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LEX LOCI: Recent New Hampshire Supreme Court Decisions

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Cases handed down in the past four months by the New Hampshire Supreme Court are an accurate reflection of the caseload statistics of the Court compiled by Ralph H. Wood, Clerk of the Supreme Court. Wood recently reported that the Supreme Court's caseload breakdown for the 1982 Term was distributed as follows: 25% appeals from governmental boards or agencies, 22% criminal cases, 42% civil cases, 6% divorce and 5% insurance. The statistics clearly point out the large number of criminal cases clogging the district, superior, and appellate court levels of our state. The criminal trial system, with the opportunity for trial *de novo* at the superior court level, and the easy appeal route to the Supreme Court have exacerbated the problem.

Recent decisions contained so many criminal cases of importance that it is difficult to select among them. *Stapleford v. Perrin,* decided December 28, 1982 and *State v. Thaxton,* decided December 30, 1982, are two cases which deal with the sentencing powers of judges. In the *Stapleford Case,* the Supreme Court was confronted with an unusual and complicated sentencing arrangement imposed by the superior court, by agreement of the defendant and the State, the salient feature of which was a period of time between sentences during which the defendant would not be incarcerated. The purpose of this unique sentence was to allow the defendant to prove that he was capable of rehabilitating himself and thus establish that further imprisonment might not be necessary. However, during the period of time the defendant was free, questions arose whether the further sentence should be invoked and the trial judge, who imposed the original sentences, invoked the additional sentence, and the defendant was incarcerated without further hearing. Justice Batchelder, writing for a unanimous Supreme Court, in a lucid opinion, discusses at length the legal concept of the sentencing process:

> "It is in the sentencing process that punishment, deterrence, and rehabilitation meet in a common forum where the court, within the framework of the Criminal Code and the common law, conveys society's sanctions upon a particular defendant for a certain crime. At the conclusion of the sentencing proceeding, a defendant and the society which brought him to court must know in plain and certain terms what punishment has been exacted by the court as well as the extent to which the court retained discretion to impose punishment at a later date and under what conditions the sentence may be modified. "

In the case before it, the Court held that when a court "retains the power to impose incarceration at a later time the defendant has been offered liberty, albeit conditional, which may not be revoked without due process". Here the Court found that due process required a hearing and the case was remanded to the superior court for that purpose. In the *Thaxton Case,* the Supreme Court considered the standards required of a trial judge when he increases the sentence imposed upon a defendant who appeals from a district court proceeding. The Court, while recognizing that such increased sentences are

permissible, held that the sentencing judge must take care that the record reflects the reasons for the increased sentence. This is particularly so in a case like *Thaxton,* where the judge imposing the increased sentence is the same judge who sentenced the same defendant in another non-related case, in which the defendant had appealed the sentence imposed by the judge. In such a case, the New Hampshire Supreme Court points out that the judge must use caution that the defendant's right of appeal is not "chilled" by his fear of personal vindictiveness by the judge. In the case at Bar, the Court failed to find any evidence that the judge was vindictive toward the defendant, but stated that in such situations the judge must use care so that the record reflects, not 'merely the judge's- conclusions as to the reasons for the increased sentence, but the evidence upon which such conclusions are based.

Several criminal cases can be discussed briefly. In *State u. Settle,* decided January 24, 1983, the supreme court made clear that while a defendant may either choose -to represent himself, or in the alternative, choose to be represented by counsel, he may not choose to act as *co-counsel* with an attorney. He must choose one or the other. The case of *State u. Chaisson,* decided January 24, 1983, a thoughtful opinion by Chief Justice King, discussing at length the important right of a defendant to cross examine witnesses against him, which right is protected by the Sixth Amendment of the federal constitution. The supreme court reversed the defendant's conviction on the basis of a violation of the Sixth Amendment right to confrontation, where the trial court had refused to permit the defendant to impeach a witness with evidence of a prior criminal conviction, the Supreme Court holding that in New Hampshire a defendant has the right to "impeach the general credibility of a witness with evidence of a prior criminal conviction". The Court acknowledged that any inquiry into prior criminal convictions was a troublesome area, but held that the trial court was required to investigate whether such cross examination should be allowed, rather than imposing a blanket rule against the use of the evidence concerning prior criminal convictions. The case of *State u.Goodrum,* decided January 26,1983, is a text-book analysis of the distinctions in the criminal law between robbery and theft. Proving that nothing is sacred in our modem world, the defendants robbed a thirteen year old paper boy of the sum of $22.56, that sum being the first day's proceeds of the boy's new paper route. The Supreme Court held that the defendants were correctly charged with robbery, as opposed to theft, since the taking had been accompanied with enough force to constitute robbery, the evidence being that the defendants had pushed the boy, knocking him off his bike and had made off with the proceeds of the boy's labors. *State v. Comtois,* decided December 30, 1982, makes clear that a defendant who escapes after a case is called and the empaneling of a jury has begun, may be constitutionally tried *in absentia* even though not one single juror is yet selected, the trial having begun once the general process of empaneling the jurors began. *State v. Cyr,* decided December 30, 1983, is a case in which the defendant claimed that the police had improperly sought identification evidence from a witness to the crime by showing the witness only a single picture of the alleged get-away car. The

