

A PECULIAR MODE OF EXPRESSION

Judge Doe's Use of the Distinction Between Law and Fact¹

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Judicial fame has been a fleeting thing in American legal history. Pursued by many, it has come to few. The touchstones for determining the qualities a judge must show to outlive his own epoch and influence the generations which follow him have never been determined by the historiographers of our law. An examination of the career of Gibson of Pennsylvania might lead the casual observer to suggest the secret lies in dominating and molding the jurisprudence of a single state. But then why is Lumpkin of Georgia forgotten by all but the lawyers of his jurisdiction? Others might look at Cooley of Michigan and say the answer is extra-judicial activities, such as treatise writing. But what of Redfield of Vermont who was remarkably prolific for his own times? To say that Shaw of Massachusetts is remembered because his long tenure gave him time to build, block by block, whole areas of emerging law during the Industrial Revolution, would be to ignore the fact that the even longer service of Beasley of New Jersey is remembered by few scholars. And to suggest the lasting reputation of Doe of New Hampshire rests on his renown as a reformer, is to overlook the fact that during the nineteenth century Appleton of Maine was regarded as the judge who best preached the gospel of reform.

Since the present state of our legal history makes it meaningless to compare the individual characteristics of such men, as so few have been the subject of formal study, the answer to why the reputations of some have outlasted others must be found in the sources which have perpetuated those reputations. That is, in the more general works such as those written by Roscoe Pound and Karl Llewellyn, which explore, with kaleidoscopic perspective, the mutable and variegated aspects of law, both past and present. It is in these books, in their texts and more frequently in their footnotes, referred to as examples of what has been accomplished or cited as analogies for what can be done, that the same names—Gibson, Shaw, Doe and a very few others—reappear with some frequency. Their use gives the impression they earned remembrance not alone by the originality of their genius, the

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pungency of their language, or the value of their service to a single jurisdiction, but more significantly because they cut a figure across the entire common law and left their mark on many facets of American jurisprudence. It was with this test, unconsciously applied, that history separated the reputations of Gibson from Jeremiah Black, Shaw from Theophilus Parsons, and Doe from Jeremiah Smith.

How Gibson, Shaw, and Doe managed to be so versatile is a question which has seldom been asked. Of course there are many factors, such as long tenure, which have to be considered. But transcending the common equation and locating the more basic explanation in individual cases is somewhat risky. For Shaw and Gibson it is not difficult to offer a tentative, educated guess based on historical analysis. They served in large, industrial states during the formative era of American legal principles, when railroads and business corporations were new experiments and litigation, moving into unprecedented areas of conflict, was posing novel questions for settlement. Deciding issues of momentous importance as matters of first impression, and speaking for prestigious jurisdictions, their opinions were bound to form the foundation for developing doctrine in many areas of the law.

With Charles Doe of New Hampshire the explanation is more elusive. He came along at a different period and spent his entire career on a small, relatively insignificant bench.² By his time the law was fairly well settled. The formative era was over and the age of reform lay in the future. He received few cases of first impression and the economy of New Hampshire was not geared to present him with the hard-core stuff from which the common law is made or even with run-of-the-mill issues in any great variety. The secret of how Doe, despite these drawbacks, played the gamut of legal institutions and left an indelible stamp on many different areas of law, lies in his mastery of the common-law technique.

Although, as Dean Wigmore suggests, Chief Justice Doe probably never constructed a system of general principles on the higher levels of jurisprudence,³ there have been very few judges who have had a firmer grasp on the workings of the common law or have known better how to manipulate its doctrines and rules. He had an intuition for developing its strengths and seizing upon its weaknesses; to make those challenging his views debate issues along lines he set down. As Dean Pound pointed out, Doe combined "sound legal instincts" with a

2. Doe was appointed (at the age of 29) a few months before Shaw retired. For the highlights of Doe's life and work see Note, *Doe of New Hampshire: Reflections on a Nineteenth Century Judge*, 63 HARV. L. REV. 513 (1950).

3. Wigmore, *Mr. Justice Holmes*, in MR. JUSTICE HOLMES 212-13 (Frankfurter ed. 1931).

“thorough knowledge of traditional legal methods,”⁴ and this permitted him, even when advancing radical ideas, to force opponents on the defensive.⁵ By giving close study to pedestrian matters which few judges of his intellectual curiosity would have detained, he not only learned to master basic common-law tools such as the distinction between law and fact, but became convinced that the unity of legal science could be effected more by procedural and evidentiary rules than by elusive, abstract principles of jurisprudence.

Lord Coke believed that jurisdiction over common pleas was the “lock and key” of the common law. Judge Doe found his lock and key in the more subtle distinction between law and fact. From the familiar principle that matters of law are for the court and questions of fact are for the triers of fact, he spun the theory which became the central theme behind most of his reforms, using it to forge a unity of judicial science in New Hampshire practice and making it the leverage with which he exerted his greatest impact upon American law in general. With it he opened many doors which had been closed for decades. With it he swept the law clear of unreasonable rules. And with it he transcended fact patterns devoid of reform-inspiring questions and brought renewed life to many areas of the common law by furnishing jurists a fresh vantage point from which to view them.

Judge Doe stumbled upon his theory concerning the distinction between law and fact by studying legal history. He realized its value in American jurisprudence when he noticed how his colleagues in other jurisdictions were misapplying it. And he reinforced its significance as a reforming tool by making it a constitutional dogma.

Doe’s historical theory was simple enough. “The law,” he said, “is burdened and obscured by a great mass of common opinion, general understanding, practice, precedent, and authority . . . that has passed for law, but is in truth not law, but fact, coming down to us largely by descent from the ancient custom of the judge giving the jury his opinion of the evidence.”⁶ Nescience of the early English jury system, Doe believed, caused the trouble. Later judges, who made declarations of law on questions which properly were matters of fact, had not understood that in the precedents upon which they relied, the court, as had been proper when its sphere was “latitudinarian,”⁷ had given to the triers of fact its conclusions and suggestions on factual issues, without explaining that these were mere opinions and not expressions

4. POUND, *INTERPRETATIONS OF LEGAL HISTORY* 139 (1923).

5. Reid, *The Reformer and the Precisian: A Study in Judicial Attitudes*, 12 J. LEGAL ED. 157 (1959).

6. *State v. Hodge*, 50 N.H. 510, 522 (1869).

7. *State v. Pike*, 49 N.H. 399, 438 (1870).

of law the jury was bound to follow.⁸ Moreover, they had failed to consider the changing role of the jury, and had accepted as immutable rules of law legal presumptions and technicalities laid down by judges responding to institutions which no longer existed. What value, he asked, were rules of evidence and statements of law designed to temper conditions when new trials were not permitted, or prisoners were not allowed the assistance of counsel in relation to matters of fact, or juries were punished at the discretion of the court for returning verdicts contrary to instructions,⁹ or when areas of English law were administered by non-common law courts without juries,¹⁰ or when the courts excluded the testimony of parties?¹¹ In those times judges had not hesitated, "by legal presumptions and other measures, to extensively control the jury in the decision of questions of fact."¹² Yet, despite changed circumstances and new theories concerning the jury's function, American courts persisted in following these precedents to such an extent they had "practically buried or obliterated the dividing line between law and fact," creating "great difficulties" for reformers like himself who endeavored "to make partition of what had so long been held in common and undivided, thoroughly commingled and blended together."¹³

Chief Justice Doe's sensitive probing of the common-law system was not limited to lessons drawn from legal history. He was as skillful handling situations involving modern juries. One of his most telling arguments was drawn from English libel cases, commonly regarded as an exception to the general rule. "Unfortunate" was how he described this exception, because it opened the door to several others, and courts had "claimed the presumption of unlawful intent to be a matter of law in cases in which it was a matter of fact, and juries were invited to render verdicts in open defiance of the express directions of the court; and the distinction between law and fact was confounded worse than ever."¹⁴

Just as he had with legal institutions long since abandoned, Chief Justice Doe warned against recent innovations which tended "to obscure the distinction between law and fact," such as the "modern practice of trying common law cases by judge without a jury, and the habit of inferring facts from an agreed statement of facts submitted

8. *State v. Hodge*, 50 N.H. 510, 520-21 (1869).

9. *State v. Pike*, 49 N.H. 399, 437-38 (1870).

10. *Lisbon v. Lyman*, 49 N.H. 553, 581 (1870).

11. *Savings-Bank v. Getchell*, 59 N.H. 281, 286 (1879).

12. *Ibid.*

13. *State v. Hodge*, 50 N.H. 510, 521 (1869).

