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Chief Justice — The Judicial World Of Charles Doe. By John Phillip Reid. Harvard University Press, Cambridge: 1967. Pp. 489, including index. $12.50.

Charles Doe served as Associate Justice of the New Hampshire Supreme Judicial Court from 1859 to 1874 and as Chief Justice of the New Hampshire Supreme Court from 1876 to 1896. His fame and influence rest entirely on his performance as a New Hampshire state court judge. He wrote no treatises, participated in no great cases as a lawyer, delivered no memorable lectures, and was hardly known outside of New Hampshire during his lifetime.

Roscoe Pound nevertheless has called Doe one of the ten greatest judges in American history.[1] This book is the first full-scale attempt to define why Doe, with a series of public accomplishments ostensibly less than those of Holmes, Marshall, Cardozo, or Story, deserves the rank ascribed to him by Pound. The author, John Phillip Reid, is a Professor of Law at New York University Law School. His book is an expanded and modified version of a series of more than fifteen law review articles which he has written about Doe in the last several years. The one unhappy aspect of the book is its awkward organization, sequence, and repetition — a result not infrequently found in a collection of biographical essays.

Doe was born in 1830, a product of over 150 years of New Hampshire Does. His father was a farmer, a real estate speculator, a legislator, a tax collector, a manufacturer, a bank director, and general entrepreneur. Doe's boyhood years were spent in rustic surroundings. He received a first-rate education in the rural New England academies, attended both Exeter and Andover, and entered Harvard College at the age of 15. He left Harvard after a year, probably as a result of having been expelled for throwing a chair through an upper-classman's window. He completed his college education at Dartmouth in 1849. He then studied law in the Dover office of Daniel Christie, one of the leading lawyers in New Hampshire in the nineteenth century. After three years with Christie, whose approach to the law could be summarized by the words "stare decisis" (against which Doe as a judge later revolted), he went to Harvard Law School. There is no record of what, if anything, he learned at Harvard Law School because he departed after twenty weeks. He returned to Dover to practice law. While in Christie's office, he had joined the Democratic Party and

1. R. POUND, FORMATIVE ERA OF AMERICAN LAW 4, 30–31, n.2 (1938). Walter V. Schaefer, Associate Justice of the Supreme Court for Illinois has stated: "[I] would venture that only Holmes, Cardozo, and Doe of New Hampshire could match Chief Justice Traynor, if the measure is taken in terms of breadth of interest and long range impact on the law." Schaefer, *Chief Justice Traynor and the Judicial Process,* 53 CALIF. L. REV. 11, 12 (1965).

had held a number of minor party jobs. When he returned from Harvard, the Democrats were still in power and Doe was soon (at age 24) appointed County Solicitor, for which he was paid the grand sum of forty dollars per year. As a result of political wars, the Democratic Party in New Hampshire fell apart in 1856, and Doe was removed as County Solicitor after two years of service. He then entered a very active practice. In 1858 he tried to obtain appointment as United States Attorney for New Hampshire but failed. About the same time, he switched his political affiliation from Democratic to Republican because he could no longer tolerate the pro-slavery secessionist attitudes of the Democrats. He became a stump speaker for the Republicans in their successful state elections in 1859 and was rewarded by the Republican governor several months later with an appointment as Associate Justice of the Supreme Judicial Court. The Democratic newspapers howled with derision; the Dover Gazette said:

> The appointment of Doe was never intended as a 'splendid compliment to his abilities and learning.' It looks to us like the 'stipulated consideration' for the transfer of his body, soul, boots, breeches and all, into the charming embrace of Black Republicanism some six or eight months ago. That's all.[2]

One would ordinarily expect that a 29-year-old judge whose appointment was immersed in political aroma would be rather cautious in his judicial role. Doe, however, did not feel restricted either by his age or the aroma.

