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## *DUE PROCESS UNDER THE COMMON LAW*

### LEGAL CONCEPT OF DUE PROCESS

The guaranty of due process as found in written constitutions, has the same purpose as it did in Magna Carta in declaring that no person shall “be deprived of life, liberty and property without due process of law.” Due Process of Law is both a directive and a restriction placed upon the actions of government, and thus carries both a positive and negative meaning. It prescribes what government officials are to do, and what they cannot do in depriving one of life, liberty or property. The definition of *due process* is primarily a *Common Law* definition, which can be stated as follows:

Due process of law implies and comprehends the administration of laws equally applicable to all under established rules which do not violate fundamental principles of private rights, and in a competent tribunal possessing jurisdiction of the cause and proceeding upon justice. It is founded upon the basic principle that every man shall have his day in court, and the benefit of the general law which proceeds only upon notice and which hears and considers before judgment is rendered.<sup>1</sup>

The due process clauses are the most important clauses in our written constitutions. Due process of law applies to social control, to administrative process, to procedure, to jurisdiction, and to substantive law. It applies to the police power, to eminent domain, and to taxation. It applies to

<sup>1</sup> *State v. Green*, 232 S.W.2d 897, 903 (Mo. 1950).

every interest which an individual may assert, whether it be a right, power, privilege, or immunity, whether civil or political.<sup>2</sup> In short, due process protects “the very substance of individual rights to life, liberty and property.”<sup>3</sup>

Because of corruption in government, due process has had its definition and scope narrowed to mean just judicial proceedings. It is but logical that a corrupt government would desire to limit and restrict what due process truly means, since “the provision is designed to exclude oppression and arbitrary power from every branch of government”<sup>4</sup>

A general definition of due process is “the exercise of the powers of government as the settled maxims of the law permit and sanction.” But corrupt and self-willed persons in government don’t want to be restricted and tied down by such old settled maxims, and therefore they devise new ones which are more lenient and convenient for them. This is what we see today, a significant departure from due process and the law of the land, thus the need for this type of book.

Generally, life, liberty and property cannot be deprived until their is a judicial trial. In this sense, due process ordinarily implies and includes a complaint, a writ or summons, a defendant, a judge, regular allegations, opportunity to answer and a trial according to the settled course of judicial proceeding.<sup>5</sup> To this there are only a few exceptions, such as the arrest of a known felon without warrant or judicial process. But these exceptions are also governed under due process and must be perform in a certain way. Thus, due process of law is not confined to judicial proceedings, but governs every aspect of government activity.

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2 Hugh Willis, *Constitutional Law of the United States* (1936) p. 642.

3 *State v. Stimpson*, 62 Atl. 14, 17, 78 Vt. 124 (1905).

4 *Dupuy v. Tedora*, 15 So.2d 886, 890, 204 La. 560 (1943).

5 *Kalloch v. Superior Court*, 56 Cal.. 229, 238 (1880), cases cited.

The essential elements then of due process of law are notice, an opportunity to be heard, and the right to defend in an orderly proceeding.<sup>6</sup> To dispense with notice before taking of property is "likened to obtaining a judgment without the defendant having ever been summoned."<sup>7</sup>

The terms "law of the land" and "due process of law" are used interchangeably in regards to the protection of rights and the restriction on government acts. But while the term "law of the land" includes due process, it embraces the much broader concept of the general fundamental laws in the land.

#### DUE PROCESS INTERPRETATION BY THE COMMON LAW

When Magna Carta was written, it was written with the spirit and intent of preserving the ancient or "old laws," as Coke stated, which had previously existed and been practiced in the land. Thus this document was founded on the common law.<sup>8</sup> It is this document which embodied the spirit of our constitutional government and the foundation of our political liberty. The provision of due process of law, whether it is written in a constitution or not, is founded on the common law and must be construed in that light.

To arrive at what is or is not Due Process of Law, we are not to look at and adopt modern policies, rules, beliefs or procedures. To answer the question of whether an act is due process, we must first examine the Constitution itself, to see whether the process be in conflict with any of its

6 *Fiehe v. R.E. Householder Co.*, 125 So. 2, 7 (Fla. 1929).

7 *Mayor of Baltimore vs. Scharf*, 54 Md. 499, 519 (1880).

