilius, Lord Baltimore, by Charles I in 1632. The charter, after defining the boundaries of the new colony, states: "And him the said now Lord Baltemore, his Heires and Assignes, Wee doe by these Presents for Us, Our Heires and Successors, make, create, and constitute the true and absolute Lords, and Proprietors of the Country aforesaid, and of all others the Premises, (except before excepted) saving alwayes, the faith and allegiance, and Sovereigne dominion due unto Us, Our Heires and Successors."¹ Thus Maryland became the first strictly proprietary colony. Baltimore was a Catholic and one of his purposes was the "propagation of the Christian Faith". He showed great wisdom in establishing religious toleration in his colony. In his instructions issued to the colonists in 1633 he "requires his said Governor and Commissioners tht in their voyage to Mary Land they be very carefull to preserve unity and peace amongst all the passengers on Shippboard, and that they suffer no scandall nor offence to be given to any of the Protestants, ... and that for that end, they cause all Acts of Romane Catholique Religion to be done as privately as may be and that they instruct all the Romane Catholiques to be silent upon all occasions of discourse concerning matters of Religion; and that the said Governor and commissioners treat the Protestants with as much mildness and favor as Justice will permitt. And this to be observed at Land as well as at sea."²

Not only was Maryland the first proprietary colony, but the charter was the first to mention representative government. "Know yee therefore moreover, that Wee ... doe grant free, full, and absolute power, by vir-

¹ For charter see Hall, C.C., Narratives of Early Maryland, 101-112

² Ibid., 16

tue of these Presents, to him (Baltimore) and his heires, for the good and happy government of the said Province, to ordaine, make, enact, and under his and their seales to publish any Lawes whatsoever, appertaining either unto the publick State or the said Province ... according unto their best discretions, of and with the advise assent and approbation of the Free-men of the said Province, or the greater part of them, or of them, or of their delegates or deputies, whom for the enacting of the said Lawes, when, and as often as neede shall require, We will that the said now Lord Baltimore, and his heires, shall assemble in such sort and forme, as to him or them shall seeme best."³

The instructions for the colonists, issued by Baltimore and sent to his brother, Leonard, who was the first governor, called for a meeting of all the freemen as soon as possible. They were to hear the instructions and the charter and to take an oath of allegiance to the King.⁴ No record is found of the earliest assemblies. Jernegan states that "The first assemblies of 1634 and 1636 seem to have been made up of the more important freemen....", but he gives no proof of the statement.⁵ Chitwood says the first assembly was held in 1635 and was composed of all the freeholders. He also does not cite his sources.⁶ In the assembly of March 1637/8 reference is made to the first assembly. "And whereas by an act of Generall Assemblie held at St. Maries on the six and twentieth day of Februry 1634 [i.e. 1635] among other wholesome lawes and ordinances then made and provided for the welfare of this Province...."⁷ The commission of Baltimore to the governor, dated April 15, 1637, refers to an assembly already held, and requests the governor "to assemble the freemen of

³ Hall, 104 f

⁴ Ibid., 20

⁵ The American Colonies, 68

⁶ Hist. of Colonial America, 106

⁷ Brown, W. H., Maryland Archives, I, 23

our said province, or their deputies, at St. Mary's upon the twenty-fifth day of January next unsuing the date hereof, and then and there to signify to them, that we do disassent to all the laws, by them heretofore, or at any time made within our said province, and do hereby declare them to be void;...."⁸ From these documents it is evident that an assembly met in 1634/5, and may have been the only one of which we have no records. The old and the new date probably accounts for the discrepancies in Chitwood and Jernegan.

The first assembly of which we have any record met at St. Mary's, January 25, 1637/8. A warrant, issued by Leonard Calvert to Captain Evelin, of the Isle of Kent, gives the following orders: "My dear brother the Lord Proprietor of this Province, hath by his commission to me...

appointed a grall assembly of all the freemen of this Province to be held at his town of St. Marjes on the five and twentieth day of January next." Evelin was required to appear at the assembly in person, "And further... to assemble all the freemen inhabiting within any part of yor jurisdiction; and then and there to publish and proclaim the said generall Assembly; and to endeavor to persuade such and so many of the said freemen as you shall thinke fitt to repair psonally to the said assembly at the time & place prefixed; and to give free power and liberty to all of the said freemen either to be pent at the said assembly if they so please; or otherwise to elect and nominate such and so many persons as they or the maior part of them so assembled shall agree vpon to be the deputies or burgesses for the said freemen, in the name and stead to advise and consult of such things as shalbe brouhgt into deliberation in the assem-

