

Lex Loci: A Survey of New Hampshire Supreme Court Decisions  
By Charles A. DeGrandpre

"If it ain't broke, don't fix it" With this timeworn adage, a divided Supreme Court deep-sixed the New Hampshire Bar Association's 13 year effort to promulgate a modern set of Rules of Civil Procedure based mainly on civil and federal pleading. *In re THE PROPOSED NEW HAMPSHIRE RULES OF CIVIL PROCEDURE*<sup>1</sup>, decided May 23, 1995. It was an humiliating end to a titanic effort for many of the Bar Association's leading trial practitioners and a phalanx of bar presidents working with the Supreme Court's own Advisory Committee on Rules. However, the opposition, ably led by several prominent trial attorneys, although late in starting, succeeded in derailing the train that looked unstoppable, by a heads-up, stubborn, and articulate defense of our present practice. At center stage was the Godfather of New Hampshire's present pleading practice, Chief Justice Charles Doe upon whom the majority relied: Doe: "Our time is too much needed for the consideration of subjects of some importance, to be properly occupied with an unnecessary and barren question of pleading." Indeed, what would Doe have thought of this current effort? It is the author's speculation that Doe (who could never write a fifteen page opinion when a thirty page opinion would do) would probably not have approved the effort to compile a comprehensive code of written rules, fearing that the rules themselves would become obstacles to the sort of free-form court procedure that he envisioned. However, times have changed since Doe and our litigation and court procedures bear little resemblance to the late 19th century problems with which he was confronted. It seems possible that Doe now would have been on the side of the advocates of the new rules, while still allowing for their avoidance in appropriate situations. Justice Thayer, in dissent, supported the proponents' arguments finding that the litigation bar's greatest lacking was "a single definitive and comprehensive compilation of procedural rules."

In an intriguing zoning case, *Caspersen v. Town of Lyme*, decided June 27, 1995, a three judge court (two Justices not sitting) reached a surprising, divided but unanimous, decision with two of the three sitting Justices concurring only. The issue involved the Town of Lyme's enactment of a zoning ordinance that prohibited lot sizes **of less than 50 acres** in a mountain and forest district. Facially, this would appear to be *per se* unconstitutional, but speaking through Justice Horton, the Court upheld the zoning ordinance in the face of several challenges. It was an important case and there were several intervenors and **amicus curiae**. Because of the unique concurrences of two Justices in the majority, it is unclear whether the Court would rule similarly in a future case, due to the fact that one Justice would have ruled differently had not the appellants conceded that the ordinance had been passed for legitimate purposes. The final result remains surprising to this reader, but there is adequate justification found in zoning ordinances across the country where it is not uncommon to find, for example, 10 acre minimums for reservoir protection, 35 acre minimums for farmland preservation, 50 acre minimums for agricultural uses and 80 acre minimums for new farm parcels.

The defendant Town offered an expert in forestry who testified that small forestry lots create access problems that prevent the opportunity for the economic harvesting of timber, that size had an important effect on the profitability of forestry enterprises, and that 50 acres was the minimum lot size where forestry becomes profitable. However, because the Court found that the plaintiff appellants had no standing to challenge the zoning ordinance on exclusionary grounds (because it effectively precluded development of low- or moderate- income housing on their property), this issue was left undecided. A lack of standing was found because, although the plaintiffs owned land in the district, they admitted that they had no present or future intention of providing low- or moderate income housing on their own land and the Court found that the plaintiffs' "general interest in a diverse community is not sufficient to sustain their standing on this issue."

