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DUE PROCESS OF LAW

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When our ancestors shook off their allegiance to the British Crown they already had a goodly estate of inheritance to which a new title was then added by right of conquest. This heritage included our English language and literature, our religious freedom, and the common law of England. These noble possessions were not wrongfully or feloniously appropriated by the fathers of the republic from the storehouse of our English forbears; on the contrary, they were native rights of the American patriots. The men who sat in just judgment on Charles Stuart fled to New Haven and found a hiding place in Judges' Cave. Cromwell himself was resolved to seek a home in America, and only the accident of a sudden storm kept him from setting sail. The armies of the parliamentary party swarmed with men who fought and died for English liberty which they bequeathed as a rich legacy to their offspring in America. Shakespeare, Milton and the King James Bible were the just possessions of our fathers; religious liberty had been won by their heroism; and parliamentary government and the English common law were their cherished birthright.

From the chamber of St. Stephen's at Westminster has gone out the most momentous influence on human liberties that has ever had its origin in a historic spot; and to Simon de Montfort, Earl of Leicester, belongs the highest meed of praise for what the House of Commons has accomplished in the cause of constitutional government. One hundred legislative bodies in Great Britain and America, and in the islands of the sea and the depths of dark continents where English liberty has penetrated, are the proud monuments of the genius of this liberty-loving hero.[1]

The subject matter of positive law is human jurisprudence, definitely enacted by legislative or judicial authority. Law, as known to jurists, is that which is announced in and enforced by courts. Divine law and natural law under whatever name, are outside the field of jurisprudence, because they do not rest for their definition and enforcement on tribunals of justice. Strictly speaking, divine law and natural law find their authority apart from the executive depart-

1. *Kilbourne v. Thompson*, 103 U. S. 184.

ment of political bodies. But positive law, formulated by man in organized society, is susceptible to being ignored and disobeyed in specific instances through human weakness and wickedness. This disobedience is restrained by penalties, threatened and applied, called sanctions. The machinery of courts exists for this purpose, to compel obedience by the terror of threatened vengeance on wrong-doers, and the specific enforcement of certain legal rights. The philosophy of remedial justice, the books on court procedure, the organization of tribunals, and the rules of practice,—all postulate the definition of substantive rights and anticipate the necessity of their vindication by executive authority. Were all mankind habitually obedient to civic duty there would be little need of courts or lawyers. Criminal tribunals would be perpetually in recess; grand juries would be discharged on the opening day after some happy deliverance on the virtues of the people; mortgages would be paid and not foreclosed; estates would be partitioned by friendly deeds and releases rather than after the trial of issues between kinsmen; commercial paper would be honored at maturity and notaries would have nothing to protest; taxes would be paid promptly when due, and land needed for public use would be ceded voluntarily for a fair compensation. The function of the legislator, the judge and the advocate in a Utopian society would differ little from that of a commentator on civic duty and an exhorter of mankind to achieve a loftier standard of ethics.

But progress has been through strife and collision. Wars have built up empires. Slavery through brute force has established principles of mastership and subordination. Competition has developed mercantile usage which has received the approval of judges and courts. Violence has compelled the enactment of repressive and vindictive measures for the establishment of personal security. The arrogance of patrician classes and the self-assertion of triumphant warriors have compelled the masses to declare their liberties and personal rights. Thus has the law progressed sometimes in the unnoticed and painless way remarked by Savigny and Puchta; and sometimes, as von Jhering observes, by a mighty struggle against vested interests through legislation.

In all human societies law has been evolved partly through the action of courts. Primitive jurisprudence is much concerned with the red tape of procedure. The higher problems of philosophic jurisprudence are solved only by the student who rises from the humble details of practice to the loftier heights of juridical science. The earliest codes deal largely with remedy. Jurisdiction, or the right

to lay down the law, is of prime importance. Shall the suppliant plaintiff apply for the redress of grievances and hale his enemy before the King's justice or his chancellor? What process of judicial coercion can be made available? Can defendant be arrested or his property attached? By how many witnesses can the truth be established? And can the party in interest himself be a witness? When may trial by jury be demanded? And is there a right of appeal? Moreover, who shall pay the costs? And what is trial by one's peers?

