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A NEW LIGHT DAWNS—
THE JUDICIAL OPEROSITY OF CHIEF JUSTICE DOE*

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THE SECRETS of most American courts are hidden behind chamber doors. Deliberations are closed to outsiders and even history is barred entrance to the room. The self-imposed curtain of silence which appellate judges have rung down to shield themselves from the prying eyes of a curious profession has served the added purpose of denying posterity knowledge of how they worked. The door has sometimes opened a crack, and the curtain has often been pierced, but almost always to reveal the judiciary at its worst rather than its best and to emphasize its weaknesses rather than its strengths. This is because when things are going smoothly and a sense of cooperation prevails, the restraints of fraternal ethics are least strained. It is on occasions of stress and discontent that the barriers of traditional propriety are breached. This has meant that aside from information furnished by published memoirs and private papers, the only glimpses of the inner routine and activities which legal historians are able to obtain of our courts have, to an extent, been limited to the extraordinary rather than the ordinary. This has occurred, for example, when the placidity of judicial temperament is rumpled by sudden flashes of annoyance which make headlines in the daily press,¹ when a refusal by the majority to admit a brethren into their confidence causes him to complain to the organized bar by spreading his side of the story across the official reports,² when judges, fearful that history may misunderstand the roles which they played in questionable intra-court maneuvers, prepare

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1. The most recent incident of this sort was "an unusually sharp attack," made by Justice Douglas in the form of "extemporaneous remarks from the bench," on "a major opinion by his colleague on the Supreme Court, Hugo L. Black," the tenor of which "startled those in the courtroom." N.Y. Times, June 4, 1963, p. 1, col. 2.

2. As when West Virginia's Marmaduke Dent refused to disassociate himself from a case in which he was interested. The remainder of the court disassociated the case from him, barred him from their conferences, and would not even permit him to see their opinion until it was released to the public. The querulous, garrulous Dent wrote a dissent in which he bitterly complained about this rather judicial treatment. Hartigan v. Board of Regents of West Virginia University, 49 W.Va. 14, 38 S.E. 698 (1901) (dissenting opinion).

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memoranda for their biographers,\(^3\) or when brilliant jurists, finding themselves associated with inept colleagues, pour out their frustration to contemporaries.\(^4\)

Courts which are free from personal animosities and official squabbles have guarded their secrets more jealously. Even the state tribunal on which more research has been conducted than any other— the Supreme Judicial Court of Massachusetts presided over by Lemuel Shaw from 1830 to 1860—has given historians few hints about how it worked. This was the court which guided American law over the hurdle from an agricic to an industrial society, and from a mercantile economy geared to the stagecoach to a revolution in legal developments ushered in by the railroad. Its decisions, at least compared to those of other tribunals, have been catalogued and tallied, and its rulings have been sifted and sorted. Yet little is known of how it reached these decisions and rulings, of what compromises had to be ironed out in chambers because of clashes between obstinate personalities, and of what opportunities to reshape the future course of law slipped away because the boldness of Chief Justice Shaw was restrained by less prescient associates.

Another well-known court of the same type was the New Hampshire bench presided over by Charles Doe. It sheltered extreme shades of opinion, was burdened with some rather fainéant members, and became the target of unusually severe criticism. Yet it apparently knew no periods of rancor, nor were there ever any outward signs of discord. Doe dominated that bench as few benches have ever been dominated in American legal history, and he forced his more conservative colleagues to swallow radical innovations about which they were far from enthusiastic. But when he thought ill health would force him to resign, they persuaded him to remain by dividing among themselves the nisi prius work he found onerous, leaving him with only appellate duties which he enjoyed. In this atmosphere, none had occasion to voice either public or private complaints to contemporaries or to leave a record of deliberations for historians. We know little about the daily routine of the court partly because the judges thought it only routine.

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3. The most famous occurrence of this type resulted from the "Legal Tender controversy." Chief Justice Chase placed his version of the events on file. This led five colleagues to subscribe to a counter explanation, drafted by Justice Miller, which told how the members of the court had persuaded Justice Grier to resign. Justice Bradley saved this "Statement of Facts" for his biographers. Fairman, Mr. Justice Miller & The Supreme Court 1862-1890 163-72 (1939).

