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inmates employed. There was a surplus of milk, beyond the needs of the infirmary, and that surplus was sold, and the proceeds, amounting to about $200 a month, went into the general treasury of the town. The burden was on the plaintiffs to prove that the production and sale of milk was a commercial undertaking rather than a mere incident to the performance of a governmental duty. *Orlando* v. *Brockton*, 295 Mass. 205, 208. The cost of the maintenance of the infirmary does not appear, but it is most improbable that it was defrayed by the proceeds of the sale of milk. We think that it does not appear that the sale of milk was anything more than an incident to the performance of the public duty of the town to care for the poor and needy. It is well settled that sale of surplus proceeds of such an institution does not make the undertaking a commercial one. *Curran* v. *Boston*, 151 Mass. 505. *Hale* v. *Williamstown*, 292 Mass. 319. *Orlando* v. *Brockton*, 295 Mass. 205, 209. *Chaffee* v. *Oxford*, 308 Mass. 520. An auction sale incidental to the liquidation of the enterprise does not convert the enterprise into a commercial one.

Exceptions overruled.

TOWN OF NEEDHAM & others *vs.* COUNTY COMMISSIONERS OF NORFOLK.

Suffolk. December 7, 8, 1948. — May 2, 1949.

Present: QUA, C.J., LUMMUS, RONAN, SPALDING, & WILLIAMS, JJ.

Way, Public: establishment, taking. *Eminent Domain*, Validity of taking, Taking of property already in public use. *Parks*. *Municipal Corporations*, Parks. *Certiorari*. *Practice, Civil*, Appeal.

No appeal lay to this court under § 1D, inserted in G. L. (Ter. Ed.) c. 213 by St. 1943, c. 374, § 4, from an order for judgment in certiorari proceedings.

No appeal lay to this court under G. L. (Ter. Ed.) c. 231, § 96, from an order for judgment in certiorari proceedings where the case was heard, not solely upon the return of the respondents, but also on pertinent and competent oral evidence bearing upon the jurisdiction of the re-

spondents respecting action sought to be quashed: the order appealed from was not an "order decisive of the case founded upon matter of law apparent on the record."

It was unlawful for county commissioners to take for the purposes of a relocation of a highway in a town substantial portions of a park and of two commons, which, if not held by the town as parks under G. L. (Ter. Ed.) c. 45, had been at least dedicated to the use of the public or appropriated to such use without interruption for a period of twenty years, where it appeared that approval of the taking by the board having control of public parks was not obtained, that the town did not give its consent, that no public notice was given stating the extent and limits of the portions proposed to be taken, and that therefore the consent of the town could not be presumed as provided in G. L. (Ter. Ed.) c. 79, § 5.

The quashing, upon certiorari, of a relocation by county commissioners of a highway in a town by reason of the unlawful inclusion in the lands taken therefor of substantial portions of a park and commons, was of the relocation as an entirety because it could not be determined whether the commissioners would have approved of the relocation without such lands or what alterations in the remainder of the relocation their omission would have made necessary.

PETITION, filed in the Superior Court on April 21, 1948, by the town of Needham for a writ of certiorari.

Twenty-four taxpayers and residents of the petitioner town were permitted to intervene as petitioners.

The case was heard by *Good*, J.

H. Guild, (*A. Lawson* with him,) for the respondents.

H. W. Hardy, Town Counsel, for the town of Needham.

E. W. Hadley, (*M. W. Cohen* with him,) for the interveners.

QUA, C.J. This petition for a writ of certiorari was brought by the town of Needham to quash an order of the county commissioners dated April 2, 1946, purporting to "relocate" Highland Avenue in said town, increasing its width by about twenty feet, awarding damages amounting in all to $19,119 to more than ninety abutters for land taken, and ordering that all the expense of the "relocation," including land damages, as well as expenses of construction, be paid by the town. Twenty-four abutters were allowed to intervene as petitioners.

In the Superior Court the judge made an order that judgment enter quashing the action of the commissioners.

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The commissioners appealed from this order for judgment.