⁸ Bozman, J. L., History of Maryland, 291-294

bly."⁹

On the day appointed the court assembled with the Lieutenant General, Leonard Calvert, presiding. The freemen came in person or were represented by proxies.¹⁰ The Isle of Kent sent burgesses as well as some of their freemen. Those who came with proxies were called burgesses, for on the second day, according to the records, "Came John Langford gent... who had given a voice in the choice of Robert Philpott gent to be one of the Burgesses for the freemen of that Island; and desired to revoke his voice and be personally sent in the assembly and was admitted".¹¹ The number of the freemen and burgesses from the hundreds was not limited¹² and each man voted for himself and as many others as he represented by proxy. On one of the early votes the president and one freeman cast fourteen "voices".¹³ Ten persons were to constitute a quorum.¹⁴ A primary assembly of the freemen was desired under this arrangement and proxies were required of all those who could not be present in person. A fine was assessed against all those not present either way. On the fourteenth of March we find the assembly sitting as a court and trying a case of piracy, in which the prisoner was sentenced to be hanged. The verdict was given in a vote of the assembly and the "judgment affirmed and approved by special consent by word of mouth."¹⁵

The charter as we have seen, gave the proprietor the right to initiate laws. In the order for the assembly sent out by Leonard Calvert the freemen are summoned to "advise and consult of such things as shalbe brought into deliberation in the assembly". At the first meeting the freemen claimed the right of initiation. "Then was read the draft of

⁹ Browne, I, 1

¹¹ Ibid., 6

¹³ Browne, I, 9

¹⁵ Ibid., 16f

¹⁰ Ibid., 2ff

¹² Division of a county

¹⁴ Ibid., 4

the laws transmitted by the Lord Proprietor, ... and severally debated in the reading.... Then were the laws put to the question... affirmed by the president and Mr. Lewger, being 14 voices, denied by all the rest of the Assembly, being 37 voices"¹⁶ Thus the governor, acting for the proprietor, was denied the exclusive right to initiate laws.

In the assembly held February 1638/9 the promiscuous representation was abandoned. In a warrant to the Isle of Kent the commander is ordered to "assemble at Kent ffort, all the ffreemen inhabiting within the Isle of Kent and then and there to propound to the said ffreemen to chuse from amongst themselves two or more discreet honest men to be their deputies or Burgesses during the next Assembly... and if they agree not in the election, then you are to return upon the Instrument the names of such two or more persons upon whom the major part of the ffreemen soe assembled shall consent".¹⁷ Similar orders were sent to four other hundreds and five Gentlemen were summoned.¹⁸ At the meeting of the assembly an order was passed regulating the members of future assemblies. Those to be present were: Members of the council, "other gentlemen of able judgment and quality Summoned by Writt", the Lord of every manor, after manors were erected, and one, two, or more, burgesses from every hundred who were to be elected by the freemen.¹⁹ This system was followed until 1641/2 when Calvert called a primary assembly of the freemen to consider new laws. Proxies could be sent as had been done previously.²⁰ The proclamation calling the assembly in June 1642 limited the members from the hundreds to two burgesses each.²¹ In 1650 the number was definitely fixed at two from each hundred. In the same year the Council and

16 Ibid., 9

18 Ibid., 27

20 Ibid., 115f

17 Ibid., 16f

19 Ibid., 74f

21 Ibid., 127

Burgesses decided to "sit in two distinct rooms apart, for the more convenient dispatch of the business".²² The upper house was to be composed of the governor, the council, and the Gentlemen summoned.²²

The only direct legislation found in Maryland was in the meetings of the primary assemblies, and these contained some who were delegates. Such a mixed body is unique in colonial history. A freeman not only spoke for himself, but he might also be the representative of one or more others. A freeman who had sent a burgess might decide that he wanted to attend in person and go and withdraw his vote for the burgess. The court of elections in each hundred was also a primary assembly. No instances of initiative or referendum are found. Representative government became based on equality of representation, two burgesses from each hundred. Maryland has the distinction of being the first proprietary colony and the first to have a charter providing for representative government. It also developed the second bicameral legislature.

Representative legislation developed in all the colonies studied, regardless of the original form of government. It was expressed in form of government where the colonies controlled by a proprietor, a company, or an aristocratic group, and at the other extreme were those controlled by the people through a primary assembly. Between these extremes are two other forms: representative legislation, and primary assemblies in the local units with delegates to a general court of the colony. All four stages are found in the early colonies. Representative legislation in various forms. It was granted in Virginia, demanded in Massachusetts, provided in Maryland before the primary assembly, was adopted at the primary assembly in New Haven, and developed from the primary assembly in the other New England colonies.

