> 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]

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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.

A legislative act dealing with the rights of citizens is thus limited in three main ways: 1) It must find authority in the Constitution; 2) It must be consistent with established due process limitations as established in early America, or as found in the common law and ancient procedures of justice; and, 3) It cannot be contrary to the Law of the Land and the Law of God. In other words, the act must conform to established limitations which pose as the final determination as to what is *lawful.* This means that not even the people by way of a constitution can violate or transcend established rights, due process, or that which is the Law of the Land. Certainly no more could be said for a legislative body.

The term "law of the land," being a general term, has often been taken to mean law passed or existing in the land such as by legislative bodies. However the phrase in its true context does not infer such law. It means only that law which was originally established and practiced on the land, which includes ancient maxims and principles as existing in Anglo-Saxon common law. The existing law in the land is thus not necessarily the "law of the land" or due process. In the law book *Ruling Case Law* it explains this situation:

> Due process of law means something more, however, than the actual existing law of the land. If it were otherwise it is obvious that the guaranty as to due process of law would be no restraint upon legislative power. Therefore not everything which may pass under the form of statutory enactment can be considered the law of the land, nor can a state make everything due process of law which by its own legislation it declares to be such.[12]

The Supreme Court of the United States had on several occasions examined the historical and legal meaning of the words "due process of law" as found in the "Fifth Amendment." In the case of *Murray's Lessee v. Hoboken*

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12 *Ruling Case Law,* "Constitutional Law," vol. 6, § 435, pp. 438-39.

Land Company, the Court explained the scope and effect of the phrase as applied to legislative power:

> The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will.[13]

One of the earliest cases in dealing with due process of law as a limitation on the legislative power was the North Carolina case of *Hoke v. Henderson* in 1833. Here it was decided that the legislature could not transfer the estate one possessed in his office of county clerk to another person. In this case Chief Justice Ruffin stated the following:

> Those terms, "law of the land," do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer, than to be "taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life," without crime? Yet all this he may suffer, if an act of Assembly simply denouncing those penalties on particular persons, or a particular class of persons, be in itself, a law of the land within the sense of the constitution. * * * In reference to the infliction of punishment and divesting of the rights of property, it has been repeatedly held in this State, and it is believed, in every other of the Union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that such legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property,

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13 *Murray's Lessee v. Hoboken Land Company,* 18 Howard (59 U.S.) 272, (1855); *French v. Barber Asphalt,* 181 U.S. 324, 330 (1900).

> without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our fore-fathers, are not effectually "laws of the land," for those purposes.[14]

The Court also said that while an act of the Legislature has "the forms of law, it is not one of those *laws of the land,* by which alone a freeman can be *deprived* of his *property."*

New York also had several early landmark cases on the subject of what constitutes the law of the land, and how it is distinct from legislative law. In the case of *Taylor v. Porter,* in 1843, an act of the legislature authorizing a road to be laid out over the lands of a person, without his consent, was held unconstitutional. In the opinion Justice Bronson stated:

> The words "by the law of the land," as here used [in the State Constitution], do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses, "You shall be vested with 'the legislative power of the state;' but no one 'shall be disfranchised, or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose." In other words, "You shall not do the wrong, unless you choose to do it." [15]

This excerpt was also quoted by Judge Cooley in his work on *Constitutional Limitations,* §354, to which he also stated the following comments on the law of the land:

> Perhaps no definition is more often quoted than that given by Mr. [Daniel] Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning

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14 *Hoke v. Henderson,* 4 Devereux Law Rep. (15 N.C.) 1, 15-16, 25 Am. Dec. 677 (1833).

15 *Taylor v. Porter,* 4 Hill 140, 145-46 (N.Y. 1843).

