State of New Hampshire
Supreme Court

NO. 2005-0147

2005 TERM

JULY SESSION

TOWN OF CANDIA

v.

CLARENCE BLEVENS, JR.

RULE 7 APPEAL FROM FINAL DECISION OF
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT, CLARENCE BLEVENS, JR.

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I. Does an interlocutory order which provides there "shall" be a hearing "[i]f there is a disagreement as to what constitutes 'junk' get extinguished by a *pro confesso* judgment, or does it remain viable because it retains its relevance, does not conflict with the final judgment, and both parties relied on it?

II. Is Mr. Blevens bound by *res judicata* when his request for a hearing was not part of a subsequent action but merely part of an on-going docket, and when the matters the Town claims are precluded were not litigated and were not capable of being litigated because the operative facts arose later; and, was the Town bound by *res judicata* when it litigated and lost the issue of whether there should be a hearing in the event the parties failed to agree?

III. Pursuant to both the federal and state constitutions, does Mr. Blevens have a due process right to a hearing and a determination by a judicial officer regarding whether there remains any "junk" on his property when he and the town have been unable to agree?

V. What is "junk"?

VI. Is Mr. Blevens' stuff "junk"?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Mr. Blevens and the Town of Candia have a long history of acrimony regarding the aesthetics of his property. Except to note that it may be the reason for the parties' harsh attitudes toward each other, that history is not relevant here.

In October 2003 the Town initiated this equity action in the Rockingham County Superior Court by seeking a declaration that Mr. Blevens was violating ordinances and statutes by keeping items on his land which the Town considers "junk," an injunction against his alleged operation of a junkyard, permission to enter his land and remove material if Mr. Blevens failed to himself, and payment of penalties, fines, and costs.

The court shortly held a hearing, at which the Town and Mr. Blevens, *pro se*,[1] appeared. During the hearing Mr. Blevens became aware that he would likely lose the litigation, but that he would later have an opportunity to litigate what constitutes "junk" in the event he and the Town disagreed. In November 2003 the court issued a "Temporary Order" memorializing what Mr. Blevens had understood. The court:

- enjoined further accumulation of items on Mr. Blevens' land;
- authorized the Town to enter to enter his property to inspect and inventory items;
- authorized the Town to record a lien of $10,000 on Blevens' property to secure payment of past fines and likely future cleanup costs; and
- promised that "[i]f there is a disagreement as to what constitutes 'junk' under the Town Ordinance, a further hearing ***shall*** be held on this issue."

TEMPORARY ORDER (Nov. 21, 2003) (emphasis added), ***Appx. to Br.*** at 25.

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[1]Attorney Joe Levasseur became involved sometime after the default judgment against Mr. Blevens had issued.

Pursuant to the temporary order, the Town secured a $10,000 lien, WRIT OF ATTACHMENT & TRUSTEE PROCESS (Dec. 16, 2003), *Appx. to Br.* at 28, and entered the property for the purpose of inventorying its contents. LETTER FROM TOWN TO BLEVENS (Mar. 19, 2004), *Appx. to Br.* at 29.

After the hearing and temporary order, Mr. Blevens had no remaining dispute with the Town. This is because he had the court's assurance that, if he and the Town were unable to agree on what constitutes "junk," he would not be at the caprice of the town; rather there would be an opportunity for a court to make the final determination. Consequently he took no further action. Because he did not file an answer to the Town's petition the court issued a default order.[2]

Thereafter the Town drafted a proposed decree. In it, the Town reiterated the terms of the temporary order in most respects, but did *not* include the sentence providing for a further hearing in the event of a disagreement about what constitutes "junk." Although there had been litigation of that matter during the October 30 hearing, the court approved the proposed decree and it ultimately became a final judgment.