8 John Adams had pointed out that the Great Charter was founded on and confirmed the great body of the common law. *Boston Gazette*, Feb. 1, 1772; John Adams, *Works*, Vol. III, p. 542.

provisions. If not found to be so, we must then look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.<sup>9</sup>

If the act or process under question doesn't meet this test then we can look to current practices as an answer to what is to be due process. But it is rather rare to have a case that cannot be guided by ancient law and precepts and by settled processes. The question then of what constitutes the Law of the Land (or Due Process of Law) is often largely a question of history. As the Supreme Court of Minnesota stated:

What is due process of law is usually a traditional or historical question. Was it due process of law under the common law, and did it remain such up to the time of adopting the constitution?<sup>10</sup>

Due process is a common law concept and therefore must be interpreted by common law terms and enforced by common law procedures. In determining then what acts, procedures or powers a government can or cannot use when depriving a citizen of inherent rights and property, the answer is to look back at Anglo-Saxon history, and see what our ancestors had established, allowed or prohibited in the past. These acts, procedures, maxims and acknowledged rights which were passed down and "practiced from time immemorial,"<sup>11</sup> is the law common to our race — the white race. It is by this common law that government must as a matter of law be regulated, restricted and limited.

9 *Murray's Lessee v. Hoboken Land Co.*, 18 How. (59 U.S.) 272, 277 (1855); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 330 (1900); *Twining v. New Jersey*, 211 U.S. 78, 100 (1908).

10 *C. N. Nelson Lumber Co. v. M'Kinnon*, 61 Minn. 219, 222, 63 N.W. 630.

11 *Ex parte Wall*, 107 U.S. 265, 289 (Ind. 1882).

The act of depriving one of life, liberty or property must be one that was known at common law to be due process of law. In other words, due process means such an exercise of powers which “the settled maxims of law permit and sanction, and under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs.”<sup>12</sup> This “common law procedure” is thus the law of the land.

[I]t is clear that the common law is the foundation of that which is designated as due process of law. When first adopted in Magna Carta, the phrase “law of the land” had reference to the common and statute law then existing in England; and when embodied in constitutions in this country it referred to the same common law as previously modified [by the colonists], and as far as suited to their wants and conditions.<sup>13</sup>

In determining whether the legislature could restrict certain creditors in their ancient common law right to collect their debts by process of execution, thus forbidding them the authority to reclaim their property, the Supreme Court of Indiana held the act void as depriving the creditors of property rights without due process of law. The rights of the creditors to have liens issued where money is due them “find their justification in their ancient character and in usage.” And while the legislature might alter the common law “with reference to some administrative and remedial process,” no such power exists “to deny to creditors the ancient common-law right to collect their debts by process of execution.” The court further stated:

[I]n determining what constitutes due process of law and equality before the law, proper consideration must be given to the ancient landmarks which were established for the protection of private rights.<sup>14</sup>

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12 *Wulzen v. Board of Sup'rs*, 35 Pac. 353, 354, 101 Cal. 15 (1894). Citing Thomas M. Cooley, *Constitutional Limitations*, p. 356

13 *Ruling Case Law*, Vol. 6, “Constitutional Law,” Chap. XIII, § 435.

14 *McKinster v. Sager*, 72 N.E. 854, 859 (1904).

Not only is Due Process of Law to be determined by what it meant at common law, but all constitutional provisions and mandates are to be interpreted in like manner. This has always been a well established rule in America, as stated by the Supreme Court of Mississippi:

It is a familiar learning that the constitutional provisions are to be interpreted in the light of the common law as it existed at the time of the Revolution, and that the rights intended to be secured were the rights of Englishmen as they existed at the common law as understood at that time.<sup>15</sup>

Thus liberty and property rights are to be so regarded as they existed at common law, and are to be protected as they were by due process of law under the common law. This means these rights can only be deprived by procedures and processes recognized at common law. It was the intent of written constitutions to secure rights by the phrases "law of the land" and "due process of law." This was revealed in the case of *Ex parte Grossman*, where the U. S. Supreme Court, in construing the powers of the President to pardon, stated:

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention \* \* \* were familiar with other forms of government \* \* \* but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.<sup>16</sup>

The concept that "every free white person is protected in life, liberty and property, until the same be forfeited, in a due course of law," was recognized by the Supreme Court of South Carolina in 1844. It said that the administration

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15 *Orick v. State*, 105 So. 465, 468 (1925).