> is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land." It is thus entirely correct in assuming that a legislative enactment is not necessarily the law of the land.[16]

Another early landmark case in New York which made a decision on the meaning of the 'law of the land' as used in constitutional provisions, was the case of *Wynehamer against The People* in 1856. Here an act of the legislature made it unlawful to sell liquor, and if sold then the liquor was to be taken and destroyed. Justice Comstock, in delivering the opinion of the court, held the act unconstitutional, as it deprives a citizen of his property by legislative law rather than by the law of the land or due process of law. In examining these phrases he held the following:

> To say, as has been suggested, that the "law of the land," or "due process of law," may mean the very act of the legislature which deprives the citizen of his right, privileges, or property, leads to a simple absurdity. The constitution would then mean that no person should be deprived of his property or rights unless the legislature shall pass a law to effect the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that when rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in a due administration of the law itself—before the judicial tribunals of the state. The cause or occasion for depriving a citizen of his supposed rights must be found in the law as it is, or at least it cannot be *created* by a legislative act which aims at their destruction.[17]

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16 Thomas M. Cooley, *A Treatise on Constitutional Limitations,* 5th Ed. Little, Brown & Co,: Boston, 1883, §353-54, p. 432.

17 *Wynehamer v. The People,* 13 N.Y. 378, 392-393 (1856).

The rights invested by law and by nature in each person are essentially inviolable, and to say the legislature can declare that they no longer exist by making the exercise of such rights unlawful, is to subscribe to the doctrine of the omnipotence of the legislature, or that it is absolute and without control. The pre-existing law, the law of the land, limits the acts of the legislature in every area in which rights are known to exist. This fundamental principle flows from the very nature of our free republican system.

In an early case in Massachusetts, the Supreme Court held that a statute which gives a single magistrate authority to try an offence punishable by imprisonment, without presentment by a grand jury, violates the article of the Declaration of Rights which provides that: "no man shall be arrested, imprisoned, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land." The Court, in viewing the concept of "the law of the land" as the great security of private rights, which were handed down to us by our ancestors, also stated:

> These terms, in this connection, cannot, we think, be used in their most bald and literal sense to mean the law of the land at the time of trial; because the laws may be shaped and altered by the legislature, from time to time; and such a provision, intended to prohibit the making of any law impairing the ancient rights and liberties of the subject, would under such a construction be wholly nugatory and void. The legislature might simply change the law by statute, and thus remove the landmark and the barrier intended to be set up by this provision in the Bill of Rights. It must therefore have intended the ancient established law and course of legal proceedings, by which our ancestors * * * had found safety for their personal rights.[18]

On deciding the meaning of the phrase, "the law of the land," in the constitution of Maine, the State Supreme Court

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18 *Jones v. Robbins,* 8 Gray's Rep. 329, 342-43 (Mass. 1857).

held that an act of the Legislature which renders it difficult to obtain a trial by jury is void under this clause. It held:

> "The law of the land," as used in the constitution, has long had an interpretation, which is well understood and practically adhered to. It does not mean an Act of the Legislature; if such was the true interpretation, this branch of the government could at any time take away life, liberty, property and privilege, without a trial by jury.[19]

The Minnesota Supreme Court, in deciding the extent of the legislative power in regards to established property rights stated:

> "No person shall be deprived of life, liberty, or property, without due process of law". . . To give this clause any value, it must be understood to mean that no person shall be deprived by any form of legislative or governmental action of either life, liberty, or property, except as the consequence of some judicial proceedings appropriately and legally conducted. It follows that a law which, by its own inherent force, extinguishes rights of property or compels their extinction without any legal proceedings whatever, comes directly in conflict with the constitution.[20]

Today, in many areas where rights or protections have long existed, it is common to find some law that allows a policeman to deprive a citizen of property or liberty, contrary to common law principles of due process. Modern law books or legal writers will admit that this practice was not lawful in the past, but then ignorantly say recent statutes now make it "legal." A good legal writer would uphold the true law of the land and denounce the current act of government to the contrary, no matter how popular it has become. Legislative law can never be a substitute for the *law of the land,* as plainly stated by the Supreme Court of Indiana:

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19 *Saco v. Wentworth,* 37 Maine 165, 171 (1852).

20 *Baker v. Kelley,* 11 Minn. 358, 375; citing *Wynehamer v. The People,* 13 N.Y. 378. Also in: *Beaupre v. Hoerr,* 13 Minn. 339, 341 (1868).

> The law of the land or due process of law cannot be taken to be the very act of legislation which wantonly deprives a person of his rights. *Wynehamer v. People,* 13 N.Y. 378. In *Loan Association v. Topeka,* 20 Wall. 655, 662, Mr. Justice Miller declared that there are rights in every free government which are beyond the control of the state.[21]

The legislature cannot turn innocence into guilt, or make the exercise of a right a crime, or violate the right of lawful private contract, or the right of private property. It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it cannot be presumed that they have done so.

