

MAINE STATE LEGISLATURE

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REASONING.

Under the provisions of the legislative act creating it, the town of Yarmouth was prohibited from adopting or enforcing ordinances which deprived inhabitants of the town of North Yarmouth of rights in flats and fisheries theretofore enjoyed by them. Those rights dated back to 1743 (Inhabitants of North Yarmouth v. Skillings, infra.), were preserved in the 1849 act and were perpetuated when the Legislature enacted a law in 1895 prohibiting the taking of clams in the town of Yarmouth between June 15 and September 15 but exempting from coverage by the act certain taking of clams by any inhabitant of Yarmouth or North Yarmouth. Private and Special Laws of 1895, c. 216. The latter act further explicitly stated that no "vote shall be passed or municipal regulations made by the towns of Yarmouth . . . and North Yarmouth, or either of them, prohibiting the taking of clams within the limits of the [town] of Yarmouth by residents or inhabitants of the towns of Yarmouth . . . and North Yarmouth."

In 1921 the legislature directed that "no clams shall be taken from any flats within the limits of either of the town of Yarmouth [or] North Yarmouth . . . except by such written permit as the municipal officers of said town may issue . . ." Private and Special Laws of 1921, c. 115. No mention was then made of preserving or repealing mutual or common rights to the flats in Yarmouth by the inhabitants of both municipalities. In 1951, however, the Legislature prohibited all persons, except licensed residents of the town of Yarmouth, from taking shellfish from within the town of Yarmouth for purposes of sale. An exclusion permitted certain taking of shellfish for personal consumption. "Resident" was defined as a person residing within the State for at least 6 months and within the town of Yarmouth for at least 3 months. Private and Special Laws, of 1951, c. 118. In 1957, the legislature amended the afore-said 1951 private and special law by deleting the words "for sale". Private and Special Laws of 1957, c. 177. The 1957 amendment left the statute authorizing the exclusion of non-residents of the town of Yarmouth from taking shellfish for any purpose from flats within Yarmouth and expressly defining "resident" as above set forth. The laws of 1849 and 1895, therefore, appear, at first blush, to be inconsistent with, and to have possibly been repealed by implication by the laws of 1951 and 1957, thus ending the common rights to Yarmouth flats for residents of Yarmouth and North Yarmouth.

Ronald W. Greene

January 3, 1972

However, the provisions of Section 5 of the Private and Special Laws of 1849, c. 264, had come before the Supreme Judicial Court of Maine in 1858. Inhabitants of North Yarmouth v. Skillings, 45 Me. 133, 71 Am. Dec. 530. By deed dated May 25, 1743,, the proprietors of the flats of what was then North Yarmouth conveyed the flats to the Selectment of the town of North Yarmouth in trust for the existing and future inhabitants of the town of North Yarmouth. The town of Yarmouth was created in 1849 out of a portion of North Yarmouth. In the Skillings case, a resident of the newly created town of Yarmouth sought to exercise rights in the flats which he formerly had a right to exercise as an inhabitant of North Yarmouth. The town of North Yarmouth sued in trespass arguing that because all rights in the flats were beneficially owned by residents of North Yarmouth by virtue of the 1743 conveyance, and because residents of Yarmouth were no longer residents of North Yarmouth, residents of Yarmouth had no rights in the flats and if Section 5 of chapter 264 of the Private and Special Laws of 1849 granted them any rights in violation of the provisions of the trust, then that section was an unconstitutional impairment of the right of contract. Cf. Trustees of Dartmouth College v. Woodward, 17 U.S. 518. The Court noted that a construction of the trust that regards all persons resident within North Yarmouth as beneficiaries of the trust is not inequitable and, therefore, that the issue of whether "it was competent for the Legislature to cut off any portion of the cestui que trusts (that is, the residents of Yarmouth) from the enjoyment of their individual rights and privileges, without their consent, would deserve grave consideration." (Insert supplied). The Court did not accept the contention of the town of North Yarmouth that the Legislature had, in effect, attempted to cut off the residents of Yarmouth from their cestui que trusts. Instead, the Court stated that the purpose of Section 5 of the 1849 act was to secure to the inhabitants of both towns the continuance of the same common rights and privileges in Yarmouth flats, and that the Legislature has a full right to change, modify or enlarge public corporations and that the acts by which such corporations are created are not contracts within the meaning of the Constitution of Maine or the United States. The Court held that:

"We do not find, in view of the fact, that the town of North Yarmouth, at the time of the incorporation of Yarmouth, held these flats

Ronald W. Greene

January 3, 1972

and sedge banks in trust, solely for its own inhabitants, any thing which prevented the Legislature from providing by law, upon the separation, that all the inhabitants (sic) of both towns should enjoy the rights and privileges to which they were then entitled as cestui que trusts, in the same manner as if no separation had taken place; or, in other words, we see nothing in the circumstances that could restrain the Legislature from providing that, for the purposes of justice and equity, both towns should be regarded as North Yarmouth, so far as should be necessary in order to give efficacy to all the rights and privileges to which all the inhabitants were then entitled, and would have continued to be entitled by virtue of the trust, if the new town had not been created. And this is in effect what has been done. For the enjoyment of these rights and privileges, provision was made that the tenancy in common which then existed, under the trust, between the inhabitants upon the whole territory of both towns, should continue in the same manner as if no separation had occurred. So far, then, as the Act of incorporation of the new town related to these rights and privileges, no separation did in fact take place, or, if it did, the old town must be regarded as holding the legal estate in trust for the inhabitants of both."

The Court therefore ruled in Skillings, supra, that the unquestioned authority of the Legislature to change, modify or enlarge public corporations could be used to make an equitable division of the property rights enjoyed by the inhabitants of old North Yarmouth. The Court did not reach the issue of whether or not that legislative authority could be used to "cut off any portion of the cestui que trusts from the enjoyment of their individual rights and privileges, without their consent" and stated that such an effort would "deserve grave consideration." In other words, while acts creating municipalities are not contracts within

Ronald W. Greene

January 3, 1972

the constitutional limitations, the Court strongly implied that the benefits enjoyed by the residents of old North Yarmouth by virtue of the trust, may constitute a contract within the constitutional limitations. In fact, contracts between a municipal corporation and private persons are generally within the protection of the constitutional prohibition against impairment of contracts. Chicago v. Town of Cicero, 210 Ill. 290, 17 N E 356; see McQuillin Mun. Corp. (3rd Ed) § 4.18 and authority there cited.

The Skillings case held that there has been no division of the towns as far as the flats are concerned and, if there has, that the flats are held in trust by residents of North Yarmouth for residents of both towns. Moreover, there is, at the very least, substantial doubt as to whether or not the Legislature could constitutionally impair the rights of the inhabitants of North Yarmouth under the 1743 trust arrangement.

The only remaining issue is whether, by subsequent ostensibly inconsistent enactments, the Legislature has tried to effect a complete separation of the towns or to impair rights held by residents of North Yarmouth. The answer is that the Legislature has not. In determining whether subsequent inconsistent statutes have amended municipal charters or repealed power-giving clauses of the charter, such a construction should be adopted as is possible to allow both acts to have full force. See 62 C.J.S. Municipal Corporations § 123 and authority there cited. The charter will be considered amended or a particular clause repealed only when the subsequent act is so obviously repugnant to it that no reasonable interpretation will permit both acts to stand together. American Bakeries Co. v. Haines City, 180 So. 524, 131 Fla. 790; Ayers v. City of Tacoma, 108 P. 2d. 348; 6 Wash. 2d 545; City of Portland v. Bingham, 307, P. 2d 492, 209 Ore. 575; Acton v. Henderson, 309 P. 2d 481, 150 C.A. 201.

