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Max Schoetz Jr.

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NATURAL AND INHERENT RIGHTS PROTECTED BY THE FOURTEENTH AND FIFTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

DEAN MAX SCHOETZ, JR., B.A., LL. B.

The Constitution of Wisconsin by section one, article one, recognizes that as individuals we have certain inherent rights, for it declares :

All men are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

It is the purpose of this article to discuss the question as to whether these natural and inherent rights are protected by the Fifth and Fourteenth Amendments of the United States Constitution.

The Fifth Amendment to the Constitution of the United States provides :

No person shall be deprived of life, liberty, or property without due process of law.

This amendment, it is well settled constitutes a restriction on the Federal Government only and not on the states. The Fourteenth Amendment provides :

Nor shall any state deprive any person of life, liberty, or property, without due process of law.

This language constitutes a limitation on the power of the states.

DUE PROCESS OF LAW

Neither the Federal nor the State Constitutions have made any attempt to define what is "due process of law." Our Supreme Court has sought to define what is meant by these terms.¹ Justice Marshall in *Eckern vs. McGovern*, 154 Wis. 157, 240, says,

What is meant by due process of law? There is nothing technical about it when we view the subject broadly. Due process of law means, in brief, the law of the land, including the unwritten law. It is simply

¹*Rowan vs. State*, 30 Wis. 129, 145; *State ex rel Milwaukee Medical College vs. Chittenden*, 127 Wis. 468; *Eckern vs. McGovern*, 154 Wis. 157, 240; *Lacher vs. Venus*, 188 N. W. 616, (Wis. May 9, 1922.)

that which must be followed in depriving anyone of anything which is his to enjoy until he shall have been divested thereof by and according to the laws of the country. Whether the proceedings relate to liberty or property, in the technical sense and be of a strictly judicial nature, or a mere trifle, immunity, status, or anything else of value which commonly are of a quasi-judicial nature, incidental to or as a part of administrative authority reviewable by courts as to judicial matters, or of a purely ministerial nature where a thing is a mere creature of the law granted upon condition of being so dealt with, due process of law pervades and rules them all.

In *State ex rel Milwaukee Medical College vs. Chittenden*, 127 Wis. 468, Justice Marshall again makes an attempt to define "due process of law" as follows:

Due process of law does not mean merely according to the law of the legislature or the will of some judicial or quasi-judicial body upon whom it may confer authority. It means according to the law of the land, including the constitution with its guarantees and the legislative enactments and rules duly made by its authority so far as they are consistent with constitutional limits. It excludes all mere arbitrary dealings with persons or property. It excludes all interference not according to the established principles of justice

The equivalent of the phrase "due process of law" according to Lord Coke is found in the words "Law of the land" as used in the Great Charter which protected every free man in the enjoyment of his natural rights. That this rule is even more firmly established than by the Magna Charta and that it is founded upon the first principles of natural justice is evidenced from a reference to the Bible, Chapter 23 of *Exodus*, wherein the rules for guidance of judges are laid down in this language:

Thou shalt not follow the multitude to do evil, neither shalt thou yield in judgment to the opinion of the most part, to stray from the Truth.

The early writers on moral philosophy virtually came to the same conclusions as is evidenced from this statement:²

Since the state derives its authority from the moral law, it can bind its subjects in conscience to observe its enactments. In order to possess this binding force such enactments must be just, therefore they must fulfill all the conditions required for just laws. An unjust law enacted by a majority, even with perfect unanimity, by an entire nation may be just as tyrannical and unjust as a despotic monarch.

There are cases, however, which hold that while "due process" does not necessarily mean in accordance with the law of the land

² *Coppens Moral Philosophy*, p. 147.

but rather in accordance with the conventional sense of justice of all of the people. In other words, that if a law is in accordance with the modern ideas of justice, it will be considered "due process." According to these cases then "due process" changes with the progressive ideas of all the people.³ Justice Oliver Wendell Holmes is one of the foremost exponents of this view.

Truth and justice are abstract terms and not relative, and acts which are of their very nature evil, cannot be made right and just because a majority wills it so. Truth is eternal and unchangeable, and because of our finite minds we may at times have difficulty in comprehending it.

LIFE, LIBERTY, AND PROPERTY

The rights which every Government is expected to recognize and protect may be classed under the following heads:

- (1) Security in person;
- (2) Security in the acquisition and enjoyment of property;
- (3) Security in the family relations.

That is why Governments are instituted among men. "We hold these truths to be self evident," says our Declaration of Independence, "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among them are life, liberty, and the pursuit of happiness."

The Fifth and Fourteenth Amendments use the term, "life, liberty, and property" which are inclusive of all of the foregoing.