Thus in a case where a legislative act allowed the owner of a dog to be charged the amount of damage done by his dog as fixed by the selectmen of the town without opportunity to be heard, the act was unconstitutional as it was contrary to natural justice and not within the scope of legislative authority conferred by the constitution. In this case, Chief Justice Perley of the New Hampshire Supreme Court stated:

> Similar provisions [*the law of the land*], borrowed in substance from *Magna Charta,* are found in the constitutions of other States, and have been held to impose a limitation on the legislative power as well as on the other departments of the government.* * * In *Greene v. Briggs,*[22] Curtis, J., says: "Certainly this [the law of the land] does not mean any act which the assembly may choose to pass. If it did, the legislature could inflict the forfeiture of life, liberty or property without a trial.[23]

If the common law could control and adjudge Parliament, as Lord Coke stated, it certainly can do so with American legislative bodies which are construed to have more

21 *McKinster v. Sager,* 72 N.E. 854, 858, 163 Ind. 671 (1904).

22 10 Fed. Cas. 1135, 1140, 1 Curtis C.C. Rep. 311, Case No. 5,764 (1852).

23 *East Kingston v. Towle,* 48 N.H. 57, 60 (1868).

limitations and less powers than Parliament. The common law is part of the law of the land, and thus the constitution can confer no power on a legislative body to enact a law in violation of the fundamental maxims of justice and equity, as were known under the common law. Due process is not what the legislature states it is, but what "settled maxims of law permit and sanction."[24]

Each citizen, and the whole community, is entitled, at all times, to demand the protection of the ancient principles which have historically been used to shield private rights against arbitrary interference, even though such interference many be deemed fair or impartial in its application. The State did not give the citizen his rights and thus cannot take them away as it chooses. The State did not establish the settled maxims and procedures by which a citizen must be dealt with, and thus cannot abrogate or circumvent them. As the Supreme Court of Illinois stated:

> An act of the legislature is not necessarily the "law of the land." A state cannot make anything "due process of law" which, by its own legislation, it declares to be such.[25]

It thus is well settled that legislative enactments do not constitute the law of the land, but must conform to it. For the legislature to adopt new rules and processes is in effect tyranny, which due process was designed to prevent.

> It is very obvious that everything which takes the form of an enactment is not therefore to be deemed the law of the land, or due course or process of law. * * * It was against the enactment of new laws which ignored the proceedings according to the course of the common law, and provided summary methods of determining legal rights, that the protecting shield of the constitution was required.[26]

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24 Cooley, *Constitutional Limitations,* § 356.

25 *Burdick v. People,* 36 N.E. 948, 949, 149 Ill. 600 (1894).

26 *Salt Creek Val. Turnpike Co. v. Parks,* 35 N.E. 304, 307 (Ohio 1893).

> "Due process of law" requires notice, hearing and judgment. These words do not mean anything which the legislature may see fit to declare to be "due process of law," for there are certain fundamental rights which our system of jurisprudence has always recognized, which not even the legislature can disregard, in proceedings which a person is deprived of life, liberty or property.[27]

LIMITATIONS ON POLICE POWERS AND SPECIAL ACTS

In order to reclaim the arbitrary power which once existed under the doctrine of "parliamentary supremacy," the socialists and subverters in our midst have tried to make the claim that legislative acts are supreme when enacted under the "police powers" of the State. The police power is the power vested in the legislature to make wholesome and reasonable laws, not repugnant to the constitution, and which are for the preservation and protection of public peace, order, health, morals, and security of the people.[28]

The number of laws which have been claimed to be passed "for the public good," but have in actuality been enacted to gain governmental control over some aspect of life, liberty or property, are too numerous to count. Many of the inroads to tyranny have been paved by this means. Since this mode of subversion has so frequently been attempted, there have been many statements from the courts warning against it:

> The legislature cannot, under the guise of police regulation, arbitrarily invade private property or personal rights.[29]

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27 *State ex rel. v. Billings,* 55 Minn. 467, 474, 57 N.W. 206 (1893), citing *Davidson v. New Orleans,* 96 U.S. 104 (1877).

28 *Black's Law Dictionary,* 2nd Ed. (1910) p. 909.

29 *Iler v. Ross,* 90 N.W. 869, 873, 64 Neb. 710 (1902).