It appears that Mr. Blevens and the Town worked together as much as was possible under the circumstances of their long acrimony. But after Mr. Blevens saw the inventory report by an auctioneering company hired by the Town, it became apparent they had serious differences about what constitutes "junk." Labled as "junk" in the inventory report are many items which Mr. Blevens intends to use and for which he has plans, and which are neither old nor scrap. *See* James

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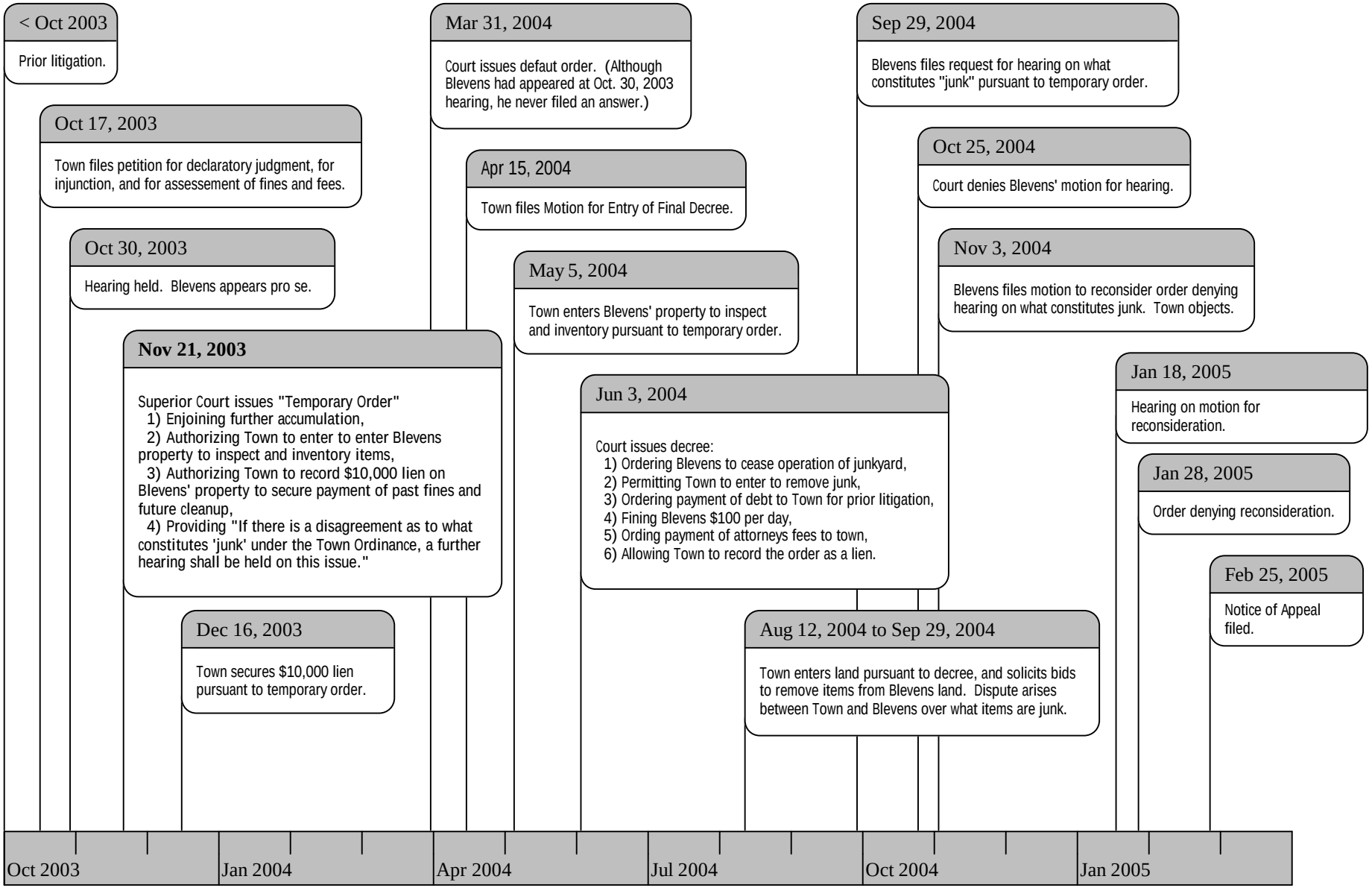
[2]The court's styling of its order as a "default" was "technically incorrect." "[I]n equity proceedings, the effect of failure to timely appear is that "the bill shall be taken *pro confesso*, and a decree entered accordingly." *O'Brien v. Continental Ins. Co.*, 141 N.H. 522, 523 (1996). With that understanding, the words are used interchangeably here.

