Anatomy of a Law Practice: John Marshall at the Bar, the Early Years, 1780-1788

John Thomas Wren

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ANATOMY OF A LAW PRACTICE:
JOHN MARSHALL AT THE BAR--
THE EARLY YEARS, 1780-1788

A Thesis
Presented to
The Faculty of the Department of History
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In Partial Fulfillment
Of the Requirements for the Degree of
Master of Arts

by
J. Thomas Wren
1985
This thesis is submitted in partial fulfillment of the requirements for the degree of Master of Arts

John Thomas Wren

Approved, April 1985

Charles F. Hobson

James P. Whittenburg

James L. Axtell
For

Suzanne

my bride

iii.
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ABSTRACT

This is a study of the nature and development of the law practice of John Marshall during his first years as a member of the legal profession.

The work utilizes primary source material collected by the editorial staff of the Papers of John Marshall, together with related court records and similar documents. The essence of the study consists of the computer-assisted analysis of these sources to gain an understanding of such aspects of Marshall's law practice as his clientele, the nature of the cases he handled, his professional relationships with other attorneys, the growth of his practice and the degree of success he enjoyed.

The results suggest that Marshall developed a wide and varied practice centered on the superior courts in Richmond. Most of his litigation activities consisted of actions related to "debt" causes, although he also had a wide familiarity with matters pertaining to real estate as well as to decedents' estates. Marshall also performed many services for his clients that went beyond mere legal representation, most notably in his roles as land agent and financial counsellor. His income and caseload grew significantly during the period studied, and his success rate was high.
ANATOMY OF A LAW PRACTICE:
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"An elderly gentleman from the country arrived in Richmond one morning in the 1780's on serious business. His case was being argued before the appeals court, and he needed a lawyer. Not knowing many people in the city, the country gentlemen asked his landlord, the owner of the Eagle Hotel, who was the best advocate in the city. The answer was quick in coming: John Marshall. But when the prospective client saw Marshall, he immediately decided against hiring him. What he saw was not inspiring. Marshall did not appear the lawyer type, not at all. He was a man of about thirty, wearing a plain linen roundabout hanging out over his knee breeches and had his hair tied in an unkempt queue at the back of his head. Even more ludicrous, he was eating cherries from a straw hat he carried under his arm!

"No, this John Marshall, no matter how highly recommended by the owner of the Eagle Hotel, was not a fit lawyer for the country gentleman. The man then went to the courthouse where he struck up a conversation with the clerk of the court. Explaining his circumstances, the country gentleman asked the clerk to recommend a lawyer for him. The clerk was happy to oblige. The best young advocate, he said, was John Marshall. The country gentleman had been through that once. No, John Marshall was not the lawyer for him. He wanted a sophisticated city lawyer, not a country bumpkin.

"At that moment, his obvious choice entered: an elderly lawyer wearing a dark coat and a powdered wig. His appearance said he was an advocate of rare ability, and the country gentleman hired him
immediately. He had brought $100 for a lawyer's fee, and he gave $95 to the man with the powdered wig.

"While waiting for his own case to come up, the country gentleman sat in the courtroom listening to the other cases being argued. The first was between John Marshall and the lawyer in the powdered wig. Immediately, the man from the country realized he had made a serious mistake. Marshall was vastly superior to the man to whom he had given his $95. When the first case was over, the country gentleman approached Marshall, explained the events of the day, and asked if he would take his case for the remaining $5. Marshall agreed. He accepted the $5 and joked about the power of a powdered wig and a black coat."

This oft-repeated anecdote (possibly apocryphal) is typical of the descriptions of the law practice of John Marshall. All commentators have agreed that Marshall was an able lawyer, but surprisingly few details concerning his early professional career have been brought forward, and until recently, only meager documentation for his practice has been readily available. This deficiency is rapidly being addressed by the publication of The Papers of John Marshall. Volumes covering the years of his law practice (1780-1796) have already been published, and a further volume highlighting the nature of his law practice is being readied for publication. The editors of the Marshall papers conclude their introductory materials with the exhortation that this collection "should begin a new era concerning Marshall and serve as a point of departure for future generations." With respect to Marshall's law practice, at least, the lure is irresistible. Fully 75 percent of the documents published in the relevant Marshall volumes
have never before appeared in print. While they form a far from complete record, these documents nevertheless "have brought [John Marshall] the lawyer alive and enabled us to watch him at work." Indeed this residuum of legal records, correspondence and other official and private papers provides a sound basis for the study of John Marshall's law practice. Here, the analysis will conform to the time frame suggested by the first volume of the Marshall series, and study his career from its inception through June of 1788, when Marshall became a participant in the Virginia constitutional ratifying convention. Close scrutiny of the documentation that survives from his first years at the bar reveals interesting insights into eighteenth-century legal practice, together with important perceptions about Marshall as a lawyer and a man.
Beginnings

John Marshall's formal study of the law began while he was immersed in another important endeavor: serving as an officer of the Virginia Continental Line. In the spring of 1780 Marshall was in Virginia awaiting further orders. During this time he visited his father who was stationed at Yorktown, and while there decided to attend lectures on the law to be delivered at the College of William and Mary by the newly appointed professor of law and police, George Wythe. Marshall began his studies around May 1, 1780.9