4. E.g., the giant of the Wisconsin bench, Chief Justice E. G. Ryan. In a series of letters to an acquaintance, Ryan left a revealing picture of his court. He called one of his two colleagues "a flippan, flatulent, unstable dunce." The other he described as "a dull, dry, obstinate egotist, always satisfied with himself and his work." Letter From E. G. Ryan to John Orton, Dec. 2, 1877, in Beitzinger, Edward G. Ryan: Lion of the Law 155 (1960).
What we do know centers mostly around Chief Justice Doe. The picture which emerges is one of hard work: of the immense amount of intense labor which he devoted to tireless research, day after day, week after week, with seldom a break or vacation. "There was," as Professor Jeremiah Smith who sat as his associate for a few years has said, "no end to the amount of drudgery he would go through." The simplest matter would lead him off onto the wildest tangents, and some of his finest reforms resulted from cases which counsel had thought cut and dried. He filled reams of paper with notes on ideas, quotations and authorities, posing questions which he would answer at great length and solving one problem only to have his solution turn up another. These notes were intended for himself or his colleagues, and some of his best work was never seen outside chamber walls.

New Hampshire lawyers were well aware of the Chief Justice's indefatigable labor. They were often annoyed by the length of Doe's opinions, some of which he seemed to fill with everything he had come across as if unwilling to omit the slightest discovery. It was not, however, until *Dow v. Northern R.R.*, published after his death, that the legal profession found out how hard Doe really could work and that he was capable of making some rather drastic cuts. In that case a minority stockholder asked the court to enjoin a railroad from leasing its track and rolling stock to a rival. In what has been called "a single cryptic paragraph," Doe granted the injunction. Then he began to research the question. Ten years later, when he died, he had not finished the job. He had, however, published part of his findings in two law review articles, each of which was so long that it had to be printed in two parts. The manuscript opinion had never been submitted to his associates, and obviously he had planned extensive revisions. To put it into final, official form the court assigned an editor who was sorely perplexed as to what to do. He finally got it into manageable shape by leaving out passages which contained arguments supporting views fully stated elsewhere and numerous lengthy quotations he believed could be handled by mere reference to authorities. Even with these omissions, the decision came to more than sixty-four printed pages in the New Hampshire reports.

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6. 67 N.H. 1, 36 Atl. 510 (1886).
9. 67 N.H. 1, 3 n.1, 36 Atl. 510, 511 n.1 (1886).
Another characteristic of Judge Doe, well-known to contemporaries, was his habit of carrying legal research to the point of a hobby. He would investigate questions completely unrelated to any business before the court, storing away his manuscripts until the right case came along. Then he would spring his findings on an astonished bench and bar. If the case never turned up, he would actively seek one out, inserting his materials into opinions where they were not strictly germane or even inventing the issue out of whole cloth.\textsuperscript{10}

Knowledge of Judge Doe's assiduous working habits has up to now rested primarily on his voluminous opinions, the testimony of his colleagues, and the traditions of the New Hampshire bar. Manuscripts have recently been discovered which substantiate the legend entirely. Indeed, they make Doe appear more sedulous than ever and show that he had a hand in all the appellate decisions of his court, advising, correcting and even writing the opinions of his associates.\textsuperscript{11} One is especially valuable for the light it sheds on his tireless energy and on the lengths to which he went to satisfy himself that every question had been thoroughly explored. Moreover, it shows how a legal genius can find himself in trouble when he uses some of his more obscure theories to solve practical issues and how his pedestrian associates sometimes call a halt to his wanderings.

The case with which this manuscript deals involved a petition for abatement of taxes which had been filed by the Winnipiseogee Lake Cotton and Woolen Manufacturing Company against the town of Gilford. At issue was the correct legal definition of the property interest which the plaintiffs owned by virtue of their right to use Lake Winnipesaukee as a reservoir to provide power for their mill.\textsuperscript{12} The plaintiffs' dam stood on an inlet called Long Bay at the head of the Winnipesaukee River, a tributary of the Merrimack. Since the Merrimack was the main artery of industrial New Hampshire, along which lay the work shops of Franklin, Concord, Manchester and Nashua, this dam, by regulating the water level, was of vital importance to most factories in the state. Gilford, the town in which the reservoir was located, recognized its value and taxed it accordingly. The matter had been before the court on several occasions. In 1887, for example, at a time when Chief Justice Doe was absent,\textsuperscript{13} Judge Carpenter had ruled that water power, or rights in a reservoir of water, are an interest in the land upon and by which they are created and are taxable in

\textsuperscript{10} Reid, \textit{Almost a Hobby}, 49 Va. L. Rev. 58 (1963).
\textsuperscript{11} This aspect of the manuscripts has been treated in Reid, \textit{Doe Did Not Sit—The Creation of Opinions by an Artist}, 63 Colum. L. Rev. 59 (1963).
\textsuperscript{13} See Sanborn v. Clough, 64 N.H. 315 (footnote at asterisk) (1887).
the town where the land is situated. 14 But just what constituted that “interest” in terms of rights and duties was still in controversy, and until it could be determined a tax assessment acceptable to both sides was remote. After disposing of two minor preliminaries appealed in 1889 and 1891, 15 Chief Justice Doe decided to join Associate Justice Clark at the 1892 September Trial Term and preside over what everyone hoped would be the final hearing on the matter.

