

Lex Loci:
A Survey Of New Hampshire Supreme Court Decisions
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Wow! What a Court! A surprising Court, one that is not afraid to make new law, to look at old questions differently, and to disagree among themselves when the occasion arises. This Court has a tendency to second-guess the lower court or body appealed from, by reversing, in part or totally, many of their decisions. The quality of the written opinions, to this observer, is outstanding. The logic of many of the opinions compellingly leads the reader to their inexorable conclusion. This Court (or its law clerks?) is writing opinions, and looking freshly at issues, on a par with the paradigms of the Kenison Court, in its heyday in the 50's and 60's.

Would you believe that the New Hampshire Supreme Court would forge new rights for criminal defendants in an area into which the U.S. Supreme Court has been timid to venture? Read *State v. Gravel*, decided December 31, 1991, and believe it. In a remarkable opinion by Justice Batchelder, the Court adopted the "fruit of the poisonous tree" doctrine in the *Miranda* situation and held that where the *Miranda* safeguards were violated, "information obtained in violation of the *Miranda* safeguards is an impermissible predicate for a search warrant. . . The evidential fruits thus arrived from the *Miranda* violation are therefore inadmissible at trial" This dramatic ruling comes at a time when the U.S. Supreme Court has never extended the *Miranda* rule to exclude the admission of physical evidence obtained from an interrogation made in violation of *Miranda*. Indeed two Justices of the U.S. Supreme Court recently have questioned the legitimacy of *Miranda* itself. *Powers v. Ohio*, 113 S.Ct. 1364 (1991). Even in straight-forward search and seizure cases where no *Miranda* violation is involved, the fruit of the poisonous tree doctrine has come under increasing attack in the U.S. Supreme Court and many observers believe that it will only be a short time before that doctrine is discarded by the conservative majority now in control of the U.S. Supreme Court. Despite this background, the New Hampshire Court based its decision on the N.H. Constitution and fearlessly pointed out that it has "historically mandated, under article 15, more protection for a suspect's rights where *Miranda* is concerned than has the U.S. Supreme Court."

And that ain't all! Consider two well-reasoned opinions by Justice Thayer, speaking for a unanimous Supreme Court in the criminal law area, *State v. Johnson*, decided July 26, 1991, and *State v. Johnson*, decided July 31, 1991. In the first of the two *Johnson* cases (unrelated to each other), Justice Thayer denied the State the ability to use offensive collateral estoppel in a criminal case as requested by the prosecutor. The case before the Court involved a perjury charge, and the prosecutor sought to introduce a specific finding of fact, made by a jury in a prior criminal trial against the defendant, as a conclusive fact that could not be relitigated by the defendant in the subsequent perjury case. Justice Thayer soundly held that the reasons in support of the use of offensive collateral estoppel in a criminal case "are simply outweighed by the defendant's right to

require the State to prove, beyond a reasonable doubt, every element of the charge against him."

In the second *Johnson* case, Justice Thayer, again speaking for a unanimous Supreme Court, held that the capital punishment statute (prior to its amendment effective January 1, 1991) was unconstitutional so that the defendants who were convicted while that statute was in effect could not be subjected to capital punishment. This opinion is noble and should be read by all neophyte judges who wish to learn how an opinion should be written. Not swayed by judicial or political philosophy, or the emotion of the depravity of the criminal charges before the Court, Justice Thayer carefully dissected the capital punishment statute as it formerly existed and mercilessly brought the light of reason to the law and the language of the statute to find it unconstitutional on its face. Bravo!

There's more. However, before proceeding further, lest the readers assume the author has a personal reason for his observations, let all be assured that the author has no present cases before the Court nor any on the way. The readers should make up their own minds about the quality of these opinions by reading some of these exhilarating and thoughtful decisions.