Wythe's curriculum for law study included two lectures per week, supplemented by moot courts and model legislatures held to instruct his students in judicial and legislative proceedings.10 In addition, Wythe expected his students to read and take notes from the English legal classics and from such law reports and collections of statutes as were available.11 The only surviving documentation of Marshall's study of the law at William and Mary are his "law notes," which reveal Marshall's careful work at "commonplacing," or abstracting portions of such works as Bacon's *A New Abridgment of the Laws*, the 1769 compilation of Virginia statutes and, occasionally, Sir William Blackstone's *Commentaries on the Laws of England*.12 These law notes were never completed, and indeed the whole of John Marshall's legal education
education lasted only three months. By July 29, 1780, Marshall had left William and Mary, never to return as a student. Thus ended his formal training in the law.

Early in August of that same year Marshall passed the bar examination and Governor Thomas Jefferson issued his license to practice. The young lawyer apparently intended to embark upon a legal career in the county of his birth, for on August 28, 1780, he took his oath of admission before the Fauquier County Court. However, his legal career was quickly transplanted to the state capital at Richmond. In the spring of 1782 Marshall was elected to the House of Delegates from Fauquier County. That duty took him to Richmond, and after his subsequent marriage to Polly Ambler of a prominent Richmond family, he established himself at Richmond to begin the practice of law.

Setting Up an Office

One of the first and most significant things that a budding lawyer must do is to establish an office from which he can conduct the practice of law. While Marshall's notorious aversion to recordkeeping forbids a thorough analysis of the way in which he set about this undertaking, notations in his account book reveal that he met with certain predictable expenses. As early as 1783, Marshall recorded his investment in two of the indispensable tools of the trade, an inkstand and a writing desk. The next year saw an outlay of six shillings for paper and, more importantly, the expenditure of over three pounds for "Dockets." This disbursement was undoubtedly for the purchase of books to maintain an office docket of pending cases, and demonstrates the increasing volume of Marshall's practice. In 1785 he again
purchased a docket, together with the acquisition of such necessary items as quills, ink and paper. Interestingly, Marshall also invested in a "quire of declarations," which was a small bundle of printed declarations (i.e., complaints used in initiating lawsuits) for his office use.

By the sixth year of his legal career, Marshall's practice had apparently increased sufficiently to move to a larger or perhaps a better-located office. In February 1786 Marshall expended a full twelve pounds "for moving my office," and nearly another three pounds for "paint for the office." Besides routine expenditures for paper and dockets, the now-established lawyer also invested in a "letter case" and recorded nearly a pound paid out for postage. By 1787 Marshall was recording twenty entries in his account book for postage expenses, totalling nearly three pounds. In addition to his usual office expenses, Marshall again invested in the upgrading of his office, this time expending nearly five pounds for "papering and painting the office." During the first half of 1788 Marshall continued his outlay for such necessaries as an inkstand, quills, paper and postage, and added an unexplained purchase of "clerks notes." Marshall's records thus reveal that throughout his first eight years of practice he was faced with the continuing overhead of maintaining and improving the physical accoutrements necessary to a successful practice of law.

Nor were the more mundane matters all that occupied Marshall's attention and money in the establishment of his law office. Throughout this period he also made a significant and continuing effort to create and expand his legal library. Indeed, some perception of Marshall's
commitment to his profession can be gleaned from his investment in the intellectual side of the law. He recorded an impressive outlay for books, most notably in 1785 when he spent in excess of £50 on his library, including the purchase of a bookcase in which to house his new legal resources (this expenditure out of a total income in that year of £750). At one point during that year Marshall found himself paying out twenty-five shillings merely for "bringing books in a stage." In subsequent years, Marshall's additions to his legal library appeared significantly smaller. This could be a function of his high initial investment, or possibly it was due to Marshall's declining attention to detail in his recordkeeping as the years wore on.

More interesting are the actual volumes Marshall chose to serve as his sources of legal reference. Most of his recorded expenditures for his library are not specific, such as the entry recording a certain sum "Laid out in Books." But occasionally Marshall's acquisitions are listed by title, and this provides insight into the nature of his working library. One of the first volumes purchased was "Blackstones Commentaries," a fundamental legal treatise of the period. In June 1785, Marshall supplemented this with "Cowpers reports," which were a collection of cases heard in the Court of King's Bench in England. This particular entry is enlightening in several ways. Marshall deemed Cowper important enough to invest £13-9 in the volumes. His investment demonstrates the continuing importance of English precedent in Virginia. Moreover, Cowper had been published in London in 1783; Marshall undoubtedly ordered the work shortly after hearing of its publication, reflecting his desire to remain current in the law. A similar purchase of "Browns chancery reports" shows his determination to also
keep pace with developments in English equity. Marshall was also quick to acquire the few publications relating to Virginia law, purchasing in 1785 and again in 1787 the most recent collected statutes of the commonwealth. In addition to specific statutory and case law, Marshall also invested in such theoretical works as Sir Geoffrey Gilbert's *The Law of Evidence* and Kames' *Principles of Equity*. At an even more abstract level, Montesquieu's *The Spirit of the Laws* became an early addition to the library. The enterprising advocate apparently also sought to polish his skills through the purchase of Blair's *Lectures on Rhetoric*. Such purchases suggest that Marshall was determined to acquire an intellectual understanding of the law as well as a command of the source material and techniques needed in the day-to-day combat of litigation.