16 *Ex parte Grossman*, 267 U.S. 87, 108-09 (1924).

of any due course action must be “caused by the law of the land.” It then described what this law means:

What is meant by the law of the land? There can be no hesitation in saying, that these words mean the common law and the statute law existing in this State at the adoption of our constitution.<sup>17</sup>

The law that originally prevailed in the land is that which constitutes the body of law that makes up our “unwritten constitution,” and which guides the written constitutions. Thus it is said that the due process provisions in our written constitutions are but “a reaffirmation of common law principles.”<sup>18</sup> The Supreme Court of Alabama, in construing the meaning of terms “reasonable” and “due process,” as used in the State Constitution, said that they,

“must be determined by what they meant at the common law, and when the Constitution was adopted. \* \* \* All the authorities, state and federal, hold that these provisions of the Constitution, and the whole of Bill of Rights, are declaratory of the common law.”<sup>19</sup>

The fundamental principles, rights, and judicial processes which are covered under the “law of the land” are those which “existed and were practiced in the courts of England and the American colonies.” This body of laws formed our common law; and “the common law is the foundation of that which is designated as due process of law.”<sup>20</sup> It has also been held that judicial trials are to proceed “according to the course, mode, and usages of the common law.”<sup>21</sup>

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17 *The State vs. Simons*, 2 Speers Rep. 761, 767 (S.C. 1844). Also see, *Adm’rs of Byrne v. Adm’rs of Stewart*, 3 Desassure 466, 477 (S.C. 1812).

18 Albert H. Putney, *United States Constitutional History and Law*, Chicago, 1908, § 245. Citing, *N.C. v. Vanderfoot*, 35 Fed Rep. 282.

19 *Ex parte Rhodes*, 79 So. Rep. 462, 463, 465, 469, 202 Ala. 68 (1918).

20 16A *American Jurisprudence*, 2d., “Constitutional Law,” § 804, pp. 953-54.

21 *State v. Stimpson*, supra; *Thomas v. State*, 44 N.W.2d 410, 416 (Ia. 1950).

In explaining the division of powers between the states and the national government, the U.S. Supreme Court in the landmark case of *South Carolina v. United States*, held:

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. \* \* \* One other fact must be born in mind, and that is that in interpreting the Constitution we must have recourse to the common law. As said by Mr. Justice Matthews in *Smith v. Alabama*, 124 U.S. 465, 478:

“The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”

And by Mr. Justice Gray in *United States v. Wong Kim Ark*, 169 U.S. 649, 654:

“In this, as in other respects, it [the constitution] must be interpreted in the light of the common law, the principle and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U.S. 417, 422; *Boyd v. United States*, 116 U.S. 616, 624, 625. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 *Kent Com.* 336; Bradley, J., in *Moore v. United States*, 91 U.S. 270, 274.”<sup>22</sup>

The meaning of due process of law in American constitutions has the same meaning that it did under the common law, and as the early Americans interpreted it up to the time of the Revolution. As the prevailing law, the common law is the guide and basis of private rights secured by constitutions, as the Supreme Court of Maine said:

In Maine our conceptions of personal and property rights are based upon the common law.<sup>23</sup>

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<sup>22</sup> *South Carolina v. United States*, 199 U.S. 437, 448-450 (1905); *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1906).

<sup>23</sup> *Wheeler v. Phoenix Indemnity Co.*, 65 A.2d 10, 12 (Me. 1949).



Since written constitutions are based upon the common law, all noted authorities recognize that its powers and provisions are to be interpreted by the common law:

The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments.<sup>24</sup>

What ever rules, statutes or policies that are devised by governments which work an infringement or deprivation of fundamental private rights, they must conform to the common law or else they are not "due process of law."

#### INTENT TO PRESERVE COMMON LAW PRINCIPLES

Since the "due process" and "law of the land" provisions were so frequently used by the colonists in their complaints against the crown, and were found in the constitutions they wrote and adopted, it is clear that the ancient common law principles were to be preserved. The Supreme Court of Pennsylvania pointed out that the legislature cannot abrogate common law rules of evidence as this is part of due process in a trial. It quoted many authorities in support of this:

In *Jones v. Robbins*, 8 Gray, Mass., 329, Chief Justice Shaw of Massachusetts declared that by the phrase, "law of the land," taken from *Magna Charta* and embedded in the Constitution of Massachusetts, was meant, "the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England, before the settlement of this country, and the emigrants themselves and

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<sup>24</sup> *In re Morgan*, 58 Pac. 1071, 1074, 26 Colo. 415 (1899), citing: T.M. Cooley, *Constitutional Limitations*, p. 208 (6th Ed.).