Chief Justice Brock, concurring specially, would have reached a different result had the plaintiffs not conceded, at the trial court and on appeal, that the ordinance was passed for legitimate purposes, stating that he "would have a difficult time finding the 'primary objective' of the ordinance, preserving and protecting a 'heritage' of 'large tracts of undeveloped forest land,' to be a legitimate zoning purpose." The Chief Justice went further to indicate that the Court should, in the future given an appropriate occasion, reverse the Court's own 1993 holding in *Asselin v. Town of Conway*, 197 N.H. 368, which established the principle "that substantive due process challenges to zoning ordinances are evaluated under the rational basis standard, while equal protection challenges to those same ordinances are reviewed with heightened scrutiny." The Chief Justice questioned the rationale for the two levels of analyses and would overrule *Asselin* by holding that "zoning ordinances should be reviewed, with heightened scrutiny. . . regardless of the nature of the constitutional challenge made to them."

Several new cases can be noted briefly in passing. *Laro v. Leisure Acres Mobile Home Park Associates*, decided June 1, 1995, makes clear that when a tenant is evicted /Tom a mobile home park in conformance with the law, "the mobile home is 'evicted' and removed as well" and the mobile home park owner may remove the mobile home /Tom the park upon obtaining a writ of possession." *In Petition of the House of Representatives*, decided June 1, 1995, the Supreme Court, in response to a House of Representatives resolution which encouraged the Court to release all professional conduct files regarding the late John C. Fairbanks, ordered a release of copies of all files which the Professional Conduct Committee possessed where waivers had been obtained from the complainants involved. It appears that *Petition of Burling*, 139 N.H. -' decided December 29, 1994 has, in effect, been a victory for Representative Burling who sought the disclosure of the records in the first place, although his petition was originally declined by the Court.

In *Lemay v. Burnett*, decided June 14, 1995, the Court upheld the dismissal of an action by a plaintiff who claimed negligence in a backyard swimming pool diving board accident case, the Court holding that where an eight foot deep pool was involved there were enough variables beyond the ordinary knowledge of a lay juror to require the testimony of an expert witness as to whether the pool was safe for diving, etc. The

Court noted that an expert would not have been required had the case involved a dive into a three foot deep pool, or conversely, into a fifty foot deep pool. To that, the author can only add: elementary, my dear Watson!

*Emerson v. Town of Stratford*, decided June 14, 1995, is a case of first impression concerning the power of district courts to grant costs and to award sanctions to a prevailing party. The Court found that a prevailing party may be awarded costs but such costs, under Rule 1.8(F), do not include items such as the plaintiff's time, mileage, postage and photocopies, but only includes specified fees for service of process, witness fees, expenses of view, costs of transcripts and such other costs as may be provided by law. The Court in *Emerson* went on to hold that, in addition to an assessment of costs, a district court has the inherent equitable power to impose sanctions such as attorneys fees to the prevailing party, even in the absence of a statutory grant. However, the Court made clear that it was adopting the majority rule which holds that an award of attorneys fees to a *pro se* litigant does not include compensation for the plaintiff's time researching, writing, making copies and preparing for court.

The joint bank account, heralded on many occasions as "that everlasting litigation producer" continues to live up to its reputation. In *Walsh v. Young*, decided July 6, 1995, the decedent had married for a second time after he and his intended wife (the defendant) executed an antenuptial agreement substantially identical to the form antenuptial agreement found in the author's treatise, *Wills, Trusts and Gifts*. Prior to the decedent husband's death, he transferred several bank accounts into joint tenancy with his second wife. The plaintiff, the daughter of the decedent by his first wife and executor of her father's estate sought to impose a constructive trust upon the proceeds of the joint accounts alleging that the defendant, as surviving joint tenant, had wrongfully retained monies which rightfully should have passed through her father's estate.

The issue revolved around the wording of the antenuptial agreement in which each party had retained the right to dispose of his/her own property "by will or by intestacy or otherwise" at his or her death but also provided that each waived all claims against each other in the event of death, "including claims for curtesy, dower, homestead, **survivorship**, inheritance, statutory distributive share, taking against the will, **or otherwise acquired by virtue of the marriage between them.**" The defendant (second wife and surviving joint tenant) claimed that under the antenuptial agreement her husband had clearly retained the right to dispose of his property by making gifts to her and that the waiver of claims based on survivorship related only to claims "acquired by virtue of the marriage between them." Since the joint accounts were not such claims, there is no basis, the defendant asserted, for the imposition of a constructive trust.

