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LEGAL INSTITUTIONS OF THE PILGRIMS

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(A paper presented to the Law Club)

FAMILIAR is the general narrative of the Pilgrims. From schoolboy days we have known about the bitter persecutions which drove that group of Separatists from the hostile bounds of England, the brief sojourn which they enjoyed upon the hospitable shores of Holland, the causes which led them to seek an unsettled, distant land. We have thrilled again and again to the story of the obstacles which beset the embarkation of that intrepid band, of the perils of their voyage across the stormy waters of the Atlantic, of the famine, sufferings and privations of their wilderness life. Gripping though that story is, equally fascinating and inspiring, but little known and less appreciated, is another phase of their eventful lives: the system of law and order which they evolved. Simple and crude that system was, but in it we find the very foundation stones of republican institutions on this continent. Too deserving it is for a treatment so imperfect and sketchy as this will be.

In 1620 when the *Mayflower* set sail for this continent, English colonies had already been planted in Virginia. A charter had been granted by the Crown to the Virginia Com-

Author's Note: The value, if any, of a historical sketch, as this aspires to be, depends to a large extent, of course, upon the sources from which it is drawn. The material for this has been gathered principally from the following works: Bradford's *History of Plymouth Plantation*; Mourt's *Relation*; *Plymouth Town Records*; *Ancient Landmarks of Plymouth*, Hon. Wm. T. Davis; *Bancroft's History of United States*; *Goodwin's, Pilgrim Republic. Historical Memoir of New Plymouth*, Hon. F. Baylies; *Martyn's Pilgrim Fathers of New England*. The first three are primary sources; the remaining ones, while secondary authorities, are believed to rank high in accuracy and trustworthiness. One original authority, *Plymouth Colony Records and Laws*, has unfortunately not been accessible. Perhaps, without it, no attempt as this is warranted; with it many details, wanting herein, could no doubt have been supplied and numerous questions occurring to the reader, could have been answered. Citation of authorities for most of the historical facts stated has seemed impracticable, and some quotations occur without accrediting the authority quoted.

pany, which was comprised of two divisions or companies—the one, the London, or southern company, had been granted authority to locate between the 34th and 41st degrees, or between Cape Fear and Long Island Sound, and the second, or northern, or Plymouth, company, had a grant to the territory northward to the 45th degree. The Pilgrims set sail with a patent from the southern Virginia company, but for some reason upon which historians do not fully agree, the Mayflower found itself in early November in the harbor of Cape Cod. This was far north of the limits of their grant; but as the passage to the south was rough and dangerous, and the season was already late, that little shipload of 102 decided on landing where they were. This decision was more momentous than it might at first appear, because if they landed there at Plymouth, beyond the limits of the Southern Virginia Company, they would lose such right as they might claim under the patent which they had and would be outside of all established authority. But the leaders were equal to the emergency and if there was no established government for them they would make one.

The situation which was thus presented and how it was met, is best told in the words of William Bradford as written in his "*History of Plymouth Plantation*". (Bradford was one of the original company and for years governor of the colony; the history which he penned covers the period from 1606 to 1646. The manuscript was long lost and has, in itself, a dramatic history). He writes:

"I shall a litle retorne backe and begine with a combination made by them before they came ashore, being ye first foundation of their governmente in this place; occasioned partly by ye discontented & mutinous speeches that some of the strangers amongst them had let fall from them in ye ship—That when they came a shore 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 ye Virginia Company had nothing to doe. And partly that shuch an acte by them done (this their condition considered) might be as firme as any patent, and in some respects more sure."

The "combination" was signed in the cabin of the Mayflower by all adult males of the party. Bradford says "the forme was as followeth":

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

Viewed in the setting in which it was conceived and against the background of the institutions of government which civilization had to that hour evolved, this compact takes on the hue of one of the most remarkable documents of all history. Bancroft can scarcely be charged with overstating the case when he said of it, in his *History of the United States*:

"This was the birth of popular constitutional liberty. The middle age had been familiar with charters and constitutions, but they had been merely compacts for immunities, partial enfranchisements, patents of nobility, concessions of municipal privileges, or limitations of the sovereign power in favor of feudal institutions. In the cabin of the Mayflower, humanity recovered its rights, and instituted government on the basis of equal laws for the general good."