14. *Id.* at 520.

to the court.”¹⁵ He overlooked little, even criticizing reported cases which failed to make the distinction clear. It was not enough, he said, for a court to correctly treat a factual issue as a question of fact. It must expressly state that its conclusion was a conclusion of fact, or else there might be confusion.¹⁶ Doe apparently thought nineteenth-century lawyers had a conditioned reflex for turning fact into law, and, by digging deeply into his reservoir of common-law polemics, he offered some rather convincing proof.

In one English case the trial judge instructed the jury that when a common carrier takes into its care a parcel directed to a specified place and does not, by positive agreement, limit its responsibility to part of the distance, it is *prima facie* evidence of a contract to carry the parcel to the point of its ultimate destination. By this the English judge had meant “that the evidence was *prima facie* evidence of the fact and not that a legal presumption existed.” But the reporters who drafted the case’s headnote wrote, “*Held*, that the Lancaster and Preston Railway Company were liable for the loss.” As a result one treatise reported “it was held that the company were [sic] liable for the loss,” from which, Doe suggested, “the reader would understand that it was so held by the court.” In other words, that the court had ruled there was a legal presumption that the parties had intended to make a contract binding the defendant to carry the parcel to its place of destination. The reporters should have said, “*Held*, by the jury, that the company were [sic] liable. *Held*, by the court, that there was evidence competent to be submitted to the jury.” That, Doe thought, would have been “a correct and useful statement of the case.” Through mistakes such as this “a plain question of fact may inadvertently be changed into a question of law.”¹⁷ And as Doe saw it, the common law needed only one mistake to start a chain reaction. “One precedent is held to justify another. Every matter of fact turned into law opens the way for further annexation of the province of the jury to the province of the court, and a gradual absorption.”¹⁸

This was the danger. Misunderstanding of common-law theory and misapplication of common-law precedents combined with the lax discipline of a cursory bench and bar “to allow settled fact to grow into law.”¹⁹ This not only made a mockery of the jury system but undermined the very foundations of the common law itself. As was

15. *Gray v. Jackson*, 51 N.H. 9, 12-15 (1871). Of course, findings of fact made by a referee fell under the same category *Holman v. Manning*, 65 N.H. 92, 18 Atl. 746 (1889).

16. *Colburn v. Groton*, 66 N.H. 151, 157, 28 Atl. 95, 98 (1889)

17. *Gray v. Jackson*, 51 N.H. 9, 12-15 (1871).

18. *State v. Hodge*, 50 N.H. 510, 524-25 (1869).

19. *Gray v. Jackson*, 51 N.H. 9, 23 (1871).

his wont when bearding professional patterns of thought, however, Judge Doe knew better than to rest his notions about law and fact on common-law theories alone. He turned to the constitution for support, claiming it unconstitutional to give certain inferences of fact the force of law²⁰ or to convert a presumption of fact into a presumption of law.²¹ He even went so far as to claim the "constitutional view" was conclusive, and with Judge Doe, a constitutional dogma, once asserted, became an absolute which, when used in argument, permitted no exceptions:

If the court may invade the province of the jury at one point, they may invade it at all points. If they can appropriate a part of it, they can appropriate the whole, and, uniting the office of judge and jury, which the constitution has divided, destroy the check and balance which have been deemed essential to the judicial branch of a free government.²²

Although the Chief Justice placed his theory concerning the distinction between law and fact on a constitutional basis, no one familiar with his judicial method would suggest that the theory originated in constitutional philosophy. Rather, he concocted the constitutional argument to buttress the question-of-fact theory. The theory was the tail that wagged the constitutional dog.

One of the most interesting, though perhaps least consequential, results of Chief Justice Doe's theory concerning the distinction between law and fact was that it furnished him with a new way of looking at the function of appellate courts. This was natural enough. If any legal institution is likely to ignore the distinction between law and fact it is the judiciary, which has both the practical opportunity and the professional impulse to encroach upon the province of the triers of fact. Since Doe was determined to revitalize the theory of law and fact, it followed that he would have to challenge the appellate powers responsible for most of the encroachments. He probably realized that if he directly attacked judicial prerogatives he might alienate many judges before he had a chance to convince them, and so he circumvented the question by phrasing his criticism in a terminology less likely to offend.

While young, Doe, like most other lawyers, had been in the habit of referring to the "discretion" of the court.²³ Eventually the expression began to rankle him. He thought it unfortunate,²⁴ apparently

20. *Kendall v. Green*, 67 N.H. 557, 561, 42 Atl. 178, 179 (1893).

21. *State v. Hodge*, 50 N.H. 510, 522-25 (1869).

22. *Gray v. Jackson*, 51 N.H. 9, 37 (1871).

23. *E.g.*, the second opinion he ever wrote. *Pittsfield Bank v. Clough*, 39 N.H. 212, 213 (1859).

24. *Darling v. Westmoreland*, 52 N.H. 401, 408 (1872).

because it smacked of arbitrary power²⁵ and confused ministerial with judicial error.²⁶ One of its practical consequences had been to obscure the rules governing the relevancy of evidence.²⁷ Because discretionary power “is exercised by weighing evidence on a question of fact,”²⁸ and, “in its technical legal sense, is the name of the decision of certain questions of fact by the court,”²⁹ he thought that matters within the court’s discretion should be called questions of fact, especially since there is “no appeal and no power of revising the decision.”³⁰ Around 1872 he stopped using the word in his opinions,³¹ and thereafter almost invariably referred to as “questions of fact” what other judges termed “judicial discretion.”

This was more than a mere switch in nomenclature. For if the expression “discretion of the trial court” conjured up the idea of arbitrariness which appellate judges were duty bound to confine within definite limits by formulating rules and presumptions, then the expression “question of fact” implied a decision which should be unfettered by judicial restraints—or so Chief Justice Doe hoped. As his court said, speaking of the admissibility of a confession (which is a question of fact for the trial judge in New Hampshire), the “finding upon this question is a finality as much as the verdict of a jury upon a question of fact.”³² The same was true concerning admissibility of unwritten foreign law and construction of a foreign statute.³³ Both matters, along with how far the cross examination of a witness could be carried³⁴ and how far the practice of trying collateral issues could justly and reasonably go,³⁵ Doe said, were questions of fact for the trial judge. So were the questions whether all or a part only of the issues in an action should be tried at one time, and which should be tried first;³⁶ whether a verdict should be set aside because of excessive

25. *Colburn v. Groton*, 66 N.H. 151, 153, 28 Atl. 95, 96 (1889).

26. *Boody v. Watson*, 64 N.H. 162, 186, 9 Atl. 794, 812 (1886).

27. *Darling v. Westmoreland*, 52 N.H. 401, 408 (1872).

28. *Edgerly v. Barker*, 66 N.H. 434, 471, 31 Atl. 900 (1891).

29. *Colburn v. Groton*, 66 N.H. 151, 153, 28 Atl. 95, 96 (1889); *Darling v. Westmoreland*, 52 N.H. 401, 408 (1872).

30. *Attorney-General v. Taggart*, 66 N.H. 362, 369, 29 Atl. 1027, 1031 (1890).

31. The decision was presaged by a letter he wrote to his closest associate. See Letter From Charles Doe to William Ladd, February, 1872, in Hening, *Charles Doe*, in 8 LEWIS, GREAT AMERICAN LAWYERS 241, 259 (1909).

32. *State v. Pike*, 49 N.H. 399, 407 (1869); *Colburn v. Groton*, 66 N.H. 151, 153-54, 28 Atl. 95, 96 (1889). See also, *Holman v. Manning*, 65 N.H. 92, 18 Atl. 746 (1889).

33. *Jenne v. Harrisville*, 63 N.H. 405 (1885).

34. *Merrill v. Perkins*, 59 N.H. 343, 345 (1879).

35. *Amoskeag Mfg. Co. v. Head*, 59 N.H. 332, 338 (1879).

36. *Owen v. Weston*, 63 N.H. 599, 605, 4 Atl. 801, 805 (1885); *Bemis v. Morey*, 62 N.H. 511 (1883).

damages³⁷ or because the finding was against the evidence;³⁸ whether a new trial should be granted by reason of newly discovered evidence;³⁹ and whether justice requires a recommittal of a verdict to a jury and whether justice will result from doing so.⁴⁰ His whole purpose was to eliminate burdensome technicalities. An easy way was to change matters of discretion into questions of fact.

