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cused from voting on this particular issue because of an apparent conflict of interest.

The PRESIDENT: The Senator from Kennebec, Senator Thomas, requests leave of the Senate to refrain from voting on L. D. 2165 because of the possibility of an appearance of conflict of interest. Is it the pleasure of the Senate to grant this leave?

It is a vote.

A division has been requested. Will all those Senators in favor of the passage of this bill as amended to be engrossed and sent down for concurrence please rise in their places until counted. Those opposed will please rise in their places until counted.

A division was had. 10 having voted in the affirmative, and 19 having voted in the negative, the Bill failed of Passage to be Engrossed in non-concurrence.

Sent down for concurrence.

An Act to Revise Requirements for Permanent Markers under the Land Subdivision Law. (S. P. 717) (L. D. 2268)

Mr. Berry of Cumberland then moved the pending question.

Thereupon, the bill was Passed to be Enacted and, having been signed by the President, was by the Secretary presented to the Governor for his approval.

Emergency

An Act Relating to Borrowing Capacity of Community School District No. 915 Consisting of the Towns of Litchfield, Sabattus and Wales. (H. P. 2256) (L. D. 2329)

This being an emergency measure and having received the affirmative votes of 27 members of the Senate was Passed to be Enacted and, having been signed by the President, was by the Secretary presented to the governor for his approval.

Committee Reports
Senate
Divided Report

The Majority of the Committee on Judiciary on, Bill, "An Act to Revise the Maine Criminal Code as Recommended by the Criminal Law Revision Commission." (S. P. 697) (L. D. 2217)

Reports that the same Ought to Pass in New Draft under Same Title (S. P. 777) (L. D. 2334)

Signed:

Senators:

COLLINS of Knox
CLIFFORD of Androscoggin

Representatives:

HENDERSON of Bangor
McMAHON of Kennebunk
PERKINS of So. Portland
HEWES of Cape Elizabeth
HOBBINS of Saco
BENNETT of Caribou
MISKAVAGE of Augusta
SPENCER of Standish

The Minority of the same Committee on the same subject matter reports that the same Ought to Pass in New Draft under New Title: "An Act Making Certain Revisions in the Maine Criminal Code (S. P. 778) (L. D. 2333).

Signed:

Senator:

MERRILL of Cumberland

Representative:

HUGHES of Auburn

Which reports were Read.

The PRESIDENT: Is it now the pleasure of the Senate to accept the majority ought to pass in new draft report of the committee?

The Chair recognizes the Senator from Cumberland, Senator Merrill.

Mr. MERRILL: Mr. President, if I understand the motion before the body, it is that we accept the majority ought to pass in new draft report of the committee. Is that presently the motion before the body?

The PRESIDENT: That is the motion that the Chair posed to the Senate. There has been no affirmative motion to that extent.

Mr. MERRILL: Mr. President, I have no problem in speaking to this in that posture. I simply would like to point out the difference in the two drafts that are before us so that the Senate may make a conscious decision, and I will be brief.

It can be noted from looking at Supplemental Journal No. 2 that Senator Collins of Knox and Senator Clifford of Androscoggin are both on the other side, and whenever I go up against these two gentlemen on a judiciary matter I feel a little bit like David going up against Goliath without a slingshot. But I would like to just point out to the Senate, so that we can have a conscious decision on this issue, what is before us.

The only difference in the two drafts comes to when it is proper for a person to use deadly force against another person. Presently the code that we passed last session tries to draw a pretty clear line, based on the previous law, the common law, that basically says that you can use deadly force to defend yourself or another person against deadly force but you cannot use deadly force to defend your property.

Also the code, I think, probably stretched the common law just a little bit. It certainly gave it the best interpretation from the standpoint of those who would like to use force, deadly force, by making it clear that when it came to using deadly force in a dwelling house that it wasn't necessary even for the party using the deadly force to believe that the other party was going to use deadly force against him, but to simply believe that it was likely that the party in the dwelling house illegally was going to use any force against him. So the situation currently in the code is that you can use deadly force to defend yourself against deadly force, except that in your dwelling house you are allowed to use deadly force to defend yourself if there is any likelihood that the person in the dwelling house wrongly — and that is interpreted to mean he is in there to commit burglary or has trespassed to commit some crime. If he is in there for that purpose, or you believe that he is in there for that purpose, then you can use deadly force if you think it is likely that he is going to use any force.