R. St. Jean, Auctioneers & Liquidators, INVENTORY REPORT (May 5, 2004),[3] *Appx. to Br.* at 33.

In September 2004, because of the inability of the parties to agree, Mr. Blevens accepted the court's promise of a further hearing by filing a request to be heard. The motion was denied in October. Ultimately there was a short hearing in January 2005 on Mr. Blevens' motion to reconsider; the motion was denied and the court did not reach the merits of what constitutes "junk." This appeal followed.

[3]Included in the appendix to this brief is a redacted version of the inventory report. Only the cover letter and the body of the report are included; for brevity the many pages of photographs are excluded.

Time Line of Procedural Events



SUMMARY OF ARGUMENT

Mr. Blevens first cites the equitable maxim that a party who enjoys a judgment cannot later attack its validity. He argues that because both he and the Town of Candia relied on the court's temporary order, the Town is estopped from now disavowing those portions it doesn't like.

Mr. Blevens then points out that although judgments *pro confesso* are deemed to be admissions of liability, they leave the remedy undetermined. He then notes that the remedy the Town sought – removal of those things that are "junk" – was therefore not decided by the judgment and what constitutes junk remains an open question. He argues that the only way the question can be resolved is by a hearing, which is what he is seeking.

Mr. Blevens then suggests that temporary orders that are relevant and do not conflict with final judgments survive the final judgment, regardless of whether the judgment was reached after trial, after settlement, or after default. He argues that the temporary order here remained relevant, that it does not conflict with the final judgment, and that the promise of a hearing was left out of the judgment at the fault of the Town who drafted it as a proposed order.

Though the Town claims Mr. Blevens is barred by *res judicata* from litigating what is junk, he offers three reasons that is not so: 1) his request for a hearing was not part of a subsequent action, but rather part of an on-going docket; 2) the matters the Town claims are precluded were not litigated and were not capable of being litigated because the operative facts arose later; and 3) *res judicata* works against the Town because it is clear from the language of the temporary order that Mr. Blevens' right to have a hearing *was* litigated, and lost, by the Town.

Then, after setting forth the constitutional test for additional process under the federal and state due process clauses, Mr. Blevens argues that his interest outweighs the State's. He notes that there is a high risk of erroneous deprivation of his stuff because whoever makes the determination of what is "junk" – the auctioneering company or the Town – has interests that will result in arbitrary determinations.

Finally, Mr. Blevens notes the ambiguity of the statute defining "junk" and concedes that, because there was no hearing on the matter below, the facts necessary for this Court to determine which of his things are "junk" are not before this Court.

ARGUMENT

I. Town is Estopped from Disavowing the Temporary Order

"It is a well-settled principle of equity that one who voluntarily accepts and enjoys the fruits and benefits of a judgment is estopped thereafter to deny its validity or assert its invalidity." *Matter of Marriage of Rutherford*, 614 S.W.2d 498, 500 (Tex.Civ.App. 1981) (relying on divorce decree former husband alienated property; court held him estopped from later requesting recalculation of property division); *see also, e.g., Owen v. City of Branson*, 305 S.W.2d 492 (Mo.App.1957) (dock owner enjoyed benefit of stipulation and judgment in suit against city; in later challenge of ordinance imposing tax on docks he was estopped from disputing validity of order); *Blankenhorn v. Edgar*, 186 N.W. 893 (Iowa 1922) (plaintiff received specific performance of contract to convey portion of lot under court order giving defendant option to tender entire premises; plaintiff estopped from refusing tender to avoid effect of order as an entirety). While New Hampshire jurisprudence appears to not have given this Court an opportunity to succinctly state the principle, it operates here as well. *See Nashua Hospital Ass v. Gage*, 85 N.H. 335 (1932) (equity not allow reliance on language of deed when parties have not abided by its restrictions).

Here the Candia relied on the temporary order by 1) enjoying its injunction against the further accumulation of stuff on Mr. Blevens' property, 2) entering Mr. Blevens' land for the purpose of inspecting it and inventorying its contents, and 3) securing a $10,000 lien to ensure payment of fines, fees and future cleanup costs. The only authorization the Town had for these actions was the temporary order, and reliance is apparent.