**Clients**

Of course the fanciest law office and the most replete library are of little use to a lawyer if he has no clients. The young John Marshall was fortunate in this regard. Although the sketchy nature of his records makes any concrete conclusions impossible, it is clear that Marshall had a wide-ranging and respectable clientele. The records of his first eighteen months of practice in Richmond reveal few identifiable clients, but by 1784 his practice was brisk. Only six fees were registered in 1783, although surviving documentation suggests that Marshall had several clients. By 1784 Marshall's account book lists 116 separate fees, and his correspondence indicates an even broader clientele. In his first six years of practice in the state capital, over one thousand different client names appear in the papers of the rising young attorney.
Marshall was aided (and his practice was shaped) in his early years at the bar by connections he had established prior to his admission to the profession. Marshall's marriage into the Ambler family was a fortunate one, and gave him a social standing which was a great asset in business and politics. More important, Marshall was a veteran, and his former comrades were particularly in need of legal assistance at the time Marshall began his practice. The Continental Congress had determined to reward soldiers for their services in the Revolution by awarding them large tracts of land. The legal snarls evolving out of the implementation of this policy caused many veterans to turn to Marshall for help. In addition to assisting veterans with land claims, Marshall devoted much of his time to obtaining military pensions from Virginia and the Congress. Marshall later commented: "My extensive acquaintance in the army was of great service to me . . . . My numerous military friends . . . took great interest in my favor, and I was more successful than I had reason to suspect." While most of Marshall's military clients are not identifiable, occasionally the records permit a glimpse of this portion of his practice. The military connection was particularly prominent in the early years of Marshall's career. In 1784 identifiable military clients were the source of 9 percent of Marshall's income, while in 1785 he derived fully 17 percent of his income from this source.

Another significant source of revenue for Marshall were clients from his "home" county of Fauquier. Early in 1785, for example, the young lawyer returned to his local constituency. Between February 1 and March 22 of that year, Marshall recorded fourteen fees as "Reed in Fauquier" totalling nearly £40. Similar entries and frequent
expenditures for "going to and & returning from [Fauquier]" also attests to Marshall's continuing connection with that county. 42

Marshall's clientele during these years also included an increasing number of prominent individuals. As early as 1783 Marshall was actively representing James Monroe in real estate matters. Similarly, in early 1784 he assisted Arthur Lee regarding land warrants in Kentucky. 43 In addition, Marshall's account book notes fees received from "Squire Lee" (Richard Lee) and "G. Mason jr." 44 Early in 1787 the controversial James Wilkinson asked Marshall to help him obtain a passport from Governor Edmund Randolph for safe passage down the Mississippi to New Orleans [the request was denied]. 45 Marshall also had a "Philadelphia connection" during these years, particularly with the noted financier Robert Morris. In 1787, Marshall represented Morris and Thomas Willing, president of the Bank of North America in Philadelphia, in litigation before the Virginia courts. Later, in 1788, Morris placed his Richmond attorney on retainer. 46

By the middle of 1788 John Marshall had become well established in his chosen profession. He was ensconced in his law office, surrounded by a working legal library of significant proportions. His practice had developed to the extent that he represented a wide clientele, many of whom were leading characters in Virginia and the nation. The nature of the law practice generated by that clientele was similarly broad and diverse.
Courts Practiced Before

The varied aspects of John Marshall's practice, together with the complex court structure existing in Virginia during his first eight years at the bar, brought the young attorney before disparate courts. An understanding of the nature of Marshall's practice requires a familiarity with Virginia's judicial institutions of the 1780s.

Prior to the Revolution the structure of the courts in colonial Virginia had been simple. It consisted of county courts composed of justices of the peace in each county, hustings courts in certain larger municipalities, and a General Court at Williamsburg manned by the governor and his council. From time to time the royal governor commissioned special courts of vice admiralty to deal with maritime litigation, or special courts of oyer and terminer to handle criminal cases when the General Court was overburdened. There were no other courts.47

By 1780, however, when John Marshall gained admission to the bar, this system had been extensively altered, although the Virginia court structure was still grounded largely on the system of county courts which had existed in the colony from its early days. After independence, as before, the county courts were the most important tribunals for most Virginians. These courts conducted the public business of the counties and heard the great majority of law and equity cases at their
monthly meetings. Also of some importance were the hustings courts, which were established in such cities as Williamsburg, Norfolk and Richmond. These courts handled minor civil and criminal matters and performed many of the same duties as the county courts. Prior to independence, the decisions of the county courts had been appealable to the governor and his council sitting as the General Court. With the coming of independence, however, and the accompanying elimination of the royal governor and his General Court, the Virginia legislature was faced with the task of erecting a new court system for the state.

