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Constitutional Law--Denial of Due Process by Change in the Adjective Law

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> "The rule that functions well produces a title deed to recognition. Only in determining how it functions we must not view it too narrowly. We must not sacrifice the general to the particular. We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance. * * * *But within the limits thus set, within a range over which choice moves, the final principle of selection for judges * * * is one of fitness to an end.*" (Italics ours.) [20]

The end reached in the case of Ultramares Corporation v. Touche, as we have said, was evidently the result of this method: the duty of the Courts, as seen by Judge Cardozo, "to declare the law in accordance with reason and justice" as *"a phase of the duty to declare it with custom."* [21] The modern progressive tendency towards liberalism and freedom from the old fetters of precedent which so often stifle justice, is, wisely applied, highly desirable.

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CONSTITUTIONAL LAW—DENIAL OF DUE PROCESS BY CHANGE IN THE ADJECTIVE LAW.

While we are all familiar with such general statements that "due process does not guarantee to a citizen of a state any particular form of procedure, its requirements are satisfied if the defendant has had notice and an opportunity to be heard," [1] yet at times it is difficult to determine what constitutes notice or opportunity to be heard. Generally speaking, this statement is true. The hearing need not be a judicial proceeding, as the decision may be entrusted to an executive officer or administrative board.[2] A state may repeal a statute of limitation and thereby revive a debt that had already been barred without violating the Fourteenth Amendment.[3] A state may change the number of jurors in a criminal case

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[20] *Ibid.* at 103.
[21] *Ibid.* at 106. (Italics ours.)

[1] Dohany v. Rogers, 281 U. S. 362, 369, 50 Sup. Ct. 299 (1929).
[2] U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644 (1905).
[3] Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209 (1885): "No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this Court, show that no right is destroyed when the law restores a remedy which has been lost. * * * We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment which shall prevent the legislature from repealing the law."

or abolish the jury system entirely without violating due process.[4] An erroneous decision on a question of substantive law presents no federal question.[5] It is well settled that a state may consider proof of one fact presumptive evidence of another, provided there is a rational connection between them, and may also change the burden of proof.[6] However, a purely arbitrary presumption of law such as that directors of a bankrupt bank are *prima facie* guilty of fraud has been held unconstitutional.[7] A state may not render a personal judgment against a non-resident who, or foreign corporation which, has not been served within its borders or subjected itself to the jurisdiction of the state.[8]

A more important aspect of this question presents itself in a series of cases which deal with trials that in form afford due process but in substance deny it. There more subtle distinctions must be drawn. In the famous Frank[9] case an appeal from an order refusing an application for a writ of habeas corpus was taken to the Supreme Court. The allegations in the petition set out that the trial was conducted in a court room packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner; that the trial Judge in the presence of the jury conferred with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment as to precautionary measures to be taken in the event of an unpopular verdict. On the morning of the last day of the trial the prosecutor was warmly applauded as he entered the court. The Judge before charging the jury advised the defendant and his counsel to leave the court, fearing violence if they remained. There was more applause as each juror was polled. The majority opinion held that due process was not denied as the defendant had an appeal to the trial term after the verdict and to an appellate tribunal, both of whom decided against him on the facts. The majority opinion further held that even if jurisdiction was lost at the trial it was regained by the judicial calm in which the proceed-

[4] Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 488 (1898): "There is no intimation here that among the privileges and immunities of a citizen of the United States are the right of a trial by jury in a state court for a state offense and the right to be exempt from any trial for an infamous crime unless upon presentment by a grand jury. * * * Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the state."

[5] Mosley v. Lake Shore & M. S. Ry., 146 U. S. 162, 13 Sup. Ct. 64 (1892).

[6] Hawes v. Georgia, 258 U. S. 1, 42 Sup. Ct. 204 (1922). The Court cited with approval Hawkins v. Bleakley, 243 U. S. 210, 37 Sup. Ct. 255 (1917): "The establishment of presumptions and of burdens of proof is clearly within the domain of the state governments."

