> "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]

---

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).

> The police power is subordinate to the constitution.[30]
>
> The police power of the state may be broad, but it cannot rise above the Constitution.[31]

If the police power is "subordinate to the constitution," and part of the constitution is the "due process of law" provision, then the police power is subordinate to due process requirements. The general test as to when the police power is valid, is whether it is essential to promote the public health, morals, safety or welfare. But even in cases where it does, if it transcends due process or the law of the land they are still invalid. In other words, even the police power is not supreme, but rather a delegated power which must be exercised within certain limits.

Many have tried to apply the doctrine of legislative supremacy in the exercise of police powers, but their flaw lies in the idea of thinking that the legislature is sovereign. This error will prevail until it is understood that the law of the land is supreme, and that due process of law has not only a procedural aspect but a substantive one as well. As such it can be used as a limitation on the police power.

This concept of substantive due process limiting the police power was revealed during the mid nineteenth century in several liquor prohibition acts of that period. In cases where the acts provided for the summary destruction of liquor, they were held invalid as a violation of due process.

In 1853 the Supreme Court of Maine declared a prohibition law void because it did not provide for a trial by jury, and thus violated the due process provision.[32] In 1854 the reasoning was further extended when the Rhode Island

---

30 *Connor v. Twp. of Chanhassen,* 81 N.W.2d 789, 797; 249 Minn. 205 (1957).

31 *State v. Armstead,* 60 So. Rep. 778, 781, 103 Miss. 790 (1913).

32 *Saco v. Wentworth,* 37 Maine 165, 58 Am. Dec. 786 (1852).

court declared a summary seizure of liquor without notice and hearing, a violation of due process.[33] The same year in a Massachusetts case the court also said that confiscation without notice or trial was violative of due process law.[34]

The higher courts were beginning to recognize the relation between due process of law and the police power. That the police power was not unlimited had been early declared in some jurisdictions, and that these limitations were to be based upon the common law was soon recognized. With these propositions established, and with the idea that procedural due process was based upon the common law, it was but a step to correlate these concepts and recognize a substantive limitation out of the "law of the land."

This alliance between the common law elements in due process as a procedural protection, and the basis of the police power, was first declared in the *Wynehamer Case.*[35] The result was a substantive limitation upon the police power regulation. A New York statute provided for the confiscation and destruction of liquor by summary process unless it were kept in a residence. The law in effect gave legal sanction to theft and was thus held invalid. It was conceded that due process was a substantive limitation on the police power.[36]

The *Wynehamer* case was cited by the Delaware Supreme Court holding that where the liquor was seized the doctrine applied.[37] The Alabama Supreme Court had at the same

33 *State v. Snow,* 3 R.I. 64 (1854).

34 *Fisher v. McGirr,* 1 Gray 1, 61 Am. Dec. 381 (1854).

35 *Wynehamer v People,* 13 N.Y. 378, 2 Parker Cr. 421 (1856).

36 Justice Comstock declared that liquor was property and hence this act was a mere confiscation of property which is in direct violation of due process of law. A legislative act could not be the law of the land for that phrase refers to settled, not transient, law.

37 *State v. Allmond,* 2 Houst. 612 (Del. 1856).

time recognized the reasoning of the *Wynehamer* decision as valid.[38] Very shortly after the *Wynehamer* case the U.S. Supreme Court handed down the *Dred Scott* decision.[39] In the majority opinion, Chief Justice Taney asserted the conception of due process as a limitation upon the police power of the state. In *Spann v. Dallas* (235 S.W. 515), it was held that "the police power is subject to the limitations imposed by the Constitution upon every power of government."

In a case in Montana, the legislature passed a law making it the duty of the county treasurer, on failure or refusal of any person to procure a license when required in any trades or occupations, "to seize any of the property upon which a lien is hereby created, or any property belonging to such person, and sell the same." The Supreme Court said that the act was unconstitutional as it provided for no notice or any hearing before the property is seized. It held that this deprived the person of property without due process of law:

> In this country, the power of the legislative departments of the government, federal and state, is limited by written constitutions, and the English doctrine of parliamentary omnipotence has no place in American institutions. * * * Nothing can be the law of the land in the sense of the constitution, however general it may be, and however it may affect the rights of all persons alike, which deprives the citizen of his life, his liberty, or his property without due process of law, and that, as we have already seen, contemplates that a hearing must be allowed to him at some stage of the proceedings against him.[40]

This case is significant in that the Court exposed the mistake and faulty reasoning used by the Michigan court in the case of *Sears v. Cottrell* (5 Mich. 250), holding that special legislative acts are not limited by due process.

---

38 *Dorman v. State,* 34 Ala. 216, 241 (1859).

39 *Dred Scott v. Sandford,* 19 Howard (60 U.S.) 393 (1856).

