"LET US NOW PERUSE OUR ANCIENT AUTHORS, FOR OUT OF OLD FIELDS MUST COME THE NEW CORNE."[1]
SIR EDWARD COKE, DR. RICHARD BONHAM AND THE BIRTH OF DUE PROCESS.

"Due Process of Law" is the most elegant phrase in our Law. Inalienable rights; life, liberty and the pursuit of happiness; the equal protection of the laws----all of it would be meaningless without due process of law. So who thought it up, where did it come from and how did it get here?

It took several hundred years for our law to progress out of its mediaeval traditions of trial by battle, ordeal, immersion, compurgation (oath taking) and other barbaric forms of fact finding. Until England developed an independent judiciary, hand in hand with the Common Law, from the 1100's to the 1600's, there was not much room for elegance in the law or for the judiciary to be anywhere but back stage. Due process of law came along ever so slowly and surely, but it found its footing----never to retreat----when placed in the hands of Justice Edward Coke. (Pronounced cook.)

If we were to rank the judges of England and America, everyone would agree that John Marshall and Edward Coke would be in the top five. Chancellor James Kent of New York would probably make the cut, as would Justice William Mansfield[2] of England. But who was the greatest? My vote would go to Edward Coke. The main reason is this. When Coke was standing up against the King in defense of the law, a judge could find himself in the Tower of London contemplating the high probability that his head would be separated from his body with extreme prejudice. Marshall, on the other hand, was safely ensconced in a life tenured chief justiceship. Unlike Coke, Marshall only had to suffer the slings and arrows of the outrageous insults cast at him by Thomas Jefferson. (Jefferson referred to Marshall as "his honorable malignancy.") But first, we must step back a few hundred years.

June 15, 1215, Runnymede, England. Runnymede meadows is just west of London, on the Thames in County Surrey. At the time, King John had gotten himself into a real pickle. His European ventures were a disaster; he lost Normandy in 1204. To finance his ventures he taxed the Church heavily. This brought him in conflict with Pope Innocent III. His other war financing policies brought him the enmity of the Barons. Faced with the unified power of the Church and the Barons and the loss of his throne (and with it his head), the rights contained in the Magna Carta were extracted from the King. This made a big difference. Previous declarations of rights by previous kings had been **granted** and, therefore, could be disregarded or rescinded by the King. With the Magna Carta, the King, the Barons and the Church were now Blood Brothers.

The most famous clause of the Magna Carta is Clause 39 (but Clause 40 is the more elegant and inspiring: **"XL. To none will we sell, to none will we deny, to none will we delay right or justice.**") Clause 39 reads as follows:

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> "XXXIX. No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn, nor will we commit him to prison, except by the legal judgment of his peers, **or by the laws of**

the land."

For Coke, the phrase "by the laws of the land" meant "the Common Law, Statute Law or Custome of England....that is, to speak it once and for all, by the due course, and processe of law.[3] According to Professor John V. Orth (Professor of Law, University of North Carolina) "Coke derived the phrase from a statute in "Law French," the vernacular of English Law for three centuries following the Norman Conquest, citing 25 Edw. 3, st. 5, c, 4 (1350): "en due manere ou process fait sur brief original a la commune lei."[4]

Magna Carta fixed, forever, the principle that no man was above the law and that the coercive power of government can be applied to the lives and affairs of persons only by the duly constituted laws of the land. However, no principle of law is ever the result of a eureka moment. Even Moses, bringing the Ten Commandments down from Mount Sinai, could not have surprised the Israelites with the news that they should not kill. The development of the law is usually glacial, except when it is mutated by a civil war or revolution. For the next five hundred years the King and Parliament would struggle for supremacy in England. Parliament would eventually win. The Judges, through the Common Law, wrote the rule book and were the referees. This was a dangerous business for the judiciary. The most famous among them, Thomas More and Thomas Becket, would lose their heads and Thomas Wolsey was on the way to the axeman but died enroute.

Edward Coke, son of a successful lawyer, was to become one of England's most famous lawyers. He gained early fame by defending an English cleric against a slander suit by Lord Cromwell (Edward not Oliver) and winning on a pleading technicality. He also successfully argued **Shelley's Case** that resulted in the famous rule that no lawyer (or Judge) can remember, if they ever understood it to begin with.[5] Coke was the Recorder of the City of London, Solicitor General for Queen Elizabeth I, Speaker of the House of Commons, beat out Francis Bacon for Attorney General, prosecuted Walter Raleigh for treason and prosecuted the defendants in the famous Gunpowder Plot. As an advocate, the phrase "due process" was not in his vocabulary. Single-minded and convinced of his righteousness would be a kind way to describe Coke. Underhanded and devious would be more accurate. He was not a nice guy.

In 1606, now under James I of Scotland, the first Stuart King, son of Mary Queen of Scots, Coke became Chief Judge of the Court of Common Pleas. As Attorney General, Coke had been an unflinching defender of the Crown's prerogatives. As a judge, he would march to a different drummer. In **Fuller's Case** (1607) Coke held that the Law Courts were the determiners of the jurisdiction of the ecclesiastic courts and that the King could not remove a case from the courts to adjudge it himself. Coke also ruled that the King could not amend the Common Law by proclamation nor could he create an ex post facto offense. Coke's duplicity as an advocate had morphed into incorruptibility as a judge. Though he had severely angered King John, his public stature had provided him a shield of sorts. The King tried to appoint him to the Court of High Commission but Coke refused. In 1616, King James thinking it was better to have Coke more on the inside than the outside, appointed him Chief Justice of the Court of King's Bench. Coke was the first person to carry the title of Lord Chief Justice of England.