At the time of Doe's appointment, the Supreme Judicial Court of New Hampshire was both an appellate and a trial bench. Doe quickly became a remarkable trial judge. He had no reverence for the stiffness and formalism that surrounded most trials. The New Hampshire bar was shocked, for example, when Doe did not insist that lawyers stand when addressing the jury or the bench; indeed, on some occasions Doe even sat with the lawyers. He held court wherever he could be found, including hotel rooms. He often shook hands with all the lawyers and jurymen on a case, and once, in the middle of a famous murder case, he began the day's proceedings by shaking hands not only with the lawyers and jurymen, but also with the defendant. He abolished the practice of requiring the sheriff to escort the judges from their lodgings to court and back. He abolished the court crier's mystical incantations at the beginning of each day. He wore no robes.

One rather amusing tale of his disregard for senseless customs involves an occurrence during a murder trial. The old rule was that a defendant was not competent to testify on his own behalf. Defense counsel often took advantage of the rule by arguing to the jury that if the defendant were permitted to testify, the jury would surely bring in an acquittal. After listening to this type of defense on one-too-many

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2. J. REID, CHIEF JUSTICE — THE JUDICIAL WORLD OF CHARLES DOE 78 (1967).

occasions, Doe told defense counsel that he could put his client on the stand.

> The learned counsel, gradually recovering from his astonishment, turned, and whispered to his junior: 'Well, John, we shall have to put the rascals on, and the result will be a conviction.'[3]

There were many lawyers who did not like to try cases before Doe. Some were shocked by his informal manner; others became annoyed at his examination of the witnesses in his desire to learn all the facts. Nevertheless, Doe was a great success as a trial judge. He was always in complete control of a trial because he understood everything and retained everything; the juries had great sympathy for his common sense reforms; and he talked to the jurors in the language of farmers and mechanics, not of lawyers.

Doe enjoyed his first ten years as a trial judge, but as the years wore on, the repetition, boredom "and the constant strain of adjusting his mental faculties to slow-thinking counsel"[4] began to diminish his love of trials. It got so bad that Doe wanted to resign, but his colleagues persuaded him to remain by agreeing that he would handle only appellate matters. For the last eighteen years of his life, he sat only at emergency trials or occasional murder trials where, under New Hampshire practice, two judges were required.

Doe's major substantive accomplishments were in the fields of procedure and evidence. When Doe became a judge, the tyranny of pleading in New Hampshire was overwhelming. If the plaintiff's action were in the form of the wrong writ, the suit would be dismissed. For Doe, however, the forms of action were "imaginary barriers." It is difficult for lawyers accustomed to the codes of modern procedure to understand Doe's revolutionary impact. If Doe were hearing a motion to dismiss a case on the ground that an improper writ had been filed, he would ask what form of writ would have been correct. On receiving the answer, he responded, "Very well, let an amendment be filed making it as suggested, and we will go on with the case." When defense counsel claimed that a bill should have been brought in equity, Doe would simply instruct the clerk to write "bill of equity" on the back of the writ and admonish the parties to get on with the hearing. His pioneering rules on discovery, joinder, recoupment, and interpleader are remarkably similar to our present day rules. Indeed, Professor Reid concludes:

> There is little in the modern practice codes, drafted by twentieth century experts, which Doe did not anticipate. . . . [the Federal rules] contained few improvements or innovations which Charles Doe had not introduced into New Hampshire practice by the time of his death in 1896.[5]

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3. *Id.* at 87.

4. *Id.* at 91.

5. *Id.* at 100, 103.

Another aspect of Doe's genius in the procedural field is that he did not wait for the New Hampshire legislature or a committee of experts to draft a procedural code. At Doe's death, the New Hampshire bar was delighted that it had been spared the intricacies of a code with the label "reform." "New Hampshire lawyers enjoyed the least complicated system of pleading in the common-law world and no other jurisdiction saw so few procedural questions appealed. There was no New Hampshire lawyer that year [1897] who lost his action on a technicality rather than on the merits."[6]

Reid speculates that the reason no other state adopted Doe's reforms by judicial rather than legislative fiat was because few judges had the courage to act on Doe's philosophy of justice.

