

**STATE OF NEW HAMPSHIRE v. JOHN KEYES**

[Cite as State of New Hampshire v. Keyes, 114 N.H. 487]

Belknap

No. 6888

July 19, 1974

1. Question of a witness' competency to testify is a threshold question to be determined by the trial judge alone.
2. Trial judge's submission to the jury of the question of a witness' competency was error, and admission of the witness' testimony into evidence without a preliminary finding that the witness was competent to testify constituted reversible error.

Warren B. Rudman, attorney general, and Gregory H. Smith, assistant attorney general (Mr. Smith orally), for the State.

Hatfield & Howard and Robert R. Howard (Mr. Howard orally) for the defendant.

DUNCAN, J. Indictment charging that on December 21, 1971, the defendant did willfully and maliciously burn the Tilton town hall. RSA 584:2. Trial by jury in June 1973, resulted in a verdict of guilty and he was sentenced to a term of five years at the State prison. During the course of the trial, defendant preserved various exceptions which were transferred to this court by a bill of exceptions allowed by Loughlin, J.

The principal issue raised before this court surrounds the admission at trial of testimony of Kenneth Viano, an acquaintance of the defendant. Prior to Keyes' trial, Viano had been found not guilty of the same crime by reason of insanity and was committed to the New Hampshire State Prison for life "unless sooner discharged".

Dr. Payson, a psychiatrist associated with the prison, examined Viano and testified at the trial of the present case relative to Viano's competency. Questioned by the county attorney, Dr.