The legislature met this challenge by creating a cluster of superior courts at the state level while retaining the system of county courts essentially unchanged. In 1777 the General Assembly erected a new court to replace the old General Court. Jurisdiction of this new tribunal, also named the General Court, was restricted to cases in law (as opposed to equity). It was granted original jurisdiction (concurrent with the county courts) to hear cases involving more than £10 currency or two thousand pounds of tobacco, and also served as the court of appeals for the county court system. When reconstructing the judicial system the Virginia legislature decided it was unwise to allow jurisdiction over law and equity to remain in one panel of judges. Consequently equity jurisdiction was placed in a new court, called the High Court of Chancery. Similar to the General Court, this new tribunal had both original and appellate jurisdiction in equity cases, giving Virginians a choice of bringing such cases before the county court or the High Court of Chancery if more than £10 were involved. In 1776 the General Assembly had also established a Court of Admiralty. Its jurisdiction extended over all maritime cases except
those involving a capital crime. The legislature initially provided no system of appeals from the decisions of the Admiralty, Chancery and General Courts, but in 1778 it organized the highest state court, the Court of Appeals. It was almost exclusively an appellate tribunal, and its bench was comprised of the judges from the other three state courts. Despite the spate of new courts, the county courts continued to handle the bulk of litigation, especially in the early years of the new system.

This, then, was the structure of the courts during Marshall's early career. In 1788, however, discontent with the operation of this judicial system forced a major revision. Legislation enacted in that year wrought many changes, the most notable of which was the diversion of the General Court jurisdiction to eighteen district courts. Many of the cases begun in the General Court during Marshall's first years of practice were subsequently transferred to the various district courts.

The Virginia court system in the 1780s had a distinctive two-tiered nature. By statute, lawyers could not practice before both the county courts and the General Court. The inevitable result of this situation was that the better members of the guild naturally gravitated toward the more exciting cases in the state capital while the younger and lesser members of the profession were "exiled" to county court practice. Thus the better lawyers gathered in Richmond around the General Court, the High Court of Chancery and the Court of Appeals.

We have seen that Marshall had first been admitted to practice before the Fauquier County Court, but by the spring of 1782 he had been elected to the House of Delegates and transferred his base of
operations to Richmond. By doing so, Marshall had elected to join the elite practice of the Richmond bar. By April 1784 Marshall could write to Arthur Lee that "I am now standing at the General Court bar.

A year later the young solicitor was admitted to practice before the Court of Appeals. He also appeared before the High Court of Chancery, and managed at least one case designated "admiralty."

The precise number of times in which Marshall appeared before the respective courts is obscured by his cryptic method of recordkeeping and by the amorphous jurisdictional nature of the courts themselves. Thus a case taken by Marshall "on appeal" might involve a cause in the General Court brought up from a county court, a similar appeal to the High Court of Chancery, or perhaps an argument before the Court of Appeals. Again, however, a careful review of the documents provides information that sheds some light on this aspect of his practice. Marshall's appearance before a specific court is indisputable in only about a hundred cases during the period studied. But of those cases, nearly eighty percent were before the General Court. Another sixteen percent of Marshall's known appearances before a specific court were before the High Court of Chancery. Only three cases are undeniably attributable to the Court of Appeals in this period. There are also isolated and unexplained references to single cases before the Fauquier County Court and the Henrico County Court. It should be noted, however, that such a narrow sample may be misleading. For example, although there are only three specific references to the Court of Appeals, Marshall's records note eighty-two cases which he handled "on appeal." There is reason to assume that several of these appeals
were heard before the Court of Appeals. A fuller picture of the nature of Marshall's practice, if not its precise venue, can be found by looking to the subject matter of his professional duties.

The specific types of cases that comprised the litigation of John Marshall will be considered in some detail in the next chapter. However, Marshall's practice may be put into perspective by first describing it in terms of clearly ascertainable overarching topical areas which emerge from the study of his surviving documents.

**Cases in Common Law and Chancery**

Beginning with the most general of categories, virtually every case coming across the desk of young Marshall was either one arising under the common law, or one in which a remedy was sought in chancery (or a combination of the two). While the surviving evidence is not always incontrovertible, it is clear that the great majority of Marshall's cases arose under the rubric of the common law. Of the nearly eight hundred cases in which this information is ascertainable, over six hundred actions (82 percent) came within the common law, while fewer than 150 cases (18 percent) called upon the jurisdiction of the chancery courts. This distribution supports our earlier estimate of Marshall's appearances before the courts of common law and chancery, thus reinforcing the earlier analysis. Marshall's fee records tell only a slightly different story. Fifteen percent of his recorded fees can be attributed to chancery cases, but there is a strong probability that this understates the case.

While the overwhelming majority of cases handled by Marshall arose under the common law rather than equity, at times a cause would
generate actions in both areas. It will be recalled that at the superior court level (the focus of Marshall's practice), Virginia had apportioned the jurisdiction over law and equity to different courts. So it might at first appear implausible that Marshall would record a fee that clearly mixed the two: "Booker with Tabb & Fields exrs ch[ancery] and common law £7-12." The anomaly is more apparent than real. It was not unusual for the same dispute to embrace both jurisdictional categories of the law. For example, in Ashby v. Grant, a Fauquier County case, Grant had won a decision at common law against Ashby. In response, Ashby, represented by Marshall, obtained an injunction from the High Court of Chancery to stay the execution of the judgment. After hearing "the bill, answer, Depositions and Arguments of Counsel on both sides," the court ordered the injunction to be dissolved, with costs to be paid by Ashby [Marshall lost].