This Court certainly cannot be described as adverse to the rights of alleged criminals. In *State v. Diaz*, decided October 4, 1991, a unanimous Supreme Court speaking through Justice Horton, reversed a lower court and held that warrantless entry into the defendant's motel room by the police was not supported by probable cause or by any other permitted justification. In *State v. Brodowski*, decided December 31, 1991, a unanimous Supreme Court speaking through Chief Justice Brock, extended its prior decisions concerning *pro se* defendants, and ruled that a trial court must provide the defendant with a transcript of all bench conferences with prospective jurors, even if the *pro se* defendant has not asked for a record. In *State v. Ward*, decided August 16, 1991, a unanimous Supreme Court speaking through Justice Horton, reversed guilty findings against two defendants in a bench trial, holding that the trial record "fails to establish any basis upon which a rational fact finder could have found the essential elements" of the crime charged.

In *State v. Dodier*, decided December 11, 1991, a unanimous Supreme Court speaking through Justice Johnson, reversed a lower court finding and held that there was no probable cause to search the defendant's vehicle where the Court found that the police officer "conducted the search of the passenger compartment of the truck to satisfy his curiosity about the nature of the object" seen in the truck by a police officer when making a routine interrogation of individuals in a parked and stopped motor vehicle in a parking lot.

In *State v. Allison*, decided July 31, 1991, the Court reversed the defendant's conviction of two counts of negligent homicide for the reason that the prosecutor failed to comply with a bill of particulars granted by the trial judge at the defendant's request. At the trial, the Court held that the prosecutor in his closing argument had improperly used material

and information called for in the bill of particulars and not previously given to the defendant's attorney.

And it's not only in criminal cases that this Court is taking a refreshing, and sometimes unpredictable, look at the arguments presented by the parties before it. In *Terren v. Butler*, decided October 4, 1991, the Supreme Court unanimously pierced the corporate veil and held civilly liable, the individual principals of a condominium development who set-up a corporation of which they were the sole shareholders and directors and which held title to a motel complex which was to be condominized. The plaintiff purchased several of the units and immediately had complaints about the quality of the condominium conversion. At the time he brought suit, the corporation had sold all of the units, the individual defendants had taken a bundle out of the corporation and the corporation had no substantial assets. The Court based its decision to allow the plaintiff to pierce the corporate veil and to hold the defendants liable individually for the dual bases (1) where otherwise it would defeat public policy or (2) where a corporation is set-up with insufficient assets to meet its expected debts or obligations under the condominium law. The Court's decision leaves a lot of questions unanswered, but it has already bedeviled corporate attorneys representing developers who commonly operate under the protection of corporate alter egos, particularly in the condominium area.

Several cases can be noted briefly. *Lorden v. New Hampshire Department of Revenue Administration*, decided August 2, 1991, dealt a well-deserved blow to the position of the D.R.A. that the real estate transfer tax applied to the distribution of unencumbered corporate real estate assets to stockholders upon a corporation's dissolution and liquidation. Although there is no explicit authority in the statute for imposing such a tax, it was the position of the D.R.A. that the tax applied. A split Supreme Court held that the tax could not be imposed for two reasons: (1) there was no transfer of the real estate in such a situation; and (2) there was no consideration paid by the stockholders. In *Gibson v. Laclair*, decided December 11, 1991, Justice Batchelder, quoting Robert Burns to the effect that "the best laid schemes of mice and men often go astray" held that a tenant could not be held liable for breach of a lease containing a clause requiring him "to use 'extraordinary' care in maintaining the leased property" where the building he has leased has become, without the tenant's fault, unusable for its purposes and which has "inherent structural vices". In *Stevens v. Merchants Mutual Insurance Company*, decided November 7, 1991, the Court held that under an uninsured motorist policy, the requirement that the company consent to all settlements of other actions by the insured is unequivocal and must be complied with strictly. Failure to do so will waive the insured's rights to uninsured motorist coverage under the policy. In *Portsmouth v. Association of Portsmouth Teachers*, decided October 4, 1991, the Court held that municipalities, despite provisions of the Public Employee Labor Relations Act, can legislatively provide that no collective bargaining agreement entered into by any board of the municipality shall contain a binding arbitration agreement.