The distinction between the substantive law, or law of primary rights, on the one hand, and the adjective law, or law of remedial justice, on the other, is not easily made. All law, properly so called, must have accompanying it a remedial right, by which its enforcement can be secured; otherwise it becomes a moral precept, or a mere *brutum fulmen,* a dead letter. If all efficient legal remedies for enforcing a contract are withdrawn or disappear, then the obligation of such contract is impaired. This the legislature may not do. But if a single substantial and efficacious remedy remains, or is offered by the law, such obligation is not impaired.[2] Remedy furnishes a large chapter in the book of law. It comprehends the organization and jurisdiction of courts, including courts of appeal, the summons and other process for compelling the appearance of defendants, various provisional remedies, such as attachment, injunction and receivership, and the final process of execution and sale, the rules of pleading or scientific allegation of causes of action and defences, the limitations of time for commencing civil actions before they are outlawed, so to speak; the rules of evidence, or the method and means of proof, and the statutory category or class of cases where written proof may be required.

No one doubts that, in pursuance of due process of law, courts can be abolished and their litigants sent to other tribunals of justice; that the right of appeal can be limited or taken wholly away; that arrest for debt, either as a provisional or final remedy, can be abolished; that property of a debtor can be exempted from execution on a judgment; that the statute of limitations may be changed and the time allowed by law for bringing an action may be shortened,[3] and that the statute of frauds may be extended, and written testimony demanded where oral proof has heretofore been deemed sufficient. It requires but small powers of imagination to see that in any one of these details, trifling as they seem when viewed generally, there lies

2. *Oshkosh Waterworks Co. v. Oshkosh,* 187 U. S. 437.
3. *Campbell v. Holt,* 115 U. S. 620.

the whole matter of substantial enforcement of a specific legal right. A friendly and humane judge leaves the bench at the end of the appointed term of court and a capricious and obstinate man takes his place; this may determine the result of a particular suit. A certain party may be a desirable tenant while distress for rent lingers in the law, and most undesirable when that historic remedy is abolished. A vendee in bad faith may be held in check by garnishment or some form of attachment or trustee process, while on the denial of these remedies he may become bold and rampant in schemes of fraud and spoliation. Manly obligation, honestly assumed, may be repudiated by one who has not written it in black and white in any instance where the statute requires a writing. Rules of evidence may be changed, and witnesses, who have full knowledge of the truth, may be judicially silenced, and the plaintiff, on whom rests the burden of proof, crippled in the establishment of his cause of action.[4] The privilege of having the assistance of counsel, learned in the law, may always be refused to a mere witness, and has often been denied to a party to the record himself.

And this is as it should be. Who can say that society should not make progress, and that legal procedure should not keep step with the general advance? Who has any vested right in the law remaining as it is, unamended and unimproved? No progressive community has ever asserted such a reactionary doctrine.[5]

"Rights of property, which have been created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct may be changed at will, or even at the whim of the legislature, unless prevented by constitutional limitations."[6] No man bringing a suit gets a vested right to a certain decision; for the lay may be amended or repealed during the pendency of the action or pending an appeal and before final judgment, and the case is to be ultimately determined by the law as it stands at that time.[7] Nor has any citizen a vested right in the continuance of statutory privileges and exemptions, such as personal exemptions from military or jury duty, and the exemption of property from taxation and execution.

The phrase "due process of law" is derived from Magna Charta, from that famous sentence in the thirty-ninth chapter, in barbarous mediæval Latin, which has been pronounced by eminent authority

4. *Ogden v. Saunders*, 12 Wheat. 213.

5 *Holden v. Hardy*, 169 U. S. 385; *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437.

6. *Munn v. Illinois*, 94 U. S. 113.

7. *Hartung v. People*, 22 N. Y. 95.

as worth more to mankind than all the Greek and Roman classics and "which alone," says Blackstone, "would have merited the title that it bears of The Great Charter": "No freemen shall be taken, or imprisoned, or disseized, or outlawed, or banished, or in anywise destroyed; nor will the king pass upon him, or commit him to prison, save by the lawful judgment of his peers, or the law of the land."[8] "By the law of the land," says Webster, in the Dartmouth College case, "is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."[9] In *Murray v. Hoboken Land Co.*[10] Mr. Justice Curtis says: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta. Lord Coke, in his commentary on those words[11] says they mean due process of law." The phrase is found in the Fifth Amendment to the Constitution of the United States which provides that no person shall "be deprived of life, liberty or property without due process of law"; and again in the Fourteenth Amendment, which says: "Nor shall any State deprive any person of life, liberty or property without due process of law." It had been held that the object of the Fifth Amendment was only to protect the citizen against the encroachments of the Federal government.[12]

Judge Cooley has shown that in some form of words the guaranty of protection by the law of the land is to be found in all of the State constitutions.[13] The Northwest Ordinance also used the words "but by the judgment of his peers or the law of the land." The legal import of the phrase due process of law is the same in both the Fifth and the Fourteenth Amendments. The Federal authority will not interfere with the settled laws of a State applicable to all persons in like circumstances and conditions, except where there is some abuse of law amounting to confiscation of property, or deprivation of personal rights.[14]

Magna Charta was evidently designed, according to the United States Supreme court, to secure the individual from the arbitrary

8. 4 *Bl. Comm.* 244.