As Chief Justice, Coke remained a strong voice for the supremacy of the Common Law. However, eventually his dark side got the better of him and he allowed political

intrigue to pollute his judicial independence. He was removed from the Court by the Privy Council. In an attempt to buy back some political favor, he forcibly married off his fourteen year old daughter, over the objections of his wife, to the brother of the Duke of Buckingham. In 1620, Coke returned to Parliament to become the King's primary bête noir from that vantage point. The King had him arrested and tried on several charges but nothing stuck. Coke's contribution to the law was twofold. First, he stood up to the King, Parliament, the Church, and the other courts and anyone else who challenged the supremacy of the "law of the land." Often he found himself standing alone. Second, through his eleven volumes of his **Reports**, he systematized the Common Law of England and gave it its most solid foundation. Despite his vast influence across the entire spectrum of English Law and his expansive writings, it is for the relatively insignificant case of Dr. Bonham for which he is remembered.

The College of Physicians, a private organization somewhat like a Bar Association, had the right to license physicians who practiced in the City of London. Dr. Thomas Bonham had been refused a license but he practiced medicine anyway. The Society fined him and ordered him to stop. Bonham ignored the order. The College arrested him and Bonham sued for false imprisonment. Coke ruled in Bonham's favor and in his decision, listed the violatins of due process. 1. The president of the college did not have the power to fine. 2. The proceedings should be recorded in writing and not on voice alone. 3. Fines collected belonged to the King and not to the College. 4. The College did not have the authority to imprison.

The two memorable conclusions that come from **Dr. Bonham's Case** are these: 1. That a person can not be a judge in a case in which he is a party. This is the baseline starting point of due process, the right to have your case heard by a neutral magistrate. (An issue most recently argued before the Supreme Court in the detainee cases.) 2. The Common Law can nullify acts of Parliament:

> "And it apeareth in our Books, that in many Cases, the Common Law doth controll Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common law will controll it, and adjudge such Act to be void;..." (**Dr. Bonham's Case,** 1610 Hillary Term, 7 James I. *Reports*, V. 8, p. 113 b)

There are claims that this is the first statement recognizing the power of judicial review, which is outside the scope of the concept of due process in the classical sense. However, the power of judicial review will come center stage when we get to "substantive" due process. In any event, the judiciary in England lost this fight because the highest court in England (The Law Lords of the House of Lords) does not have the power to overrule an act of Parliament. The fact that England does not have a constitution, as such, made that row a difficult one to hoe for the judiciary.

The elements of due process of law are fairly well settled at this point in time. They would include the following. 1. A neutral magistrate to hear the issue. 2. Adequate notice of the date, time, and place to be heard and of the issues at hand. 3. The right to be heard on the issue. 4. The right to present evidence. 5. An ability to compel the presence of witnesses and obtaining evidence. 6. The right to confront adverse witnesses. 8. The right

to view all evidence considered by the decision maker. 9. A decision made only on the evidence produced at the hearing. 10. The right to the assistance of counsel. (See, **Goldberg v. Kelly**, 397 U.S. 254 [1970]. In **Goldberg,** the court was asked to determine what process was due before welfare benefits for the indigent could be terminated. In 2004 the Court is being asked to determine what process is due to enemy combatants. Four hundred years after Dr. Bonham's case we are still exploring issues of due process. For the most part we know what it is but we are still not sure who gets it.

(NEXT TIME, THE STORY OF THE BIGGEST JUDICIAL POWER GRAB OF ALL TIME: "SUBSTANTIVE DUE PROCESS.")

1. 4 *Co. Inst. 109*

2 William Mansfield (1705-1793, Scotland) would be ranked by many ahead of Coke. A self made man, Mansfield served as England's Solicitor General, Attorney General and, for thirty-two years, Chief Justice of the King's Bench. Mansfield modernized the Common Law and adapted it to the expanding commercial enterprises of the expanding British Empire. In his most famous case, Charles Stewart of Virginia had retrieved his slave, James Sommerset, who had escaped while on a trip with Stewart in England. An anti-slavery group petitioned the Court by Writ of Habeas Corpus to free Sommerset. Mansfield and his Court ruled that the no provision of positive [legislative] law of England permitted slavery. He wrote that the very concept of slavery was so objectionable that the Common Law could not support it. "It is so odious, that nothing can be suffered to support it, but positive law." This decision freed 15,000 slaves in Great Britain. No doubt, Mansfield, for England, is the full counterpart of our John Marshall. Maybe even more so. After all, Marshall was writing on a clean slate. Mansfield, on the other hand, was encumbered with over 500 years of English Common Law.

3. Quoted in **The Selected Writings of Edward Coke**, V. II, Liberty Fund, Steven Sheppard, ed., 2003., p.849.

4. **Due Process of Law, A Brief History**, University of Kansas Press, Lawrence KS, 2003.

5. There is no way to explain the rule in Shelley Case in a footnote. However, it should be noted that it really should be called "The Rule Used in Shelley"s Case" because the rule was well founded well before Shelley ever had a case and it was just admitted as a controlling point in that case.