The Town is now estopped from disavowing those parts of the order it doesn't like. If the

Town believed it had reason or basis to attack the order, it could have done so by requesting reconsideration or appealing. It did neither.

Moreover, the Town drafted the proposed decree which eventually became the final judgment. Despite the litigation of the issue of Mr. Blevens' opportunity for a hearing in the event he and the Town disagreed over what constitutes junk, the Town failed to include that provision in its proposed final decree. Because the Town's proposed decree was not an accurate reflection of the result of the previous litigation, equity should prevent the Town from now taking advantage of its superior knowledge of procedural law.

The language of the temporary order is mandatory. It provides that a hearing "shall" be held if the parties cannot agree. Like the town, Mr. Blevens relied on the order. The Town should thus be estopped from disavowing it now.

II. Liability Was Conceded by Judgment *Pro Confesso*, But Remedy Was Not

When an equity respondant fails to take some procedural action that would result in a default, the bill is taken *pro confesso*.[4] *O'Brien v. Continental Ins. Co.*, 141 N.H. 522 (1996). A defendant who is taken *pro confesso* is deemed to have admitted matters such as subject matter jurisdiction, that the case was filed according to acceptable procedures, that the plaintiff has stated a claim upon which relief may be granted, the existence of all well-pleaded material allegations of fact, and that the defendant is liable to the plaintiff. *See e.g.*, *Toppan's Petition*, 24 N.H. 43 (1851); *Manchester's Petition*, 28 N.H. 296, 300 (1854); *Brady v. Mullen*, 139 N.H. 67 (1994); *Huntress v. Effingham*, 17 N.H. 584 (1845); *Bell v. Liberty Mut. Ins. Co.*, 146 N.H. 190 (2001); *Bowman v. Noyes*, 12 N.H. 302 (1841).[5]

Pro confesso, however, is *not* an admission of damages. After a party has been deemed *pro confesso*, the court has an obligation to either take evidence regarding remedies, or to calculate a remedy from the facts deemed admitted. *Pope v. United States*, 323 U.S. 1, 12 (1944) ("It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly.").

In equity proceedings . . . actions that would constitute a default at law technically

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[4]Mr. Blevens appeared *pro se* at the October 30, 2003 hearing held shortly after the suit was commenced. He failed, however, to file an answer to the Town's petition, and this failure resulted in the default. Having made a general appearance, however, the default may have been entered in error. *Hutchinson v. Manchester St. Ry.*, 73 N.H. 271 (1905). The issue was not appealed, however, and was thus waived.

[5]The cases reveal some inconsistency in whether *pro confesso* results in an admission that the plaintiff has stated a claim upon which relief may be granted, but that controversy is not relevant here.

> result in a judgment *pro confesso* in equity. A judgment *pro confesso* is neither a verdict nor a judgment. It is merely an interlocutory order that results in the admission of all material and well-pleaded allegations of fact and forms the basis for the later entry of judgment upon proof of right and amount. . . . [A] default judgment result[s] in admission of the well-pleaded facts alleged in the libel, but . . . the defendant . . . [is] still entitled to a hearing on the proper disposition of . . . assets.

Bursey v. Bursey, 145 N.H. 283, 285 (2000) (quotations and citations omitted). *See also*, *Hutchinson v. Manchester St. Ry.*, 73 N.H. 271 (1905); *Parker v. Roberts*, 63 N.H. 431 (1885); *Collins v. Walker*, 55 N.H. 437 (1875); *Willson v. Willson*, 25 N.H. 229 (1852); RSA 514:1(requiring hearing on damages).

In *State v. Consolidated Recycling, Inc.*, 144 N.H. 467, 470 (1999), for example, this Court found that after an order *pro confesso*, "the trial court erred when it entered [a] final order without providing the defendants with the opportunity for a hearing to determine the appropriate relief." In *Barton v. Hayes*, 141 N.H. 118, 121 (1996), this Court wrote that after default, "it was error for the trial court to enter the damages judgment without affording the defendant the opportunity for a hearing."