[7] Manley v. Georgia, 271 U. S. 1, 46 Sup. Ct. 415 (1929).

[8] Pennoyer v. Neff, 95 U. S. 714 (1878); Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236 (1907): "No judgment of a court is due process of law if rendered without jurisdiction in the court or notice to the party."

[9] Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. 582 (1915).

ings before the Appellate Courts were conducted. A minority opinion written by Justice Holmes held that since a constitutional question was involved the federal Court should have tried the allegations and determined the facts for itself.

In a later and somewhat similar case [10] in which the petition of five negroes for a writ of habeas corpus contained the usual allegations that they were hurried to a conviction under pressure of a mob and that the trial was a mere mockery and that the attorney who attempted to defend them was indicted for barratry, the Supreme Court, Justice Holmes writing the opinion, held that although the petitioners had three appeals in the state courts it was incumbent on the District Judge to try the facts for himself. This case would seem to establish the proposition that a trial is none in substance whatever it may be in form if the verdict does no more than register the bidding of a mob. Not alone must the trial be conducted free from duress but the Judge must be disinterested. Thus a conviction before a Justice of the Peace whose fees are proportioned to the fines that he imposes, is not due process.[11]

A recent case [12] decided by the Supreme Court does much to chart the limitation on state action in this field of the law. Plaintiff, a banking institution, brought suit in the courts of Missouri to restrain the treasurer of Henry County from attempting to collect taxes assessed against them on shares of stock on the grounds that the assessor had discriminated against them insofar as he had systematically and intentionally assessed bank stock at its full value, whereas all other classes of property were assessed at 75% or less of their true value. The answer opposed relief in equity on the grounds that under the Missouri Statutes [13] a remedy was provided by an appeal to the State Board of Equalization. The Missouri Court disregarded this contention but held that plaintiff was not entitled to equitable relief as he could have appealed to the State Tax Commission. The possibility of relief before the Tax Commission was not suggested by anyone before the Court rendered its decision. But under the decision [14] application to the Tax Commission could not be made after the tax books had been delivered to the collector. This was done about October 1, 1927. The opinion was handed down June 29, 1929. Six years previous this same Court in construing the statute in question [15] held that the tax commission had no such power, saying that it was "preposterous" and "unthinkable" that the statute conferred any such power

[10] Moore v. Dempsey, 261 U. S. 86, 43 Sup. Ct. 265 (1923).

[11] Tumey v. Ohio, 273 U. S. 510, 47 Sup. Ct. 437 (1927).

[12] Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 50 Sup. Ct. 451 (1930).

[13] Secs. 12820, 12827, 12853, 12857 Missouri Revised Statutes of 1919.

[14] Laclede Land & Improvement Co. v. State Tax Commission, 295 Mo. 298, 243 S. W. 887 (1922).

[15] *Ibid.* note 13.

and, that such a construction would violate the State Constitution. A petition for a rehearing was seasonably made reciting the above facts, but was denied without an opinion. On appeal the Supreme Court, Justice Brandeis writing the opinion, held that while the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state, and while the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decision on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on the federal courts, yet in the present case the state Court by refusing to hear plaintiff's complaint because plaintiff did not first seek an administrative remedy, which in fact was never available, and which is not now open to it, and by denying to it the only remedy that was ever available for the enforcement of its right to prevent the seizure of its property, deprived the plaintiff of due process. The Court further stated that the federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.