Following the conclusion of the trial, at which evidence of ownership was submitted by both parties, Doe and Clark ruled that under the original act of incorporation passed in 1831 16 the plaintiffs had not acquired, nor had the state parted with, “the title to the basin of Long Bay (which is a public water), or an indefeasible right to change the natural level of the water in the bay.” 17 The most which the charter (and a subsequent amending act passed in 1846 18 authorizing capital expansion) had granted, was “a perpetual right to a reasonable use of the lake as a reservoir and source of a reasonably uniform stream, for the improvement of the Winnepesseoge and Merrimack rivers.” 19 This construction of the legislature’s intent, they said, was a possible basis of ownership for purposes of tax appraisal, but what it meant in terms of property interests held by the plaintiffs as against the state was another question.

If, by the true construction, the right above described was not granted, if the grant is revocable without compensation, or if, on any ground, the state, by the exercise of any other power than eminent domain, can stop the plaintiffs’ reasonable use of the lake as a reservoir, or prevent their making reasonable changes in its natural level, the value of the plaintiffs’ property is less than we have found it to be, and there should be another hearing. While the wrong that would be done by depriving the plaintiffs and the Winnepesseoge and Merrimack valley of the benefit of the improvement made by the plaintiffs, would be so apparent and so great as to afford a degree of moral assurance that it would not

14. Winnepesseoge Lake Cotton & Woolen Mfg. Co. v. Gilford, 64 N.H. 337, 348, 10 Atl. 849, 850 (1887). Throughout this paper the name of New Hampshire’s largest lake is spelled in four different ways: 1) “Winnepisseogee,” as it was spelled in the plaintiffs’ corporate charter; 2) “Winnepesseoge,” as Doe spelled it in the lower court opinion (see text at footnotes 19 and 20); 3) “Winnepisseoge,” as Doe spelled it in the manuscript and once in the opinion (footnotes 33, 41 and 68); and 4) when it does not appear in a quote it is spelled according to today’s standards—“Lake Winnipesaukee.”
be done, the legal right of the state to do it would affect the value of the plaintiffs’ water power and mill property in Gilford, as well as the value of all property benefited by the improvement in N.H. and Mass. 20

The implications of this did not seem to worry the plaintiffs’ attorneys. When the defendants appealed, they declared themselves “willing to accept the conclusions of the presiding justices upon the law” and moved “that decrees be entered accordingly.” 21 But the reference to “moral assurance” balancing “the legal right of the state” showed that something troubled Judge Doe. Regardless of what the plaintiffs may have thought, Doe believed that the decision which he and Clark had written threatened their interests. And some of these dangers were of his own creation.

One of the matters which the Chief Justice had studied as a hobby had been the ownership of bodies of fresh and salt water such as lakes and ponds. He waited thirty-six years for the right case to come along before he was able to put his research to practical use, 22 and when it finally turned up he wrote one of his most far-reaching and controversial opinions. The case he had waited for was Concord Mfg. Co. v. Robertson, 23 and the rule he laid down was that New Hampshire’s great ponds and lakes belonged to the people and were held by the state in trust for their common benefit. A great pond or lake he defined as one of ten acres or more in extent. The “pretended reasoning” behind the long, involved, and often abstruse opinion, which went directly counter to every English, Irish, and American precedent on the subject, has been called unsound by one observer, 24 criticized by one court, 25 and followed by none. It is a classic example of Doe’s tendency to legislate. It laid down a doctrine of substantive law of vast importance to lake-studded New Hampshire, a doctrine which the Chief Justice used to strip littoral land owners of exclusive control over ponds which they had stocked, cleared and maintained and which they had long believed their own private property. 26 This was probably all he had in mind—to preserve New Hampshire’s lakes and piscaries in common for all the people and to keep them from

20. Ibid.
22. See Reid, op. cit. supra note 10, at 63.
23. 66 N.H. 1, 25 Atl. 718 (1889).
falling into the hands of a privileged few as he believed had happened in England.27

It was apparently not until he began considering the Gilford case that the full implications of the doctrine dawned on Chief Justice Doe. In fact, it seems likely that this was why he sat on the trial below. He had long since given up presiding at trials, except those involving capital punishment, but it is possible he may have journeyed north for this case in order to help lay a proper factual foundation for the decision he wanted.