And, of this compact, John Quincy Adams remarked, in 1802:

"This is perhaps the only instance in human history of that positive, original social compact which speculative philosophers have imagined as the only legitimate source of government. Here was a unanimous and personal assent by all the individuals of the community to the association, by which they became a nation. * * * The settlers of all the former European colonies had contented themselves with the powers conferred upon them by their respective charters, without looking beyond the seal of the royal parchment for the measure of their rights and the rule of their duties. The founders of Plymouth had been impelled by the peculiarities of their situation to examine the subject with deeper and more comprehensive research."

Goodwin in his "*Pilgrim Republic*" makes this observation:

"They indeed recognized James I as their sovereign, but he ignored them. The moment they landed north of 41° north latitude, they would become waifs and estrays, save that they would still be a voluntary church. * * *. If the world would not provide them with a civil organization, they would present the world with a new system, of a simplicity and excellence hitherto unknown. Not that they fully comprehended the logic of their own ideas, but that in this unforeseen emergency they instinctively laid hold on great principles hitherto unrevealed to the nations of the earth."

Thus, here, at New Plymouth, struggling against the almost overwhelming odds of a wilderness, the Pilgrim fathers, without the sanction of royal charter and without a direct precedent to follow, began the exercise of self-rule and from the germ of practical expediency, slowly evolved a system of government, simple but essentially new and unique. This system for a while, with its common property and personal rights, seems almost an experiment in communism but, as the colony grew, it gradually developed, taking on new form "to provide remedies for defects, measures for the removal of obstacles, new laws for new needs and new officers for new labors and duties".

Before the first year had passed, a patent from the Northern Virginia Company was brought over. This conferred upon the colonists the power to make laws and choose officers by "most voices" and after its arrival, the compact signed in the cabin of the Mayflower probably lost its original significance as the source of authority, but the colony continued to exist and function as a body politic until 1692, when with Massachusetts Bay and other colonies, it became a part of the Royal Province of Massachusetts. During this period, the Plymouth Colony and its neighbor the Massachusetts Bay Colony, which was planted in 1629, lived under institutions of government which were in some respects similar, but the two colonies were wholly separate and distinct, and are not to be confused.

After recounting the adoption of the compact, Bradford goes on to say that on the same day "they chose, or rather confirmed, Mr. John Carver their Governour for that year". Thus we find the colony beginning to function under the direction of a governor chosen by the will of the people. In April, 1621, Carver died and William Bradford was chosen in his place. The governor at first was, apparently, the only official,

but Bradford was given one assistant and in 1624 four more assistants were added; later, in 1636, the number was increased to seven. Just how these first elections were held is not entirely clear, but in 1636 a law was passed (what the law-making body was will be indicated later), which probably gave form to what had been a previous practice and which provided that the election of officers, including the governor, his assistants and others that will be mentioned later, should be at a General Court. This General Court was comprised of the whole body of freemen. Freemen, in turn, were, at first, the signers of the compact and such other persons as might be added by a majority vote. Other qualifications for freemen were from time to time prescribed, one of which barred Quakers and such as were judged by the Court "to be grossly scandalous". Finally in 1671, it was required that freemen be twenty-one years of age, of sober and peaceable conversation, orthodox in religion and possessed of twenty pounds ratable estate in the colony. A curious provision which may here be noted is that included in the Act of 1636 imposing a fine of three shillings upon a freeman for failure to appear at an election. It appears that difficulty was experienced even then in getting the voters to exercise their right of franchise. Another interesting provision is that which was later made for voting by proxy. Thus, from the very beginning, the authorities directing the affairs of the colony were elected by popular vote, and, until the colony's independent existence ended, the freemen met annually in one assembly as a "court of election" and chose the governor, assistants and other officers.

Originally the body of freeman, or the General Court, as it was called, was also the law-making body. In 1639, however, an important change was effected in the government. Several settlements and towns had by this time grown up and become incorporated into separate units, and it was found inconvenient for the whole body of freemen to attend the General Court at Plymouth. Moreover, the General Court of freemen had grown in such numbers as to become unwieldy. So by an enactment in 1639 the General Court was made a court of delegates chosen by the freemen in the various towns in the colony. This law seems of sufficient interest to be here set forth in substance:

"Whereas complaint was made that the freemen were put to many inconveniences and great expense by their continual attendance at the Courts, it is therefore enacted by the Court for the ease of the several colonies * * * that every towne shall make choyce of two of their freemen and the town of Plymouth of four, to be committees or deputies to joyne with the Bench to enact and make all such laws and ordnances as the common good requires. * * * Provided that the laws they do enacte shall be ppounded one Court to be considered up until the next Court and then to be confirmed if they shall be approved (except the case require present confirmacion). And if any act shall be confirmed by the Bench and committee which upon further deliberation shall prove prejudicial * * * the freemen at the next election Court, after meeting together, may repeal the same and enacte any other useful for the whole. * * * But if any such committee shall be insufficient or troublesome that then the Bench and other committees may dismiss them, the town to choose other freemen in their place."