This case is not here under the form of appeal provided by G. L. (Ter. Ed.) c. 213, § 1D, inserted by St. 1943, c. 374, § 4. That section provides for an appeal from a "final judgment," with substantially the effect of an appeal from a final decree in equity, but it makes no provision for an appeal from an order for judgment. See *Shemeth* v. *Selectmen of Holden*, 317 Mass. 278, 282; *Reardon* v. *Director of Civil Service*, 318 Mass. 173. The only statute under which an appeal from an order for judgment could be entertained is the appeal provided for proceedings at law by G. L. (Ter. Ed.) c. 231, § 96. This section permits appeal in three specified instances only, one of which is from "any order decisive of the case founded upon matter of law apparent on the record." When concurrent jurisdiction over certiorari, mandamus and some other matters was first conferred upon the Superior Court by St. 1939, c. 257, § 1, inserting §§ 1A and 1B into c. 213 of the Tercentenary Edition of the General Laws, express provision was made in § 1B for reports to this court, and doubtless cases could also come here on exceptions under the very broad provisions of G. L. (Ter. Ed.) c. 231, § 113 (amended in respects not here material), but a question existed as to whether an appeal under c. 231, § 96, was open in such cases. See discussion in *Codman* v. *Assessors of Westwood*, 309 Mass. 433, 434–435. Subsequently, however, in a mandamus proceeding, this court entertained an appeal under § 96 from an order sustaining a demurrer. *Clement* v. *Selectmen of Westwood*, 316 Mass. 481. Such an order also constitutes one of the three instances in which an appeal can be had under § 96. We therefore assume that a certiorari proceeding could come here under § 96 on appeal from "any order decisive of the case founded upon matter of law apparent on the record." But the order from which appeal is here attempted is not such an order. In the Superior Court the case was not heard solely upon the return of the respondents. The judge heard oral evidence bearing upon

the jurisdiction of the commissioners to take certain of the lands taken. That evidence was pertinent and competent. *Marcus* v. *Street Commissioners of Boston*, 252 Mass. 331, 333. *Morrison* v. *Selectmen of Weymouth*, 279 Mass. 486. *Morrissey* v. *State Ballot Law Commission*, 312 Mass. 121, 124–125. The order for judgment of the trial court may have been, and probably was, founded wholly or partly upon findings made upon that evidence. It therefore does not appear to have been an "order decisive of the case founded upon matter of law apparent on the record." *Harrington* v. *Anderson*, 316 Mass. 187, 191. The appeal is not properly here.

Inasmuch, however, as the same final result (quashing of the order of the county commissioners) would have been reached if the case had come here on appeal from a final judgment under G. L. (Ter. Ed.) c. 213, § 1D, inserted by St. 1943, c. 374, § 4, we think it proper to state briefly the reasons which would have led us to that conclusion.

It appears from the return that among the lands taken were areas varying from six hundred thirty square feet to fourteen thousand three hundred sixty-three square feet from three school house lots, the lot on which stands the public library, the land in front of the town hall known as "Needham Common," the land known as "Needham Heights Common," and land of the "Memorial Park," all belonging to the town of Needham. The town and the abutters who have intervened in the suit contend that the commissioners had no power to take these town lands, and therefore that the order of taking was invalid as a whole. The town and the interveners rely upon the principle that land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end. *Higginson* v. *Treasurer & School House Commissioners of Boston*, 212 Mass. 583, 591. *Eldredge* v. *County Commissioners of Norfolk*, 185 Mass. 186. *Byfield* v. *Newton*, 247 Mass. 46, 57. *Bauer* v. *Mitchell*, 247 Mass. 522, 528. If we assume that strips could lawfully be taken from the school and library lots on the ground that

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there was no interference with buildings and that the use of the land for the purposes to which it was first devoted was only slightly impaired (*Easthampton* v. *County Commissioners of Hampshire*, 154 Mass. 424; *Boston* v. *Brookline*, 156 Mass. 172, 175), no such justification exists for the taking of strips from the common and park lands, since the taking for a public way of any portion of land taken for or held as a park by a town under G. L. (Ter. Ed.) c. 45, without the approval of the board having control of the public parks, or of any portion of a common or park dedicated to the use of the public, or appropriated to such use without interruption for a period of twenty years, except with the consent of the town after public notice stating the extent and limits of the portion thereof proposed to be taken, is expressly forbidden by G. L. (Ter. Ed.) c. 79, § 5. There was ample evidence to warrant a finding that these common and park lands, if not held as parks under c. 45, as to which we express no opinion, had been at least dedicated to the use of the public or appropriated to such use, as commons or parks, without interruption for a period of twenty years. See *Lowell* v. *Boston*, 322 Mass. 709, 730. We think this is true of "Memorial Park," as well as of the two commons, even though "Memorial Park" had been originally acquired as a memorial to soldiers, sailors, and marines under St. 1920, c. 292. And we think that the respondents' return is fairly to be construed as showing that approval of the taking by the board having control of the public parks was not obtained; that the town did not give its "consent"; that no public notice was given stating the extent and limits of the portions proposed to be taken; and that therefore the consent of the town could not be "presumed" as provided in said § 5.[1]