Doe realized what Robertson, carried to extremes, could mean to mill companies like Winnipiseogee Lake Cotton and Woolen. If ponds of over ten acres were held by the state in trust for the people, what right had private corporations to make them into reservoirs and raise and lower water levels whenever they pleased? If they had no definable property interest in these bodies of water which could be protected in court, then New Hampshire's industrial enterprises would depend on the grace of the legislature for their power, a situation the Chief Justice (who based all his constitutional tenets on a social-compact theory limiting the role of government and protecting the equality of property28) would have deplored.

At the Trial Term Doe and Clark had been well aware of their dilemma. They also knew that on appeal the parties might ask the court to settle the question of ownership. If that happened the state should be heard, and so they ordered copies of their opinion sent to the Governor and Attorney General.29 The Chief Justice either did not trust the Attorney General to act, or lacked confidence in his ability to appreciate the problem, because a few weeks later, after further investigating the legal issues, Doe prepared an amicus brief for the government to submit. This is the manuscript which has recently been uncovered lying in the vaults of the New Hampshire Supreme Court.30 It is in every respect a remarkable document. Here was the Chief Justice of the state writing an argument to be used before his own court by a potential party in litigation upon which he would be officially barred from sitting, since he had participated in the trial below. The Attorney General, to whom he planned to send the brief, was Edwin G. Eastman, appointed just three months earlier to succeed Daniel Barnard. What Doe would have done had Barnard still been in office is a question, since Barnard had served as counsel for the plaintiffs

29. "Reserved Case," supra note 17, at 165.
30. Manuscripts File 579, Doe Papers, New Hampshire Supreme Court (hereafter cited as Mss.).
during three of the four previous appeals. To complicate the matter further, George A. Bingham, who while a judge had presided at one of the trials, had retired and was now acting for the defendant. He had been succeeded by William Chase, who was assigned to write the opinion. Whether Doe ever intended telling Chase the true origin of the state's brief, had the Attorney General submitted it, will never be known.

The manuscript is no mere collection of notes, arguments, or suggestions. It is a formal brief in every respect. Upon receiving it all the Attorney General would have had to do was to sign his name at the end. Doe considered each essential point. He cited authorities in full, provided liberal quotations from cases and referred to his own decisions in the third person. Although otherwise unimportant, the opening paragraph is worth quoting since it exemplifies the general tenor of the entire work. Doe does not even leave it to the Attorney General to determine the state's interest, but decides for him what type of appearance to enter and upon which statutes to rely:

A copy of the reserved case having been sent to the Attorney General by an order of the court made at the trial term, some response from him seems not to be out of place. The reason given for the order was that "the state may desire to be heard[']."

It is the duty of the attorney general to act for the state in all "civil causes in the supreme court in which the state is interested." Pub. St. c. 17, s. 4. The state is a party to no pending suit in which any right in Lake Winnepisseogee or any other public water is brought in question, & cannot be made a party to this suit without its consent. *Beers v. Arkansas*, 20 How. 527. It has not consented, & does not now consent, to be made a party, or to be bound by the judgment to which one of the parties is entitled. This situation raises the question whether the state is "interested" in the cause, within the meaning of the statute; & on this question there may be a difference of opinion. As no public right, claimed under the state's title, can be conclusively determined by the judgment that must be rendered in this suit, there is a sense, limited to that view of the subject, in which the state may not be interested in the result. But a decision of questions of law & fact involved in the case might be attended by some consequences that would have a practical effect in future suits in which the state may elect to appear as a party & assert either its whole title, or some public rights involved therein. My duty will apparently be done, without entering either a general or special appearance for the state, by submitting the following suggestions as *amicus curiae.*

31. See cases reported at 64 N.H. 337, 10 Atl. 849 (1887); 66 N.H. 621, 30 Atl. 1121 (1891); 66 N.H. 626, 30 Atl. 1121 (1891).

32. The appeal of this case is reported at 64 N.H. 337, 10 Atl. 849 (1887).

From there Doe went on to fill thirty-seven more large sheets of paper for the Attorney General, all in his meticulous clear handwriting, doctored with interlineations, alterations, and marginal notes.

The question which the Attorney General was supposed to fear might be settled in the state's absence related to the lower court decision by Doe and Clark that the acts of 1831 and 1846 granted the plaintiffs a reasonable use of Lake Winnipesaukee as a reservoir. In Robertson it had been held that alienation of the title of the soil beneath a great pond or lake was "not an executive function." 34 "It was," Doe said in the brief, "assumed that the legislature have the power, but the question has not been settled or considered by the court." 35 An adoption of his lower court opinion that the legislature had made a limited grant would imply that it also had power to convey title in fee. Moreover, he continued, "If one of those rights can be alienated without a trial of this question, & without a decision of it in favor of the grantee, all of them can be given away, the state's title to the soil can be rendered worthless, & the entire beneficial interest of the public in inalienable trust property can be extinguished. There is no distinction but a verbal one between a conveyance of land, & a conveyance of all the rights in the land that can be useful to its owner." 36