Judge Cardozo seemed to summarize this phase of the law in one of his publications when he said, "The guaranty of liberty in the constitutional law of the nation and its constituent commonwealths is a guaranty that claims and immunities conceived of at any given stage of civilization as primary and basic shall be preserved against destruction or encroachment by the agencies of government. We may classify under this head some of the decisions defining those indispensable elements of justice that are essential to the attainment of due process of law. There must be judgment after notice and a hearing. There must be trial by an impartial Judge without interest in the event. There must be calmness and deliberation, or at least the fair opportunity for them." [16]

The question naturally suggests itself how far may a state modernize its procedure or deviate from the traditional modes of trials without violating the due process clause of the Fourteenth Amendment? Much of the criticism of the law from lay sources is due to its archaic forms of procedure. In recent years the profession has been keenly aware of this problem and many efforts have been made to eliminate anachronisms in this field of the law. While we must not be unmindful of the warning of Dean Pound that "The general security forbids that trial judges experiment at the expense of life, liberty and property" [17] it seems certain that the future will bring many radical changes in our present systems of adjective law. Although there has been some confusion of thought on this subject, due to the Federal Constitution guarantee-

[16] Cardozo, Paradoxes of Legal Science, (1927) 123.

[17] Pound, *Science and Legal Procedure* (1928) 8 Amer. J. of Psychiatry, 33, 36.

ing certain modes of procedure, in federal cases, it is submitted that there is nothing in the Fourteenth Amendment that forbids a state from keeping its rules of procedure and evidence abreast of the most enlightened views of modern jurisprudence.

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BEST EVIDENCE RULE—ORAL PROOF OF CONTENTS OF WRITINGS.

It is common learning in the law of evidence that a writing or document is the best evidence of what it contains. "Indeed the term 'best evidence' has been described as a convenient short description of the rule as to proving the contents of a writing." [1]

Therefore, generally, oral testimony will not be admitted to prove what was contained in a writing; the document itself must be produced and offered in evidence.[2] The reasons for this rule are founded on the uncertainty of oral testimony based on recollection, and the inability to reproduce properly such characteristics as form, handwriting and physical appearance.[3] But, like most laws of a pseudo-science, this general rule has several exceptions, and it is with one of these exceptions that we are concerned.

Broadly stated it may be said that when the writing is not in issue and is merely collateral to the subject of the action, parol evidence of its contents is admissible without otherwise accounting for its absence.[4] Expediency demands that we curtail our inquiry from examining into every writing, no matter how remote.[5] Briefly

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[1] Jones, Law of Evidence (3rd ed. 1924), p. 286.

[2] Arizona Fire Ins. Co. v. Dillingham, 23 Ariz. 508, 205 Pac. 589 (1922); Butler v. Mail & Express Pub. Co., 171 N. Y. 208, 63 N. E. 951 (1902); Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903 (1903); Matter of Smith, 61 Hun 101, 151 N. Y. Supp. 425 (1891); 2 Wigmore on Evidence (1923 Sec. 1178. (The rule has been held to apply to Workmen's Compensation cases.) Baum v. Industrial Commission, 288 Ill. 516, 123 N. E. 625, 6 A. L. R. 1243 (1919). (The application of this rule should not be confused with the parol evidence rule which is binding only on parties to the instrument but not on third persons.) Follinsbee v. Sawyer, 157 N. Y. 196, 51 N. E. 994 (1898). (The best evidence rule applies to all who seek to use a writing whether or not they are parties to it.) *Infra* note 33; *cf.* Miles v. Walker, 179 N. C. 479, 484, 102 S. E. 884, 886 (1920).

[3] 2 Wigmore, *supra* note 2, Sec. 1179.

[4] Coonrod v. Madden, 126 Ind. 192. 25 N. E. 1102 (1890); Gilbert v. Duncan, 29 N. J. L. 133 (1861); Fairchild v. Fairchild, 64 N. Y. 471 (1876); Grover v. Morris, 73 N. Y. 473 (1878); Daniels v. Smith, 130 N. Y. 696, 29 N. E. 1098 (1892); Bowen v. Newport National Bank, 11 Hun 226 (N. Y., 1877); Cullinan v. Furthman, 70 App. Div. 110, 75 N. Y. Supp. 90 (1st Dept. 1902); Thayer's Cases on Evidence (1900), p. 747; 2 Wigmore, *supra* note 2, Sec. 1252.

[5] Massey v. Farmer's National Bank, 113 Ill. 334, 338 (1885).