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THE LAW OF THE LAND

NATURE OF THE LAW OF THE LAW

The basis and substance for our security or legal protection of Life, Liberty and Property against arbitrary actions and abuses of government lies in the concept known as the "Law of the Land." It is in fact the heart of a nation's jurisprudence and provides for the stability of its society.

The concept of the Law of the Land is ancient, going back to biblical times, and has developed in the West under the Anglo-Saxon common law. The great efforts and advancements in securing the rights of Life, Liberty and Property in the past were based upon the idea of "the Law of the Land." It thus is important to understand what the Law of the Land is and how it came about.

The Law of the Land is basically the law, legal principles and rights which were originally established in a land, or which were first practiced there, by a certain race of people. These legal precepts become the foundational law for that race of people as long as they remain in the land. It thus is a concept based on the maxim of precedents—a precedent which future generations inherit and are bound to follow.

The law that originally existed in the land has always been used as a guide in determining what is to be regarded as lawful or unlawful. Its concept is revealed in the Bible. When God brought the Israelites into the Promise Land, He had directed them to bring the Ark of the Covenant into the land which contained the *Ten Commandments* on stone along

with the books of the law. He also specifically told the people that these laws were to be followed in the land:

> Now these are the commandments, the statutes, and the judgments, which the LORD your God commanded to teach you, that you might do them in the land where you are going over to possess it.[1]

So when the Israel people crossed the Jordan River, the law that was brought with them was the Law of God. It was this law which was first practiced by this race of people in Palestine and thus became the Law of the Land. As a result, the people and rulers that had lived two hundred years after the founding of the Promise Land, were still obliged to follow the law even though neither them nor their parents had agreed to it at Mt. Sinai. They were bound to the law their ancestors followed by way of their racial heritage, and also to the law their ancestors had, through Divine Providence, originally established in the land in which they lived. For the Israelites, the *law of the land* became an historical issue.

The *law of the land* principle is similar to the legal concept that dictates the right of discovery of new lands. The right of discovery is given to the race or nation that first steps upon the land. When John Cabot first set foot on American soil, that gave the right to the land to England, since Cabot was sailing under authority of the British Crown. The fact that the French or Spanish also landed on the same shores of America did not give title of the land to those nations. Where there is uncertain claims to land distant from the shore (as with the Oregon or Louisiana territory) title is secured by the first to explore it or have settlements in the land. This is the fundamental law of *precedence,* which has been recognized for thousands of years. There is a law which is connected to the land, and there are many maxims and legal principles which recognize this concept.

1 Deuteronomy 6:1; 5:31; 11:8; 30:16.

MAGNA CARTA AND ENGLISH LAW

To better understand the meaning of the concept of the Law of the Land and how it protects rights of Life, Liberty and Property, a study of English history is required. It is in English history that we find the first definite mention of the phrase "the Law of the Land." This occurs with the *Magna Carta* document in 1215. Of the 63 articles which make up the document, the most famous is the 39th which states:[2]

> No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.

By the 39th chapter, all persons are guaranteed that they will not be arrested ('taken'), jailed ('imprisoned'), deprived of their property ('dispossessed'), or condemned for a crime ('outlawed') unless it be by a judicial trial by jury, or *per legem tarrae* — "by the law of the land." What then is this law? It is in essence the pre-established law in the land of England.

The words "by the law of the land" (*per legem tarrae*) in 1215 meant the law of England (*lex Angliae*), that is, those laws, principles, customs and maxims that were already commonly known and practiced in the whole land of England.

> The term "law of the land" * * * when first used in the Magna Charta, * * * probably meant the established law of the kingdom, in opposition to the Roman law, which was about being introduced into the land.[3]

When *Magna Carta* was written, King John was allowing other types of law to exist by which he could deprive the people of their liberties and property. It was asserted in *Magna Carta* that such deprivation could only be had by law

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2 In some of the shorter versions of Magna Carta this passage is referred to as the 29th chapter.

3 *State v. Stimpson,* 62 Atl. Rep. 14, 18, 78 Vt. 124, (1905); citing *Janes v. Reynolds' Adm'rs,* 2 Tex. 250, 252 (1847).

originally and anciently followed and recognized, as opposed to recent innovations in law. The people wanted no more influence from Roman law, and declared that any act which would take away their rights must conform to previously established laws and procedures. The principle of the 'law of the land' was known even before *Magna Carta,* as this section, and other provisions involving individual rights, were "largely declaratory of the fundamental law of England."[4]

In explaining the section of Magna Carta which declares that no man shall be taken or imprisoned but *per legem terrae* (by the law of the land), Sir Edward Coke says this means *"by the common law, statute law or custom of England."* In other words, by law and custom already established in England. Coke adds the following comments on this phrase:

> *Nifi per legem terrae.* But by the law of the land. For the true sense and exposition of these words, see the statute of 37 Ed. 3. chap. 8, where the words, by the law of the land, are rendered 'without due process of law,' for there it is said, though it be contained in the great charter, that no man be taken, imprisoned, or put out of his free-hold without process of law; that is, by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law.
>
> Without being brought in to answer but by due process of the common law.
>
> No man be put to answer without presentment before justices, or thing of record, or by due process, or by writ original, according to the old law of the land.
>
> Wherein it is to be observed, that this chapter is but declaratory of the old law of England.[5]

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4 *McKinster v. Sager,* 72 N.E. 854, 856, 163 Ind. 671; making reference to 1 Blackstone, *Commentaries* 127; Coke, *Inst.*, proem.