What Judge Doe wanted the Attorney General to argue was that he and Clark had been wrong; that a careful reading of the plaintiffs' charters showed that nothing had been conveyed "but authority to do, as a corporate body, what they could have done as unincorporated partners . . . by exercising their private rights as landowners, without overflowing highways, or invading public rights or public property. No section, line or word of either act can be construed as a conveyance of land or an interest in land, or as evidence that such a conveyance was thought of." 37 This, Doe knew, would have placed the entire problem back where it had been at the start—what was the nature of the property interest which the plaintiffs owned (and the defendant taxed) by virtue of their right to use Lake Winnipesaukee as a reservoir and to raise and lower water levels?

Seeking the answer in the amicus brief, Chief Justice Doe considered and rejected in lengthy, involved discussions three possible solutions. The first was the argument that, by implication, the legislature in 1831 had intended to grant a right in fee since it sought

34. Concord Manufacturing Co. v. Robertson, 66 N.H. 1, 6, 25 Atl. 718, 720 (1889).
36. Id. at 6-7.
37. Id. at 20.
to encourage manufacturing and the plaintiffs' dam benefited the entire state by helping to regularize flowage along the Winnipesaukee and Merrimack rivers. In reply to this, Doe would have had the Attorney General answer the question Robertson had left open and argue that, regardless of any intention, the legislature would not have had the constitutional authority to make such a grant. The first reason he suggested was that any right of exclusive private use and control would be incompatible with the purpose for which the state held great ponds and lakes in trust for the people. No matter if every voter in the state agreed the plaintiffs' dam was beneficial to New Hampshire, it was still not a use beneficial to the public in the sense that it improved the trust estate. Nor was it "a public benefit for which the power of taxation can be exercised."

If the legislature cannot grant cash from the state treasury to improve the Winnepisseoge & Merrimack rivers for the private benefit that would ensue in the private use of the manufacturing power of those streams, on what grounds can they, for the same private benefit, grant a perpetual use of nearly 71¾ square miles of land which the state holds, in a special trust, by a title that is inalienable except so far as parcels can be granted without detriment to the public interests in that tract of land.

The next argument rejected by Judge Doe was that the state may grant perpetual interests in great ponds and lakes for private uses to a reasonable extent. He said this amounted to a claim that there are reasonable limits within which the violation of inalienable rights may be legal.

A grant of a perpetual private use of it for the benefit of mills below the dam, whether reasonable or unreasonable, is a surrender of a part of the public title—a conveyance of an interest in nearly 71¾ acres of the state's land. The qualification of reasonableness does not affect the question of legislative power. . . . If any realty passed by those acts, more of the same estate can be conveyed, for the same or similar private use, by additional acts, until nothing of any substantial value is left in the private owner.

The third argument Judge Doe took up had to do with what he called "the erroneous doctrine of an incidental private reservo in public waters." The doctrine was based on the theory that water power is part and parcel of the abutting real estate. It had

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38. Id. at 3.
39. Id. at 7-8.
40. Id. at 8.
41. Id. at 9-10. (The 71¾ square miles refers to Lake Winnipesaukee.)
42. Id. at 11.
43. Id. at 12.
44. Id. at 37.
been long accepted and acted on in New Hampshire. Doe thought this explained why nothing was said of property rights in the plaintiffs' original charter; the incorporators saw no need to mention what they believed they already had.\textsuperscript{45} The doctrine had been given the force of authority by former Chief Justice Bellows in an opinion to which Doe had concurred separately.\textsuperscript{46} And at least one subsequent case which discussed it had involved the present parties.\textsuperscript{47} But now it gave Doe trouble. In \textit{Robertson} he had suggested that a governmental grant of abutting land conveys no title to the soil under a great pond even if the land entirely surrounds the pond.\textsuperscript{48} More recently, he had said that a private owner of all the littoral property could not acquire title to the bed of a pond by prescription.\textsuperscript{49} These pronouncements seemed to cut the ground out from under the "easement" doctrine as laid down by Judge Bellows, even though Bellows had been careful to say that the easement did not depend upon prescription, but was an incident to the land.\textsuperscript{50} Besides, Bellows' reasoning had been unsatisfactory and precedents not based on sound reasons carried no weight with Doe. He saw no way around the views that he had expressed in \textit{Robertson}, and in the amicus brief he had the Attorney General deny the "soundness" of Bellows' easement theory and assert that it "must be regarded as overruled."\textsuperscript{51}