He sometimes went beyond this and used the question-of-fact approach to overturn doctrines of trial practice which conventional thought did not regard within the court's discretion. Consider, for example, how he dealt with the rule that a recorded verdict cannot be amended by the jury once it has separated. Separation, he admitted, increased the danger of wrong being done and this raised the question whether justice required a recommittal of the case for reconsideration, which in turn raised the second question whether, if reconsidered and amended, justice required a judgment on the amended verdict. "Both questions," Doe said, "were matters of fact to be determined at the trial term."⁴¹ By using the side door provided by the question-of-fact approach he was able to slip reforms into the law of practice in a rather painless manner.

The most important series of reforms introduced by Judge Doe had to do with common-law pleading.⁴² Based on his belief that procedural questions are formal, never substantive, they combined a liberal system of amendments with the principle that every right has a remedy. Here, too, Judge Doe got extra mileage from the question-of-fact approach. He had no doubts whatever that the common law provided a remedy for every right. The court, he said, was duty

37. *Merrill v. Perkins*, 61 N.H. 262 (1881).

38. *Colburn v. Groton*, 65 N.H. 151, 154, 28 Atl. 95, 96 (1889); *Fuller v. Bailey*, 58 N.H. 71 (1877). This rule, of course, conflicted with Doe's theory that a decision on a question of fact should never be disturbed. For Doe to hold that it is a question of fact whether a verdict is against the evidence was an admission that sometimes the conclusion of the triers of fact could be upset. He made this exception as narrow as possible by saying:

The question is, whether the conflict between the verdict and the evidence is so strong that the court can see that the jury, in coming to their result, were influenced by passion, prejudice, partiality, or corruption, or unwittingly fell into a plain mistake. When there is oral testimony, such a question of fact should be decided at the trial term by the presiding justice, who, having heard and seen the witnesses, has much better means of deciding it correctly than others can have who were not at the trial. And when all the evidence is in writing, the case falls within the general rule, that questions of fact, arising at a trial in the trial term, are to be determined there, and not in the law term. *Id.* at 71-72.

39. *Brooks v. Howard*, 58 N.H. 91 (1877).

40. *Dearborn v. Newhall*, 63 N.H. 301 (1885).

41. *Id.* at 302-03.

42. Reid, *From Common Sense to Common Law to Charles Doe: The Evolution of Pleading in New Hampshire*, 1 N.H.B.J. 27 (April, 1959).

bound to use the most convenient apparatus of procedure for ascertaining and establishing the right and obtaining the remedy, and what kind of procedure is convenient is a question of fact for the trial term.⁴³ He showed how far he was willing to carry this by inventing a writ for the recovery of a future interest for which equity already provided a remedy.⁴⁴

As for the liberal system of amendments, undoubtedly his finest achievement as a judge, Doe sought to eliminate technical, justice-defeating rules of common-law practice by amending mistakes or omissions, that is, by using amendments to substitute new writs or to convert an action at law into a suit in equity. The test for permitting an amendment was the requirements of justice, and whether justice required an amendment was a question of fact determinable at the trial term.⁴⁵ In a typical case, Doe held that when a suit is seasonably brought, but the writ has been abated because it contained no declaration, the declaration can be amended after the time when a new action for the same case would be barred by the statute of limitations. Whether justice requires the amendment is a question of fact.⁴⁶ Solving the problem of how far to extend these reforms by leaving each case to be determined on its merits as a question of fact, Doe bequeathed to New Hampshire the most efficient system of procedure devised during the nineteenth century and brought about the closest thing possible to a judicial merger of law and equity. And he did it without adding new technicalities or refinements as was done in code states. His method was to turn the law of pleading into a question of fact.⁴⁷

He effected a similar revolution in the law of evidence using the same methods. Considering the premises upon which Judge Doe based his question-of-fact theory, it is hardly surprising he made legal presumptions a chief target for reform. For how else would he characterize a legal presumption but as the failure to draw a line clearly distinguishing law from fact, that is, a question of fact mistakenly held to be a question of law?⁴⁸ So determined to weed

43. *Metcalf v. Gilmore*, 59 N.H. 417, 434 (1879).

44. *Walker v. Walker*, 63 N.H. 321 (1885).

45. *Morgan v. Joyce*, 66 N.H. 476, 30 Atl. 1119 (1891); *Gagnon v. Connor*, 64 N.H. 276, 9 Atl. 631 (1886); *Cochecho Aqueduct Ass'n v. Boston & Me. R.R.*, 62 N.H. 345 (1882). For amending a suit at law by adding relief in equity see, *Metcalf v. Gilmore*, 59 N.H. 417, 432 (1879).

46. *Gagnon v. Connor*, 64 N.H. 276, 9 Atl. 631 (1886).

47. Interestingly enough, Doe once used the excuse of New Hampshire's easy amendment procedure to treat as a rule of law a matter he otherwise might have recognized as a question of fact. *Gamsby v. Ray*, 52 N.H. 513, 516 (1873).

48. "Among the various ways in which the province of the jury has been encroached upon," he said, "the use of legal presumptions as substitutes for evidence, is one of the most conspicuous." *Lisbon v. Lyman*, 49 N.H. 553, 563 (1870).

legal presumptions from the common law, Doe even overturned one traceable to the seventh-century code of Ine⁴⁹—that the unexplained possession of recently stolen goods raised a presumption that the possessor was the thief. As Doe saw it, presumptions of this nature should always be treated as questions of fact, not questions of law. “It is useless,” he said, “to call such a presumption a presumption of law. Call it what we may, it is a presumption of fact.”⁵⁰ Whether a defendant had possession of stolen goods, and “whether his possession, if any he had, was recent enough, or exclusive enough, or unexplained enough, to raise a presumption of guilt,—were questions of fact for the jury.”⁵¹

Common-law judges, Doe thought, were fooling themselves if they believed there could ever be pure legal presumptions. No matter how much fact they changed into law, there were still factual issues to be resolved. Even if it were accepted that recent and exclusive possession of stolen property created a legal presumption of guilt, there would still be the problem of inventing a rule to determine whether possession was recent. Surely the question of recentness—of distance in time—would be one of fact under the circumstances,⁵² so why not be candid and admit the entire problem properly belongs to the triers of fact?

Judge Doe carried his dislike of legal presumptions to its logical conclusion, treating as presumptions problems which many judges view as merely involving the burden of proof. Here he did some of his best work,⁵³ and again put the question-of-fact approach to effective use. He even thought the rule shifting the burden of proof on the party possessing peculiar knowledge of the evidence to be proven was “an unnecessary transformation of a matter of fact into a matter of law.” Admitting that “obvious impracticability on one side, contrasted with obvious feasibility on the other,” might “authorize the invention of an exception to release a litigant from his duty of proving the essential facts of his case,” he showed himself willing to make the entire law of evidence a question of fact by saying that “the existence of such impracticability and feasibility, is a question chiefly of fact.” No rule of law had been formulated for the decision of that question, and even if one had formerly been construed, it would have

49. See, THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 327-29, and 328 n.5 (1898).

50. *State v. Hodge*, 50 N.H. 510, 517 (1869).

51. *Id.* at 526.

52. *Id.* at 512.

53. Reid, *A Speculative Novelty: Judge Doe's Search for Reason in the Law of Evidence*, 39 B.U.L. REV. 321, 328-34 (1959).

little application now that parties were permitted to be witnesses in their own actions.⁵⁴

Turning rules of evidence into questions of fact determinable at the trial term according to the dictates of justice, enabled Judge Doe to revitalize the best-evidence rule, freeing it from the technicalities which prevented triers of fact from hearing certain evidence. His method is shown by his criticism of the explanation, then currently accepted, that the reason for excluding evidence was that, as a matter of law, it could have no bearing on the issue being tried. The correct rationale, he insisted, was that, "as a matter of fact, it is, under the circumstances of the case, too remote in point of time or place, or too insignificant in other respects, to have any proper weight, or to have any other than a confusing and misleading effect."⁵⁵ From this vantage point he wrote the "classic" and leading opinion on the admissibility of collateral evidence,⁵⁶ later carrying his views to their logical extreme when he said that how far a trial could justly and reasonably go upon collateral issues, "is often a question of fact."⁵⁷ Of course, such problems as the remoteness of evidence were to be treated as questions of fact⁵⁸ and not subjected to confining rules and exceptions.

Still another area in which Doe used the theory of the distinction between law and fact to bring about a thorough housecleaning of hoary technical rules and legal presumptions was the construction of statutes and documents. What he wanted was to re-establish, on a firm footing, the fundamental principle that the meaning of an instrument should be determined by ascertaining the intent of the maker. To Doe this principle had become one of the most glaring cants in the common law, for while every court claimed to honor it, few gave it practical meaning. They said they sought the maker's intent and then determined that intent by applying technical rules of

54. *Lisbon v. Lyman*, 49 N.H. 553, 569 (1870).