When we put this into the law, even though I think that everyone would admit that studied the matter that this is certainly a liberal interpretation of the present law with regard to the right of an individual to use force in defending his dwelling house, a lot of citizens became outraged, outraged because they believe that if somebody was trespassing on their property they should have the right to use deadly force just to bring an end to that trespass.

I am not going to suggest to this Senate that this hasn't been a matter that has been well worked over in committee. It has. And the draft that the majority of the Judiciary Committee supports is as responsible a draft as could be written. If the Senate believes that it is ever proper for a person to use deadly force for a purpose other than protecting human life or protecting himself against the use of force in his dwelling house what I am suggesting to the Senate is that the line is pretty clearly drawn by the two positions here.

I frankly come to my position not from a concern for the person in a house committing burglary — I have no great concern for that person, and if somebody were to use deadly force against them I have to admit that I shed no great tears — my concern is with the general growing problem of homicides in America, which are growing from this very sort of situation. Every homicide isn't committed between two strangers or between some member of organized crime shooting somebody walking down the street; it takes place in somebody's dwelling house as often as not, and often it involves one member of a family shooting another member of the family, and this sort of thing. Although I, or maybe partly because I couldn t support gun legislation in the last session, I have to examine my own position in regards to this sort of question in light of the fact that society is arming itself. And recognizing that this difference of opinion between myself and the majority of the members of the Judiciary Committee has to do with what could be a successful defense against a charge of unlawful homicide brought by the state, I sincerely believe that the effect of this, if it has any effect on primary conduct, will be to encourage members of the citizenry to take up arms against each other. The result of this, I think, won't be that a lot of burglars will get shot but that a lot of people who aren't burglars will get shot.

Last week we stayed fairly late into the night discussing this for its last round, and I would like to compliment the Senator from Knox, Senator Collins, in giving this more than a fair hearing in the committee. It was fairly late in the evening when I left, and I went to the Holiday Inn and there were no rooms, so I went over to John Martin's house and entered his house at about 2 o'clock at night without waking anybody up, and I couldn't help but reflect on how happy I was that the Speaker of the House doesn't normally keep loaded firearms in his house. It is going to lead to this sort of accidental killing, and I am afraid also that by making bigger what can be a successful defense to a crime of unlawful homicide it is also, although that certainly is not our desire, going to allow some people to take advantage of this defense who actually have set out to commit first degree murder.

The bill, as it is drafted, would allow somebody to use deadly force to defend their dwelling house without the belief that force is going to be used against them, without that belief, and without a warning, without giving a warning to the person in the dwelling house, if they believe that by giving a warning they could put themselves in danger, so obviously if it was late at night and you thought the person might have a gun, to give a warning at that time could reasonably make you think that it would put you in danger. What I am afraid of is a situation where we find ourselves bringing charges, for example, against a spouse who shoots a spouse in the dead of night, and then makes the defense that they were acting under the rights granted by this section. Without a requirement for a warning, I am afraid it would be very difficult if the only witness, the only living witness, were the spouse who has used the deadly force, it would be very difficult under those circumstances to bring a successful action.

It is for those reasons that I have signed a revision to the code that has that one difference. And because it is such an important issue, I would ask the Senate to indulge me and to let this vote be taken by the "Yeas" and "Nays" so that we may state our positions clearly.

The PRESIDENT: A roll call has been requested.

The Chair recognizes the Senator from Knox, Senator Collins.

Mr. COLLINS: Mr. President and Members of the Senate: The Senator from Cumberland, Senator Merrill, has very ably described the issue before us. It has not been an easy issue for the Judiciary Committee.

In exploring the history of justification defenses, we found that only the State of Texas

goes all out in permitting the use of deadly force to protect property. In the State of Maine for 97 years the prevailing principle has been that human life is more important than property. I think that is still our posture as a general philosophical proposition. But I submit that the draft favored by the majority of the committee is a moderate middle ground that permits the householder to have greater protection in defending his own dwelling place.