Similarly, in Duncan & Company v. Dameron & Company, the plaintiff had brought suit on a bond and had received an office judgment (a default judgment entered by the clerk of the court). The bond had been burned in a Richmond fire, and the plaintiff thereupon asked the General Court to direct the clerk to issue execution (that is, to enforce the judgment). Marshall, for the defendant, objected. The court agreed, holding that the loss of the bond precluded the plaintiff from proceeding at law, the court "conceiving he might proceed in Equity." 

Original versus Appellate Practice

Similar to the division between cases in common law and chancery, all of John Marshall's litigation could be classed as "original"
actions (those originating in the court ultimately presiding over the case) or appellate (those cases which were before a court on appeal from a lower court). In his first eight years at the bar, Marshall's practice leaned heavily toward actions of an "original" nature. Over 80 percent of his litigation involved cases which were initially filed in the court ultimately determining the dispute; only 16 percent of Marshall's cases were of an appellate nature. 74

While the bulk of his practice concerned original cases brought by declaration (in the common law courts) or by bill (in chancery), even at this comparatively early date in his career John Marshall's work as an appellate lawyer was growing yearly. The young attorney's appellate practice—measured as a percentage of his total case load—increased steadily from a low of around 4 percent in 1784 to more than 16 percent of his practice in 1788. Appellate work measured as a percentage of income reveals a similar pattern. 75

Such information on the extent to which Marshall's early professional career was devoted to appellate work can be usefully inter-related with some of the aspects of his career previously discussed. For example, the original-appellate dichotomy can shine further light on the nature of Marshall's practice before individual courts. The General Court and the High Court of Chancery were the two courts which had combined original-appellate jurisdiction. John Marshall's activity before those courts [in an admittedly limited sample] reveals that 73 percent of his appearances before the General Court involved original causes of action, while 92 percent of his activities before the High
Court of Chancery were of that nature. Similarly, a look at the county courts which did supply Marshall with cases on appeal provides an interesting insight into the geographical diversity of his practice. Of the eighteen appeals where the lower court was mentioned, fifteen different county courts appear.

Beyond the clear-cut dichotomies of common law chancery and original-appellate, much of the law practice of John Marshall seems to naturally coalesce around several topical categories. Discussion of these aspects of his life as a working lawyer serves to illuminate Marshall's early professional career.

Real Estate Practice

Much of the good fortune John Marshall enjoyed in establishing a successful law practice was attributable to legal services he provided with respect to matters concerning real estate. In developing a significant real estate practice, Marshall was particularly favored by several circumstances. We have seen that he had connections with his old military comrades of the Revolution. Many veterans had claims to land based on Treasury warrants issued by the Continental Congress as well as state warrants issued at Richmond. These warrants were in reality little more than "hunting licenses." The establishment of actual title to the land required a complicated series of steps involving the location and survey of a tract and the filing of papers with the Virginia land office in Richmond. Because Virginia had granted more land than was available, and because surveying techniques were primitive, conflicting claims abounded. In such cases the only way to protect a claim was to file a caveat with the land office against a rival claim
to the same parcel and await a court decision on the matter. Every inch of Kentucky land was quickly disputed. John Marshall was in a particularly advantageous position to profit from this reservoir of potential legal business. He had been an officer in the Continental Army, had legislative connections, and resided in Richmond near the land office. But the chief circumstance which placed Marshall in position to build up a substantial real estate practice was his connection with his father. Thomas Marshall had moved to Kentucky where he was appointed surveyor for Fayette County, and soon became one of the best-established surveyors in the entire area. He quickly formed a partnership with his lawyer son in Richmond. After John had obtained the warrants, Thomas would survey the land. John would then file the papers with the land office. The two men were thus well situated to obtain warrants and file caveats for military veterans and others speculating in western lands with Virginia's depreciated currency.

The records of John Marshall's law practice are rife with evidences of the close connection between father and son in real estate matters. As early as 1782 the son had placed a public notice in the Virginia Gazette that the "Surveyor for the County of Fayette" [Thomas Marshall] had opened an office for all those who had lands to locate or survey. Later, John Marshall records paying, on behalf of his father, the hefty sum of £100 to the College of William and Mary as the statutory surveyor's fee of one-sixth of all surveying fees collected. Indeed, during his first years of practice the younger Marshall collected fees on behalf of his father totalling over £235. There is also evidence of the role John Marshall played in
relating to clients in the father-son partnership. Late in 1784 John Marshall wrote to James Monroe, that "I shewd my Father that part of your letter, which respects the western Country. He says he will render you every service of the kind you mention which is within his power with a great deal of pleasure." More specific is the service rendered to Arthur Lee. In late 1782 Lee had asked Thomas Marshall to locate two tracts of land in Kentucky amounting to some 10,000 acres. Subsequently, the elder Marshall notified Lee that he had not been able to finish locating the land, and asked Lee to pay the deputy and register's fees. The money was to be delivered to John Marshall in Richmond. In February 1783 the lawyer son wrote Lee, notifying him that he (Marshall) had detained "forty five pounds for the fees due on your western lands."  

