– 7 –

LIMITATIONS ON THE LEGISLATIVE POWER

COLONIAL LEGISLATIVE LIMITATIONS

Due process of law, or the law of the land, was originally a restriction and limitation on the acts of the king or executive acts which affected the rights and justice of the subject. The guarantee generally did not work as a limitation upon legislative acts of Parliament, and except for the opinion of Coke and a few others, it was not taken to operate as such. Thus the doctrine of Parliamentary supremacy generally prevailed in England. There did exist a maxim of the common law which prohibited such acts from affecting the fundamental rights of the subject. Yet Parliament enacted measures that established due process procedures, while enacting others which impinged upon common law rights and procedures. This paradoxical situation had the potential of nullifying the rights of Englishmen, by placing the safety for such rights completely in the hands of Parliament.

This legal premise however was not recognized in America, and even at the earliest colonial times, limitations and restrictions on the legislative power was decreed and followed. These restrictions were imposed by requiring legislative acts to conform to and not violate established laws, principles, customs and rights as were anciently known and settled in England. In other words, they were limited by "the law of the land," or the law of England, which included the ancient common law. As stated, this was the case from the very beginning of colonial history. Thus in the *Charter to Sir*

Walter Raleigh of 1584, we find this restriction placed on the manner of laws and statutes that could be made:

> So always as the said statutes, laws, and ordinances may be as near as conveniently may be, agreeable to the form of the laws, statutes, government, or policy of England, and also so as they be not against the true Christian faith, now professed in the Church of England.[1]

So not only were any newly enacted laws in America limited by the common law of England, but by Christianity, which included the laws of God as found in the Bible.

In the *Charter of Maryland* of 1632, legislative powers of the government were established to "enact laws relating to the Public State or the private Utility of Individuals, of and with the Advice, Assent, and Approbation of the Free-Men of the Province." Such laws made were to conform to the following restrictions:

> VII. So, nevertheless, that the Laws aforesaid be consonant to Reason, and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the Laws, Statutes, Customs, and Rights of this Our Kingdom of England.[2]

This same provision is found in *Sir Robert Heath's Patent* issued under king Charles I, 1629, which governed the area of North Carolina. Many other documents prescribed that procedures, laws and acts *"be not contrary to the law of England,"* including the common law. Such provisions can be found in the following documents:[3]

- The Charter of New England—1620 (p. 1832, 1833)
- The Charter of the Colony of New Plymouth—1629 (p. 1844).

---

1 F.N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and other Organic Laws,* vol. 1, p. 55, Washington, G.P.O., 1909.

2 F.N. Thorpe, *op cit.,* vol. 3, p. 1679-80,

3 The page numbers given are from Thorpe's work.

- The Charter of Massachusetts Bay—1629 (p. 1853).
- Commission of Sir Edmund Andros for the Dominion of New England—1688 (p. 1864).
- The Charter of Massachusetts Bay—1691 (p. 1882).
- The Combination of the Inhabitants upon the Piscataqua River for Government—1641 (p. 2445).
- The Agreement of the Lords Proprietors of the Province of New Jersey—1664 (p. 2537, 2538).
- Grant of New England to the Duke of York—1676 (pp. 2592, 2593).
- The Charter of Carolina—1663 (p. 2746).
- Concessions and Agreements of the Lords Proprietors of the Province of Carolina—1665 (p. 2758).
- The Charter of Carolina—1665 (p. 2764).
- Patent for Providence Plantations—1643 (p. 3210-11).
- Charter of Rhode Island and Providence Plantations—1663 (p. 3215).

Thus, whatever laws were passed in the Province of Maryland, or any of these other colonies, such laws could not be contrary to the ancient common law — the "Laws, Statutes, Government and Customs of this our Realm of England," as it was often stated. In fact, such laws and ordinance passed had to "conform" to, or be "agreeable to such Laws and Government" as existed in England. The "Law" is that law which was established in England — the law of the land. Thus, the "laws of our Realm of England" would mean to include the common law, as would the term "customs." Also, many of the older "statutes" had declared or codified the laws which safeguarded the rights of Englishmen and were considered part of the "common law."

The colonial laws also could not be "contrary" the the "Rights" of individuals living in the Province. These rights which the legislative body could not violate, were the ancient,

inherent, natural and fundamental rights recognized under Anglo-Saxon law. As the colonists were to have the rights of a natural born subject in England, such rights could not be taken away by legislation. This then was an area in which even Parliament was limited.