I ask you, if you care to study the provisions in question, to note that we have confined this use of deadly force to the dwelling place. This doesn't mean that you can just go shooting anybody that is robbing a store, factory, or some other place that is not the dwelling place. It comes to that old English axiom that a man's dwelling place is his castle.

The good Senator is quite correct that many of the most difficult homicide questions come between and among those who are well acquainted, sometimes closely related by blood or marriage, but in weighing this decision today I would ask you to place particular emphasis on two or three words that are very carefully drafted into these sections. The sections in question that are the difference between the two versions submitted to you in this bill are sections 104 through 108 of the criminal code. Those are not the numbers in these drafts because they come up in sections that you need to look at the criminal code number to find the exact portion. The two sections that we are concerned with really here, 104 and 108, allow the occupant of the dwelling place to use deadly force under two circumstances.

Number one is when it reasonably appears necessary to prevent an intruder from inflicting bodily injury upon a person in the dwelling place or upon a person attempting to prevent the intrusion. This part I think is easy because when bodily safety of the person in the dwelling is involved we have to meet this threat with deadly force, if necessary.

The second condition is when it reasonably appears necessary to prevent or terminate the criminal trespass by an intruder who it reasonably appears is committing or is likely to commit some other crime within the dwelling place.

The question has been raised of why do we have to set out these rights in two separate sections. Section 108 is commonly called a crime prevention statute, and this has important substantive implications. In contrast with section 104, section 108 does not limit the right to use deadly force to persons licensed or privileged to be in the dwelling place, thus, a police officer or a passerby who observed a burglary of a dwelling place could use deadly force to prevent the infliction of bodily injury upon an occupant of the dwelling place. This would be true even if the officer or passerby were not physically within the confines of the dwelling place.

Both sections 104 and 108 contain a number of prerequisites which must be met before the defense of justification is available. I am only going to dwell on two of them because I think that they ought to be the determinative prerequisites, and I know that there are limits to what we can grasp in this sort of a dissertation.

The first limitation is that there must be reasonable belief. This means that the jury must find that the defendant honestly believed that the circumstances which gave rise to the right to use deadly force actually existed. If they believe the defense to be contrived, the defendant can be found guilty of an intentional crime, such as criminal homicide in the second degree.

The other word of importance is "necessary", and this is perhaps the most important word in these statutes. We have no intention of granting people a license to execute other people when it is not necessary. Generally speaking, this means that deadly force must be the only viable remedy under the circumstances.

I think that this is all I would like to say. I am hopeful that our other member of the Judiciary Committee, Senator Clifford, may give us his views, and I believe that he has an amendment coming along, if this report is adopted, which will further sharpen the language that we have used here.

I have had letters running into the several hundreds by this time from people all over the state who have read in newspaper letters to the editor all over the state commentary on the criminal code, a commentary which suggests that in passing this code last year we weakened the right of the homeowner. That was not the case, however. Last year we were simply codifying the existing common law of the State of Maine as it has developed in the last 97 years.

But it is clear that in a rural state, partially rural at least, like Maine, that there are many people who are quite a long ways away from a police officer who can really help them. And we know that there is an increasing amount of burglary. So we felt that we were justified in strengthening in the dwelling place the use of deadly force reasonably necessary to alleviate the problems that the householder would face in these circumstances.

The PRESIDENT: The Chair recognizes the Senator from Androscoggin, Senator Clifford.

Mr. CLIFFORD: Mr. President and Members of the Senate: As has been stated, the difference between the majority and the minority report of the Committee on Judiciary goes to the differences between when one can use deadly force in the dwelling under certain circumstances to protect the home.

And as has been stated, the criminal code, when it was enacted, not much attention I think, frankly, was paid to this section, and the law was simply codified. And once that law became published and was studied by people from throughout the state, many people were surprised at what the law was. Therefore, the Judiciary Committee, in hearing the revisions to the criminal code, heard extensive testimony as to what the law should be. And I think it is fair to say that we heard a great many requests to greatly strengthen the rights of the homeowner; indeed, we heard many requests to greatly strengthen the rights of the property owners in general, especially as it relates to the use of deadly force.