9. *Webster's Works*, V. 487; *Dartmouth College v. Woodward*, 4 Wheat. 419.

10. 18 How. 272.

11. 2 *Inst.* 50.

12. *Barron v. Baltimore*, 32 U. S. 243; *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238; *Brown v. New Jersey*, 175 U. S. 172.

13. *Constitutional Limitations*, 429.

14. *French v. Paving Co.*, 181 U. S. 324.

exercise of the powers of the government.[15] "This document," say Pollock and Maitland, "becomes a sacred text, the nearest approach to an irrepealable fundamental statute that England ever had. In brief, it means that the King is and shall be below the law." This high authority continues: "It has been possible for men to worship the words *nisi per legale judicium parium suorum vel per legem terrae,* because it was possible to misunderstand them. . . . It is now generally admitted that the phrase *judicium parium* does not point to trial by jury. (*Stubbs Constl. Hist. of Eng.* Vol. 1, 578; *Walker v. Sauvinet,* 92 U. S. 90.) . . . This clause expresses a claim by the barons for a tribunal of men of baronial rank which shall try even civil causes in which barons are concerned. . . . In the most famous words of the charter we may detect a feudal claim which will only cease to be dangerous when in course of time men have distorted their meaning. A man is entitled to the judgment of his peers; and the King's justices are no peers for earls and barons." [16]

Formulated in England to protect the feudal baron against the tyranny of the King, this clause became in America the bulwark of defence for the humblest citizen against the legislative power. It is therefore much more powerful here than in the mother country for Parliament is unrestrained by an organic law, whereas under the decision in *Marbury v. Madison,*[17] every department of our government is subject to constitutional limitations. True liberty has an inherent power of growth and expansion. The Fourteenth Amendment itself was once conceived by the Supreme court as designed solely to protect the colored race.[18] Roscoe Conkling argued against this narrow view and produced in court the journal of the reconstruction Congress which drafted the amendment to show its broad scope. There was a powerful dissent in the *Slaughter House Cases* from the opinion of the court; and some of the views of the dissentient minority are now the law of the land. Not one case in twenty that are now adjudicated under this amendment concerns the negro in any way. The last three amendments, in the language of Justice Swayne, in the *Slaughter House Cases,* "may be said to rise to the dignity of a new Magna Charta." A broad view is now taken of them as great and far-reaching provisions in protection of individual

15. *Bank of Columbia v. Okeley,* 4 Wheat. 235.

16. *Hist. of Eng. Com. Law,* Vol. 1, p. 173.

17. 5 U. S. 137.

18. *The Slaughter House Cases,* 83 U. S. 36; *Strauder v. Virginia,* 100 U. S. 303.

liberty against governmental oppression and spoliation.[19] Ex-Chief Judge Parker, of the New York Court of Appeals, in an elaborate discussion of this theme, shows the application of this constitutional test to legislation affecting police powers, eminent domain, taxation and procedure.[20]

"Due process of law," says Justice Curtis, "generally includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." Yet this is not universally true; and, in the case under discussion, the court sustained a distress-warrant, without any such trial. This distress-warrant was a summary remedy for the collection of public dues, process, in its nature, final, which issued against the body, lands and goods of certain debtors to the public treasury.[21] Judge Story says: "When life and liberty are in question there must, in every instance, be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted."[22]

But the constitution does not describe the processes which it intends to demand or exclude. It does not even indicate what principles are to be followed in order to determine whether any given process be due. Clearly it is not left to Congress to do its own liking; for the organic law is a restraint on Congress. When any particular process is challenged for unconstitutionality we have not only to examine the Constitution itself to see if there be any direct conflict, but in addition we must examine the settled modes of judicial procedure in England before the emigration of our ancestors and note those that were put in operation here as suited to our politcal and civil conditions. But England was the home of the Star-Chamber Court, sitting at one end of Westminster Hall, and proceding to judgment by arbitrary authority instead of according to the common law. This court has given its name, once honorable (whether derived from the gilded stars in the roof of the temple or from the deposit there of Jewish bonds called *stars,* as Blackstone tells us) as a by-word and reproach to all tribunals that substitute for orderly procedure the secret and unfair methods of despotic authority. Surely, as we have no King, so we will have none of this.