This just about exhausted all arguments. After thirty-eight pages, Judge Doe not only eliminated most possibilities, but overruled the one theory of ownership that (at least for purposes of taxation) had been accepted in the past. He was quite discouraged. He had an unqualified faith in the common law's ability to settle every problem without legislation, but now it seemed to be letting him down. This was doubly bad, for not only would the legislature have to enact law to straighten out the problem, a solution Doe intensely disliked, but it might be legislation of an especially undesirable kind. More likely than not, some politicians would take advantage of the embarrassment in which mill operators would find themselves once the court held they owned no interest in their reservoirs, and would seek to win votes by making them pay exorbitant rates for privileges which, before \textit{Robertson}, nobody had doubted belonged to them. Confiscatory was what Doe called legislation of this sort. He had recently gone to extreme lengths to prevent the state from exercising a right, reserved

\textsuperscript{45} Ibid.
\textsuperscript{46} Cocheco Manufacturing Co. v. Strafford, 51 N.H. 455 (1871).
\textsuperscript{47} Gilford v. The Winnisiquegee Lake Co., 52 N.H. 262 (1872).
\textsuperscript{48} Concord Manufacturing Co. v. Robertson, 66 N.H. 1, 6, 25 Atl. 718, 720 (1889).
\textsuperscript{49} State v. Welch, 66 N.H. 178, 179, 29 Atl. 21, 22 (1889).
\textsuperscript{50} Cocheco Manufacturing Co. v. Strafford, 51 N.H. 455, 461 (1871).
\textsuperscript{51} Mss. File 579, supra note 30, at 35.
in the original charter, to buy the Concord Railroad at less than the current market price. As a result, both he and the court were then being subjected to one of the most bitter attacks ever directed by the press against the judiciary in America. He surely wanted to avoid risking a repetition, yet if the issue of reservoir ownership could not be quietly resolved by an action such as this, it might well have to be settled by overruling a "confiscatory" law with all New Hampshire looking on. Judge Doe's constitutional tenets and ideas on government were involved in a question of this sort, and there can be no doubt that he would have annulled any statute, no matter how popular, which sought to capitalize on the mill owners' predicament.

These considerations—the desire to solve the Robertson dilemma in a manner equitable to all sides and to keep his court free from political controversy—form the background for understanding the high spirits and buoyant enthusiasm with which Doe suddenly broke off the amicus brief. The thirty-ninth page of the manuscript which contains the brief is written in the form of a note, dated on the morning of November 23, 1893. The Chief Justice had apparently passed a restless night, but now the concern and worry are over. A great load has lifted from his shoulders, and he describes to himself the sheer joy of finding a solution:

The foregoing [i.e., the first thirty-eight pages] was written with the idea that if it were presented to the court & the parties, as suggestions made in behalf of the state, & extended & applied by further suggestions according to the views entertained by the writer when the foregoing was written, the result might be that there would be judgment by agreement. The mischiefs of that result were apparent. Great interests would be left on no legal footing. Demagogues would be tempted to endeavor to induce the legislature to levy black mail on the great numbers of people who use ponds of more than 10 acres as reservoirs. But I saw no way of avoiding that result. After long & severe cogitation, a new light dawns. Judge Bellows was right. Everybody & everything is right. The law is equitable & wise, & clear as the sun, although I didn't apprehend it till after sunrise this morning. This change of view changes my whole plan. I will send this to Chase instead of the gentleman for whom it was written, changing the conclusion, & completing it according to the new light.

53. For newspaper reaction to Doe's decision in Corbin's Case see Richardson, William E. Chandler, Republican (1940).
54. Doe had intended that the Attorney General would urge the parties to agree that extension of the plaintiffs' property specifically authorized in the second charter (1846) could have been accomplished in no other way than by "using the lake as a reservoir." This would have avoided the need for determining whether the ruling made at the trial by Doe and Clark was correct, and would not have been prejudicial to the state since it would not have been bound. Mss. File 579, supra note 30, at 16.
55. Id. at 39.
Nowhere else can the reason for Judge Doe’s achievement of judicial greatness be seen more clearly than in this note written during the early hours of a November morning. His insatiable quest for the proper solution to every legal issue is shown by the immense amount of labor he had already poured into the first thirty-eight pages of the manuscript. His unselfish devotion to scholarship is shown by the fact he originally intended that the product of his untiring research should be presented to the world as the work of the Attorney General and in no way add to his fame or credit. His love for the common law, something he stated on many occasions, is shown by the excitement with which he discovers that once again the answer to a difficult problem is to be found among its “wise” principles. And his belief that justice and reasonableness are the foundations of all true law is shown by the satisfaction he expresses now that the matter at hand can be settled in a manner equitable to all parties.