After the judgment *pro confesso*, and after it became clear to Mr. Blevens that he and the Town would not reach accord on what items were "junk," Mr. Blevens sought judicial intervention. The issue he raised concerned the extent of the Town's remedy. The Town here seeks to forcibly remove all "junk" on Mr. Blevens land and seeks to then bill Mr. Blevens for the service. What has not yet been established is what items the Town may forcibly remove and bill for, *i.e.*, there has been no judicial determination of the extent of the actions the Town may take to remedy the situation. Thus the outstanding unresolved issue is one of remedy.

Had the Town and Mr. Blevens been able to agree on what items constitute "junk," there

would be no need for a post-default hearing. But because they have been unable, Mr. Blevens retains the right to litigate the remedy.

Moreover, if Mr. Blevens chooses (as is likely) to remove the items himself, he requires an unmistakably clear list of what is *not* junk so that he can avoid incarceration for contempt. Civil contempt is a ***remedial*** step, because the "the contemnor is said to carry the 'keys to the jail' in his pocket and stands committed until he performs the affirmative act required by the court's order." *Town of Nottingham v. Cedar Waters, Inc.*, 118 N.H. 282, 285 (1978).

Thus, regardless of the court's temporary order, and merely as operation of existing law, Mr. Blevens has a right to litigate what constitutes junk, and to demand judicial determination of the issue.

The lower court's temporary order recognized the requirement of a remedy hearing, and its later refusal to allow it is inexplicable.

III. Temporary Orders Survive Judgment *Pro Confesso*

Normally a judgment is produced by plaintiff suing defendant, then holding a trial, then rendering a verdict, *and then* the verdict gets reduced to a judgment. *See Piper v. Boston & Maine R.R.*, 75 N.H. 435 (1910). A stipulation of settlement also leads to final judgment. *Appeal of Hooker*, 142 N.H. 40 (1997). When there is a default, first there is an entry of a finding of default, which if unaddressed is likewise reduced to a judgment. *See e.g., Hutchinson v. Manchester St. Ry.*, 73 N.H. 271 (1905).

But other than the way they are arrived at, there is nothing special or peculiar about default judgments; once they reach the judgment stage, defaults or *pro confessos* operate like any other judgment in all respects.

Regardless of what lead to the final judgment, interlocutory orders (if they are relevant after the final order), do not become moot. *See State v. Fifield*, 110 N.H. 282 (1970) (findings of probable cause moot upon conviction). And if they do not conflict with the final order, they generally survive final judgment. *See State v. Small*, 150 N.H. 457, 460-61 (2004) (noting terms of temporary order continued past time of final order); *see also, e.g., State v. MacMillan*, __ N.H. __ (decided April 1, 2005) (because trial courts have discretion to revisit their interlocutory orders at any time, they survive to be reviewed by standard post-judgment appellate process).

Here the final order did not address whether a hearing to determine what is junk would be available; hence there was no conflict between the orders. Nothing in the final order mooted the temporary order, and nothing in the facts of the case or in the temporary order caused the promise of a hearing to expire or become irrelevant.

In *City of Manchester v. Manchester Firefighters Ass'n*, 120 N.H. 230, 234 (1980),

Manchester firefighters staged a sick-out strike, which is barred by statute for public employees. The City sought an emergency injunction, and the superior court temporarily enjoined the strike. When the firefighters refused to work, the City got assistance from the Public Employees Labor Relations Board (PELRB). After a hearing, the PELRB persuaded the court to renew the injunction, and also to amend it by adding fines, threats of incarceration, and other enforcement mechanisms. The issue in the case was whether the City should have sought the assistance of the PELRB before seeking the emergency injunction. In answering the question, this Court noted that the temporary order expired with the involvement of the PELRB. It is important to note, however, that the final order was *broader* than the temporary injunction, and by its terms completely subsumed the temporary order. In Mr. Blevens case, on the other hand, the final order is *narrower* than the temporary order. Here the final order contains no language addressing the further-hearing issue, or ending its terms. Thus, unlike *Manchester Firefighters*, the final order here does not subsume the earlier order and therefore the promise of a hearing contained in the first order remains in force.

The temporary order here retains its relevance. The importance of a hearing to determine what stuff is junk became apparent only after the Town made clear what it intended to remove and Mr. Blevens had a chance to realize the Town's intent did not comport with his own. The temporary order does not conflict with the final judgment – it is broader. Moreover, it was the Town that drafted as a "proposed decree" the order that ultimately became the judgment, and it was the Town that left out the promise of a hearing. Thus its absence is the fault of the Town.

