

**LEX LOCI: Recent New Hampshire Supreme Court Decisions**

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Only rarely does the author of this column comment upon cases other than the decisions of our own New Hampshire Supreme Court. It is difficult enough to keep up with the flood of opinions from our own supreme appellate body without taking on the task of revising some of the very important cases arising in our New Hampshire probate, district and superior courts, as well as in the Federal Court for the District of New Hampshire and the First Circuit Court of Appeals. However, every once in awhile there comes along a case about which the author just can't resist commenting. Such a case is *Bundy v. Wilson*, (United States Court of Appeals, First Circuit), decided March 20, 1987. The author's own vanity creates his fascination with the case since it vindicates an earlier judgment of his (see 21 NHBJ 7 1979) and 27 NHBJ 49 (1985)) in which he forecast that the New Hampshire Supreme Court's procedure for handling of appeals would be subject to close constitutional scrutiny. In the *Bundy Case*, a unanimous Court of Appeals speaking through Judge Bownes, formerly of our New Hampshire court system, struck down the New Hampshire Supreme Court's discretionary appeals procedure, insofar as it applies to felony criminal appeals.

The appeal was skillfully prosecuted on behalf of the defendants by the attorneys of the Appellate Defender Program, who raised the constitutional issue whether the New Hampshire Supreme Court's procedure granted the felony defendants due process of law.

The opinion is an important one but must not be read too broadly. For example, the Court of Appeals clearly recognized that although New Hampshire was only one of three states that fail to grant felony criminal defendants an automatic right to at least one appeal on the merits, there was no constitutional infirmity in the state's failure to do so. The Supreme Court's discretionary appeals procedure was not found to be defective as a matter of constitutional law *per se*, but rather was found to be defective in its application to felony criminal defendants. Furthermore, the New Hampshire Supreme Court's discretionary appeal procedure as it applies to civil cases or minor criminal cases was not found to be defective.

What was found to be defective is the manner in which the Supreme Court applies the discretionary appeals procedure to felony criminal defendants. In some cases the Appeals Court found that the Supreme Court denied the defendant an appeal without allowing the defendant to procure a transcript of the case for presentation to the Supreme Court, even though the claimed error was dependent upon a record of the trial being presented to the Court. In other cases, the form of notice of appeal was found to be so short that the defendant lacked the opportunity to fully present his case to the Supreme Court. The Court of Appeals struck down the Court's discretionary appeals procedure, holding that the Court's "failure to provide criminal appellants with a

transcript, and the perfunctory outline of the basis for the appeal required by the notice of the appeal, seriously threatens the interest of criminal defendants in obtaining meaningful review in New Hampshire's appellate system." The criminal defendants were not let off scot-free, however, since the Court of Appeals gave the Supreme Court ninety days to accept from each defendant a brief written argument as to why his appeal should be accepted (contrasted with the former notice of appeal which the court found deficient). What this case means is that the discretionary appeals procedure is not constitutionally defective *per se*, but if remedied, would pass constitutional muster. Even if not remedied, the opinion does not apply to civil cases or minor criminal cases.

There is increasing evidence that the members of the New Hampshire Supreme Court are following the distressing, but current, practice of the members of the United States Supreme Court of issuing separate opinions in important cases, even among members of the majority or minority on an issue. *Appeal of Concerned Corporators of the Portsmouth Savings Bank*, decided March 30, 1987, is a case in point. This very important case addresses important banking and fiduciary law issues. The opinions of the Court total some forty-four single-spaced typewritten pages. The majority opinion is a *per curiam* opinion expressing the opinion of only two members of the Court. A third justice (a justice of the superior court sitting by designation) concurred in the *per curiam* opinion but wrote a separate opinion. Two members of the Court dissented from the opinion of the other three justices, one being the Chief Justice who wrote his own opinion and the other being Justice Souter who wrote a distinct dissenting opinion. It is difficult to believe that this trend will not continue and grow, since it is the current trend in judicial opinion writing today. And, except for having to slog through the always lengthier decisions that this individualistic approval results in, there probably is no good reason to decry the trend.

The *Portsmouth Savings Bank Case* is a very important decision, both for its banking implications and its fiduciary law making, but particularly as to the latter. The banking issues are somewhat limited, as the Court points out that the statute relating to mutual savings banks has been amended since the factual decision now before the Court arose. Based on the unique factual situation, the Court held that the proposed action of the majority of the incorporators of a mutual savings bank was improper because it did not preserve the rights of the depositors to the surplus of the bank. The Court found the depositors' rights were imbedded in the bank's 1823 legislative charter, citing the famous *Dartmouth College case* (17 U.S. 581 (1819)) which first breathed life into the U.S. Constitution's contract clause. U.S. Const., Art. I, § 10.

On the issue of the fiduciary duty of the incorporators of the mutual savings bank to the depositors of the bank, the Court made important law in this somewhat neglected area. The Court basically found that the conversion plan approved by the incorporators was unfair to the depositors, citing the very high standard of care applicable to a fiduciary: "It is not enough for one vested with [a fiduciary] duty merely to avoid fraud, or to protect the interest of his beneficiaries adequately within the technical letter of the law." Citing to Justice Cardozo's famous fiduciary standard, the Court agreed with Cardozo that:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "distinguishing erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

The majority found that the incorporators stood as fiduciaries to the depositors and that the incorporators had, by acceptance of the proposed plan, failed to protect the interest of the depositors in a manner consistent with the law. "If mere compliance with the technical letter of the law were enough, fiduciary law would be just so much empty doctrine, devoid of any substance."

