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## *THE AMERICAN DOCTRINE OF DUE PROCESS*

### DUE PROCESS IN COLONIAL AMERICA

It was a main priority with the colonists that if they were to go to America, they would possess all the rights recognized in England. Though the guarantee of the old liberties was frequently made, the promises were not always well kept. Many of the royal governors sent from England were tyrannical and dishonest. The Americans were much annoyed by English laws against the manufacture of woolen goods and ironwares. The colonists had many furs and could make hats very cheaply, but no hatter was allowed to send hats from one colony to another. Much of their trade with other countries was also regulated by Parliament.

The colonies were obliged, much against their will, to admit negro slaves brought in by English merchants. They were forced to send nearly all their leading products to England for sale. They were not allowed to buy any European goods, except in England, and no foreign ships were allowed to enter their ports. Laws were made to discourage people in the colonies from making and trading in such things as were made in England. Custom houses were established by law in all principle ports of the colonies and duties were collected for the king. But the colonists evaded these unjust laws in every way they could, and there was a great deal of smuggling all along the coast.<sup>1</sup>

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1 Edward Eggleston, *A History of the United States*, New York, 1900, p. 153.

The colonists realized that if they could be deprived of their rights of liberty and property by arbitrary laws and acts of the government, rather than by the well-established methods known at common law, then they in effect had no rights at all.

In their disputes with their royal Governors or acts of Parliament, the early Americans rested their arguments on the fundamental rights of Englishmen according to the British constitution. Their position was that the "ancient English liberties, confirmed by *Magna Charta*, came to the people of the American States as a part of the common law."<sup>2</sup> It was understood that this law was originally planted and implemented on the land, and Parliament and the Governors were bound to it. This line of thinking guided us to the development of American due process and the meaning of the *law of the land*.

The colonists assumed this foundation to be immutable and looked upon the protections of *Magna Carta* as one of its chief parts. It was a cornerstone of the "unwritten constitution," of which the "due process of law" provision was an integral part. Upon this cornerstone they based their claims to many of their most cherished rights such as the right to be free from seizure of their property, the protection against unjust discrimination on the part of the legislature, the right to be free from arrest or imprisonment except by common law process, the right to make and sell their own goods, the right to a voice in levying their taxes, and the right to a trial by jury.<sup>3</sup>

Though the legal processes adopted and established in America were primarily derived from the English Common

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2 *Paulson v. City of Portland*, 19 Pac. 450, 453, 16 Ore. 450 (1888).

3 Rodney Mott, *Due Process of Law*, Indianapolis: Bobbs-Merrill Co. Publishers, 1926, pp. 135-36.

Law, the American system contains certain changes and additions that were more favorable to liberty, free enterprise and limited government.

The colonists in America were well informed in matters of law and history. They regarded the principles of *Magna Carta* as the ancient birthright of all Englishman. They were greatly influenced by the works of Sir Edward Coke. Not only were his writings found more often in the colonial libraries than the books of any other authority on law or politics, but he is cited more frequently in their legal cases than is any other authority.<sup>4</sup>

The concept of a fundamental constitutional law which even Parliament could not override fell upon very fertile soil in America. Consequently, the doctrine of parliamentary supremacy never developed in the United States in spite of the popularity of *Blackstone's Commentaries* in which Blackstone supported the doctrine.<sup>5</sup> The reason for this is found in the fact that Coke's *dictum* as to the supremacy of the common law, and Locke's philosophy on the limitations of government, were very popular at the time when political ideas were forming in America. Locke's philosophy finds expression in the Declaration of Independence; and Coke's *dictum* is probably the chief reason for written constitutions in the United States.<sup>6</sup>

There can be no question that the procedural elements of due process were uppermost in the minds of the colonists before the Revolution. The colonial attempts to write the wording of this protection into the local statutes are evident.

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4 Mott, *Due Process of Law*, p. 89.

5 Blackstone's doctrine of parliamentary supremacy was bitterly attacked in America as being contrary to constitutional government.

6 Hugh Willis, *Constitutional Law of the United States*, The Principia Press, 1936, p. 648.

This was no doubt prompted by the colonial governors whose notoriously arbitrary acts and administration of the penal law within the colonies caused many conflicts with due process procedures.

Due process of law was their defense against all arbitrary actions of government. In the 170 years before the American Revolution, *Magna Carta* was referred to and its protection invoked in every one of the colonies. An investigation of these incidents "will show that the due process provision was cited more often than any other, and that it was, indeed, considered the heart of the venerable document."<sup>7</sup>

The position which *Magna Carta* occupied as a part of this fundamental law in the colonies is significant. From the earliest times the term "*Magna Carta*" was used generically for any written document of fundamental importance. Thus in 1638, the people of Massachusetts desired a *Body of Liberties* like "*Magna Carta*." In fact, some nine provisions of *Magna Carta* were, in one way or another, incorporated into the *Body of Liberties*. The *Body of Liberties* was actually drawn up in answer to a positive demand that judges should not act in an arbitrary manner, and that administrative officials and the legislature should be restrained in their actions.