While John Marshall's active participation in matters pertaining to real estate is evident from the records, his precise actions on clients' behalf are somewhat more obscure. Marshall's records reveal 54 cases in which it is possible to identify a specific legal activity relating to real estate. Of these, 23 involved actions in ejectment, 10 were actions to quiet title to land, 8 while 9 were caveats. Marshall also engaged in the drafting of conveyances and the drawing of deeds (5 instances each), and on one occasion provided "Advice on Welbourne's deed." In addition, he actively represented clients' interests in ways that are not so easily labelled. For instance, Marshall often acted as agent for his clients. In early 1788, Charles Tyler appointed "my trusty friend John Marshall . . . my true and Lawful Attorney, for me and in my behalf to subscribe my name to an Assignment of a certain Tract or parcel of Land . . . ." Similarly,
Marshall sometimes advanced fees to be paid a surveyor, or otherwise advanced necessary monies: "Pd. for Mr. Colston in a tax on deed from Peachy to him, £7-10." Of course, he also engaged in litigation in support of his clients' realty interests. For example, in June 1787 he recorded a fee "From Mr. Bryan for a suit with Withers concerning land in Fauqr." Undoubtedly the most notable cause in this respect was the landmark case of Hite v. Fairfax, in which Marshall argued before the Court of Appeals on behalf of the property interests of the heirs of Lord Fairfax. A related case eventually brought John Marshall before the United States Supreme Court and helped to establish his national reputation.

Land causes, then, made up an important part of John Marshall's early legal practice. It appears that a significant role was also played by Marshall's representation of clients regarding matters pertaining to wills and estates.

Wills and Estate Practice

John Marshall was often called upon to assist his clients in matters pertaining to the testamentary disposition of their property. Commonly, Marshall would be asked to provide counsel concerning the making of a will. His fee book abounds with such notations as "Advice fee on Hardaways will." Of the identifiable cases involving wills, nearly 40 percent involved this sort of activity. In at least one instance, Marshall gave such aid to a third person; he provided "Colo. [William] Peachy advice on the will of Mr. Samuel Peachy." Marshall's duties often extended also to the interpretation of wills. For instance, in May 1784, the lawyer wrote to John Ambler: "...
you request me to give you my opinion on your Fathers will with respect to Masons claim on a part of the slaves. I have been reading the will & really think it to intricate to determine on the question without mature consideration . . . . At present I can only say that I am rather inclined to think that his claim is not a good one though it is a point on which I am by no means yet awhile decided." Marshall was eventually to charge Ambler £9-12 for his counsel. In addition, Marshall was often involved in "establishing" a will, and he records one fee "from Colo. Carrington for probate of will." The attempt to "establish" a will involved litigation. Indeed, many disputes relating to wills found their way to the courts. One of Marshall's cases in particular serves to evoke the flavor of such a dispute. The case of Ashton v. West demonstrates the complexity of some of these actions and suggests the degree of sophistication necessary to handle such litigation. Ashton was a case arising from the interpretation of a will, with the plaintiff Ashton seeking a court order to eject the defendant West from a certain piece of land. Who held right to the land hinged on a will that had been executed nearly ninety years previously. On the surface, the words of the will seemed clearly to favor the plaintiff's case. But John Marshall, with fellow counsel Charles Lee, argued that the testator did not mean what he said in the will. A technical and spirited legal argument ensued before the judges of the General Court, and the court eventually unanimously found for Marshall and his client. The court agreed that the defendant had successfully established three objections to the plaintiff's claim (regarding the impact of the creation of "cross-remainders," the lack of the necessary possession of the land, and the failure to come within the statute of limitations).
While such litigation demanded much of Marshall's attention, this aspect of his practice was not limited to work with wills. A significant portion of Marshall's early years at the bar was spent either representing the interests of executors and administrators of estates, or in advocating positions in opposition to such an executor or administrator. In all, eighty-seven cases can be discerned where Marshall had some contact with the fiduciary of an estate. In over 60 percent of the cases, Marshall represented the decedent's estate, while in the remaining actions he found himself in opposition to such an interest. Particularly as his practice matured in 1787 and 1788 this sort of client became prominent. While in 1784 less than 1 percent of his cases and income can be attributed to the representation of estates, by 1787 nearly 7 percent of Marshall's income was so derived, and in 1788 over 10 percent involved the representation of an executor or administrator of an estate.

Analysis of Marshall's work with estates provides further insight into the nature of his early law practice. For example, in the instances where he represented an estate, the large majority of cases (over 85 percent) came within the common law rather than equity. Similarly, an overwhelming percentage of cases were original in nature; less than 10 percent of the estate cases Marshall handled were on appeal. Moreover, although the information is scanty concerning the courts before which Marshall argued these estate actions, the evidence is nevertheless suggestive. Twelve of the thirteen cases so identified were in the General Court (the remaining action Marshall argued before the High Court of Chancery). Perhaps more interesting is the type of case in which Marshall was engaged. Exactly half of the
causes in such litigation (15 of 30 identifiable cases) entailed some form of debt action. Another four causes of action were in detinue, three involved a replevy bond, while two others sounded in trespass on the case. Finally, of the twelve cases where the outcome is known, Marshall won seven, and lost five.