The terms life,⁴ liberty,⁵ and property,⁶ are used in the constitutional guarantees in a broad, liberal, and general sense. The right to life including the right of the individual to his body in its completeness and without dismemberment, not only life but everything connected with life for its growth and enjoyment; the right to liberty embraces not only freedom from imprisonment but also freedom in the enjoyment and use of ones faculties in going where one pleases, in the choice and pursuit of a vocation or occupation and in the making of contracts; and the right of property embraces everything over which a man may have exclusive

³ *Harvard Law Review* for November, 1918, pp. 40 to 44; See reply, 3 *Marquette Law Rev.*, 91.

⁴ *Bertholf vs. O'Reilly*, 74 N. Y. 509; *Munn vs. Illinois*, 94 U. S. 113, 142.

⁵ *Allgier vs. La.*, 165 U. S. 578, 589; *State vs. Kreutzberg*, 114 Wis. 530; *Spencer Social Status*, 94; *Montesquieu*; *State vs. Ryan*, 70 Wis. 676, 680.

⁶ 2 *Story Const. Sec.* 1950; *Wilkinson vs. Leland*, 2 Pet. 627; *State vs. Chittenden*, 127 Wis. 468.

dominion, everything which has an exchangeable value, in fact everything belonging to one which has its foundation in the fundamental law.

Thus the parental rights to the child come within this constitutional guarantee,⁷ the right of every citizen to select those tradesmen whom he desires;⁸ the right to change a beneficiary in an insurance policy;⁹ the right of an employer to discharge an employee;¹⁰ the right of a riparian owner to drive piles and build piers;¹¹ the rights of a policy holder in a mutual company.¹²

INHERENT RIGHTS

How far, consistent with freedom, may the rights and liberties inherent in the individual members of society be subordinated to the law of the Government? That question has been at war from the very first existence of any form of Government. For many centuries, while debated as ethical and philosophical questions, it was resolved in each instance by force or by the ability to exert force. As stated by Judge Dodge in *State vs. Kreutzberg*, 114 Wis. 530, 532:

A little more than a century ago the attempt was made by the American people to define the limits by written contract, and to withdraw their decision and investigation from the arena of physical strife and transfer it to the peaceful forum of the judiciary. In line with that attempt people of what is now the State of Wisconsin, some sixty years ago formulated their Constitution.

As stated heretofore the very first section of that Constitution declares

All men are born equally, free and independent and have certain inherent rights.

It does not provide that the government grants these rights but recognizes that they already exist before the Government is established "and to secure these rights Governments are established," and it cannot be doubted that this declaration of the purpose to be accomplished by this Government is to be construed as a limita-

⁷ *Schlitz vs. Roewitz*, 86 Wis. 31, 40; *Estate of McCormick*, 108 Wis. 234, 238; *Guardianship of Knowl*, 167 Wis. 461; *Lacher vs. Venus*, (Wis.) 188 N. W. 613.

⁸ *New Method Laundry Co. vs. McCann* (Cal.), 161 Pac. 990.

⁹ *Boehmer vs. Kalk*, 155 Wis. 156.

¹⁰ *State vs. Kreutzberg*, 114 Wis. 530.

¹¹ *Janesville vs. Carpenter*, 77 Wis. 288.

¹² *Huber vs. Martin*, 127 Wis. 412.

tion upon the powers given. By the preamble of our Constitution preservation of liberty is given precedence over the establishment of Government. It would be inconceivable that the people of Wisconsin, in establishing a Government to secure the rights of life, liberty, and the pursuit of happiness, should by general grant of the legislative power, have intended to confer upon that Government authority to wholly subvert those primary rights.

Justice Eschweiler in *Lacher vs. Venus*, 188 N. W. 613, 617, says:

If a man's money shall not be taken away from him save by due process of law, much less shall his child. We do not deem it necessary to base this decision upon or dwell at any length upon such possible sordid, because material, grounds for our conclusion, but rest it upon the natural rights of parenthood, a far finer and higher quality, and for that reason more sacredly to be upheld.

Thus we see that all natural and inherent rights of the individual are protected by the constitutional guarantees for which purpose our Government was founded. Our Government exists for the good of the people; in the others, the people exist for the good of the governing power. As stated by Justice Eschweiler in his article in 7 *Marquette Law Review* 25:

The individual, however, humble and oppressed by a law which the law making body had no constitutional power for making, is entitled to as much solicitude, care and protection by the courts, indeed to greater care and solicitude, because the odds are greater than when he complains of the unlawful acts of an individual neighbor. Thus may, and may only, and must be secured and observed those guaranteed inherent rights of the individual for whose security and preservation our government is instituted and stands solemnly pledged.