Thus, by this provision prohibiting laws being passed contrary to the "Law of England," as found in most charters and constitutions, laws enacted that were contrary to the common law or the procedure that safeguarded private rights, were not authorized and thus invalid. These provisions were a clear limitation and restriction on legislative power. In some cases these limitations were made more specific, as shown in the *Maryland Charter* of 1632:

> And so that the same Ordinances do not, in any Sort, extend to oblige, bind, charge, or take away the Right or Interest of any Person or Persons, of, or in Member (Limb), Life, Freehold, Goods or Chattels.[4]

Here we have an expression (underlined) which is equivalent to the phrase "life, liberty and property," used to limit what type of ordinances could be enacted. Rights pertaining to life, limb, land and property could not "in any Sort" be infringed, diminished or "taken away" by an act of the legislative assembly. Thus the "law of the land" was recognized as restricting the legislative process. This was also well exemplified in *The Charter of West New Jersey,* drafted in 1676, whose first concession established the preemience of the common law and fundamental rights:

> That the common law or fundamental rights of West New Jersey, are individually agreed upon by the Proprietors and freeholders thereof, to be the foundation of the government, which is not to be altered by the Legislative authority, or free Assembly hereafter mentioned and constituted, but that the said Legislative authority is constituted according to the

4 Thorpe, op. cit., p. 1681.

> fundamentals, to make such laws as agree with, and maintain the said fundamentals, and to make no laws that in the least contradict, differ or vary from the said fundamentals, under any pretense or allegation whatsoever.[5]

This provision states the true and correct doctrine and philosophy of American law and government. The charter also provided that if any persons in the legislative assembly shall "designedly, willfully, and maliciously, move or excite to move, any matter or thing whatsoever, that contradicts or in any way subverts, any fundamentals of said laws in the Constitution of the government," then they shall "be proceeded against as traitors to the said government."

It is clear that the colonists during the Revolutionary period did not accept the concept of parliamentary supremacy. They continually asserted that there is a fundamental law which naturally and of necessity places limitations on legislative powers.[6] The doctrine that whatever Parliament declares is the "law of the land" continued to be the center of attack up to 1776.[7]

The colonial experience showed that it was not so much what Parliament had done, but what it might do with the powers it exercised. The colonists feared a principle of power exercised which, though harmless at first use, may allow corruption or result in a destruction of their liberties later on. This helped to formulate the following rule on determining the limitations on legislative power:

> The legality of power must be estimated not by what it will do, but by what it can do.[8]

---

5 Thorpe, *Federal and State Constitutions,* vol. 5, p. 2548.

6 For an excellent discussion of the colonial view of parliamentary limitations see R. G. Adams, *Political Ideas of the American Revolution* (Durham, N. Car., 1922), ch. VI.

7 R. L. Mott, *Due Process of Law,* (Indianapolis, 1926), § 52, p. 136.

8 *Block v. Hirsh,* 256 U.S. 135, 162 (1920).

> It has been well said: "The constitutional validity of a statute is to be tested not by what has been done under it, but by what may be done thereunder."[9]
>
> In determining the existence of a constitutional power, inquiry is not limited to the results of its attempted exercise; it is of the first importance to consider what might be the results of its future exercise.[10]

This maxim has gone a long way in eliminating legislative acts that are potentially hazardous to life, liberty or property.

LEGISLATIVE LAW IS NOT THE LAW OF THE LAND

Since the *Law of the Land*, or that which is to be *Due Process of Law*, refers to the ancient established principles of law, these provisions do not and cannot mean statutes or ordinances enacted by current legislative bodies. Citizens cannot be deprived of their liberty or property by legislative acts which are not pursuant to the law of the land. Thus acts of the legislature by themselves do not constitute the law of the land or due process of law. This is one of the single most important principles of American jurisprudence. This concept was stated in a well researched decision by the Supreme Court of Wisconsin:

> Due process of law does not mean merely according to the will of the Legislature, or the will of some judicial or quasi-judicial body upon whom it may confer authority. It means according to the law of the land, including the Constitution with its guaranties and the legislative enactments and rules duly made by its authority, so far as they are consistent with constitutional limitations.[11]

---

9 *Babb v. Bullitt,* 220 S.W.2d 394, 398 (Ky. 1949), cases cited. *Mongogna v. O'Dwyer,* 16 So.2d 829, 204 La. 829 (1943).

10 *Ashton v. Cameron County Dist.,* 298 U.S. 513, syllabus (1935).

11 *Ekern v. McGovern,* 154 Wis. 157, 142 N.W. 595, 620 (1913), cases cited.