The superior court agreed and the Supreme Court affirmed, holding that the second wife did not waive her rights of ownership in the accounts when she signed the antenuptial agreement. The Court went on to describe the gist of a joint account under RSA 384:28 as follows: "[s]urvivorship rights in a joint account do not arise by virtue of a relationship between the joint owners; rather, they are acquired by virtue of an agreement or contract between the owners and the banking institution." The Court held

that a valid gift to the survivor was created when the decedent established the joint accounts with his second wife, which he had retained the right to do. Perhaps it is not surprising that there is so much litigation concerning the rights of parties to joint accounts since in our modern day era joint accounts often dispose of substantial amounts of a decedent's property and it is probably inevitable that contests over the various rights of parties will continue despite the best efforts of the courts and the legislature to settle conclusively these ownership issues.

The obstacles often encountered by creditors seeking to enforce guaranty agreements was before the Court in *First New Hampshire Mortgage Corp. v. Greene*, decided January 20, 1995. The creditor bank extended credit to allow the defendants to develop a large tract of land in the town of New Boston. The loan was to a corporate borrower but the note was secured by a mortgage on the tract as well as a joint and several guaranty of the full amount of the mortgage plus interest and costs signed by each of the individual defendants. The corporate borrower later filed for bankruptcy and the bank foreclosed on the property. At the foreclosure sale the bank was the only bidder entering a successful bid that left a substantial deficiency. The bank then proceeded against the individual guarantors, but met with the defense that the property was worth a lot more than the purchase price and that the bank's purchase price and the sale were "commercially unreasonable" and "that a commercially reasonable price would have covered the costs associated with the promissory note." The creditor bank relied on the unequivocal language in the guaranty agreement which stated that the guarantors waived "any and all defenses available to a surety or a guarantor except payment and performance in full" and which further provided that "the liability of the [guarantors] shall not be effected by any action which lender [FNHMC] may take or fail to take with respect to any. . . security for the obligations hereby guaranteed. "

The trial court allowed the defendants, over the bank's objections, to present the defense of commercial unreasonableness and the court found the sale to be commercially unreasonable and ruled in the defendant's favor. On appeal, the Supreme Court affirmed, recognizing that while a guaranty agreement may provide for a waiver of a mortgagee's breach of its duty of good faith and due diligence, such a waiver is not absolute. The Court held that, although such waivers are generally enforceable, the provisions "which purport to relieve from bad faith or intentional wrongs are considered to be against public policy and will not be enforced." The Court adopted the most recent trend in judicial decisions and held that "where a breach of the fiduciary duty owed by a guarantor or mortgagor by a mortgagee is the result of affirmative negligence, the defense of commercial unreasonableness cannot be waived." One can well imagine the frustration of the bank that relied on the crystal clear, well-drafted language of the guaranty. However, the decision of the Court seems to be the emerging trend in American jurisdictions.

Is the New Hampshire Supreme Court going the way of the United States Supreme Court where Justice Scalia's opinions, in particular, have through their scathing and personal criticism of other Justices' opinions, given the Court a reputation of being "uncourtly"? That was the opinion of one of the three Justices writing opinions in a

significant search and seizure case, *State v. Canelo*, decided February 3, 1995. A closely divided (three to two) Supreme Court issued three clashing opinions, each unique for its personal tone. The case involved a search warrant issued by a judge of the superior court authorizing a search of a defendant's apartment and his person. The issues involved were momentous: (1) Does the New Hampshire Constitutional search and seizure provision (part I, article 19) allow anticipatory search warrants?; and (2) is there a good faith exception to the exclusionary rule under the New Hampshire constitution?

A slim three Justice majority (Chief Justice Brock, Justice Johnson and Justice Batchelder) first needed to get over the issue of mootness since the defendant had died before the case was decided by the Court. Surprisingly, the Court accepted the State's request that the Court consider the issues anyway because of the great public interest in the issues and because they were likely to occur again. That caused the dissenters to take the position that the Court's majority opinion was "dicta", with which statement the Chief Justice, writing for the majority, took umbrage stating that such a claim was without foundation.