The practice of shifting the burden of proof by a legal presumption . . . materially encroached upon the province of the jury, but caused less injustice when parties were not allowed the power to testify than it would now. When courts assumed the power of excluding the testimony of the parties for reasons alleged to have been satisfactory in a certain state of society, they did not hesitate, by legal presumptions and other measures, to extensively control the jury in the decision of questions of fact. The tendency in this state is towards a correction of those errors, and the establishment and observance of the true line between law and fact, and between the duty of the court and the duty of the jury. *Savings-Bank v. Getchell*, 59 N.H. 281, 285-86 (1879).

55. *Gregg v. Northern R.R.*, 67 N.H. 452, 456, 41 Atl. 271, 273 (1893).

56. *Darling v. Westmoreland*, 52 N.H. 401 (1872). For the appellation "classic" see, 2 WIGMORE, EVIDENCE § 458, at 474 (3d ed. 1940); 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 172 n.5 (1954).

57. *Amoskeag Mfg. Co. v. Head*, 59 N.H. 332, 337 (1879).

58. *State v. Boston & Me. R.R.*, 58 N.H. 410 (1878); *Hovey v. Grant*, 52 N.H. 569, 580 (1873).

construction which had little to do with what the maker meant and quite often defeated the very thing he wanted to bring about. Doe thought the law would be greatly simplified if judges would recognize that the principle really had two parts—first that any grant, “statutory, contractual, or testamentary,” is to be interpreted by ascertaining the intention behind it, and second that “the question of intention is a question of fact to be determined upon competent evidence.”⁵⁹ And, as he stressed in decision after decision, he meant exactly what he said—intention was to be found “by the natural weight of competent evidence proving the fact, and not by artificial and technical rules.”⁶⁰ Indeed, Judge Doe once asserted that the overriding necessity of drawing a distinct line between law and fact left him no alternative except to ignore all rules of construction, even those which had been sanctioned by centuries of use.⁶¹

An important illustration is his successful attack on the legal presumption that imputes to every testator full knowledge of law. Not only does it arbitrarily turn fact into law by determining intent through legal nomenclature but worse, it makes law “contrary to the fact.”⁶² Using this argument, Judge Doe accomplished one of his most cherished objectives and removed from New Hampshire law the remaining traces of English legal doctrine inherited from the days when estates in land reflected feudal theory. Other judges might regard as substantive law the technical rule that one must use the phrase “and his heirs” to reserve a fee interest, but not Doe. At most it was a rule of construction, and a rather bad one at that, since it made the issue of intent turn on a redundancy only a lawyer could appreciate. It ignored the factual question, which was whether the grantor intended to pass full title or only a life estate, by assuming he possessed knowledge of the law, when knowledge or lack of knowledge was perhaps the best evidence available of his probable intent. Even persons who know something about law, Doe said, “are not familiar with the relaxed feudal rule concerning a devise of an estate of inheritance. To apply

59. *Burke v. Concord R.R.*, 61 N.H. 160, 233 (1881).

60. *Bodwel v. Nutter*, 63 N.H. 446, 448, 3 Atl. 421, 422 (1885); see also, *Kimball v. Lancaster*, 60 N.H. 264 (1880); *Houghton v. Pattee*, 58 N.H. 326 (1878). This was one of the very few principles grounded on his question-of-fact theory in which Doe failed to convince all his colleagues. See Judge Carpenter’s dissent, *Stevens v. Underhill*, 67 N.H. 68, 73, 36 Atl. 370 (1883).

61. *Kendall v. Green*, 67 N.H. 557, 561, 42 Atl. 178, 180 (1893).

62. *Kimball v. Bible Society*, 65 N.H. 139, 149, 23 Atl. 83 (1889). About the closest Doe came to laying down a rule of law in a will case was his assertion that a testator has the “right to use what idiom he pleased, and to use it in his own sense.” *Sanborn v. Sanborn*, 62 N.H. 631, 640 (1882).

that rule to their wills or deeds is to disregard the evidence of intent furnished by the probable extent of their information."⁶³

If it had been held that the word "heirs" in a deed, for example, is necessary in order to convey a fee, it was not because the law of this state requires the use of the word, but because it was regarded as competent evidence of the intention of the parties, and conclusive if not controlled by other evidence. When, however, it is stated as an unyielding and arbitrary principle of law, all other evidence is thereby excluded, and it as often operates to defeat, as to promote and ascertain, the real intention.⁶⁴

Nowhere else did Doe apply his theory concerning the distinction between law and fact with more telling effect. Never were his powers of analysis so strongly evident. Other judges thought they were giving expression to intention when really defeating it. Mesmerized by common law habits of thought, they confused fiction with reality. Using the question-of-fact approach as his lock and key, Doe opened compartments of the law long since closed. He did not challenge the importance of the word "heirs." For all he knew it might be the magic word that proved intent in all cases. But whether it did was a question of fact determined as other questions of fact, "by the aid of all competent evidence, and not by the expulsion of evidence otherwise competent, nor by the mechanical application of antiquated forms of expression erroneously supposed to express legal principles."⁶⁵

Had Judge Doe limited his emendation of the law of construction to exposing musty rules, he might have been less controversial and gained more proselytes. But he was a man completely sincere in his institutions and after postulating a legal theory was prepared to pursue it to the bitter end, regardless of how many would-be converts he antagonized in the process. What the Chief Justice wanted to establish was that all instruments should be construed according to the intention of their makers. The question-of-fact theory was merely the tool he used to carry it out.

There are few doctrines in the common law more likely to defeat intention than the rule against perpetuities, though it is so well defined that it would be extreme tenacity for a judge to question its traditional application. Yet this is exactly what Doe did in *Edgerly v. Barker*. The testator had created a class gift to take effect forty years after lives in being and the heirs-at-law claimed that since the remainder could not vest within the period prescribed by law the entire estate passed as intestate property. This was unquestionably correct and any court would have declared the will null and void. Any court, that is, except Doe's. To invalidate the will by a strict application of

63. *Smith v. Furbish*, 68 N.H. 123, 156-57, 44 Atl. 398, 414-15 (1894).

64. *Kendall v. Green*, 67 N.H. 557, 559, 42 Atl. 178 (1893).

65. *Ibid.*

the rule against perpetuities, he said, might destroy the testator's intent. What if he had intended the gift to be valid and would have made it effective in twenty-one rather than forty years had he known about the rule? This is a question of fact which should be treated as such and not arbitrarily brushed aside by a rule not designed to determine intent. "The construction of the will," Doe wrote in the first sentence of his opinion, "including the question whether the testator intended the remainder, which he devised to his grandchildren, should vest in them before they became entitled to a distribution of it, is determined as a question of fact, by competent evidence, and not by rules of law."⁶⁶ Even the issue whether the court could make a division of a defective will was to be settled as a question of fact by examining the testator's intent.⁶⁷ Applying these principles, Doe concluded that the primary object of the testator was to pass the property intact to his grandchildren and that the requirement of forty years was of only secondary importance. Therefore, he held, "When the youngest of the grandchildren is twenty-one years of age, the remainder devised to them will be theirs."⁶⁸ A daring decision, sometimes praised but never followed,⁶⁹ it at least had the virtue of accomplishing the chief aim of all Doe's reforms. It left in full force an established rule of law while nullifying the harshness of its application. And it did this by having the extent of its application determined as a question of fact.

When confronted with doctrines of substantive law, Judge Doe made almost as wide a use of the distinction between law and fact as he did in the areas of procedure and evidence. He found it particularly effective in furthering his efforts to have the norm of reasonableness recognized as the underlying principle in tort law. Reasonableness was the legal test, but there was no need to define it—indeed, it could not be defined—because it was a question of fact for the jury.⁷⁰ Doe seems to have been a forerunner of what has been called the most striking modern development on the allocation of responsibility between judge and jury in tort cases during the last quarter century—the trend toward less judicial supervision over jury findings of negligence.⁷¹ He was prepared to leave negligence pretty much in the

66. *Edgerly v. Barker*, 66 N.H. 434, 447, 31 Atl. 900, 902 (1891).

67. *Id.* at 472, 31 Atl. at 413.

68. *Id.* at 474, 31 Atl. at 916.

69. Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 649 n.29 (1938). Also, Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 735 (1952).

70. *Green v. Gilbert*, 60 N.H. 144 (1880); *Thompson v. The Androsoggin River Improvement Co.*, 54 N.H. 545 (1874).

71. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 503 (1962).

hands of the triers of fact.⁷² This causes him to appear rather liberal for his day and age, for it means he removed some of the rigidity from the law of torts, making it more a matter of degree and giving it greater flexibility.⁷³

One example may be taken as typical. It stemmed from Doe's criticism of a Maine case in which the jury was instructed that if a man starts upon a race, having that object in view, and not any legitimate purpose of travel, he ceases, as against the town, to have the rights of a traveller upon the highway; his intention to race, accomplished by the fact that he was actually started upon the race, prevents his recovery of damages; it matters not if he starts at a walk, if he is in the act of racing, the speed at which he is driving is immaterial; his use of the highway for racing is not legitimate.⁷⁴ This was the type of decision which especially goaded Doe. It not only turned the factual question of reasonable use into a rigid rule of law, but into a rather harsh one at that, at least when he considered the infinite variety of situations to which it might apply. By neglecting the line between law and fact, the Maine court made it difficult to separate, as a matter of law, fact patterns in which racing or its equivalent is reasonable from those in which it is not, as for example:

the case of a person who, while out driving for recreation, incidentally, but with a complete racing purpose, puts his horse to his speed to overtake or pass other teams, and the case of a person who uses the highway wholly for the purpose of racing. That the former uses the road for a purpose for which it was constructed, and the latter does not, may not be a matter of law. There may be in such cases a question of reasonable use, which may be a question of fact, on which the court can be required to decide whether there is any evidence on which it can properly be found that the use was reasonable. There being no illegal betting, and mere racing being lawful, and the speed immaterial on the question of law, it would seem that, whatever differences of fact may affect the conclusion of fact, the law is the same whether the match is for running or walking, whether the race is to the swiftest or to the slowest, and whether the contest is one of speed or style; and that the point at which such diversions pass the bounds of legitimate recreation as a proper use of a highway is to be found by solving the question of reasonable use as a question of fact.⁷⁵

72. *Huntress v. Boston & Me. R.R.*, 66 N.H. 185, 191, 34 Atl. 154, 156 (1890).

73. *Compare*, for example, Doe's decision in the *Huntress* case (*Ibid.*), with that of Justice Holmes in *Baltimore & Ohio Railroad Co. v. Goodman*, 275 U.S. 66 (1927). Both cases involved accidents at railroad crossings. Holmes established a hard, fast rule and took issue of due care from the jury. Doe not only made it a jury question but probably also thought that what constitutes due care was a question of fact.

74. The case was *McCarthy v. Portland*, 67 Me. 167 (1878).

75. *Varney v. Manchester*, 58 N.H. 430, 437 (1878).

Some New Hampshire lawyers thought Doe's annoyance with precedents like this Maine case—precedents which turned fact into law—had led him too far in the opposite direction. His young associate, Frank N. Parsons, was one. Appointed just ten months before Doe died, Parsons came to the bench determined to oppose what seemed to be Doe's policy of letting every tort case go to the jury. He began writing opinions, notable for their argumentation of factual questions, in which he required that the plaintiff produce substantial evidence before the lower court could submit the case to the triers of fact. Apparently reacting to Doe, Parsons employed the principle that every plaintiff must prove his case in tort as well as in contract, to reverse what he and the bar believed was an overemphasis on the question-of-fact theory.⁷⁶

While it is true that Doe extended the area of liability by freeing issues such as causation from appellate review,⁷⁷ Parsons and his followers were mistaken if they believed he was looking toward the day when it would be a question of fact whether any given action constituted a tort. After all, Doe wrote *Brown v. Collins*⁷⁸—the decision considered to have turned the tide against the doctrine of absolute liability in American common law—in which he certainly intended to lay down a rule of law taking from the jury the question whether fault is necessary to sustain a cause of action. On other occasions he permitted the issue of liability to be taken from the jury.⁷⁹

If Parsons misunderstood Doe's objectives he can hardly be blamed. Others have as well, including John Chipman Gray, George F. Hoar, and practically every recent writer on the law of criminal insanity. Their misunderstanding was of a different kind, however, and probably resulted from considering only a single opinion without appreciating the intricate common-law theory which the Chief Justice constructed during thirty-five years on the bench. His continual harping on the question-of-fact theme, in decision after decision, caused local lawyers such as Parsons to think it the main object of his reforms rather than the tool. He probably wanted them to, for it kept their attention focused on the means rather than the ends and permitted him to effect changes in substantive law which appeared not too radical when viewed as part of the question-of-fact pattern. But

76. *Brown, Remarks*, 5 PROC. N.H. BAR ASS'N 162, 166 (1924). For one of Parsons' earliest decisions taking a tort case from the jury see, *Burham v. Concord & M. Ry.*, 63 N.H. 567, 44 Atl. 750 (1896).

77. Three cases typical of Doe's tort theories are: *Huntress v. Boston & Me. R.R.*, 66 N.H. 185, 34 Atl. 154 (1890); *Squires v. Young*, 58 N.H. 192 (1877); *Underhill v. Manchester*, 45 N.H. 214 (1864).

78. 53 N.H. 442 (1873).

79. *E.g.*, *Morse v. Boston & L. R.R.*, 66 N.H. 148, 28 Atl. 286 (1889); *Knowlton v. Pittsfield*, 62 N.H. 535 (1883).

out-of-state lawyers who did not regularly read the New Hampshire Reports approached his opinions from a different vantage point. To them the substantive innovation loomed large, while the question-of-fact theory seemed just an isolated argument thrown in to lend historical probity to a questionable departure from precedent.

Surely no one suffered greater shock reading a Doe opinion than did John Chipman Gray when he read *Edgerly v. Barker*. In a blistering, bitter article, calculated to draw blood, he criticized it from every angle and denounced it on every conceivable ground. Yet, when he came across the question-of-fact argument as it related to giving expression to the testator's intent—the very heart and motivating force of Doe's decision—he dismissed it with the words, "This mode of expression is peculiar to the learned court."⁸⁰ He either had become weary of encountering it in Judge Doe's decisions or else he had decided that it was merely a smoke-screen sent up by Doe to cover his real purpose. In any event, Gray considered it of little importance and readers, relying on his summary, never got a complete idea of what the Chief Justice was actually saying. Since the article has been reprinted in every edition of Gray's treatise, it meant most American lawyers have depended on his presentation.

If Professor Gray believed Doe employed the question-of-fact approach primarily as an excuse for rewriting substantive law to suit himself, without conviction of the theory's intrinsic worth, he was mistaken. Judge Doe was so unequivocally committed to the principle that the distinction between law and fact forms the mainspring of the common-law system, that he lost few opportunities to expound his theory, often with a crusader's zeal. This was another reason he sometimes was misunderstood, as illustrated by the *Mink Case*.⁸¹ It was a relatively unimportant decision in which Doe held that a statute, prohibiting the killing of minks, could not constitutionally apply in a situation where the owner of geese acted in defense of his property. Researching the matter, Judge Doe concluded that English courts, concerned about the use of "spring-guns, man-traps, or other engines calculated to destroy human life or inflict grievous bodily harm," had unsuccessfully turned fact into law by trying to formulate legal rules for determining the reasonable necessity of such devices under varying circumstances. They so bungled the job that Parliament had stepped in and straightened out the mess by passing rules of its own. Doe, who disliked statutory interference with the common law, thought this a classic example proving the folly of changing fact into law:

80. Gray, *General and Particular Intent in Connection With the Rule Against Perpetuities*, 9 HARV. L. REV. 242, 243 (1895).

81. *Aldrich v. Wright*, 53 N.H. 398 (1873).

If the courts had refrained from the invasion of the province of the jury, it would not have been necessary for the legislature to make this imperfect restoration of the common law, or to provide penalties for its violation. If the reasonable necessity of employing defensive machinery of all kinds had been left to the jury, as such a question of fact should have been, much judicial and legislative trouble would have been avoided, and the general principles of the common law would have been sufficient. The evil effects of holding fact to be law, practically demonstrated in this branch of the doctrine of defence, should operate as a warning against similar mistakes.⁸²

Aroused by this legislative interference with the common law, necessitated by the failure of English courts to draw a clear line between fact and law, Doe set about writing a treatise on the problem, in which he attempted to re-establish basic principles and keep American courts from following the English precedents. The quantity, quality, and time of justifiable defensive action, he asserted, depend upon the reasonable necessity of each case, and what is a reasonable necessity is determined as a question of fact according to the particular circumstances. To demonstrate the soundness of this principle, he ridiculed the absurdity of one English rule, relied on by counsel, that the defendant would have been unjustified in killing the minks if his geese were not in imminent danger, that is if he could have driven them away or frightened off the minks without harming them.⁸³ This led Doe into a rather facetious discussion of the reciprocal rights, duties, and liabilities of owner, geese, and minks. To one unfamiliar with Doe's reforming zeal, his devotion to the purity of the common law, and his belief in the distinction between law and fact, his purpose could be easily misunderstood. When President Arthur was wavering between appointing Doe or Horace Gray to the United States Supreme Court, Senator Hoar called the general frivolity of the *Mink Case* to the attention of the Senate as proof that Doe was not fit for the post. Considering his interpretation, it made effective ammunition.⁸⁴

Critics like Professor Gray and Senator Hoar, who dismissed the question-of-fact approach as unimportant, hardly worried Judge Doe. He did not mind if men disagreed with him. But he was sorely

82. *Id.* at 404-05.