Court held that, unlike identification of a defendant in a line-up or through photographs, there was no due process requirement requiring a "line-up" of several automobiles when the identification was of an inanimate evidentiary object such as an automobile.

There are two recent decisions in the banking law area that clearly demonstrate the growing trend of the law in New Hampshire to allow the growth of diverse and wide - spread facilities. In the first, *Appeal of Kingswood Trust* & *Savings Bank,* decided January 18, 1983, the Supreme Court upheld the application of a Manchester bank holding company to form a guaranty savings bank in the Town of Wolfeboro, pursuant to RSA 386-A. The proposed bank was to be a wholly owned subsidiary of the bank holding company. The Supreme Court upheld the decision of the Board of Trust Company Incorporation, holding that in order to justify a negative finding under the statute, there must be evidence "before the Board that suggests that the new bank will jeopardize the ultimate security of funds deposited by customers of existing banks". The second case, *Appeal of Portsmouth Savings Bank,* decided January 19, 1983, involved an interpretation of the branch bank law, RSA 384-B. Here the Supreme Court upheld the application of a Concord mutual savings bank to open a branch in the City of Portsmouth, the Court stating the general rule that a Board of Trust Company Incorporation hearing was an administrative hearing, and that "mini-trials" were not required at that level. The Court ruled that the ultimate issue in a branch banking case is "an economic one involving a determination of whether the. . . area can accommodate . . . additional. . . banking facilities". These two decisions leave the State of New Hampshire open to almost unlimited intrastate banking competition. The position of the New Hampshire Supreme Court is that the Board of Trust Incorporation is the ultimate arbiter of such matters, the role of the Court being only to set aside or vacate decisions of the Board for errors of the law.

A case that received nation-wide press and television coverage was decided by the Supreme Court on December 23, 1982. *Reardon v. Lemoyne.* This is the case of the four sisters of the Roman Catholic Church who were fired from their teaching duties in a parochial school in Hampton. They sued for breach of contract and the ensuing brouhaha resulted. It is difficult to see waat all of the fuss was about. As Chief Justice King stated in his concurring opinion, "except for the parties involved and the emotional rhetoric, this is basically a simple case of an alleged breach of contract." The trial court had dismissed the nuns' petition without a hearing on the merits, ruling that any relief granted would violate establishment of religion clause of the First Amendment. A unanimous Supreme Court ruled that "religious entities .- . . are not totally immune from responsibilities under the civil law. . .It is clear. . . that civil courts are permitted to consider the validity of undoctrinal contractual claims which are raised by parties to contracts with religious entities." The case was then remanded to the superior court for hearing in conformity with the opinion. This is a good example of the truism that the amount of time devoted by the media to a legal issue does not necessarily

have anything to do with the significance of the issue. Where else would Phil Donohue get fodder for this confrontation interviews?

On the other hand, a truly significant case in a very complicated area of the law is *In* re *John* M. *and David C.,* decided December 29, 1982. The decision is a consolidation of three cases and is a discussion of the tricky area of law involving responsibility of governmental units for the placement, care and maintenance of delinquent and neglected children. In a very careful and detailed opinion, Justice Douglas, whose special interest of the law lies in this area, established for a unanimous court the standards for liability amongst governmental units and for placement of such children in a facility housing children who are abused and neglected but *not* delinquent, even if such facilities are out-of-state, although district court judges and YDC authorities are first asked to exhaust appropriate in-state placements. Next, the court ruled that as between two towns, the liability for the expenses and maintenance of such child resides, although that town, after first paying, may seek reimbursement from the county or other legally liable unit. The court then moved on to the third issue, that of town vs. county liability. The court discussed the ancient and hoary concepts of "loss of settlement", and "pauper assistance" and determined that a town or city is the intially liable unit for a one-year period where there is a settlement in the town, after which the county becomes liable. Where the children's parents never gained a legal settlement in a city or a town, the children are "county paupers" and the county is liable for their support. However, the Supreme Court stresses that for the protection of the child, the district court's order assessing liability shall first be paid, and then the unit so assessed may bring an action for reimbursement against the appropriate legally liable unit. It is indeed unfortunate that in the latter half of the 20th century, the responsibility for our wayward, destitute and abused children are subject to the intricacies of such archiac and, indeed, meaningless laws. As Justice Douglas points out in conclusion, "further legislative clarification is welcomed in this tangled area of the law."