While the above figures should be read with a good deal of caution (the information is too scanty to provide the basis for any solid conclusions), they do help illuminate this portion of Marshall's practice. Another logical grouping of cases which arises from the analysis of the records relates to his representation of commercial clients.

Commercial Practice

In his early years as a practicing attorney, John Marshall devoted himself to the representation of commercial clients. For example, Marshall notes a rather large fee from "Mr. Heron"--a Richmond merchant--for "law business." This was probably a fee in the nature of a retainer obligating the young attorney to represent Heron's business interests. Similarly, Marshall's listing of a fee "From Pollard for Biddle & Co" undoubtedly represents moneys received from the agent of a company (probably foreign). The location of the corporate client is clearer when Marshall lists a receipt "From Mr. Gracie for Hazlegreen & Co. Merchts. of Amsterdam."

An idea of the nature of the duties John Marshall performed for his commercial clients can be gleaned from his records. In April 1786 Marshall records a large fee "From McRoberts for difft persons." McRoberts was a Richmond merchant; the cryptic notation "for different persons" could well have referred to several collection matters handled
by the young attorney. More clear is the collection letter written by the advocate to Cadwalader Jones: "Sir: An order of yours on Mr. Williams Constable Mercht. of Philadelphia for 2000 wt. of tob[acco] in favor of Mr. Gratz & which is returned unpaid has been in my hands upwards of twelve months & Mr. Gratz is now anxious about payment." Another time Marshall represented the Philadelphia firm of Willing, Morris & Co. in defending a suit seeking to settle some commercial accounts.

Marshall was apparently also closely involved with legal matters concerning bills of exchange. For instance, he lists a fee from a suit "on a bill exchange." An example of the type of action that might arise from such bills is that of Wilson v. Powell. In that case, John Marshall represented the plaintiff, an assignee of Jesse Simms. John Harper, "a person in trade and commerce and being indebted to the said Jesse Simms," drew an order upon a third person [the eventual defendant Robert Powell], ordering Powell to "Please pay Mr. Jesse Simms one hundred twelve Dollars which is the sum you are owing me." Powell thereupon "accepted the Order according to the customs of Merchants in such cases." When Powell later refused to pay Simms the money, an "action accrued to the said Jesse Simms to demand and have [the money]." Marshall also utilized bills of exchange in his own behalf. In December of 1785 Marshall recorded a disbursement "by a bill in favor of Messieurs Williams & Rochester & Co" totalling over eighty pounds.

Further insight into John Marshall's commercial litigation practice can be derived from his records. Again, while the sample is small (approximately 30 cases), analysis of its tendencies is revealing. In
these cases, Marshall represented a commercial client nearly 40 percent of the time, and found himself in opposition to commercial interests the remainder. The great majority of his cases (87 percent) were within the jurisdiction of the common-law rather than chancery. Similarly, John Marshall's commercial practice appears to have been overwhelmingly of an "original" (as opposed to appellate) nature. Predictably, his litigation in this field was chiefly before the General Court. In commercial actions, the young advocate represented the plaintiff 40 percent of the time, the defendant 60 percent. The types of cases with which Marshall became involved are of interest. Of the thirteen cases where this is ascertainable, eight related to "debt" causes, while four were in trespass on the case (according to Marshall's own categorization; in reality actions in "debt" and "case" were often interchangeable). Of the debt cases, three were based on bonds, three on bills of exchange, and one sounded in indebitatus assumpsit on a promissory note. Finally, in the few cases (twelve) where the result is known, John Marshall won half, and lost half.

Another topical area of the young lawyer's legal practice, while of a somewhat less important nature, was Marshall's involvement in criminal cases.

Criminal Practice

Until 1786 Marshall occasionally represented a client in a criminal proceeding; after that date, evidence of this sort of legal activity disappears. During his first eight years of practice, less than 1 percent of the young lawyer's cases were of a criminal nature.
But the cases he did involve himself in were of a highly varied nature. In October 1785 Marshall received a fee "From Peachums--Murder." That same month the advocate noted that he represented Burton "for horse stealing." At least two defendants were charged with robbery, while a Mr. Coats was prosecuted for "passing [a] forged note." 117

A final aspect of John Marshall's early legal practice was his provision of legal opinions and advice. While not as topically well defined as some of the earlier analysis, this nevertheless formed an important part of his professional life.

**Legal Opinions and Advice**

Without question one of the most frequently occurring notations in John Marshall's account book is that for "advice." The eighty-eight entries thus recorded represent 8 percent of his total fees for the period. Moreover, the percentage of his fees attributable to "advice" rises steadily and dramatically during his first years of practice. In 1784 and 1785, a little over 4 percent of Marshall's cases involved providing counsel. By 1786-1787, this had increased to nearly 10 percent. In 1788 almost 13 percent of the young lawyer's recorded activities pertained to counselling his clientele. 118 This steady increase comports with a perception of Marshall's growing status in the community as a legal advisor.