5 Edward Coke, *Institutes of the Laws of England,* 2d part, p. 50. Also in, *Hurtado v. California,* 110 U.S. 516, 524 (1883).

Thus the provision that no one's rights, property or liberties could be infringed or taken away but by "the law of the land" means by the old laws, legal maxims and customs that had previously been established in the land of England. The concept behind the law of the land is the maxim of law which states: *"that which is first in time, prevails as a matter of law."* It thus was to exclude new laws or decrees created by the King or Parliament which could arbitrarily deprive subjects of their rights or property. Such measures would logically not be "the law of the land" and thus not lawful. As Coke said, "an act against *Magna Carta* was void."

The phrase 'law of the land' did not mean jury trial, as that procedure was covered by the clause, "by the lawful judgment of his peers." Rather it meant the law that had previously existed and been practiced on the land or soil of England. Thus both the law that protected rights and which regulated judicial procedure were included in the "due process of law" provision used after *Magna Carta.*

The whole context of *Magna Carta* conveyed the idea of established law. To those excited by political change the document offers little. "It is true that when first read the Great Charter is almost sure to be a disappointment. There are no new arrangements about government, nothing but a return to old customs."[6] By it the king agreed to abide by certain principles and procedures that had anciently come down as a part of the general stock of English liberties. No longer could the rights of the people be summarily or arbitrarily taken away by new laws made up by the government. No longer could people be deprived of their rights by new procedures or claims of power. A method or process previously or customarily used in the past had to be followed before a deprivation of a right could be justified.

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6 Edward P. Cheyney, *A Short History of England,* Ginn & Co., 1919, p. 181.

CONFIRMATION OF MAGNA CARTA

It is true that king John declared only a few months after he had signed Magna Carta that he did not intend to keep it, and had induced the pope to declare it void because he had accepted it under compulsion. Nevertheless, John's son and latter successors swore time and time again to observe it. The content of Magna Carta was so highly esteemed, that in the course of the next two centuries it was confirmed no less than thirty-seven times. In fact, the very day that Charles II (1660-1685) entered London, after the civil wars of the seventeenth century, the House of Commons asked him to confirm it again.

In the confirmatory statute of 9 Henry III in 1265, the text of Magna Carta was put into the Statutes at Large, thereby making it part of the existing law of England. This statute slightly enlarged the contents of the 39th article of Magna Carta by adding after the word "dispossessed," the words "of his freehold, liberties, or free customs." The addition obviously intended to explain the right of property which the word "dispossessed" represents and declares.

A noteworthy confirmation occurred in 1297, when King Edward I had again copied the charter onto the Statute Rolls. This confirmation was brought about when Edward, in great need of money to attack France, exacted large sums of money from the clergy, demanded many forms of payment from the towns and merchants, and seized a quantity of wool in the hands of the merchants. The barons, alarmed at these arbitrary measures, insisted on the king's reaffirming all previous charters of liberties, including the Great Charter, with certain additions.

In a statute passed during the reign of King Edward III (1327-1377), the 39th article of *Magna Carta* was rephrased using other familiar words. It was in this statute that the

phrase "due process of law" first appeared. In claiming the rights of Englishmen, the 3rd Chapter of the English statute (28 Edward III) read as follows:

> "No man of whatever state or condition he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law."

Here the phrase 'due process of law' was used in place of "law of the land" as a prerequisite to follow before one can be deprived of his land, property, liberty or life. The meaning and scope of this 'due process' requirement was strengthened and broaden by later English and American declarations using *due process of law* to mean the established laws, procedures and individual rights which were inviolate.

By the time Sir William Blackstone published *Magna Carta* in his famed *Commentaries,* it was well regarded as a charter guaranteeing liberty in general. The Great Charter had been described as the "keystone of English liberty," and "all that has since been obtained is little more than confirmation or commentary."[7]

The significance of *Magna Carta* rests largely upon the fact that its stipulations were wrung from the hands of an unwilling king by men with arms in their hands. Hence it is regarded as an historical monument of right, and it is called the "palladium of English liberty."[8] Historically, then, Magna Charta was originally designed to secure the people against the arbitrary action of the Crown and ministers thereunder.[9] This was done by the requirement that they follow the ancient law when their rights were involved, rather than by newly devised laws or modes of procedure.

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7 4 *Harvard Law Review,* 365, 370 (1891).

8 Ibid.

9 16A *American Jurisprudence,* 2d Ed., sec. 805, cases cited.

The 'law of the land' clause, when used as a restriction against government, means the same as 'due process of law' —that is, those laws and procedures that government must follow when dealing with the rights of the people. In this sense, the Law of the Land would mean to include a trial by jury. However, it principally meant substantive law —that relating to legal rights and principles as distinguished from remedial law. But in a larger sense, the phrase includes the whole organic law of the land—that which forms the legal and political structure of government. Due process of law does not include this whole area of "organic law," but rather just the area of "substantive law" and rules of procedure.

AMERICAN LAW OF THE LAND

The basics of law and government in America were primarily derived from the English system. But the English Common Law had, over the course of several centuries, deviated from many fundamental principles and original precepts of the law. In the founding of America, certain concepts of English law were not established, and new ones were added. All of these events form the American Common Law or Fundamental Law. This principle was recognized by Chief Justice Tilghman of Pennsylvania:

> Every country has its common law. Ours is composed partly of the common law of England, and partly of our own usages. When our ancestors emigrated from England, they took with them such of the English principles as were convenient for the situation in which they were about to place themselves. It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length, before the time of the revolution, we had formed a system of our own.[10]

10 *The Guardians of the Poor v. Greene,* 5 Binney (Pa.) 554, 558 (1813).