If not already previously dealt a death blow by former Governor Thomson's reversal in the 1970's on the oil refinery location question in Durham, two recent Supreme Court decisions leave little but threads' to the myth of the "home rule" right of municipalities and their citizens. In *Seabrook Citizens for the Defense of Home Rule v. Yankee Greyhound Racing Inc.,* decided February 18, 1983, the Supreme Court re-emphasized the longstanding legal rule that municipalities are the creatures of the Legislature which may change the rights of such municipalities at will. Thus in the *Greyhound Case,* the Legislature was held by the Supreme Court to be free to take away the right of the town of Seabrook to prevent Sunday dog racing within the confines of that town, even though the Legislature had previously granted the town a veto right over such racing. In *Stablex Corporation v. Hooksett,* decided December 28, 1982, even more serious blows were inflicted on the ghost of home rule. In this case, the Supreme Court overturned a series of ordinances passed by the town of Hooksett requiring voter approval at the town meeting for the location of hazardous waste disposal

sites in the town. The court held that the field of hazardous waste regulation had been pre-empted by the State, stating that there is "no tradition of home rule in the regulation of hazardous waste". The basic rule of such state vs. municipal contests is that what the State has bonded one day it may later rend asunder. The Supreme Court, split three to two, this time focusing on the role of the Public Utilities Commission in attempting to control the expenditures of the Public Service Company of New Hampshire upon the plant. *Appeal of Public Service Company of* New *Hampshire,* decided December 27, 1982. The majority of the Supreme Court, speaking through Justice Douglas, held that the Commission was without authority to impose conditions upon the issuance of securities by the company which had the effect of preventing the company from completing the second unit of the power station. The court's majority vigorously took the Commission's role in .the proceedings to task, claiming that the Commission had failed to give the parties adequate notice about the subject of the proceedings, had used intemperate statements, had engaged in *ex parte* communications which had prejudiced the company and had otherwise failed to comport itself in a judicial manner. These are strong words in an opinion of appellate court, illustrating the apparent anger of the court's majority with questioned practices of the Commission in the nuclear plant controversy. The court's minority, speaking by Chief Justice King, would hold that the PUC had "acted reasonably in the prior proceedings in the concern for the financial and long-term health of PSNH", stating that the court's majority had given the Public Service Company a "blank check" to obtain as much money as it desired without any regulation by the Commission. This is one of those issues that transcends the judicial process and the unnecessary rhetoric of the Commission on the issue has been matched by unnecessary rhetoric of the court.

Finally, if lawyers didn't have enough problems, it now appears that with the help of one of our own members, an attempt is being made by the medical profession to participate in the practice of law. *Bilodeau u. Antal,* decided January 24, 1983, presents the sorry spectacle of a "recognized medical expert" seeking, not only to act as an expert in the medical practice action which is the subject of the case, but to act as "co-counsel" in the case, presenting evidence, cross examining witnesses, and otherwise using his undisputed medical expertise of counsel for the plaintiff! Fortunately the Supreme Court, with the advice of the Bar Association's Committee on the Unauthorized Practice of Law, as *amicus curiae,* shut the door on any such practice. The court recognized that our law and constitution provide that a person, on occasion, may have someone who is not a lawyer represent him, but the Court held that there was a great difference between that occasional representation and the kind of representation proposed by the medical expert in this case. Based upon his role in the present case, the expert made clear that he intended to act as co-counsel in other similar medical malpractice cases, soliciting such appointments from plaintiffs' counsel who were inexperienced in the presentation of such cases. A unanimous court prohibited the practice, stating that non-lawyers were not allowed "to engage in the *general* practice of law" as opposed to isolated instances of legal representation. The

court made clear that the solution for trial counsel in complex medical malpractice cases is to either refer the case to counsel competent to handle such a case or to take the time himself to master the medical details.