I think it is fair to say that we did not greatly strengthen the rights of the homeowner, and we did not at all strengthen the rights of the property owner. We did slightly change the law. And I think it was certainly in the prerogative of the Judiciary Committee, and is the prerogative of this legislature, to look at the policy of the law, as opposed to the technical language, and to make that change if the legislature feels it is in the public interest to make it. So that the majority committee report does in fact slightly change the existing Maine law, and it gives the homeowner some more rights in the protection of the sanctity of the home. It does not go anywhere near to the extent in giving rights to the homeowner that were recommended by some of the people who testified before our committee.

I think if you will look at L. D. 2334, which is the new draft bill being recommended by the majority of the Judiciary Committee, on page 9, I think some of the phrases were quoted by the Senator from Knox, Senator Collins, and that is what we are talking about. And I think it is fair to summarize that what we are recommending the legislature adopt as policy for the State of Maine in the use of deadly force in protection of the dwelling — and it is only the dwelling, and not other property — is that deadly force can be used, first of all, only when it is necessary to prevent certain things from happening, as the Senator from Knox, Senator Collins, has pointed out. It is not an unlimited right to use deadly force. There is no license to use deadly force. And I think that the circumstances under which deadly force may be used are pretty tightly drawn.

So that deadly force, under the revised version, or the one that the majority is recommending, would be able to be used by the homeowner to protect life when life is in jeopardy — and that right exists of course today — and also in situations where there is a criminal trespass occurring within the dwelling; and further, the criminal trespasser is not only committing a criminal trespass but is engaging in some other criminal activity, normally, of course, the burglary. There are further restrictions that in normal circumstances the homeowner, before he is allowed to use deadly force, must give a warning to the person who is committing the criminal trespass and the other criminal activity, unless he reasonably believes that to give that warning would be to jeopardize his own life. Only then, and only if the criminal trespasser who is committing the other criminal activity fails to desist from the criminal trespass, only then is the use of deadly force authorized. For example, if the person ceases the trespass and begins to retreat, the use of deadly force is not authorized. If the person ceases the trespass and begins to retreat with property in his possession that he has stolen, the use of deadly force is not authorized. If that person begins to retreat from the criminal trespass, even though he is continuing the commission of the crime, which would normally be the burglary, under this amendment the use of deadly force would not be authorized. It is only when the criminal trespasser persists in the criminal trespass and in the commission of the other criminal activity.

So I do think it is narrowly drawn, I think it is carefully drawn, and I think it is a change in policy which reflects, in my opinion, what the law in Maine should be. I think perhaps that circumstances in Maine are different today than they were in 1870, and I think that perhaps the rights of property owners have been eroded. I think that this is one small step, reasonable step, towards making the home the castle, toward the sanctity of the home, if you will. I think it is reasonable and I think that this Senate should go along with the majority of the Committee on Judiciary and adopt Report "A", L. D. 2334. Thank you, Mr. President.

The PRESIDENT: The Chair recognizes the Senator from Cumberland, Senator Merrill.

Mr. MERRILL: Mr. President and Members of the Senate: I think that the issue is probably pretty clearly before us. I just want to make clear that a warning isn't always necessary. This is one of the places where the committee and I parted company, that a warning isn't necessary if a person reasonably believes that it will put him in danger to give a warning. And I submit that that probably would be the case any time when it was dark enough so you couldn't see whether or not the person was armed. Certainly if there was a possibility that you had an intruder committing a burglary, which is breaking and entering with the intent to commit any crime, and if you thought that he was armed, or reasonably could believe that he was armed, it could put you in danger to warn him.

I really see this question as one between whether or not we want to treat a perceived problem at the expense of making a real problem worse. The perceived problem is that burglary is increasing, that crimes against people's dwelling houses are increasing, because people don't have the legal right to use their arms — usually we are talking about a gun here — against the people that are breaking in. That is the perceived problem. Those of us who

are familiar with the inability usually to use this as a solution to the problem I think would recognize that if the problem isn't one that is only perceived, the solution is one that is only perceived. It necessitates obviously having a loaded handgun ready or a handgun with its ammunition nearby which, if you have children, is a very dangerous condition to have present. This is the perceived problem.