If the case were properly before us, we would feel obliged to hold that the failure to make a successful taking of the three parcels of common or park lands rendered the entire

[1] "Such consent shall be expressed by a vote of the inhabitants, if ten or more voters file a request in writing to that effect . . .; in the absence of such request, consent shall be presumed." G. L. (Ter. Ed.) c. 79, § 5.

relocation of the way invalid. The attempted takings from these lands were in substantial amounts. They were separated from each other by considerable distances. To proceed with the remainder of the relocation without these takings would leave these parcels protruding into the relocated way. We cannot know whether the commissioners would have approved the project without these parcels or what alterations in the remainder of the relocation their omission would have made necessary. *Warren* v. *Street Commissioners of Boston*, 183 Mass. 119, 120–121.

Appeal dismissed.

OLD COLONY TRUST COMPANY, trustee, *vs.* GERTRUDE TOWNSEND & others.

Essex. March 9, 1949. — May 2, 1949.

Present: QUA, C.J., LUMMUS, RONAN, & WILLIAMS, JJ.

Trust, Capital and income, Trustee's compensation. *Capital and Income. Devise and Legacy*, Capital and income.

A Probate Court under G. L. (Ter. Ed.) c. 206, § 16, as amended by St. 1941, c. 36, might properly allow an apportionment of the compensation of a trustee under a will between principal and income where it was found that the charges were fair and reasonable and that the apportionment was fair and reasonable, and where the will, making no mention of the trustee's compensation, displayed a dominant purpose of the testator to care for his daughters during their lives by means of the trust but no concern as to final disposition of his property.

PETITIONS in the Probate Court for the county of Essex for allowance of certain accounts of the trustee under the will of Charles W. Townsend, late of Ipswich.

The case was heard by *Costello*, J.

A. Brayton, for the petitioner.

J. A. Murphy, (*L. B. Phister* with him,) for the respondents.

RONAN, J. This is an appeal by the trustee under the will of Charles W. Townsend from a decree of the Probate Court disallowing six items in the eighth to twelfth accounts,

COMMONWEALTH OF MASSACHUSETTS.

Norfolk, ss. Before the County Commissioners

In the matter of the order of the County Commissioners dated April 2, 1946, relocating Highland Avenue in the Town of Needham in the County of Norfolk, a copy of which order is recorded with Norfolk Deeds, Book 2600 at page 534 and with the Norfolk Registry of the Land Court.

I CERTIFY THAT said order is the order upon consideration of which the Supreme Judicial Court for the said Commonwealth, as appears in volume 324 at page 293 of its reports, ordered dismissed the appeal of said Commissioners from an order of the Superior Court for the County of Suffolk that judgment be entered quashing the action of the Commissioners set forth in their said order dated April 2, 1946.

WITNESS my hand and the seal of said County this twelfth day of November, 1952.

Clerk County Commissioners

Rec'd & entered for record Nov.14,1952 at 9h.A.M.

Telephone Workers' Co-operative Bank

of Boston Massachusetts, holder of a mortgage

from Philip S. Bailey and Helen M. Bailey

to Telephone Workers' Co-operative Bank

dated June 9, 1939

recorded with Norfolk County Registry of Deeds

Book 2235 Page 339 acknowledges satisfaction of the same

In witness whereof, the said Telephone Workers' Co-operative Bank has caused its corporate seal to be hereunto affixed and these presents to be signed, acknowledged, and delivered in its name and behalf by Paul J. McInerney

its Treasurer this 14th day of November A. D. 19 52

HIGHLAND AVE. STREET TOWN NEEDHAM

Plan	Pet.	RECORD PLAN Vol.	RECORD PLAN Plan	Date Decree	Description
(Now State Highway)		7	472	12/1874	Webster St. to Charles River
43B	←	8	535	6/1877	Hunnewell to Webster St.
		8	534	6/1878	Plain Ave. to Rosemary St.
45B		5	332	11/1865	From Great Plain Ave. to ~~Upper Falls Rd.~~ (Webster St.)
318	(This Layout VOID)			4/2/1946	Great Plain Ave to Webster St.
	SEE CORRESPONDENCE FILE 4268 FOR COURT DECISION				