40 *Chauvin v. Valiton,* 20 Pac. Rep. 658, 662, 664, 8 Mont. 451 (1889).

Sometimes special legislation, that which is confined to a particular purpose, object, person or class, is erroneously claimed not to be limited by due process because the guaranty was intended only to protect the general rights of society. But our Republican system was intended to protect the rights of the few from the majority. Thus when a case of special legislation arose in Tennessee in 1831, the court took great pains to point out exactly how the law violated the "law of the land." Justice Greene said:

> By 'law of the land' is meant a general and public law, operating equally on every individual in the community. If the law be general in its operation, affecting all alike, the minority are safe, because the majority, who make the law, are operated on by it equally with the others.[41]

Since the law of the land is in its nature a general law in the land, it works as a limitation on special legislation as well as general legislation. Most special acts of the legislature are by their very nature special judicial decrees and hence could not be considered valid under the "law of the land."

This line of reasoning has appeared most frequently in connection with cases involving special statutes which deprived officers of their office. In the landmark case of *Hoke v. Henderson,*[42] the Court refused to enforce a special act depriving a county clerk of his office.

In a New York case the Court held that the legislature has no power, by special act, to authorize the sale of the property of parties, for other than public purposes, without their consent. The State Supreme Court said:

> Although it be true, that in England, private acts of parliament have become a common mode of assurance (2 Bl. Com. 344), and are upheld, upon the principle that the parliament is

41 *State Bank v. Cooper,* 2 Yergers Rep. (10 Tenn.) 599, 605-06 (1831).

42 15 N.C. 1, 25 Am. Dec. 677 (1833).

> omnipotent (2 Kent's Com. 448), that principle does not prevail with us. Here, the sovereign and absolute power resides in the people; and the legislature can only exercise such powers as have been delegated to it.[43]

In the landmark case of *Taylor v. Porter,*[44] a special act which authorized a private road to be laid out over the lands of a person, without his consent was contrary to the law of the land and void. Thus due process of law or the law of the land, as applied to legislative enactments, means not only statutes that are general in their operation which affect the rights of all alike, but also means a special act of the legislature passed to affect the rights of an individual or a few against their will.

DELEGATION PRINCIPLE AS A LIMITATION

In describing the nature of American legislative bodies, Justice Story stated the following:

> The Legislature is in no just sense sovereign. It is but the agent, with limited authority, of the State sovereignty.[45]

The legislature is a mere agent of the true political power, that being the people as a whole. The people have granted or delegated to the legislature, as the people's agent, an authority to exercise some of their political power. As agents, the legislature can only exercise the power delegated, but there is more to this legal principle of delegation, as is revealed in the following quote:

> Though the lawmaking power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the constitution prohibits the creator from doing.[46]

---

43 *Powers v. Bergen,* 6 N.Y. Rep. 358, 366 (1852).

44 4 Hill 140 (N.Y. 1843).

45 *Charles River Bridge v. Warren Bridge,* 11 Peters (36 U.S.) 420, 643.

46 *State v. Tenant,* 14 S.E. 387, 388, 110 N.C. 609 (1892), authorities cited.

Just as the Legislature is limited by the Constitution as to what powers it can delegate to its creature the municipality, making the municipality limited by the Constitution; the people are likewise limited by a law as to what powers they can delegate to the Legislature, making the Legislature limited by that law. But by what law then are the people limited? They are limited by three main areas of law— the Law of the Land, the Law of God, and the Law of Nature.

The people created the legislative department and delegated legislative authority to it; but they did not, and could not, give their creature the power to do what they themselves are prohibited to do by the Law of the Land or the Law of God. Governmental power cannot be greater than that inherent in the people, in other words, the creature cannot exceed the powers of the creator. As Justice Daniel said:

> Power can never be delegated which the authority said to delegate itself never possessed.[47]

By the Law of God, the people have laws upon them which prevent them from committing theft, murder, rape, sodomy, blasphemy, kidnapping, usury, witchcraft, fornication or hybridization. The Legislature thus cannot authorize such things. By the Law of the Land the people must abide by the common law principles of justice, due process, and the fundamental rights; none of which can be "submitted to the vote of the people," or "be infringed simply because a majority of the people choose that it be."[48] Thus the legislature, as an agent of the people, also cannot infringe upon such things.

It is thus erroneous to say that the people have an "unlimited capacity" when sitting in a constitutional convention, or that their sovereign powers have no bounds. The people are limited and restricted and so are their agents.

---

47 *New Jersey Steam Nav. Co. v. Merchants' Bank,* 47 U.S. 344, 407 (1848).

48 *Lucas v. Colorado Gen. Assembly,* 377 U.S. 713, 736-737 (1963).