Accordingly, that portion of the temporary order that mandates a hearing when the parties fail to agree on what constitutes junk was not subsumed by the final judgment, and therefore it 56remains valid.

IV. Res Judicata Does Not Bar Litigation of What Constitutes "Junk"

> In its most basic formulation, the doctrine of collateral estoppel bars a party to a *prior action*, or a person in privity with such a party from relitigating any issue or fact actually litigated and determined in the *prior action*. Res judicata, or "claim preclusion," is a broader remedy and bars the relitigation of any issue that was, or *might have been*, raised in respect to the subject matter of the prior litigation.

McNair v. McNair, 151 N.H. 343, 352-353 (2004) (emphasis added). To the extent *res judicata* is relevant to Mr. Blevens' case here, it applies to judgments reached by default. *Barton v. Barton*, 125 N.H. 433 (1984).

For several reasons, however, *res judicata* does not help the Town.

First, Mr. Blevens asked the court to re-open an existing case to fulfill its promise to hold a hearing. He filed a motion, not a new petition or complaint, under the same docket number as the existing case. *Res judicata* bars relitigation of matters decided in a "prior action." *Warren v. Town of East Kingston*, 145 N.H. 249 (2000) (former employee's allegation that town blocked appointments since dismissal involved events subsequent to dismissal and were not based on same allegations as prior case; res judicata not apply). Because Mr. Blevens motion was in the same case, there was no "prior action," and *res judicata* cannot apply.

Second, for an issue to be barred from relitigation, it either had to have been previously litigated, or had to have been capable of being previously litigated. Here the issue of what constitutes junk was neither previously litigated, nor could it have been.

The temporary order which the Town claims has preclusive effect was issued on November 21, 2003. That order, in addition to promising a hearing on remedies, gave the Town permission to enter Mr. Blevens' land for the purpose of inspecting and inventorying. The resulting inspection was done in early May 2004 and submitted to the Town by the auctioneer on

May 11, five months after the temporary order.

In the interim, on April 15, 2004, the Town filed a motion for entry of final decree, which on June 3 resulted in entry of the final decree. In August and September 2004 the Town solicited bids for removal of stuff from Mr. Blevens' land. *See* TIME LINE OF PROCEDURAL EVENTS, *supra* at 5.

At the time the Town asked for entry of a final decree and at the time the final decree was issued, the inspection and inventory had not been done, and the Town had thus not indicated what items it intended to remove. At those times there was no basis on which to determine what the Town considered "junk," what the Town intended to remove, and whether Mr. Blevens disagreed with the Town's assessment or action. At those times the dispute that gave rise to this appeal did not yet exist. This dispute did not become ripe until late September 2004 when the Town made clear what it intended to haul away. Moreover, by the Town's admission, the inventory report was not even made available to Mr. Blevens until August 25, 2004. CANDIA'S OBJECTION TO RESPONDENT'S SECOND MOTION FOR RECONSIDERATION (Feb. 14, 2005).

The issue of what was junk, therefore, could not have been litigated either at the time of the November 2003 temporary order, or the June 2004 final decree. Accordingly, *res judicata* cannot apply. *Warren v. Town of East Kingston*, 145 N.H. at 249 (*res judicata* inapplicable when subsequent litigation involves subsequent events); *Schwartz v. N.H. Dept. of Revenue Admin.*, 135 N.H. 470 (1992) (second suit arose from different tax year thus not barred by prior adjudication); *City of Laconia v. Becraft*, 116 N.H. 786 (1976) (prior action seeking to compel removal of cement foundation not *res judicata* in later action seeking to remove building set on the foundation because at time of first suit building had not been constructed); *Guay v.*

Brotherhood Bldg. Ass'n, 86 N.H. 344 (1933).

To claim *res judicata*, the Town would have had to wait until the issue had become ripe – *i.e.*, the inventory report prepared and the list of items to be removed made clear to Mr. Blevens – before it sought and received a final judgment.