Most interesting is the provision for expelling undesirable representatives. And apparently even in those days there was the evil of fickle, ill-considered legislation. One is led to wonder whether our problem of ever-growing laws and codes could not be partly solved by following the example of those humble pioneers and requiring that a bill lie over from one legislature to the next before it goes upon the books as an enactment.

Incidentally, the governor and his assistants, also known as magistrates, were called the "Bench", and as provided in the act just quoted, the representatives from the towns were called "Committees" or "Deputies". The two branches sat as one body with the governor presiding. Decisions in the General Court were by a majority vote, with no division between the Bench and the Deputies. It will also be observed that while by the law just quoted the newly created court of delegates, acting with the governor and his assistants, became the law-making body, the freemen as a whole still retained control over legislation as at the next election Court after the passage of an Act, it might be repealed and a new act adopted.

Passing now to the judiciary of the colonial organization, we also find a simple but interesting system. In the early years of the colony the General Court, then consisting of the whole body of freemen, in addition to electing officers and passing laws, constituted the judiciary. Verdicts in cases coming before it were rendered by a majority vote and for some time this General Court apparently acted as both judge and jury, the

governor having little authority beyond carrying out the decision. As early as 1623, however, it was enacted that "all criminal facts and also all matters of trespasses and debts between man and man should be tried by the verdict of twelve honest men to be impanelled by authority, in form of a jury, upon their oath". Thus, here, for the first time upon this continent, was that distinctive badge of Saxon civilization, the right to trial by jury, established. In 1636 it was enacted that the governor and two assistants might try civil cases involving an amount not exceeding forty shillings and criminal cases involving a small fine. In that same year what corresponds to our Grand Jury was provided for by an act reading:

"That a great quest be panelled by the governor and assistants and warned to serve the King by enquiring into the abuses and breaches of such wholesome laws and ordinances as tend to the preservation of peace and good. And that they present such to the Court as they either find guilty or probably suspect that so they may be prosecuted by the governor by all due meanes."

These provisions relating to trial continued in force until 1665 when provision was made for each town to choose from its freemen three or five persons called "selectmen" for the management of the town. These selectmen, or the majority of them, were empowered to hear and determine "all debts and differences arising between person and person" within their respective townships not exceeding forty shillings. If the determination of the selectmen was not "satisfied party wronged to repair to some magistrate for a warrant to recover such award by distraint". The selectmen were allowed twelve pence apiece for every award they agreed on. To some of the towns the right to try certain other small cases seems to have been given. In 1685 when the colony as a body politic was already beginning to disappear, courts in the nature of county courts were organized and the judicial powers of the General Court and the courts of assistants and selectmen ceased for the most part and became vested in county judges.

It should be observed at this point that as the towns were established and incorporated they conducted their internal affairs at the well known Town Meeting. The Town Meeting continued even after the establishment of selectmen, and the records of some of the towns exhibit numerous instances of the town meeting directing the action of its selectmen and also

instructing its deputies who represented them in the General Court. The number of towns grew until when the colonial government ceased to function there were seventeen towns. But throughout, the colony of New Plymouth as a whole had its central government at the town of Plymouth, and functioned through its General Court and the magistrates, with the governor over all.

Further light upon the judicial system is to be found in the provisions of the act of 1636 when for the first time the duties of the governor and his assistants were defined by law. The act relating to the powers of the governor provided, among other things, that if the assistants judged the case too great to be decided by them and referred it to the General Court, then the governor should "summon a Court by warning all the freemen aforesaid that are then extant and there also propound causes and goe before the assistants in the examination of particulars and propound such sentence as shall be determined"; further it was made "lawful for him to arrest and to commit toward any offenders provided that with all convenient speed he should bringe the cause to hearing either of the assistant or General Court according to the nature of the offense". The same law of 1636 provided that the office of assistant consisted, among other things, "in haveing a special hand in the examination of public offenders" and in "contriving" the affairs of the colony, and "to have a voice in the censuring of such offenders as shall not be brought to public court". Also it was made lawful for him, in his Majesty's name, to direct his warrants to any constable within the government and to "bind over persons for matters of crime to answer at the next ensuing court of His Majesty after the fact committed, or the person apprehended".