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19. *Yick Wo v. Hopkins,* 118 U. S. 356.

20. *American Law Review,* December 1903 and January 1904.

21. *Murray v. Hoboken Land Co.,* 18 How. 272; *Palmer v. McMahon,* 133 U. S. 660.

22. *Story on the Const.,* 1943.

The Constitution does not control the form of procedure, if the method adopted gives reasonable notice and affords a fair opportunity to be heard.[23]

The right to appeal cannot be demanded as essential to due process of law.[24] And a statutory right to take an appeal may be taken away, even as to matters already pending in the appellate court.[25] A State can arrange and parcel out the jurisdiction of its several courts at its discretion and can deny to certain suitors the right of appeal and of writs of error.[26] In England, in cases of murder, the court of first instance is the court of last resort; and, in case of conviction, the prisoner's only appeal is to the clemency of the King, which his majesty exercises on the advice of the home secretary.

Mr. Justice Matthews said in *Hurtado v. California*:[27] "Any legal proceeding, enforced by public authority, whether sanctioned by age or custom, or newly devised, in pursuance of the general public good, which regards and preserves the principles of liberty and justice, must be held to be due process of law." It was accordingly held that the State is not tied down to the practice and procedure at common law, and that the grand jury system may be abolished, and the prosecution of crimes by indictment discontinued.[28] A State has the right to alter the common law at any time.[29] The State of New York might adopt the civil law.[30] A trial by jury in suits at common law pending in the State courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge.[31]

Courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property without due process of law.[32]

The due process clause of the Fourteenth Amendment does not control mere forms of procedure in State courts, or regulate practice therein; and all its requirements are complied with, provided that in

23. *Railroad v. Iowa*, 160 U. S. 389; *Water Company v. Brooklyn*, 166 U. S. 685; *Hooker v. Los Angeles*, 188 U. S. 314.

24. *Reetz v. Michigan*, 188 U. S. 505.

25. *Ex parte McCardle*, 7 Wall. 506.

26. *Missouri v. Lewis*, 101 U. S. 22.

27. 110 U. S. 516.

28. *Thompson v. Utah*, 170 U. S. 349.

29. *West v. Louisiana*, 194 U. S. 258.

30. *Missouri v. Lewis*, 101 U. S. 22.

31. *Walker v. Sauvinet*, 92 U. S. 90; *Hodgson v. Vermont*, 168 U. S. 262.

32. *French v. Barber Asphalt Co.*, 181 U. S. 345.

the proceedings the person condemned had sufficient notice and adequate opportunity to defend.[33]

Due process of law, prescribed by the Fourteenth Amendment, requires compensation to be made to the owner when private property is taken for public use.[34] Ordinarily notice to the owner and opportunity to defend must be given.[35] Whenever necessary for the protection of the parties the law must give them an opportunity to be heard.[36] Notice to owners of land liable to be assessed for a public improvement need not be given.[37] And property may be taken for public use prior to any payment.[38]

Exactly what due process of law requires in the collection of general taxes has never yet been decided by the Supreme court. While notice is required in condemnation proceedings, it has been held that no notice is necessary for the collection of general taxes.[39] Notice to a taxpayer need not be personal.[40] The owner need not have an opportunity to be present when the tax is assessed.[41] Due process of law is afforded to a taxpayer if he is given an opportunity to be heard before the assessors.[42] And perfectly legal notice may be given by simple publication, as in case of a municipal ordinance distributing the cost of a sewer.[43]

The prompt payment of taxes is important to the public welfare. The individual taxpayer is not entitled to the delays of litigation. If the tax laws are harsh the remedy is with the legislature and not with the judicial branch of the government.[44] So, where the city of New Orleans drained swamp lands and assessed the real estate benefited thereby, it was held that the Federal Constitution did not control the State authorities although excessive prices were allowed and unequal assessments levied.[45]

Among other interesting adjudications showing the range and

33. *Railroad v. Schmidt*, 177 U. S. 230; *Iowa Central R. R. v. Iowa*, 160 U. S. 389; *Wilson v. North Carolina*, 169 U. S. 586.

34. *Railroad v. Chicago*, 166 U. S. 226; *L. I. Water Co. v. Brooklyn*, 166 U. S. 685.

35. *Spencer v. Marchant*, 125 U.S. 345; *Paulsen v. Portland*, 149 U.S. 30.

36. *Turpin v. Lemon*, 187 U. S. 58.

37. *Goodrich v. Detroit*, 184 U. S. 432.

38. *Williams v. Parker*, 188 U. S. 491.

39. *Hagar v. Reclamation District*, 111 U. S. 701.