The third reason *res judicata* does not help the Town is because the doctrine works *against* its interests. The issue of whether Mr. Blevens would get a hearing was fully litigated at the October 30, 2003 hearing. The resulting order, which promised Mr. Blevens an opportunity to resolve disagreements over what constituted junk, makes clear that the issue of whether Mr. Blevens would get a hearing had been litigated on October 30. The Town cannot now claim that Mr. Blevens is not due a hearing; the Town already lost that issue, and never appealed it. Accordingly, Mr. Blevens should get his hearing.

V. Due Process Guarantees Mr. Blevens a Hearing Before the Town Can Take His Stuff

Citizens have constitutional rights in their property, even if the property is junk. *Propert v. District of Columbia*, 948 F.2d 1327 (D.C.Cir.1991); *Price v. City of Junction*, 711 F.2d 582, 589 (5th Cir.1983) ("Whether a junk car has little or great value, it is constitutionally protected property.").

Pursuant to both the Federal and New Hampshire Constitutions, the right to process is determined by a three-part test. U.S. CONST., amd. 14; N.H. CONST., pt. I, art. 15. The Court considers:

> 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, considering the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

In re Noah W., 148 N.H. 632, 638-639 (2002), *citing Mathews v. Eldridge*, 424 U.S. 319 (1976).

Mr. Blevens' interest is in not having his property confiscated by the Town. Some of the stuff listed in the inventory report, although termed "junk," clearly has value. *See* INVENTORY REPORT (May 5, 2004), *Appx. to Br.* at 33. As value is not a factor in determining whether an item is junk, RSA 236:91 & 112; TOWN OF CANDIA ZONING ORDINANCE (2003), some of the alleged junk might be worth a considerable amount. Moreover, the Town seeks to bill Mr. Blevens for its removal. His property will thus be *twice* taken.

The Town presumably has an interest in the expeditious removal of junk, and in a smooth resolution of this controversy.

A hearing – which is all Mr. Blevens is requesting – will serve all these interests. It will provide Mr. Blevens with a forum for educating the court regarding the non-junk-ness of at least

some of his stuff, it will resolve the dispute, and it will facilitate the cleanup of what the Town considers an eyesore.

Without a hearing, there is a great risk of erroneous deprivation. The Town has admitted that the determination of what is junk will ultimately be in discretion of the auctioneer. *Trn*. at 12 (Offer of proof by Town's attorney: "All I know is the inventory was done and all items were considered by the dealer St. Jean to be junked items."). Not only is the auctioneer a private party not associated with elected government, but auctioneers make their living by selling prized items acquired cheaply. Because it is in the auctioneer's interest to label as "junk" the most valuable items, regardless of the terms of the statute, the determination of what is "junk" is arbitrary as far as the law is concerned. If there is a hearing, Mr. Blevens can be assured that the determination will be made according to the law, and not the auctioneer's profit.

Even if the Town, and not the auctioneer, were to make the determination of what is "junk," the result would be similarly arbitrary. The Town's aesthetic interest is in removing the stuff from Mr. Blevens' property. It thus has an interest in labeling as "junk" the ugliest stuff, or everything on the lot. Because it will bill Mr. Blevens for hauling it all, the Town has no countervailing interest in minimizing the cost of removal. Mr. Blevens will therefore be deprived of his stuff – and billed for it – at the caprice of the Town's aesthetic taste.

It is not reasonable to suggest that by failing to file an answer, especially after he appeared and was satisfied with the promise of a hearing, that Mr. Blevens somehow submitted himself to arbitrary action by either a private firm or the Town. Although unlikely, it is possible that the auctioneer or the Town could pronounce Mr. Blevens' house and dog "junk" and confiscate them. Without a hearing he cannot be assured of a process in compliance with the law.

Mr. Blevens is not seeking systemic change; he is seeking a single hearing. While there is great value in that additional process, its cost is negligible. *C.f. Larose v. Superintendent, Hillsborough County Correction Admin.*, 142 N.H. 364, 368 (1997) (systemic challenge to video arraignments which "saved the State thousands of dollars in transportation and security fees").

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978) (due process right to hearing before termination of utility service). In *Town of Randolph v. Estate of White*, 693 A.2d 694 (Vt. 1997), the Vermont Supreme Court found that due process requires notice and a hearing to determine whether stuff was "junk" in violation of that Town's ordinance before it could bill the resident for its removal.