The “new light” apparently dawned upon Chief Justice Doe while rereading his decision in the Robertson case.66 He saw that Judge Bellows had been right, but for the wrong reasons. There was, as Bellows had said, an “established right of abutters to a reasonable private use of public waters,” but Bellows’ explanation that the right was founded on an easement incidental to the land still did not satisfy Doe. It did not express the reason of the law. For the correct explanation of the right he turned to his jurisprudential theory that the common law is a system of “natural principles,” adopted by custom and consent, growing out of the usage and conditions of a progressing society.67 As he expressed it, the right had been sanctioned by the “experience of more than 250 years.”68

The private use of a large pond as a reservoir for manufacturing purposes by building a dam & opening & shutting gates at the outlet, differs materially from other rights of using the same pond which are incidents of abutting lands. But the difference is not a conclusive argument against the reservoir right. The private right of wharfing out for purposes of navigation, differs materially from other water rights vested in the littoral proprietors. Unlikely as these rights are, they are all alike in one respect,—they are all confined within the bounds of reasonableness. Within that limit, no reason is perceived for denying the reservoir right “founded on necessity & convenience, & maintained by uniform usage,” through the long period in which it has been so exercised that it

56. The pages to which he refers are 66 N.H. 1, 17-20 (1889).
would have been questioned & contested, if it had not been universally recognized as a legal right growing out of the situation & circumstances of the people which are one of the chief sources of the common law. 59

"This is the whole point of the case," he told his colleagues. "The fact of universal understanding & usage should be asserted in the broadest & strongest terms, unless you find on inquiry that the outlets of ponds of more than 10 acres have not been used, from the first settlements, by unincorporated & incorporated persons, without any legislative grant of reservoir rights in the ponds." 60

When the appeal was heard he would not be sitting, so he told Judge Chase to have counsel investigate the history of usage of mill ponds in New Hampshire to determine if, without specific legislative grant, it was always understood that owners had a reasonable right to use public waters for reservoirs. "If the number & the fact are what I anticipate," he added, "why won't you have an impregnable basis of usage for a decision that will do justice & prevent an immense deal of demagogic agitation, & alarm & perhaps iniquitous legislation against the owners of the outlets?" 61

If the court adopted this solution, then the ruling made by Clark and himself at the trial term, "that the plfs have 'a perpetual right to a reasonable use of the lake as a reservoir & source of a reasonably uniform stream' was correct, & the supposed derivation of the right from statutory construction instead of the common law, was an error that did not affect the legal merits of the case or the judgment that should be rendered." 62

Doe almost pleaded with Judge Chase to adopt these views, telling him how he had worried that, because of the Robertson decision, he had been "thrown into a dilemma from which there was no escape without much ensuing mischief."

At the trial, Clark & I were sorely troubled by the question, & didn't think of this way of solving it. We did the best we could, but saw that our solution of the difficulty would expose to damage or ruin all mills at outlets where the owners were not incorporated, & that demagogues would not be satisfied with our construction of plfs' charter. If the foregoing suggestions are found to be an adequate, equitable & legal solution of the whole question, I shall be greatly relieved. 63

59. Id. at 43.
60. Id. at 43-44.
61. Id. at 45.
62. Id. at 47.
63. Id. at 45-46.
Chief Justice Doe wanted Judge Chase to do more than just adopt "the foregoing suggestions." He expected him to use the opinion as he, Doe, had written it, and sent him everything, including the thirty-eight page amicus brief which needed only a few omissions and a slight shifting of emphasis to serve as a judicial decision. He knew, however, that the laconic Chase, who was never known to have a refreshingly original thought in his life, was "abnormally & excessively squamish abot [sic] using other folks' ideas." So Doe tried to impress him with the seriousness of the problem and begged him to lay his scruples aside just this once.

What happened after this is unknown. For some reason—either because he did not share Doe's sense of urgency regarding the problem, or because he remained true to his practice of not using "other folks' ideas," Chase ignored the manuscript sent him by the Chief Justice. Instead of taking the broad road of judicial legislation which Doe would have taken, he followed the narrow path of judicial restraint which was not on Doe's map. Just as Doe was the type of judge who could not resist creating new law when the need arose, Chase was the type of judge who could not resist settling matters on a technicality or on a point of fact. He knew that Doe's prime violation of the tenets of decision writing was his practice of extending issues beyond conventional limits in order to widen the range of discussion. This was how the Chief Justice, who had much to say, squeezed far-reaching opinions from unchallenging fact patterns. Chase's main strength as a judge was that he did the opposite and confined issues to their proper limits. He knew he had nothing to say.

Anyone reading Judge Chase's opinion would have no idea of the toil and worry Chief Justice Doe had given to the matter of defining the property interest possessed by mill owners in reservoirs formed from great ponds and lakes. Indeed, it would be difficult to guess that it had even been regarded an issue. Chase relegated it to a point of procedure and dismissed it in his first three sentences.