> [Doe] believed every plaintiff had a right to the easiest and cheapest remedy which justice and convenience could devise and that not only did the court have the power to invent the best procedure possible but it had no authority to withhold relief because of a technicality sanctioned by precedent. . . . Rules which Charles Doe saw as technicalities other judges accepted as rights vested in the defendant, which only the legislature could take away.[7]

Doe's ability to cut through the jungle of the nineteenth century law of evidence can be attested by nothing more convincing than the simple fact that Professor Wigmore dedicated his monumental treatise on evidence to Doe.[8] Doe's major reform in the law of evidence was to restore to the jury its proper function. This he did by recognizing that the so-called "presumptions of law" should not be substitutes for evidence and should themselves be submitted to the jury in each case and that many of the presumptions and so-called "rules of evidence" had developed primarily to protect railroads and other defendants in tort cases.

The New Hampshire doctrine of criminal insanity is essentially one facet of Doe's view of the rules of evidence. For Doe, the definition of criminal insanity and the issue of whether the defendant suffered from insanity were questions of fact. Reid demonstrates that the New Hampshire doctrine, born in Doe's dissent in *Boardman v. Woodman*,[9] has been misinterpreted in recent years. Both the District of Columbia Circuit in *Durham v. United States*[10] and many legal commentators have assumed that Doe's formulation was not unlike the *Durham* test — *i.e.*, a medical test of insanity which forces the jury to accept the latest psychiatric opinion as to whether the crime was the product of a mental disease. Doe's test is legal, not medical. Although the New Hampshire doctrine, the *Durham* rule, and the more recent A.L.I. test insure that the best evidence will be admitted, the New Hampshire doctrine renders the issue a question of fact, while *Durham* makes it a matter of law. Reid protests that the critics of *Durham*

6. *Id.* at 103–04.
7. *Id.* at 105.
8. The treatise was also dedicated to Professor James Bradley Thayer.
9. 47 N.H. 120, 150 (1865).
10. 214 F.2d 862 (D.C. Cir. 1954).

have assumed that by criticizing *Durham* they are also criticizing Doe; in doing so, they are ignoring the fact that Doe's doctrine is not one of medical jurisprudence or criminal responsibility but is simply a rule of evidence. The confusion has been compounded by the fact that Doe was not uninterested in medical definitions of insanity, as shown in the recently published Doe-Ray correspondence; however, these definitions played no part in determining his conception of what the judge's role should be where criminal insanity is involved.

Doe's penchant for converting doctrines of law into issues of fact is also evident in his opinions construing wills and contracts. He found the "rules of construction" to be artificial substitutes for the intention of the draftsman. He never declared an instrument void for vagueness, because he felt that the intent of the instrument was an issue of fact which could not be avoided by retreating behind a rule of construction. The best illustration of Doe's common-sense approach to the construction of documents is *Edgerly v. Barker*.[11] In this case, the testator left his property in trust to his son and daughter for their lives, with the remainder to their children "when the youngest of said children shall arrive at the age of forty years." The remainder obviously violated the rule against perpetuities; based on precedent in other jurisdictions, the son and the daughter were, therefore, entitled to the entire estate free of trust.