Accordingly, this Court should order that Mr. Blevens be allowed a hearing so that a judicial officer can determine what constitutes "junk" under the ordinance and statute.

VI. What is Junk?

New Hampshire law purports to contain a definition of junk. It provides that junk is:

> old or scrap copper, brass, rope, rags, batteries, paper, trash, rubber debris, waste, or junked, dismantled, or wrecked automobiles, or parts thereof, iron, steel, and other old or scrap ferrous or nonferrous material.

RSA 236:91; RSA 236:112. Candia's ordinance provides no further details.

The definition is ambiguous. To qualify as "junk," an item must be either "old," or "scrap."

"Old" is not given a particular age nor further defined. It should be pointed out, however (and as proven by services such as E-Bay), that there is a substantial market for antique and cast-away items. Some of Mr. Blevens' stuff may be antiques. One of the items labeled as junk, for instance, is a 1974 Volkswagon Beetle. INVENTORY REPORT, item 49, *Appx. to Br.* at 33, 39. Despite its age, for instance Sir Isaac Newton's 1672 telescope would not be considered "junk." *See e.g., Sierra Club v. United States Forest Service*, 878 F.Supp. 1295 (D.S.D. 1993) ("old" growth forest defined as being more than 200 years old); *Service Armament Co. v. Hyland*, 362 A.2d 13 (N.J. 1976) (replicas of antique guns were not "old" to be exempt from gun control law).

"Scrap" is susceptible of several meanings. Generally, however, it is understood to mean "material or objects which are the waste or by-product of industrial fabrication, or which have been discarded on account of obsolescence, failure, or other reason." *Wilson Athletic Goods Mfg. Co. v. United States*, 161 F.2d 915, 918 (7th Cir. 1947) (citing federal legislation defining "scrap"). It may also mean "material . . . reduced to fragments . . . or pieces as to be useless for any purpose other than resmelting." *Pennsylvania R. Co. v. Brooklyn Contractor's Machinery Exchange*, 61 N.Y.S.2d 217, 220-221 (N.Y.City Court.1946). *See also Hilt Truck Line, Inc. v.*

United States, 605 F.2d 1080 (8th Cir. 1979); *Atchison, T. & S. F. Ry. Co. v. U.S. ex rel. Sonken-Galamba Corporation*, 98 F.2d 457 (8th Cir. 1938) (citing federal Interstate Commerce Commission rules); *Northwestern Auto Parts Co. v. Chicago, B. & Q. R. Co.*, 139 F.Supp. 521 (D.C.Minn. 1956); *County of Milwaukee v. Superior of Wisconsin, Inc.*, 610 N.W.2d 484 (Wis.App.,2000) (citing state legislation defining "scrap"); *City of St. Louis v. Friedman*, 216 S.W.2d 475 (Mo. 1949) (citing city ordinance).

In any event, the trial court in this case has never undertaken to define "old" nor "scrap," and has never determined whether Mr. Blevens' stuff meets the definitions.

Thus, as noted in Issues IV and V of Mr. Blevens' Notice of appeal and in his list of questions presented, *supra*, unresolved here are the questions of what constitutes junk and (if the statute adequately answers that in the context of this case) whether Mr. Blevens' stuff is junk. As much as Mr. Blevens would like this court to answer those questions, because he didn't get a hearing below, the relevant facts are not in the record. It would thus be unproductive to draw this Court's close attention to the details of the inventory; the uses to which Mr. Blevens intends to put each item; their age, obsolescence, suitability for resmelting, or value; and Mr. Blevens' explanations of why the disputed items are not junk. Thus he merely requests the opportunity litigate those matters.

CONCLUSION

In accord with the foregoing, Mr. Blevens respectfully requests this honorable Court to remand this case with instructions to the Superior Court to hold a hearing at which Mr. Blevens will be able to litigate the junk-ness of each item the Town seeks to confiscate.

Respectfully submitted,

Clarence Blevens
By his Attorney,

Law Office of Joshua L. Gordon

Dated: July 5, 2005

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Clarence Blevens requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on July 5, 2005, copies of the foregoing will be forwarded to Matthew R. Serge, Esq.

Dated: July 5, 2005

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APPENDIX