This is a Supreme Court unafraid to tackle head-on, requests to fashion new remedies for alleged wrongs, often giving an affirmative response. In *Morancy v. Morancy*, decided July 26, 1991, the Court recognized for the first time a new tort in New

Hampshire, ruling that an injured party may recover damages for the **intentional** infliction of emotional distress. In a pithy opinion by Justice Johnson, the Court drew upon the decisions of the U.S. Court for District of New Hampshire and the *Restatement (Second) of Torts*, § 46. The Court referred to the fact that it had previously recognized the tort of **negligent** infliction of emotion distress and held that "intentional conduct which causes harm to another is certainly more blameworthy than negligent conduct which causes such harm." The Court specifically left "for another day the determination whether proof of physical manifestations are a prerequisite for a finding of severe emotional distress."

In the Court decided *Britton v. Chester*, decided July 21, 1991, a case receiving national attention and having potentially national impact on the rights of low income people to live in the community of their choice, despite so-called "snob" or exclusionary zoning, the Supreme Court extraordinarily approved a lower court's imposition of a so-called "builder's remedy" where a builder had successfully challenged as unconstitutional a portion of a municipality's zoning ordinance which essentially prohibited the construction of low- and moderate-housing in the town. The Court struck down the prohibition and held that a builder's remedy, which is an order of a court providing that the builder be granted immediately a building permit for the proposed project, was appropriate, "both to compensate the developer who has invested substantial time and resources in pursuing this litigation, and as the most likely means of insuring that low and moderate income housing is actually built." The author denies ever saying that this was a conservative court!! In *Adams v. Bradshaw*, decided November 7, 1991, the Court delivered a negative response to a request for a new remedy and reversed a ruling of a lower court that a town's discontinuance of its entire sewer system was invalid. The Supreme Court held that the town's discontinuance of its sewer system did not constitute "inverse condemnation" requiring damages to be paid to present users of the system, leaving the current users high and dry, or perhaps, better put, "low and wet".

This is also a Court that is going to be hard to predict. In *State v. McAdams*, decided July 24, 1991, two Justices, in dissent, Batchelder and Johnson, would adopt in criminal appeals a "plain error standard" to address claims of insufficient evidence to support a verdict even though raised for the first time on appeal. The majority ruled that the defendant's failure to make a contemporaneous objection had waived his right to have an issue of the sufficiency of the evidence considered on appeal. The dissenters would put New Hampshire with the majority of states and provide that where there is "plain error" concerning claims of insufficient evidence, the Court should consider such a claim on appeal even though not raised in the lower court. In *The MacMillin Co., Inc. v. The Aetna Casualty and Surety Company*, decided December 31, 1991, two dissenting Justices, Horton and Batchelder, would, in an insurance coverage case, read the entire policies involved and determine on the face of the policies whether or not coverage was available to the insured, whether or not the specific coverage issue had been raised on appeal by the appellant! If the views of the dissent become a majority, insurance coverage cases will take on another, and much more provocative and complex, aspect.

Finally, *In re Estate of Emily J. Brunel*, decided December 6, 1991, the Supreme Court

affirmed that New Hampshire has a common law of intestate descent and distribution, independent of the statutory descent and distribution framework provided by R.S.A. 561:1. The Court used the common law rules to prevent escheat to the State of assets of an intestate decedent where the decedent died leaving only second cousins surviving. Second cousins are not mentioned as takers under R.S.A. 561:1, and under the Uniform Probate Code (upon which R.S.A. 561: 1 is modeled) second cousins would be barred from taking and the property in such a case would escheat to the state. The New Hampshire Court, relying on such hoary authorities such as Louis G. Hoyt's, *The Practice in Proceedings in the Probate Courts of New Hampshire*, (1901), and Justice Smith's, *An Essay on the Law of Descent and of Last Wills and Testaments* (circa 1797-1805), held that the second cousins did take under New Hampshire common law rules of descent and distribution. Isn't it wonderful to practice in a field of law such as probate where a recent case is any decided within the last 50 years and authorities 100 or 200 years old are considered irreproachable!!