Doe found that the testator's primary intent was to make a gift to his grandchildren. His secondary intent, which violated the rule against perpetuities, was that the gift not take effect until the youngest grandchild became forty years old. Since the primary intention should not be defeated by a secondary intention, Doe held that the remainder should vest in the grandchildren when the youngest reached twenty-one. It was reasoned that the testator must have wanted the remainder to vest sooner rather than not at all. The rule against perpetuities must never be an inflexible rule of law, Doe reasoned, but only a rule of construction which, if it would result in a conflict with the testator's primary intention, must yield to that primary intention. Naturally Professor Gray and the other purists of the Rule thought Doe's opinion to be heresy. How remarkable it is, however, that in this field too, Doe's views have been adopted by those legislatures, including Maryland's, which have ended the Rule's "reign of terror."[12]

For Doe, public acclaim was "a toxic, to be avoided like the plague."[13] He assiduously sought anonymity. He tried to give the other judges all the credit for the New Hampshire doctrine of criminal insanity and for procedural reform. He vigorously refused to have his name used in connection with any matters not directly related to the business of his court. While off the bench, he insisted on being called "Mr.," not "Judge."

"No credit," Doe said, "should be given to any living man, especially a judge, for anything that he has done; wait until he is dead and then, in balancing the good and the bad, what is proved to be

11. 66 N.H. 434, 31 A. 900 (1891).
12. *See* MD. CODE ANN. art. 16, § 197A (b) (1957).
13. J. REID, *supra* note 2, at 155.

valuable and what injurious, speak of him as his life on the whole has proved to have been."[14] Today, when honors and tribute seem to be the salient desire of too many judges, Doe's remark is even more appropriate than when it was originally made. We can only be reminded of Learned Hand's memorable tribute to Cardozo:

> In this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire, it was a rare good fortune that brought to such eminence a man so reserved, so unassuming, so retiring, so gracious to high and low, and so serene.[15]

Reid also discusses Doe's reputation for a lightning-like mind, impatience with slow trials, great patience with younger lawyers, sense of humor both in his opinions and off the bench, charity, kindness, complete indifference to his dress, and disdain for superficialities. His dress, or lack of it, was legendary. He wore shabbier clothes than farmhands and factory workers. His beard was unkempt. His shoes were never shined. At a dignified funeral, the other pallbearers wore black kid gloves; Doe wore blue and white mittens. Once when he was sitting in the lobby of a Boston hotel, he was taken for a tramp and ordered out.

He had a great love for fresh air. Before each term, he would request the Sheriff to keep the courtroom windows open for at least five days. Often during trials, even in the middle of winter, he would order the windows to be opened. Counsel were permitted to wear overcoats and hats. As one newspaper put it, "Lawyers declare that to attend court in winter, when the Chief Justice presided, was equal to a trip to the Arctic regions."[16] Many of the windows at Doe's house, which itself was an oddity, were permanently removed.

Doe lived very simply, almost like a peasant. He married in 1865 and had nine children. The best description of his wife, albeit an indirect one, is contained in a letter of advice on marriage he wrote to Wigmore. It is timeless and worth quoting in full:

> I trust you will be fortunate in your companion. The wives of the present generation of professional men are generally, in one way or another (often in more than one), a heavy burden and incumbrance, — a drain upon the time, the attention, the comfort & the mental & financial strength of the unhappy victims. I know more than one able man whose success at the bar has been made impossible by domestic distraction, extravagance, folly & misery. A young woman of education & refinement, content with her lot, & willing & able to be anything but a constant annoyance & inordinate expense to her husband, has become a rare bird. I hope you will both begin right, with sensible notions of expenditure, contentment & harmony, & thus stand some chance of attaining that position of honor & independence to which your

14. *Id.* at 157.
15. Hand, *Mr. Justice Cardozo*, 48 YALE L.J. 379, 381 (1939).
16. J. REID, *supra* note 2, at 168.

> talents are entitled. A vulgar notion of display, & an affectation of social rank, are besetting sins, so universal & so ruinous, that an old man fails in his duty when he neglects a fair opportunity to warn every young person who is worthy of a high place in the world. With due labor, you are sure of fulfilling your ambition. Without an economical, unpretending, peaceable, quiet & happy home, the necessary continuous, intense & undisturbed mental application is impossible.[17]

Doe's only hobby was reading about the battle of Waterloo. He spent the rest of his time with legal work — "dull, hard, sustaining, lucubratious work. When writing an opinion he was indefatigable in research."[18] Doe was also equally indefatigable when he was merely commenting on the opinions of the other judges. His intra-court memoranda were generally as long as full-blown opinions. Doe's theory was that each opinion issued by the court should be a true joint effort and that the publication of the name of one of the judges as the author of each opinion was not only irrelevant but also misleading.