The two minority opinions contain lengthy expositions of each of the dissenter's opposing views. What is remarkable in the majority and minority opinions is the tit-for-tat response contained in both opinions. Justice Souter and the majority justices engage in an unproductive parry and thrust - parry and thrust argumentative duel. Justice Souter's opinion is also remarkable for calling into question the precedential value of the decision, Justice Souter pointing out that, without the vote of the sitting superior court justice, the Court was really divided 2 to 2. Although this fact is obvious to any close reader of the opinion, it seems surprising to have a justice of the Supreme Court make that observation.

The law of res judicata got a real shot in the arm in an April 13, 1987 decision of the New Hampshire Supreme Court, *Eastern Marine Construction Corporation v. First Southern Leasing, Ltd.* This somewhat unusual case became the springboard for a challenging decision by Justice Johnson, which substantially broadens the rules relating to res judicata and collateral estoppel. In the instant case, the plaintiff had brought an action against the defendant alleging certain irregularities in the manner in which the defendant sought to first enforce its rights as a lien creditor under certain agreements between the plaintiff and the defendant. Plaintiff's first action was in equity seeking an injunction, alleging that the notices of the mechanics lien filed by the defendant were improper and illegal. The plaintiff obtained a preliminary injunction that became a final injunction, after which the plaintiff sought attorneys fees and costs which were denied by the trial court. The suit was then dismissed because the defendant complied with the injunction. At this point, and some two months later, the plaintiff brought a second action requesting for the first time damages alleged to have arisen from the defendant's acts, the second suit sounding as an action of law for negligence and wrongful attachment, etc. Under older rules, the actions being different (one founding in equity and one in law) and asking for different types of relief, the first would not bar the second. However, a unanimous Supreme Court, (one becomes thankful for such blessings after awhile) held that the second action was barred, the Court adopting the modern and more liberal approach which relies on the Restatement (Second) of Judgments, Section 24. Under

this rule, all conflicting claims flowing from a common source should be determined in a single action, thus avoiding vexatious litigation and conflicting judgments. This sweeping new rule is of great significance and should be a warning to all attorneys that they should litigate, almost without exception, all claims arising out of a single factual situation in one action. This is an important new rule, which all should heed.

Charles Dickens' wonderful novel *Oliver Twist* gives rise to a much quoted statement which is the bane of attorneys worldwide: " 'If the law supposes that,' said Mr. Bumble . . . 'the law is an ass-an idiot.' " The New Hampshire Supreme Court, in the case of *State v. Settle*, decided March 6, 1987, speaking through Justice Souter, referred to "Mr. Bumble's judgment," while delicately avoiding a statement of the quotation, to avoid being put in the position of making law that could be characterized as Mr. Bumble stated. The issue before the Court was the ability of the defendant to appear as an attorney in several cases presently before the superior and supreme courts. The Attorney General's office sought to enjoin the defendant's appearances, citing the statute against the unauthorized practice of law, RSA 311:7. The defendant relied upon RSA 311:1 which provides that "[A] party in any cause or proceeding may appear, plead, prosecute or defend *in his proper person* or by any citizen of good character" (Emphasis supplied.) The New Hampshire Bar Association appeared as *amicus curiae*.

The facts indicated that the defendant was no stranger to litigation in his own right, having been involved as a party in some ten cases in the superior, supreme and district courts of New Hampshire. One of these cases involved the defendant's conviction for shoplifting. In addition to his own role as party, the defendant had entered appearances in the supreme and superior court in four other cases, claiming to enter his appearance on behalf of an unincorporated association known as the New Hampshire Civil Rights Association (NHCRA), of which he was ostensibly an officer. The defendant had never been admitted to the practice of law and the State sought an injunction to prevent him from continuing to perform legal services for others. The defendant claimed that his appearance on behalf of an unincorporated association was permitted by the language of RSA 311: 1 quoted above, which allows a party to appear "in his proper person." The Court unanimously rejected the defendant's claim, holding that the phrase "in his proper person" was synonymous with "pro se" and held that the phrase is limited "to the direct personal conduct of litigation by a party on his own behalf." The Court reached back to Coke and Blackstone to buttress its position (when was the last time you have seen either of these two learned but hoary legal authorities cited?) and to support its holding that a corporation could not appear personally but was required to appear by an attorney. The Court extended this rule to unincorporated associations and held that the defendant was properly enjoined from prosecuting the instant case as well as other cases in which he had entered his appearance. The Court rejected the defendant's argument that he was entitled to appear under the provision of RSA 311: 1 applying to "any citizen of good character" by stating that the "first and most patent reason [for finding against the defendant] is the defendant's demonstrably bad character," citing his own prior criminal conviction for shoplifting, as well as his earlier cases for larceny which were overturned in appeal on procedural issues. This case is a victory for the

orderly administration of justice in our New Hampshire courts and the Supreme Court should be applauded for forthrightly confronting this issue.

\* *The author is a member of the firm that represented the defendant.*