While on the topic of governors and assistants, these further provisions of the Act of 1636, defining the powers of the governor are noteworthy:

"The office of the Governor for the time being consists in the execution of such laws and ordnances, as are or shall be made and established for the good of the corporation according to the severall bounds & limits thereof, viz: In calling together or advising with the Assistants or Counsell of the said corporation upon such material occasions * * * as time shall bring forth. In which assembly and all others the Governor to propound the occasion of the

assembly & have a double voice therein. * * * And this office continue one whole year & no more without renewing by election."

The following oath was required of the Governor:

"You shall swear to be truly loyall to our Sovereign Lord King. * * * Also according to that measure of wisdom, understanding and discerning given unto you faithfully, equally and indifferently without respect of persons to administer justice in all cases coming before you as Governor of New Plymouth. You shall in like manner faithfully duly and truly execute the laws and ordinances of the same. And shall labor to advance and further the good of the Colonies and plantations within the limits thereof to the utmost of your power and oppose anything that shall seem to hinder the same."

Another interesting provision and one which would be most unnecessary in these days, made the offices of governor and assistant obligatory and a fine of twenty pounds was provided for a refusal of any one to "hold and execute the office of governor for his year", and of ten pounds for the refusal to act as assistant.

As early as 1633 constables were also found necessary. Up to that time Miles Standish, as captain of the guard, had apparently performed the duties belonging to the office of constable. This office was also elective, there being one constable for each of certain divisions or wards. The constable was required to take an oath to diligently see that His Majesty's peace be not broken and to carry the person offending before the governor or some one of his assistants and there attend the hearing of the case and such order as shall be given and to apprehend all suspicious persons and bring them before the governor or some one of his assistants. The constable was also delegated to give notice to the freemen of meetings of the General Court.

In addition to the offices of governor, assistants and constable, provision was made from time to time for the annual election of other officers, including a deputy governor, treasurer, secretary, coroner, assessor of rates, and in 1634 persons were also chosen whose duties were to lay out highways.

A survey of this phase of the Pilgrim period would not be complete without a brief separate consideration of its laws.

It is recorded in Bradford's History that early in 1621 "they mette and consulted of laws and orders both for their civill and military governments as the necessities of their con-

dition did require * * *", and the Colony records exhibit several laws passed during the early years to meet special wants. Not until 1636, however, was any written code of laws drafted. In 1658 a second revision was made, a copy being written for each town and this copy was to be publicly read in each town once a year. In 1671 a further revision was made and for the first time the laws were printed. In 1685 the last revision was made. Goodwin, in his *Pilgrim Republic*, observes that "truly it was a wonderful community that, by mass meetings of its citizens, could so long and so successfully conduct such weighty affairs, with no more formally defined frame of government, or assignment or limitation of official powers, and with no written laws against crime".

In enacting their laws, the General Court was no doubt influenced and guided by English laws and customs, but they made many new enactments to fit their own peculiar needs and many which were wholly repugnant to English law. Likewise in a good many cases coming before them, the magistrates probably followed the usage of England, especially in criminal matters and where they had no applicable law of their own, but it is certain that they did not consider the laws of England binding upon them. In the early years, at least, the scriptures appear to have had more weight as precedents than did the laws of England, and such ponderous questions as "What sodomitical acts are to be punished with death" were referred to the Elders for advice. About in 1684 one town made recommendations to the Committee on Revision of Laws for an enactment "that in all civil cases if either party produces a known law of England in defense of his case it may be made publicly to appear that it is the law allowed of in this government as the rule of justice in all known cases". There seems, however, to be no record of such enactment ever being made.

Some of the early laws not already mentioned are: In 1626 exportation of food and lumber without official permit was forbidden. In 1633 it was made finable to permit drunkenness in one's house and strong drinks were to be retailed only by innkeepers who were to sell not over 2d worth to anyone but strangers just arrived. Wills were to be probated within one month before the Governor and his Council—so it

appears this body was also the probate court. A widow was to have one-third of the real estate for life and one-third the personalty absolutely.