40. *Glidden v. Harrington*, 189 U. S. 255.

41. *McMillan v. Anderson*, 95 U. S. 37.

42. *Hibben v. Smith*, 191 U. S. 310.

43. *Paulsen v. Portland*, 149 U. S. 40.

44. *Springer v. U. S.*, 102 U. S. 586.

45. *Davidson v. New Orleans*, 96 U. S. 97.

variety of the decisions under this clause of the Constitution we note that aliens may be deported and anarchists excluded from the country;[46] that mail matter may be seized by the postmaster-general under a fraud order, without invoking the aid of the courts;[47] that the sale of liquor may be regulated by a local option law, and the penalty for illegal selling may be left to the discretion of the court;[48] that a State statute may require the erection of a railway station;[49] that women may be excluded from saloons licensed to sell liquor;[50] that the hours of work in laundries may be regulated;[51] that the conduct of a grain elevator may be placed under State regulation;[52] that the right to continue the practice of the learned professions is property which cannot be arbitrarily taken away;[53] that State laws may prohibit the intermarriage of white and blacks;[54] that separate schools may be impartially provided for whites and blacks;[55] that a health officer may be empowered to kill a diseased beast;[56] and that debauched women who are being imported into the State for immoral purposes may be excluded.[57]

No man ought to be judge in his own cause, and close relationship to plaintiff or defendant should disqualify him for the exercise of judicial functions. So, if the estate of the judge will be affected by his ruling, he should not sit.[58] By statute in many States interest arising from holding corporate stock or from being a taxpayer no longer works a judicial disqualification.

Distinguished jurists have taken time to analyze the proceedings in the trial of Jesus, according to the gospel narrative, and to exhibit their turbulent and disorderly character. Mr. Justice Gaynor and Mr. Justice Hatch, of the New York Supreme Court, have written eloquently and learnedly on this theme. It seems that political authority and the power of judicial condemnation in capital cases were with the Roman governor of Judæa. And so the Apostles'

46. *Turner v. Williams*, 194 U. S. 279.
47. *Clearing House v. Coyne*, 194 U. S. 497.
48. *Lloyd v. Dollison*, 194 U. S. 445.
49. *Railroad v. Minnesota*, 193 U. S. 53.
50. *Cronin v. Adams*, 192 U. S. 108.
51. *Barbier v. Connolly*, 113 U. S. 27.
52. *Munn v. Illinois*, 94 U. S. 113.
53. *Dent v. West Virginia*, 129 U. S. 114.
54. *State v. Jackson*, 80 Mo. 175.
55. *People v. Gallagher*, 93 N. Y. 438.
56. *Newark & S. O. Co. v. Hunt*, 50 N. J. L. 308.
57. *Matter of Ah Fooh*, 49 Cal. 403.
58. *Dimes v. Grand Junction Canal*, 3 H. of L. Cases 759.

Creed speaks fairly of Christ as having "suffered under Pontius Pilate," not only in the time of Pilate and in the period of his proconsulship, which is doubtless all that was intended by this language, but actually under his jurisdiction, which was the substantial truth in the case. However, it has been thought necessary to charge the conviction and execution of the Man of Nazareth to the Jews, who arraigned him in the court of the high priests, before Annas and Caiphas, and judged him according to Jewish law. In the course of this prosecution careful observers have noticed the indecent haste with which execution was ordered, and the indifference displayed by the judges to the formalities of just procedure, prescribed by the Mosaic jurisprudence. Thus, in addition to the false testimony adduced on the trial, and the shifting of the charge against the accused from blasphemy to treason, we note that the trial before the high priest was held in the night-time, contrary to the pentateuchal code, and that the truth of the charges was not established beyond a reasonable doubt.

A member cannot be expelled from a voluntary unincorporated association without notice and opportunity to be heard.[59] Failure to appear will not authorize expulsion without proof; and failure to serve copies of charges, as required by the by-laws, is a jurisdictional defect.[60] In the case of membership associations an action cannot be maintained to correct errors or illegal acts in the course of their government and administration till the remedies provided by the constitution and by-laws have been exhausted.[61] The wide application of these principles is commended in an English case of great authority where the Court said: "No man shall be condemned to consequences resulting from alleged misconduct, unheard, and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."[62]

Isaac Franklin Russell.

59. *Loubat v. LeRoy*, 40 Hun 546.
60. *People ex rel Deverell v. Protective Union*, 118 N. Y. 101.
61. *La Fond v. Deems*, 81 N. Y. 507.
62. *Wood v. Wood*, L. R. 9 Ex. 190.