83. Doe said the jury question was "not whether [the defendant] . . . could have driven [the geese] away from the minks, but whether [the shooting] . . . was reasonably necessary for the protection of his property, considering what adequate and economical means of permanent protection were available, the legal valuation of vermin life, and the disturbance and mischief likely to be wrought upon his real and personal estate if . . . other than a sanguinary defence were adopted." *Id.* at 423.

84. Reid, *Of Men, and Minks, and a Mischievous Machinator*, 1 N.H.B.J. 23 (Jan. 1959).

troubled when he found they had missed his message altogether; that by heeding only his unprecedented results, they had neglected his arguments. During his lifetime he saw this happen to what today is the most controversial of all his pronouncements, the New Hampshire doctrine of criminal insanity. He had grounded it squarely on the distinction between law and fact, yet courts and commentators had universally accepted it as a medical attack on the traditional tests for insanity rather than a positive pronouncement of common law principles. This was partly Doe's fault. His usual habit, when using the question-of-fact route to reform a rule of law, was to say he had no quarrel with the old rule, as long as its probative value was recognized as properly belonging to the province of the jury. For all he knew the rule might be a correct test of the facts. In this way the Chief Justice softened the impact of innovation by tinting the rule with the stigma of having disrupted the common-law system by usurping the province of the jury.

But when he ran up against the right-wrong test for criminal insanity Doe became so convinced of its basic unsoundness, in fact as well as law, that he wrote a commentary on its psychiatric fallacies. This was a mistake, for it led observers to believe he was endorsing as a law, counter-theories which he really was making questions of fact.⁸⁵ After waiting twenty years Judge Doe complained, somewhat bitterly, that despite the many things written about his insanity doctrine, "I have seen nothing that can be regarded as a serious effort to grapple with the argument of the common law question."⁸⁶

He would have been amazed had he lived to see what happened after 1954, when the District of Columbia court formulated the *Durham* rule and said, gratuitously, that it was "not unlike" the New Hampshire doctrine.⁸⁷ Writer after writer, and decision after decision, accepted this inaccurate statement as true, and the New Hampshire doctrine has become inseparably associated with the *Durham* rule and has been forced to share the blame for all the faults that *Durham* spawns. This is erroneous. The *Durham* rule and the New Hampshire doctrine of criminal insanity are not the same and, at the very most, are only distantly related.⁸⁸ Indeed, as far as Doe is concerned, *Durham* and the right-wrong test are the twins, since both are guilty

85. See e.g., Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 370 n.12 (1955).

86. Letter from Charles Doe to Clark Bell, Jan. 10, 1889, in Bell, *Editorial: The Right and Wrong Test in Cases of Homicide by the Insane*, 16 MEDICO-LEGAL J. 260, 263 (1889).

87. *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954).

88. Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 60 YALE L.J. 367 (1960).

of the same fundamental error—both confuse fact with law by turning contemporary medical theory into legal dogma.

Anyone who takes the trouble to read the opinions by Judge Doe, giving birth to the New Hampshire doctrine, will find them classic expressions of the question-of-fact approach. The *M'Naghten* rules, the irresistible-impulse test, and all other formulae for determining criminal insanity, he says, are not doctrines of substantive law. At best they are legal presumptions which invade the province of the jury by turning questions of fact into matters of law.⁸⁹ His two opinions contain all the premises upon which he vested the question-of-fact theory: the idea that there is a basic unity to the common law which can best be maintained by adhering to fundamental principles such as the distinction between law and fact;⁹⁰ the argument from history that the formulation of insanity tests was originally a question of fact which had been mistakenly turned into a rule of law during the epoch when courts forgot their proper function;⁹¹ and the conclusion that error had been perpetuated by false precedents⁹² leading to results which call the common-law process into question.⁹³ The

89. Consider, for example, how he dealt with the irresistible impulse test:

It was, for a long time, supposed that man, however insane, if they knew an act to be wrong, could refrain from doing it. But whether that supposition was correct or not, is a pure question of fact. The supposition is a supposition of fact,—in other words, a medical supposition,—in other words, a medical theory. Whether it originated in the medical or any other profession, or in the general notions of mankind, is immaterial. It is as medical in its nature as the opposite test.

State v. Pike, 49 N.H. 399, 437 (1869) (concurring opinion).

90. He first formulated the New Hampshire doctrine in a probate case, insisting that the test for capacity to make wills and the test for criminal accountability were the same—both are questions of fact. *Boardman v. Woodman*, 47 N.H. 120, 140 (1865) (dissenting opinion). In that case the jury was instructed that “delusion” was the test for capacity. Doe said:

The question whether Miss Blydenburgh had a mental disease was a question of fact for the jury, and not a question of law for the court. Whether a delusion is a symptom, or a test, of any mental disease, was also a question of fact, and the instructions given to the jury were erroneous in assuming it to be a question of law.

Id. at 147-48.

91. Without any conspicuous or material partition between law and fact, without a plain demarcation between a circumscribed province of the court and an independent province of the jury, the judges gave to juries, on questions of insanity, the best opinions which the times afforded. In this manner, opinions purely medical and pathological in their character, relating entirely to questions of fact, and full of error as medical experts now testify, passed into books of law, and acquired the force of judicial decisions. Defective medical theories usurped the position of common-law principles.

State v. Pike, 49 N.H. 399, 438 (1869).

92. *Id.* at 432.

93. It is the common practice for experts, under the oath of a witness, to inform the jury, in substance, that knowledge is not the test, and for the judge, not under the oath of a witness, to inform the jury that knowledge is the test. And the situation is still more impressive, when the judge is forced by an impulse of humanity, as he often is, to substantially advise the jury to acquit the accused on the testimony of the experts, in violation of the test asserted

correct view, Doe said, is to recognize that judges have no business declaring which factual test is correct. The whole difficulty with the law of criminal insanity, he concluded, is that “courts have undertaken to declare that to be law which is a matter of fact.”⁹⁴ Few decisions rest so solidly on the distinction between law and fact, yet none has been so universally misunderstood by commentators.

One reason may be the very expression “question of fact.” Other courts feel they make “insanity” a question of fact when they limit the jury’s role to determination of whether the defendant suffered from certain prescribed symptoms of sickness. To Doe this is laying down a rule of law—a legal presumption—to solve a matter properly within the province of the triers of fact. When he said insanity is a question of fact, he meant that it is for the jury to determine, without judicial interference, according to the circumstances of each case, whether the defendant is insane. This includes deciding what is the definition of insanity and whether a causal relationship between disease and act has to be established. It is little wonder his decisions have been misread. By using the English language in a literal sense, he sowed the seeds of confusion, forgetting that lawyers are educated to legal fictions of phraseology. Twenty years after he wrote his insanity opinions, Doe wished he could rewrite them.

These things are minor, however. What really counts are the reforms which he accomplished by using the question-of-fact approach. It would be impossible to say what was more important to him, the immediate reforms or the general need to re-establish the distinction between law and fact. Perhaps in *Edgerly v. Barker* the common-law argument, as it related to finding the testator’s intent, was more motivating than any desire to remodel the rule against perpetuities. With the New Hampshire insanity doctrine, however, it is possible that dissatisfaction with the right-wrong test weighed more heavily, and the question-of-fact theory was only the means to an end. It does not really matter. What is unique is the formulation and the use. Only an acute scholar of the common-law process could have formulated the theory. Only a master of the common-law technique could have used it to filter so many otherwise unrelated rules and principles.

Many other judges have shared Charles Doe’s desire to reform law by eliminating harsh rules and abolishing unnecessary technicalities. Yet few brought about even a fraction of the reforms which Doe

by himself. The predicament is one which cannot be prolonged after it is realized. If the tests of insanity are matters of law, the practice of allowing experts to testify what they are, should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself qualified to testify as an expert.

Id. at 441.