The real problem that we put in danger by passing this bill is the real homicide situation in this state today, which is either an accidental killing or a killing that is provoked by the heat of anger. And if we encourage people to have weapons ready and available for use to prevent people from burglarizing their homes, then we have to recognize that part of the consequences of that encouragement is that those weapons will be ready and available for use by a husband against a wife or a child against his father, under those sorts of circumstances. If we are going to encourage this activity, we have got to realize its natural consequences. And I suggest, if you have read the crime statistics, if you are concerned with the homicide rate in this country, that you know the real problem is the latter, and not the one that this seeks to overcome.

There is a lot of talk about homes being castles, and even when phrased in very precise and careful legal tones and intonations, it sort of raises a red flag over this issue, and I wonder how many people think of their home as a castle after somebody grabs a loaded handgun that has been kept around to get the burglar and in a moment of passion shoots their spouse or shoots their parent. The home probably doesn't look much like a castle after that has happened. And that is the reality that we are talking about in the United States today as self help becomes more and more desirable and more and more of our citizens arm themselves to prevent this burglary that may happen in the future.

The PRESIDENT: A roll call has been requested. In order for the Chair to order a roll call, it must be the expressed desire of one-fifth of those Senators present and voting. Will all those Senators in favor of a roll call please rise in their places until counted.

Obviously more than one-fifth having arisen, a roll call is ordered. The pending question before the Senate is the acceptance of the majority ought to pass in new draft report of the committee. A "Yes" vote will be in favor of acceptance of the majority ought to pass report; a "Nay" vote will be opposed.

The Secretary will call the roll.

ROLL CALL

YEAS: Senators Berry, E.; Berry, R.; Carbonneau, Cianchette, Clifford, Collins, Corson, Cummings, Curtis, Cyr, Danton, Gahagan, Greeley, Hichens, Huber, Jackson, Johnston, Katz, Marcotte, McNally, Pray, Roberts, Speers, Thomas, Wyman.

NAYS: Senators Conley, Graffam, Graham, Merrill, Reeves, Trotzky.

ABSENT: Senator O'Leary.

A roll call was had. 25 Senators having voted in the affirmative, and six Senators having voted in the negative, with one Senator being absent, the Majority Ought to Pass in New Draft Report of the Committee was Accepted and the Bill in New Draft Read Once.

The PRESIDENT: Is it now the pleasure of the Senate that the rules be suspended in order for this bill to be given its second reading by title only at this time?

The Chair recognizes the Senator from Knox, Senator Collins.

Mr. COLLINS: Mr. President, I would request that we not have second reading at this time. There are a couple of amendments being prepared, one to correct typographical errors, and one that I have already mentioned which I feel should be put on before this goes further.

The PRESIDENT: What time does the Senate assign for the second reading of this bill?

Thereupon, the Bill in New Draft was Tomorrow Assigned for Second Reading.

The President laid before the Senate the following tabled and Specially Assigned matter:

Bill, "An Act Relating to Exceptional Children." (H. P. 1797) (L. D. 1956) (Emergency)

Tabled — March 29, 1976 by Senator Speers of Kennebec

Pending — Motion of Senator Speers of Kennebec to indefinitely postpone Senate Amendment "A" (S-482)

(In the House — Passed to be Engrossed as Amended by Committee Amendment "A" (H-1083), as Amended by House Amendment "A" (H-1104) Thereto)

(In the Senate — Committee Amendment "A" Adopted as Amended by House Amendment "A" thereto)

Mr. Speers of Kennebec was granted leave to withdraw his motion to Indefinitely Postpone Senate Amendment "A".

Mr. Katz of Kennebec was then granted leave to withdraw Senate Amendment "A" from consideration.

Whereupon, on motion by Mr. Speers of Kennebec, the Senate voted to reconsider its former action whereby Committee Amendment "A" was Adopted.

Thereupon, on further motion by the same Senator, tabled and Tomorrow Assigned, pending Adoption of Committee Amendment "A".