One of Doe's major difficulties was that his written opinions tended to be long and verbose because he considered it necessary to explore in great detail every conceivable legal issue. The difficulty in approaching his opinions, some of which ran to over one hundred pages, has undoubtedly contributed to Doe's relative anonymity. Because of his desire to write a law review article in every opinion, he would literally take years in writing some opinions. In fact, when the Democrats regained control of New Hampshire in 1874 and promptly reorganized the judicial structure by abolishing Doe's court, Doe spent the next two years in no other occupation than writing opinions on cases which he had heard before he lost his job. In 1876, the Republicans were victorious and appointed Doe as Chief Justice of the newly-created Supreme Court. When Doe assumed his duties as Chief Justice, he still had not completed opinions from his previous court.[19]

A large portion of Professor Reid's book deals with Doe's philosophy of the role of a judge. Doe was unique in the nineteenth century because he was what we now call a "judicial activist." Late nineteenth century American jurisprudence was an era of conservatism after the imaginative and formative eras of our early legal history. In Doe's era, the exemplary judge was considered to be the one who was best at discovering precedents and applying them in a mechanical fashion to the facts of each case. Doe, on the other hand, believed that precedents were not the law itself, but only evidence of the law. In his view, a court had the duty to overturn error, not to perpetuate

17. *Id.* at 175–76.
18. *Id.* at 185.
19. One incidental effect of Doe's turtle-like pace was that New Hampshire appellate opinions were generally published about five years late. In one case in 63 N.H., there is a citation to Dole v. Pike, 64 N.H. ___. The reaction of New Hampshire lawyers was not unlike the general displeasure of the Maryland Bar with the fact that the bound volumes of legislation enacted by the General Assembly each year do not appear until late August, almost three months after the effective date of most of the legislation.

it. The judge who overstepped his bounds and engaged in "judicial legislation" was, according to Doe, the one who, by adhering to erroneous precedent, was failing to fulfill his duty.[20]

The criticism of Doe's disrespect for the sacrosanct character of precedent was not unlike some of the current criticism of the United States Supreme Court.[21] One New Hampshire newspaper complained of Doe's effect by stating that "the practice of law in New Hampshire is more uncertain in its results than it is in Turkey and Russia."[22]

In one area, Doe eventually came to regret his activism. In an extremely interesting chapter, Professor Reid discusses the manner in which Doe tried to mold his court into a quasi-legislative body in his attempt to regulate the bitter railroad struggles in New Hampshire. This melancholy saga is as good a brief for administrative agencies as one can find. The court's inability to act until a suit was brought, to move with alacrity when an explosive situation was encountered, or to formulate, in the context of a specific dispute, long-range policy guidelines for railroad competition were the chief factors that doomed Doe's attempts to fashion the New Hampshire courts into a "New Hampshire Commerce Commission."

The one measure of Doe's brilliance that shines through Professor Reid's book and all the tedious controversy about stare decisis was his remarkable ability to apply that vague concept of "justice," which of course is the desirable end in the law but which is often found difficult to apply by many lawyers who, of necessity, are more dedicated to their client's cause than to seeing justice done. However, its meaning can somehow be sensed in most cases by those who can detach themselves from their own private ambitions, frustrations, hopes and jealousies.

*Shale D. Stiller**

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20. *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

21. For an excellent recent defense of the Supreme Court, see Rosen, *Contemporary Winds and Currents in Criminal Law, With Special Reference to Constitutional Criminal Procedure: A Defense and Appreciation,* 27 MD. L. REV. 103 (1967).

22. J. REID, *supra* note 2, at 325.

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