The finding that the plaintiffs' charter conveyed to them rights in the lake, as stated in the case, is favorable to the defendants. Its tendency was to increase the market value of plaintiffs'...
real estate. The defendants have no occasion to object to it; and the plaintiffs have waived their objection by moving for decrees. . . . 66

Later, in the body of the opinion, when discussing an issue of evaluation, Chase added: "This control of the lake as a reservoir is limited within the bounds of reasonableness, having reference to the rights of riparian owners upon the rivers forming its outlet." 67

The only thing salvaged from Judge Doe's labor was tucked away in the statement of facts made by the Court Reporter, so obscure and subtle as to go almost unnoticed. In the unpublished opinion filed with the judgment they had made at the trial, Doe and Clark had said that the legislature, by the acts of 1831 and 1846, had "granted to the plaintiffs a perpetual right to a reasonable use of the lake as a reservoir and source of a reasonably uniform stream, for the improvement of the Winnepiseogee and Merrimack Rivers." 68 In the statement of facts the Reporter or Doe or perhaps even Chase changed this to read:

It was held that the state, by the acts of 1831 and 1846, granted to the plaintiffs a perpetual right to a reasonable use of the lake as a reservoir and source of a reasonably uniform stream for the improvement of the mill privileges upon Winnepesogee and Merrimack rivers, subject to the limitation that the right of navigation upon the lake should not be unreasonably impaired thereby, and also subject to the right of the owners of mill privileges upon said rivers to have the water of the lake come down its natural course, without unreasonable diminution or an unreasonable degree of irregularity caused artificially. 69 (Emphasis added.)

The italicized words were taken from that part of the manuscript which Doe had written originally as an amicus brief for the Attorney General. 70 They state the principle of ownership which the Chief Justice wanted to establish, but do not explain the theory of social usage upon which it is based. And of course they meant little, for even if the principle of reasonable use were noticed and its importance were appreciated by the bar, the opinion made it clear it was not adopted as law in New Hampshire. At the very most, it rested on a judgment at the trial term; a judgment founded on an erroneous construction of the acts of 1831 and 1846.

By most standards, Judge Chase was right and Chief Justice Doe wrong. At least Chase showed himself a more faithful adherent to the

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67. Id. at 520, 35 Atl. at 948.
68. "Reserved Case," supra note 17, at 161.
70. Mss. File 579, supra note 30, at 4.
common-law process. The usefulness of the judicial decision, after all, is limited to the facts of each particular case, and its function is to settle controversies which arise in bona fide actions between competent parties. As Chase knew, its utility is jeopardized when it becomes a peg for solving potential problems not yet in litigation. This was too confining for Charles Doe. To him the common law was not merely a collection of doctrines, rules, and guides sanctified in precedent. Rather it was the application of right reason to specific circumstances and existed independently of official pronouncement. As a result, he drew little distinction between *ratio decidendi* and obiter dictum since dictum which expressed the reason of the law carried more weight, than unreasonable *ratio* which represented the law's authority. He believed that the function of a common-law judge was to make law with bold strokes and not to avoid issues by using technicalities. In the New Hampshire of 1893 many large business enterprises, involving thousands of people and vast expenditures, were caught in a legal dilemma which seemed to result from the discovery that private rights in reservoirs might conflict with the public ownership of great ponds. Was it not, he asked, the duty of the court to set minds at ease and avoid expensive litigation by declaring at the first opportunity the correct principle of property law which solved the dilemma? His critics—and there were many—would have answered no; the Chief Justice should have learned a lesson from the consequences of his decision in *Robertson*. Had Doe restrained himself there, had he not deliberately formulated a new rule of substantive law uncalled for by the strict facts of that case, the troublesome dilemma would have never existed. Judge Doe believed that one of the evils of legislation was that it bred the need for more legislation. His critics could have said he had proved the same thing true of judicial legislation.

Perhaps this was what Chase told him: that he had gone too far, and it was time to call a halt. Chase may have been awed by Doe's industry and sympathetic with his desire to rewrite New Hampshire law according to the dictates of reason, but he refused to be the means by which Doe formulated the doctrine of reasonable usage for private reservoirs in public waters. It is mainly because he created law in this manner, that Charles Doe is remembered as one of the greatest judges in American legal history. Judge Chase is remembered because he was an associate of Chief Justice Doe.

71. "The maxim which, taken literally requires courts to follow decided cases is shown by the thousand of overruled decisions, to be a figurative expression requiring only a reasonable respect for decided cases." Lisbon v. Lyman, 49 N.H. 553, 602 (1870).