Repeal by implication is not favored and will not be upheld in doubtful cases. State v. London, 162 A. 2d 150, 156 Me. 123; Inman v. Willinski, 65 A. 2d 1, 144 Me. 116. This is, at best, a doubtful case. If the 1951 and 1957 statutes are construed not to recover or extend to the residents of North Yarmouth, then the earlier and the later statutes are not "obviously repugnant" and both may

Ronald W. Greene

January 3, 1972

stand together. Such a construction is particularly compelling in this instance because the legislature did not even have before it or expressly take into account prior property rights of the residents of North Yarmouth when it enacted the 1951 and 1957 private and special laws. The legislature is presumed to have been acquainted with the Skillings decision when it enacted the above cited private and special laws of 1951 and 1957 and is presumed to have enacted those statutes in light of the judicial construction and previous statutory preservation of the rights of the inhabitants of North Yarmouth. In re John S. Goff, Inc. (Me.) 141 Supp. 862; State v. Crommett, 116 A. 2d 614, 151 Me. 189. The towns of Yarmouth and North Yarmouth may be, under the Skillings case, the same town with respect to Yarmouth flats. No statutory enactment since that decision is directly concerned or deals with this situation. Furthermore, the rights of the inhabitants of North Yarmouth, as created by the 1743 conveyance in trust, are founded in common law, rather than merely in prior legislative enactments and the legislature is not presumed to have intended to abrogate or modify the common law and is not presumed to have reversed an established policy of its predecessors. Palmer v. Inhabitants of Town of Sumner, 177 A. 711, 133 Me. 337. It seems clear, therefore, that no subsequent private and special acts have repealed or altered rights to Yarmouth flats held by residents of North Yarmouth.

During a portion of the time covered by the above private and special laws, the legislature enacted certain public laws which were statutory predecessors of 12 M.R.S.A. § 4252. R.S. 1954, c. 38, § 49 provided that any town could provide by regulation the times and amounts in which shellfish could be taken from flats within a town. While no residency requirement was mentioned, that statute expressly provided that it "shall not be construed to effect the repeal of any special privileges enjoyed by the inhabitants of certain towns by virtue of any public or private and special law in force on August 6, 1949", the effective date of the statutory predecessor of R.S. 1954, c. 38 § 49. The inhabitants of North Yarmouth clearly came under the protection of this provision when it was enacted in 1954 as the applicable law in 1949 was as set

Ronald W. Greene

January 3, 1972

forth above in the private and special laws of 1849 and 1895. In 1959, R.S. 1954, c. 38 § 49 was repealed and reenacted as R.S. chap. 37-A by P.L. 1959, c. 331, § 50, providing for the enactment of ordinances by municipalities regulating the taking of shellfish from within their corporate limits. The language protecting special privileges was dropped. In 1963, the latter statute was amended to expressly permit municipalities to specify residence requirements in their ordinances. P. L. 1963, c. 277, § 2. In view of the above cited authority to the effect that repeals by implication are not favored, the deletion of the language expressly protecting special privileges does not alter or amend the laws of 1849 and 1895. Furthermore, a general public statute, without negative words, will not be construed to repeal, by implication, the particular provisions of a former statute which are special in their application to a particular situation, unless the repugnancy be so glaring and irreconcilable as to clearly indicate the legislative intent to repeal. State v. Donovan, 36 A. 982, 89 Me. 448. No such intent is clearly indicated here. Finally, of course, the rights of the inhabitants of North Yarmouth are based, at least in substantial part, on the provisions of the 1743 trust arrangement and not merely on other public or private and special laws.

Based upon the rights to Yarmouth flats enjoyed by inhabitants of North Yarmouth, as enumerated and construed in Skillings, supra, and as legislatively protected and perpetuated in the above cited private and special laws of 1849 and 1895, the town of Yarmouth may not adopt or enforce an ordinance under 12 M.R.S.A. § 4252 excluding residents of North Yarmouth from taking shellfish in Yarmouth flats. Subsequent public and private and special legislation, to the extent it has any bearing on the rights enjoyed by the residents of North Yarmouth, has not repealed or altered those rights.

LMS/mf

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