Having gotten beyond the issue of mootness, the majority marched toward its conclusions. It upheld the constitutionality of an anticipatory search warrant, which it defined as "a warrant that has been issued before the necessary events have occurred which will allow a constitutional search of the premises." The majority held, on this issue, that it disagreed with the trial court that part I, article 19 of the New Hampshire Constitution contained language that would bar anticipatory search warrants. However, the Court found that the particular anticipatory search warrant (a so-called "self-executing" warrant) issued here was improper since the magistrate inappropriately delegated her constitutional function to the prosecuting authority.

On the issue of whether the New Hampshire constitutional search and seizure provision allows a good faith exception to the exclusionary rule, the majority held that the New Hampshire constitutional provision was unique and "manifests a preference for privacy over the level of law enforcement efficiency which could be achieved if the police were permitted to search without probable cause or judicial authorization" and that a "good faith exception is incompatible and detrimental to our citizens' strong right of privacy inherent in part I, article 19 and the prohibition against the issuance of warrants without probable cause."

This conclusion caused Justice Thayer, writing in dissent (Justice Horton joining him) to write an extended and strongly worded opinion, accusing the majority of rushing to adopt a rule already discredited in the federal courts and not supported by New Hampshire constitutional history. Justice Thayer's opinion accused the majority of using two different tests within the same opinion that he claimed was "to say the least, confusing." He went on to accuse the majority of misapplying the legal tests set forth in the First Circuit opinion upon which the majority relied and found that he would hold that a good faith exception would not violate our state constitutional provision nor would it be inconsistent with the prior decisions of the Court. Justice Thayer concluded this dissent

by asserting that the Court's authority to interpret its New Hampshire Constitutional search and seizure provision as giving greater protection than the United States Constitution's provision **"does not give us permission to invent new constitutional protections that some may argue are based on the whim of the majority."** The use of the word "whim" caused Justice Johnson to go into judicial orbit, concurring specially with the majority, to lament "heightened rhetoric [which] adds nothing to the jurisprudence of our State." Johnson went on to criticize the incivility of opinions by Justice Scalia and he concluded that it "would be regrettable that the writing of this Court would now or in the future emulate this unfortunate practice. I would hope that this court, which heretofore has avoided such rhetoric, would not begin down the road to ever more offensive language." To that the author says, amen.

A tender story of unquenchable love followed by a tragic climax unfolded in the pages of the decision of the Supreme Court in *DePalantino v. DePalantino*, decided May 26, 1995. Who says they don't write them like this anymore? This story could become a modern opera with a Greek chorus and a Wagnerian climax as the love of the two lovers turns to enmity in the halls of a courtroom. The DePalantinos were married in 1972 but then, unfortunately, did not live happily ever thereafter. They were divorced in 1978. However, love springs eternal and one year later they were remarried and remained so for 10 years at which time they were divorced for a second time. Three years after the second divorce the two time wife sued to reopen the property settlement in the second divorce claiming that the husband had misrepresented the law concerning whether his military pension was vested or not. The Court overturned the Master's ruling approving a modification, pointing out that the wife had been put on notice that there was a pension and she had made no claim of entitlement. The Court held that it was immaterial that "she was unaware of the full extent of her legal rights regarding" the pension because she "had the opportunity to obtain legal counsel at the time and could have had her rights to the pension adjudicated." Perhaps the parties should forgive and forget and consider a third marriage because the Bible teaches us to forgive our enemies "seventy times seven." This case is a good example of the observation that love is a "temporary insanity curable by marriage."

### **Endnotes**

1. The author's firm represented a party in the action and, therefore, the author's view may be colored.
2. New Testament, 51. Matthew, 21.
3. Ambrose Bearce, *The Devil's Dictionary*, page 107 (1991).