94. *Id.* at 442.

accomplished. Lacking his genius and insight, they did not appreciate the need to master the more pedestrian tools in the common-law arsenal. Where he used the question-of-fact approach to outflank an entrenched legal dogma which he wished to reform, they would conduct frontal assaults and were driven back far short of their goals. Many besides Doe knew what causes had to be fought, but he found a more effective means of fighting. Instead of placing their precision colleagues on the defensive by contending that inferences, presumptions, and rules of construction should be treated as questions of fact, these others would offer alternative inferences, presumptions, and rules of construction. Alternatives based on notions of justice drawn from the factual circumstances of particular cases are not likely to sway judges devoted to *stare decisis*. Chief Justice Doe never debated facts with his colleagues. He knew it would be a waste of time.

One of the advantages to the question-of-fact argument, as previously suggested, was the way Doe used it to skirt the problem of persuading other New Hampshire judges that the rule he wanted reformed was unreasonable. He often ducked the problem by admitting it was perfectly reasonable—as fact but not as law.⁹⁵ This is shown by his treatment of the knowledge tests for criminal insanity. Even though he made it quite clear he thought them bad medicine, he nevertheless insisted he found no fault with them as definitions. They “fairly and properly” describe the mental phenomena they are used to depict, he conceded.⁹⁶ “Whether the old or new medical theories are correct,” however, “is a question of fact for the jury; and it is not the business of the court to know whether any of them are correct.”⁹⁷ It was for those who wished to preserve the rules he challenged to prove them matters of law. Doe was not going to debate their merits.

When championing a reform, the Chief Justice tried to avoid antagonizing the vast army of nineteenth-century lawyers who made *stare decisis* their motto. He did this by squeezing another advantage out of the question-of-fact approach. He used the historical premises on which he based it to pose as a conservative while acting radically. By claiming he was restoring the common law to its historical purity as it had been before English judges overstepped themselves and began confusing fact with law, he could argue that the rule he was trying to reform had erroneously been slipped into the law by courts which

95. *E.g.*, Doe thought the presumption of guilt raised by recent and exclusive possession of stolen property was probably reasonable, but its existence as a presumption was a question of fact for the jury. *State v. Hodge*, 50 N.H. 510, 526 (1869).

96. *State v. Pike*, 49 N.H. 399, 433 (1869).

97. *Id.* at 438.

exceeded their authority. This was one way Doe abrogated words of limitation. They had, he said, been introduced by a judicial exercise of legislative power.⁹⁸ He anticipated the charge that he himself was guilty of legislating by saying that rules of construction had originally been questions of fact. To change them into matters of law by making them legal standards for proving intent, was a legislative rather than a judicial function.⁹⁹ The onus was on the defenders of precedent to produce an act of Parliament or prove his historical theory incorrect. It was he who was the conservative by re-establishing a fundamental principle of the common law.

Finally, Judge Doe found the question-of-fact argument handy for side-stepping altogether the problem of precedent. Labelling as questions of fact matters usually treated as within the court's discretion or as questions of law, he was able to ignore precedents which called them "presumptions," "rules of construction," "discretion," and so on. This was more than a switch in terms, for the implication was that courts which did not call them questions of fact had undoubtedly committed error. "A single precedent of a matter of fact turned into law," he warned, "is a dangerous thing where precedent is authority."¹⁰⁰

The very fact that precedent was so highly regarded as authority during the second half of the nineteenth century may be one reason why Judge Doe relied on the question-of-fact approach to effect his reforms. He did not forget that the history of the common law has been a struggle to balance stability with expansion. Since the current price for rejecting precedents was to turn law into fact, he willingly tipped the scales in favor of expansion. Doe knew this could bear heavily on defendants in tort cases, yet he insisted that wrong done in the decision of questions of fact could not "be legally prevented or rectified by a judicial alteration of the law."¹⁰¹ To any criticism that he was extending liability, he would have replied that he was merely restoring to the jury its original functions.¹⁰²

98. *Sanborn v. Sanborn*, 62 N.H. 631 (1882).

99. *Kendall v. Green*, 67 N.H. 557, 560-61, 42 Atl. 178, 179 (1893).

100. *Gray v. Jackson & Co.*, 51 N.H. 9, 37 (1871).

101. *Huntress v. Boston & Me. R.R.*, 66 N.H. 185, 192, 34 Atl. 154, 157 (1890).

102. The leading critic of the question-of-fact approach was Justice Holmes. Perhaps his best analysis of its faults was given in an address delivered three years after Doe's death. Holmes believed that the jury had no historic right to decide standards of conduct. Although the theme of his paper was that history should be used to expose false explanations of legal rules in the way in which Doe excelled, he did not mention Doe's historical theory concerning the distinction between law and fact. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899); HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 232-38 (1921).

Judge Doe gave the same answer to the charge that he was making law uncertain and unpredictable by depriving it of the convenience of uniform rules.¹⁰³ He sought reasonableness ahead of certainty, even in business transactions,¹⁰⁴ yet realized the latter's importance. He thought that if jury verdicts "seem to be sufficiently settled and invariable" this would answer the contention that questions of fact had to be changed into questions of law for the sake of expediency and convenience.¹⁰⁵ He probably knew this was none too convincing, for he also put his case on the more solid footing of constitutional principle. Any argument that the law has to be certain, Doe said, "must be sparingly used in a jurisdiction in which the subject has been placed upon the high ground of a constitutional duty which renders a careful distinction between law and fact a vital part of trial by jury," even in criminal cases.¹⁰⁶ "If trial by jury is as valuable as it seemed to the founders of our institutions, the danger of holding a matter of fact to be a matter of law outweighs the inconvenience of any uncertainty likely to be produced by verdicts of juries. . . ."¹⁰⁷

Nor would the Chief Justice have agreed that he was avoiding difficult legal details by turning them into questions of fact, or, conversely, that he was giving jurors matters which were too difficult for them to solve. To Doe, the true beauty of the common law was that it did not burden itself with details or try to solve every fact pattern in advance. If, he once wrote, the trend favoring questions of fact over questions of law made the law "still more simplified," then "the profession would be relieved and justice promoted."¹⁰⁸ Any fear of making things too difficult for the triers of fact, Doe thought, was no excuse for neglecting the distinction between law and fact. "It is," he said in his criminal-insanity decision, "often difficult to ascertain whether an individual had a mental disease, and whether an act was the product of that disease; but these difficulties arise from the nature of the facts to be investigated, and not from the law; they are practical difficulties to be solved by the jury, and not legal difficulties for the court."¹⁰⁹

It has been said that Judge Doe was so anxious to turn law into fact, he sometimes forgot that many matters contain mixed questions of law and fact. But criticism of this sort usually came from lawyers

103. *Gray v. Jackson*, 51 N.H. 9, 36-37 (1871).

104. The proper exercise of corporate powers, for example, he held a question of fact. *Burke v. Concord R.R.*, 61 N.H. 160, 244 (1881).

105. *Gray v. Jackson & Co.*, 51 N.H. 9, 36 (1871).

106. *State v. Hodge*, 50 N.H. 510, 524 (1869).

107. *Gray v. Jackson & Co.*, 51 N.H. 9, 37 (1871).

108. *State v. Hodge*, 50 N.H. 510, 526 (1869).

109. *State v. Pike*, 49 N.H. 399, 438 (1869).

who disagreed with his conclusions or misunderstood his aims. Of course, his use of the expression "questions of fact" to describe what others called "judicial discretion" caused some confusion. So too did contemporary New Hampshire law, which tended to lean heavily on the factual side, leaving out-of-state readers of Doe's opinions with the impression he had not considered the possibility that the rule which he was discussing might combine both law and fact.¹¹⁰ Although not always as explicit as he could have been, he usually gave the question some attention. He seems to have viewed it as a kind of clinical problem, in which the actual dividing lines could be determined only after examining the facts. As he put it, "Many questions of combined law and fact cannot be answered with legal precision until their component parts are separated, and the facts are found."¹¹¹ Here again he shied away from laying down rigid legal tests and thought solutions could rest on the circumstances of each case. When forced to admit that a question was properly a matter of law for the court, Doe tried to retain what flexibility he could by introducing as much fact as possible. Thus he held that while the construction of a bond is a matter of law, and not a matter of fact, "it is to be determined, like a question of fact, by the weight of the competent evidence contained in the bond and other writings, and not by any technical rule of law."¹¹²

It would be hard to say just where Doe would have drawn the line favoring fact over law. Constitutional matters he certainly thought were not questions of fact.¹¹³ He said, for example, that the extent of legislative power was a question of law.¹¹⁴ In at least one case the two most conservative members of the court dissented when he held that the application of a statute was a matter of law. They thought it a question of fact.¹¹⁵ This may offer one explana-

110. *Parsons v. State*, 81 Ala. 577, 609, 2 So. 854, 874 (1887) (dissenting opinion).