The 39th article of *Magna Carta* thus became a common provision found in colonial cases and charters. In the *Fundamental Constitution for the Province of East New Jersey*, drafted in 1683, the guaranty of the 39th article of *Magna Carta* is evident:

XIX. That no person or persons within the said Province shall be taken and imprisoned, or be deprived of his freehold, free custom or liberty, or be outlawed or exiled, or any other way

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7 Mott, op. cit., p. 93.

destroyed; nor shall they be condemned or judgment passed upon them, but by lawful judgment of their peers: neither shall justice nor right be bought or sold, deferred or delayed, to any person whatsoever: in order to which by the laws of the land, all trials shall be by twelve men.<sup>8</sup>

Likewise, the *Charter or Fundamental Laws of West New Jersey*, adopted in 1676, provided:

And that no Proprietor, freeholder or inhabitant in the said Province, shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises, upon any account whatsoever, without a due trial, and judgment passed by twelve good and lawful men of his neighborhood first had.<sup>9</sup>

The charter further provided that no one in the Province “shall be attached, arrested, or imprisoned, for or by reason of any debt, duty, or thing whatsoever (cases felonious, criminal and treasonable excepted) before he or she have a personal summons left at their last dwelling place.”

The seventeenth century was a century of far different character in English history; it was a century of intense religious and political awakening, and a century which witnessed the greatest of all Anglo-Saxon contests for civil rights and political liberty. The colonists in America were, in general, men in whom was strongly implanted the prevalent spirit of the age, the intense love of political liberty, and the resolute resistance to tyranny. The century which gave to Englishmen the *Petition of Right* and the *Bill of Rights*, which sent one king to the block and another into exile, was to give birth to colonies which could be trusted in the future to resist any attempt to deprive them of those liberties. For the great charters of the seventeenth century had declared these liberties to be the heritage of the Anglo-Saxon race.

8 Thorpe, *Federal and State Constitutions*, vol. 5, p. 2580.

9 Ibid. p. 2549.

The most sacred rights of the colonists which needed the most protection were early summed up in the phrase, "life, liberty and property." In defense of these rights the most common and powerful weapon used was the claim that such rights could not be taken away except by jury or by the law of the land. The due process concept was their sword and shield against tyranny.

William Penn may be said to have been the father of the idea of due process of law in the Dutch and Quaker colonies. He became interested in this protection in a very personal way in 1670, when he was brought before a London magistrate. He was indicted, together with William Mead, for having addressed a crowd in a London street which, it was claimed, resulted in a public disturbance. The jury refused to bring in a verdict convicting him, whereupon the judge fined both prisoners and the jury for contempt of court.

Penn contended he was not allowed a fair trial in that he was given no copy of the indictment before being required to enter his plea, that he was threatened with contempt of court if he spoke in his own defense, that the jury was threatened with imprisonment if they acquitted him, and that he was not allowed a jury trial on the question of contempt of court. Penn asserted that "according to the Fundamental Laws of England, no Englishman should be fined or amerced but by the judgment of his Peers or Jury." Thus the actions of the court "expressly contradicts the 14th and 39th chapter of the Great Charter of England."<sup>10</sup>

Penn recited the "law of the land" and Edward Coke's interpretation of it saying that the provision allows no less than a trial by due process. He left no doubt that Magna Carta was a part of the fundamental law of England and thus America. He stated: "So heinous a thing was it esteemed

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10 Mott, *op. cit.*, p. 107.

of old, to endeavor a depravation, or subversion of these ancient rights and privileges by acts of parliaments . . . inconsistent with our Great Charter. . . . Parliaments are said to err when they cross its bounds.”<sup>11</sup>

William Penn thought the best remedy for legislative violation of due process of law was to be found in an enlightened public. Consequently he undertook the task of educating people in England and America regarding their rights in this respect. So successful was he that henceforth the right of trial by jury seems not to have been questioned. This then is another of many illustrations found in history where the establishment of fundamental law and individual rights became the fruit of an act of government corruption. Due process has often been fortified by the lessons of history.

As a result of Penn’s trial, the colonial records show that the colonists generally considered a regular indictment as an essential element to criminal proceedings according to due process of law. The damage which might be done to innocent parties by forcing them to stand trial before being regularly indicted was well understood. And unless indictments were made according to the recognized rules of the common law they would be of little value as a protection.

### THE AMERICAN REVOLUTION

Due process of law was a major theme underlying the causes for the American Revolutionary War. The King and Parliament had repeatedly violated the basic rights of the colonists through acts and decrees that were not by the *law of the land*. The Declaration of Independence lists some of the many due process violations that were committed under King George.

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<sup>11</sup> *William Penn’s Case*, 6 Howell State Trials (1670), 951 at 990.