In 1636 horse racing was forbidden and so also walking about late of nights. Sabbath work and travelling was forbidden and also visiting on that day. Profane swearing was punishable by placing in the stocks; lying, by the stocks or by fine. No person was to be admitted to live in the colony without the leave of the governor or two of his assistants. Some of the new laws enacted after 1636 included laws sharply restrictive as to spirituous drinks and strong measures were taken to keep everything of the sort from the Indians. Frequent falsity of Indian evidences as to where they got their drink led in 1673 to the establishment for such cases of the new principle of allowing the accused to testify for himself at his option. In 1682 this was extended to suits for the collection of accounts. In 1638 smoking of tobacco was forbidden on the highway or out of doors within a mile of a dwelling house or while at work in the fields. That same year the Court attempted to regulate wages but after a few months withdrew the order. Quaker troubles beginning in about 1659 were probably the cause of many sharp laws bearing on religious conduct. In 1662 the Court charges each town to have a school master set up and fifteen years later this was made compulsory on all places of fifty families.

Marriage ceremonies were performed only by the magistrates, because, Bradford writes, "it being a civil thing upon which many questions about inheritances do depend * * * and most consonant to the scriptures—Ruth 4, and nowhere found in the gospels to be layed on the ministers as a part of their office".

Another of the earlier enactments must be briefly mentioned because in its startling pronouncement one finds a forerunner of the declaration of American independence which the following century was to bring forth: It reads:

"As freeborn subjects of the State of England, we hither come indewed with all and singular the privileges belonging to such * * * that according to the due privilege aforesaid no imposition, law or ordnance be made or imposed upon us by ourselves or others at present or to come but such as shall be made or imposed by consent according to the free liberties of the state & King of England."

Fascinating, also, is that part of the colony's legal history relating to the cases, civil and criminal, which came before its tribunals, but space permits only brief mention of this phase.

In an inexorable manner and with almost barbaric severity and with utter disregard for personages, justice was administered and punishment meted out. The lash was a common punishment for minor offenders. Heavy fines were imposed for lying, swearing, card playing and drunkenness. Many offenders were put in the stocks or compelled to lie in a public place, heels tied to neck. There were ten executions under the civil authority in the colony. There were six divorces granted during the colony's existence. So far as I could find, the Colony had no divorce law and what, if any, grounds except scriptural, existed, I cannot say.

Cruel and almost barbarous as was often its means for dealing with infractions of its strict code, the Plymouth colony's actions as to witchcraft is refreshing. It was not caught in the frenzy of this superstition as were the neighboring colonies and while Plymouth had a law for the execution of witches only two cases arose in the colony and in both the accused went free.

The Pilgrim General Court exhibited a zeal which would tax us sorely. It met at 7 A.M. in summer and at 8 A.M. in winter, and there was a fine of 6d for tardiness.

In 1630 Bradford writes of a murder case:

"This year John Billington ye elder (one that came over with the first) was arraigned and both by grand and petit jurie found guilty of willful murder, by plane and notorious evidence and was for ye same accordingly executed. This was ye first execution amongst them so it was a matter of great sadness unto them. They used all due means about his trial and took ye advice of Mr. Winthrop and other ye ablest gentlemen in ye Bay of Massachusetts, that were then newly come over, who concurred with them yt he ought to dye and ye land to be purged from blood."

Many novel punishments were ordered. In 1625 one Oldam who had been a troublesome character and ordered out of the colony, returned without leave, and, writes Bradford:

"But in conclusion they comited him till he was tamer and then appointed a guard of musketeers which he was to pass throw and everyone was ordered to give him a thump on ye brich with the but end of his musket."

Bradford relates of another incident of which he says, "Horrible it is to mention but ye truth of ye history requires it". And so also, truth of this account requires me to make brief mention of it too, because it serves to illustrate not only their procedure but also their reliance on scriptural law. A youth of about 17 had been detected of and had confessed to buggery with a mare, a cow, two goats, five sheep, two calves and a turkey. Bradford writes:

"And this free confession was not only in private to ye magistrates but afterwards, upon his indictment, to ye whole court and jury. * * * And whereas some of ye sheep could not so well be knowne by his description of them, others with them were brought before him and he declared which were they and which were not. And accordingly he was cast by ye jury and condemned and afterwards executed about ye 8 of Sept. 1642. A very sad spectacle, it was, for first the mare and then ye coves and ye rest of ye lesser cattle were kild before his face according to ye law. Levit. 20-15. And then he himself was executed."

The events which led to the sounding of the death knell of this colonial government of the people are beyond the scope of this narrative. As early as 1686, however, the end was to be seen, and in 1692 Governor Phipps arrived from England with a charter which combined Plymouth, Massachusetts Bay and other colonies, into the royal province of Massachusetts. The body-politic created in the cabin of the Mayflower had passed into history. But was not the future to demonstrate that they had builded better than they knew, and that the simple edifices which they left behind were to tower into institutions beyond the imagination of men?