The President laid before the Senate the following tabled and Specially Assigned matter:

Bill, "An Act Relating to Town Ways." (H. P. 1920) (L. D. 2108)

Tabled — March 29, 1976 by Senator Merrill of Cumberland

Pending — Passage to be Engrossed

(In the House — Passed to be Engrossed as Amended by Committee Amendment "A" (H-1028), as Amended by House Amendments "A" H-1070) and "D" (H-1122) Thereto.

(In the Senate — Committee Amendment "A" adopted as Amended by House Amendment "A" and "D" Thereto)

Mr. Merrill of Cumberland then requested a roll call.

The PRESIDENT: A roll call has been requested. In order for the Chair to order a roll call, it must be the expressed desire of one-fifth of those Senators present and voting. Will all those Senators in favor of a roll call on the passage to be engrossed of Legislative Document 2108 please rise in their places until counted.

One-fifth having arisen, a roll call is ordered.

The Chair recognizes the Senator from Cumberland, Senator Graham.

Mr. GRAHAM: Mr. President, I wonder if some member of the Senate would care to explain this bill a little more.

The PRESIDENT: The Senator from Cumberland, Senator Graham, has posed a question through the Chair to any Senator who may care to answer.

The Chair recognizes the Senator from Cumberland, Senator Jackson.

Mr. JACKSON: Mr. President and Members of the Senate: This bill is the result of a piece of legislation that was put in, and evidently there have been some municipalities throughout the state that have had the problem with roads that were presumed to be abandoned, or were abandoned, with people moving into these abandoned places and then petitition the town to improve the road that continued to their place of residence. Evidently this cost many municipalities throughout the state great sums of money to put these roads in proper condition so that they could be maintained.

The committee amendment took out the section of the bill which provided for taking by eminent domain for recreational purposes. I do notice that a House amendment that was put onto the bill does provide for this being reinstituted by taking it back. Supposedly, in the original bill it was supposed to have been passed on to the abutting landowners and they would gain title to the property. The House Amendment which was put on, H-1070, does provide for the town to take this back by eminent domain without any retribution to the landowners that do acquire the property.

The bill did come out of committee with a unanimous report. I was hesitant on signing the bill out because I had reservations as to the workings of it. The old bill provided that the appeals procedure would go to the county commissioners, if somebody was aggrieved. Under this bill, they go directly to the superior court.

I do think at the time, whereas developers are buying many parcels of land which are on discontinued ways, or are presumed discontinued, that it is kind of a burden to a small community to have to repair these roads and put them into a situation where they would be passable or maybe even better than that. I do think that the Senate would be stepping in the right direction to assist some of these small municipalities in the passage of this bill.

The PRESIDENT: The Chair recognizes the Senator from Cumberland, Senator Merrill.

Mr. MERRILL: Mr. President, I am obviously no expert on this bill. I asked for an explanation this morning, and later on I had a chance to talk to someone from the Maine Municipal Association who has an interest in this bill, and I have some understanding of it, but I would be anxious to be corrected in my misunderstandings.

I think the heart of this bill has to do with the right to have what is now a public road no longer be a public road. Now, if it is not a county road, if it is a town road, as I understand it, that can be done now by the town. What this bill does though is provide that if thirty years have passed, and the town hasn't put any money into keeping the road up, that there is an automatic presumption that the road is thereby terminated, that it was in fact ended, even though there may be nothing in the town records to ever show that the town voted to have that road come to an end.

Now, the merit, as I can understand it, on the one hand there is the possibility of the town finding out about these roads that it has neglected, somebody finally wants the town to keep it up, as they are supposed to do, and that is costing the town a lot of money. That is the weighing concern on the one hand. My concern, on the other hand, is how about the owner of the land who bought a piece of property that was on a public road, who never had the town take a legal action through their elected officials to bring an end to that road, or through the town meeting process to bring an end to that road, and suddenly finds that through no fault of his own he no longer lives on a public road.

Now, if I understand correctly again, the result of that decision, the result of that legislative fiat, is that there is a public easement over the land between that owner and a public road. But this public easement is the property not only of the abutting landowners but is free for the use of anybody who may care to pass over it. So the situation that the person could be in would be that he would find himself maintaining a road that would be used that he couldn't prevent use of by the public.

Now, I think that in passing this law, which may in fact do the most good for the most people, the town citizens who would have to pay to have these roads fixed up, we have to recognize