CONCLUSION

Representative legislation and primary assemblies are also found. These main features may be said to include all others. (1) Representative legislation through representative elected assemblies, with the growth of population the primary assembly became an assembly, and all colonies were at a standstill until the affairs of state were finished. (2) These assemblies had to be elected and members paid to the assembly. (3) Representative was essential. Not only was it essential and essential, but (4) it secured the cooperation of the people. In these colonies where the people were in direct control the system worked to maintain their co-operation as before. In the governments where the people had been without power it furnished a compromise. The rulers were satisfied for government but not too placed in the hands of all the people without reservation, and the people were satisfied because they had secured a voice in their own government. Representative and

Representative legislation developed in all the colonies studied, regardless of the original form of government. At one extreme in form of government were the colonies controlled by a proprietor, a company, or an aristocratic group, and at the other extreme were those controlled by the people through a primary assembly. Between these extremes are two other forms: representative legislation, and primary assemblies in the local units with delegates to a general court of the colony. All four steps are found in the early colonies. Representation developed in various ways. It was granted in Virginia, demanded in Massachusetts, provided in Connecticut before the primary assembly, was adopted at the primary assembly in New Haven, and developed from the primary assembly in the other three colonies. The causes of representative legislation are also varied. Three main reasons may be said to include all others.

- (1) Legislation through representatives proved convenient. With the growth of population the primary assembly became cumbersome, and all business was at a standstill until the affairs of state were finished.
- (2) Since business had to be neglected and expenses paid to the assembly, representation was economical. Not only was it convenient and economical, but (3) it secured the cooperation of the people. In those colonies where the people were in direct control the system served to maintain their co-operation as before. In the governments where the people had been without power it furnished a compromise. The rulers were satisfied for government had not been placed in the hands of all the people without reservation, and the people were satisfied because they had secured a voice in their own government. Representation was

used or considered in almost every form. Delegates from a political division were common. Unique was the system followed for a time in Maryland, in which the burgess could represent himself and as few as one other. At the other extreme we find Massachusetts with an unenforced statute providing for each ten freemen to elect one delegate to cast votes for them, an early form of our system of electors. The fact that the colonies, with their various original governments, developed the same principle of legislation seems to prove that representation is the best method of legislation.

The using of proxies found great favor in the colonies. Adopted because of economy and convenience, it continued to gain in popularity until the election court disappeared. Only one regret was expressed over the disappearance of the primary assembly for elections, and that was because the discussions would be lost.¹ Under modern conditions that objection cannot hold and the ballot stands without condemnation as far as the experience of the colonies is concerned. Massachusetts did not find it perfect, but adopted no better system.

In every colony the assembly originated as one house. In one colony, Plymouth, it continued as such. Political theories of checks and balances may have been known, but the houses actually divided because of disputes. There is no great political theory to bound in the "business of the sow" that created the first bicameral legislature in America.² The upper house, magistrates or council, and the lower house, deputies, delegates, or burgesses, represented different groups in all the colonies except Plymouth. In some colonies the upper group were appointed by a person or group, while the lower was elected by the people. In

The ballot and a decision by the majority of the voters of the entire

other colonies the upper group represented the aristocracy or theocracy, while the lower represented the common people. In either case there was a conflict of opinions not due directly to any theory of government. The modern bicameral legislature may be justified, but its origin does not provide the justification. No longer do we have a proprietor, a company, a king, or an aristocratic or theocratic group that needs or deserves special representation. The origin of the assemblies disproves the common theory that the bicameral legislature is an imitation of the British Parliament. The origin is not so simple. Every assembly originated as one house, and it was twenty five years from the date of the first assembly in Virginia in 1619 to the date of the first bicameral legislature in Massachusetts. Plymouth never changed her unicameral house and the other colonies maintained theirs for periods of time ranging from ten years in Massachusetts to over sixty in Virginia.

Direct legislation by a primary assembly was used in all the seven colonies except Virginia. It was used but once in New Haven and on that occasion the people delegated their powers without reservations. Little use was made of it in Massachusetts, or in Maryland after the primary assembly stage. Direct participation was common in the other three colonies and reached its highest stage of development in Rhode Island. In the colonies which previously had had direct control by the primary assembly it was accepted as the logical procedure. In the others it was used with an ulterior motive. Individual participation by the people in the making of laws meant individual support in upholding those laws. The methods ranged all the way from personal participation in a primary assembly to the submission of the questions to the people by means of the ballot and a decision by the majority of the voters of the entire

colony. The latter is a very modern method. Court decisions were submitted to the people on occasion, and primary assemblies sat as courts of appeals, but such an exercise of the judicial function did not grow in popularity.

Direct legislation proved satisfactory and no abuses of its use are found. The fact that it died out in popularity does not prove that it was not successful, but rather that it was not needed to any great extent. Small towns and small populations meant that representation was responsible. No case is found of recall, and it was probably not needed. The people knew their representatives personally and the representatives knew their constituents. The sense of the people was not hard to ascertain. The study of the legislation in the colonies shows that the people raised no objection to laws passed by themselves or by their direct representatives. If we are to learn from their experiences we must recognize that government is most satisfactory when it most nearly represents the will of the people. The will of the majority then, proves best in the long run for the people, though the will of the majority may not always be right. Laws to be observed must have the sanction of those who are to observe them, and representatives must express the will of the voters when that will can be ascertained.

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