111. *Dow v. Northern R.R.*, 67 N.H. 1, 6, 36 Atl. 510, 512 (1887).

112. *Houghton v. Pattee*, 58 N.H. 326 (1878). Also, *Sanborn v. Sanborn*, 62 N.H. 631, 643 (1882).

113. Of course, the construction of the Constitution by finding the makers' intention was to be effected as a question of fact and not by technical rules. *Hale v. Everett*, 53 N.H. 9, 133 (1868) (dissenting opinion).

114. *Dow v. Northern R.R.*, 67 N.H. 1, 54, 36 Atl. 510, 537 (1887).

115. Doe ruled that plaintiff, who worked to repair defendant's mill on a Sunday, could not sue on the contract because of a Sunday blue law which permitted only those repairs on Sunday "in mills and factories which could not be made on a week-day without throwing many operatives out of employment." *Carpenter and Blodgett, JJ.*, dissented. They were "of opinion that the question whether the plaintiff's labor was a work of necessity is a question of fact, and that no reason of convenience or expedience requires it to be treated as a question of law." *Hamilton v. Austin*, 62 N.H. 575, 576 (1883).

tion why Judge Doe encountered little opposition from his colleagues on the question-of-fact theory. It had already obtained a respectable place in New Hampshire practice by the time he adopted it as his chief tool for reform.¹¹⁶ Once the members of the court recovered from the initial shock of his unorthodox views,¹¹⁷ he had little difficulty getting them to think in terms favorable to questions of fact. It is still the hallmark of New Hampshire's jurisprudence; perhaps the chief legacy Doe left to the bench and bar of his state. Some, like Parsons, questioned the indiscriminate extension of the theory,¹¹⁸ but almost invariably they went along with their Chief Justice.

It was in this manner—by using the distinction between law and fact as his leverage—that Judge Doe was able to influence many different areas of adjective and substantive law, and win a place in legal history alongside Lemuel Shaw and John Bannister Gibson. They left their mark by speaking for prestigious courts, on important matters often of first impression. He did it by finding a simple, unifying principle, which permitted him to reform seemingly unrelated legal rules, eliminate long-established technicalities, and introduce flexibility and degree to previously rigid law. Indeed, it was the question-of-fact doctrine which first brought Judge Doe to national attention.¹¹⁹ He knew he was in the vanguard of a trend. "We are," he wrote, "consciously moving against a great current of authority, towards a trial by jury in which the jury shall be the judges of fact as fully and completely as the court are the judges of the law."¹²⁰

His belief that the distinction between law and fact was the neglected principle underlying the common-law system seems hardly novel. But it was in the practical application of theories that Judge

116. At least Judge Doe said he was following theories laid down in *Pitkin v. Noyes*, 48 N.H. 294 (1868); *State v. Bartlett*, 43 N.H. 225, 232 (1861); *Pierce v. State*, 13 N.H. 536 (1843). The first two decisions were written by Judge Bellows and it is difficult to say whether he influenced Doe or was influenced by Doe. Compare, *Hays v. Waldron*, 44 N.H. 580 (1863), with *Green v. Gilbert*, 60 N.H. 144 (1880).

117. In the first two cases in which Doe tried to establish his question-of-fact theory, his views were rejected. *Boardman v. Woodman*, 47 N.H. 120 (1866); *Kendall v. Brownson*, 47 N.H. 186 (1866). Doe's dissents in both of these cases were later adopted by the whole court.

118. As in will cases where Blodgett warned it could "inevitably incite litigation" and "produce infinite uncertainty and delay in the settlement of estates." *Hoitt v. Hoitt*, 63 N.H. 475, 498, 3 Atl. 604, 616 (1886). Doe took no exception to this when he wrote Blodgett his views on the draft opinion. See, Reid, *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 COLUM. L. REV. 59, 68-69 (1963).

119. Note, *Province of Court and Jury*, 6 ALBANY L.J. 269 (1872).

120. *State v. Hodge*, 50 N.H. 510, 526 (1869).

Doe excelled. The idea that through it he could unify the common law is proof of his originality. Yet here he sometimes let theory dominate practice, as when he concluded that testamentary capacity and criminal responsibility present similar legal problems since both involve the issue of mental derangement, the definition of which should be a question of fact; or that the test of a criminal confession and an admission of civil liability can be simplified into a common pattern since they raise the same factual issue.¹²¹ The discovery that he could reform so many substantive and procedural technicalities by using this one unifying theory as a reagent to bring fresh methods of analysis to bear on some of the common law's most entrenched doctrines, is proof of his genius. Still it is these decisions, where much of Doe's fame rests, which have been most frequently misunderstood or undervalued.

It has been suggested that Chief Justice Doe's desire to abolish common-law technicalities "was founded on his confidence in jury trial."¹²² This puts the cart before the horse by confusing the means with the end. The means, or the tool, was the distinction between law and fact. The jury system was only incidentally the beneficiary of the application of the tool. The ultimate end which he sought was the abolition of technicalities. He utilized the jury so that "the experience, intelligence, and judgment of twelve men may be availed of to settle disputed questions of fact."¹²³ If during the thirty-five years he was on the bench the jury's province was enlarged, it was not because he had inherent faith in their experience, intelligence, and judgment, but rather because it was a natural consequence of extending the area of fact while contracting the area of law. Judge Doe was prepared to set aside a verdict contrary to evidence,¹²⁴ because he knew jurors are fallible,¹²⁵ and to exclude some matters from jury consideration, because he knew the probativeness of questions of fact has limitations.¹²⁶ It was not that Doe admired the jury; he detested legal technicalities.

The furthest Chief Justice Doe went towards giving the jury any consideration in justifying the question-of-fact theory was when he

121. *Colburn v. Groton*, 66 N.H. 151, 158 (1889). Cases cited note 32 *supra*.

122. Note, *Doe of New Hampshire: Reflections on a Nineteenth Century Judge*, 63 HARV. L. REV. 513, 516 (1950).

123. *Huntress v. Boston & Me. R.R.*, 66 N.H. 185, 189, 34 Atl. 154, 156 (1890).

124. *Colburn v. Groton*, 66 N.H. 151, 28 Atl. 95 (1889).

125. While the law does not and cannot prescribe the weight to be given to the evidence bearing on a question of fact, it does not tolerate wild, erratic, fanciful, or distorted views. It can lay down no absolute rule for ascertaining what property is worth, because that is a question of fact; but it requires that question to be decided by a fair exercise of the common sense of an honest an [sic] intelligent man.

Cocheco Mfg. Co. v. Strafford, 51 N.H. 455, 481 (1877).

126. *Gregg v. Northern R.R.*, 67 N.H. 452, 454, 41 Atl. 271, 273 (1893).

remarked that adherence to the line of demarcation between its province and that of the court, would be "a practical improvement, tending to facilitate the study and administration of the law, and to make it a more intelligent and rational system of general rules—a point of no small consequence in a society which undertakes to found its institutions upon popular intelligence."¹²⁷ The jury was important, true enough, but the main thing was to make the law an intelligent and rational system. The distinction between law and fact was the principle which had to be restored to its central place in the common law, because neglect of it in the past had caused legal fossilization. This was his theory and his purpose. It lay at the heart of all his reforms and at the same time explained those reforms, because if it had not been forgotten or ignored there would have been no need to reform the law.

The simple, plain, methodical, and sensible system of the common law, is composed of a few elementary principles. To these have been added presumptions, exceptions, fictions, and refinements, excessively multiplied and extended in intricate and attenuated forms, with a great amount of fact wrongfully converted into law. The labyrinth of authority, already vast and dark, and rapidly growing vaster and darker, is beginning forcibly to suggest the necessity of recurring to fundamentals. If some of the skill exercised in inventing special and exceptional rules, and changing presumptions of fact into presumptions of law, were used in following general principles in their full operation and complete development, distinguishing between law and fact, submitting questions of fact to the jury, and clearing the law of the mass of fact with which it is now encumbered, it might be more easily and thoroughly understood and more rationally and justly administered. And it may be well to consider precedent more natural and logical, less artificial and incoherent in vindication of the claim that the law is a science and the perfection of reason.¹²⁸

Professor Gray was wrong about Judge Doe's use of the question-of-fact theory. It was more than a peculiar mode of expression.

127. *State v. Hodge*, 50 N.H. 510, 524 (1869). Doe also said:

In usurpations, the jury do not meet the court upon equal terms, and the court must be equally sensitive, whether it is their own province, or the province of the jury, that is encroached upon.

Ibid.

128. *Libon v. Lyman*, 49 N.H. 553, 571 (1870).