Marshall did not often describe the subject matter of his counsel; in those cases where the topic is discernible, it--predictably--varied. We have seen an example of the young counsellor's advice concerning matters testamentary when he wrote John Ambler regarding his father's
Another time Marshall provided advice to "Mr. Lukes on contract to lease a tavern to Mr. Hawkins." Sometimes the advocate's input amounted to little more than a situation report. In February of 1787 he reported to client John Alexander on the status of his suit. "The Judges seem rather to incline to continue the injunction until the final hearing of the suit & to decide on the whole together." At other times, Marshall appeared to gently suggest a course of action. He wrote Leven Powell concerning his litigation with "Burwells Exrs": "If the matter is not arbitrated, [it] will without question be tried next Court."

Perhaps most revealing is the counsel Marshall sometimes gave to other members of the legal profession. Younger members of the bar in particular seemed to be the beneficiaries of the Marshall wisdom. In September of 1786, he responded to a request for assistance from William Branch Giles: "I think on looking at the law the gaming act [stating that gaming debts were unenforceable at law] ought to be pleaded and cannot be given in evidence on the plea of payment." In another case Marshall agreed with Giles that the latter's client had the basis for a successful appeal, although he chastized the attorney below for failing to demur: "Doubtless the original institution of the suit was wrong and there can be no question but that the error would have been deemed fatal on demurrer. The only question is whether it is cured by verdict, I think now it is not . . . " Similarly, Marshall took great pains to assist neophyte lawyer John Breckinridge. He responded to a Breckinridge request: "I shall with very much pleasure make you any communications on legal or any other subjects whenever you chuse. I cannot promise you that they will be worth
receiving, but such as they are--take them." Marshall proceeded to describe in great detail the procedure for obtaining a writ of habeas corpus, and concludes "I wish you great success at the bar." A few months later Breckinridge turned to Marshall again, seeking confirmation that one of his clients had a basis for appeal. Marshall had to disappoint him. "I have looked it over but do not think there is any error in it. Will you please mention what mistake the clerk has committed? I see some thing not entirely usual but I think there is nothing material." Such reliance on Marshall's knowledge of the law suggests that by 1787 his standing at the bar was high. This conception of Marshall's emerging reputation is reinforced by yet another scrap of evidence. In February 1787, Marshall recorded a fee "From Southampton Justices for advice." Apparently even some of the judiciary were turning to the up-and-coming lawyer for counsel.

On occasion, Marshall gave advice of a more formal nature. For instance, he was named as an arbitrator in a dispute where Philadelphia merchant Simon Nathan claimed he had accepted thirteen bills of exchange from General George Rogers Clark for military supplies and was due the face amount in specie rather than depreciated currency. Marshall agreed with Nathan that the bills were drawn for specie. On another occasion the governor requested John Marshall's services regarding a tricky criminal question. James Goss had been convicted of horse stealing and was sentenced to death. He escaped from jail, but was apprehended. The governor pardoned him on condition of three years' hard labor. Goss escaped again. When he was again in custody, the governor revoked the pardon and sentenced him to die. Apparently an appeal was made to the governor and Council to reconsider Goss's
conviction on the ground he was insane. Marshall was appointed to a panel of three to give an opinion on the defendant's sanity. It was the opinion of the panel that "tho the unhappy object [Goss] is ignorant & Stupid to a great degree, yet we are perfectly convinced he does not come under the Term of Idiotism or insanity, but is a Competent Judge of Right from Wrong." And, in 1787, the attorney-general called upon the young lawyer to give counsel on several questions relating to the Naval Office in Virginia. Again, this seeking of Marshall's legal opinion by the most prominent citizens of the Commonwealth demonstrates his rising legal reputation.

While the general nature of John Marshall's early law practice can be described and analyzed under convenient topical headings, another major aspect of his practice is not so neatly defined. A great part of his professional activities related to disputes in actual litigation. No survey of Marshall's practice would be complete without looking to the nature of his courtroom activity.
CHAPTER THREE

TRIAL PRACTICE

John Marshall was first and foremost a trial lawyer. In his initial eight years of practice there is evidence of the young lawyer litigating over seven hundred cases; two-thirds of all his recorded legal activities related to matters at issue before the courts of Virginia. The surviving evidence of this key aspect of Marshall's early law practice is sporadic and uneven in quality. Nevertheless, this documentation of his early professional life gives us some idea of the nature of cases in which the young lawyer involved himself, and provides a glimpse of the hurly-burly of trial practice before the superior courts of Virginia in the late eighteenth century.

Side Represented

Inevitably, John Marshall brought his legal expertise to bear for clients situated on one side of a controversy or the other. In original actions (which we have seen constituted over 80 percent of his trial practice), Marshall did not specialize in representing either plaintiffs or defendants. In fact, the records reveal that he went before the bar of the court a remarkably equal number of times for each. During Marshall's first eight years of practice, he represented plaintiffs in 284 cases (49.7 percent of the time) and defendants in 287 cases (50.3 percent).
When viewing the side represented measured as a percentage of his income, the results are dramatically the same. In those eight years Marshall earned £867 representing plaintiffs and £877 on behalf of defendants. While Marshall's practice before appellate courts was much smaller, his representation of clients' interests on appeal reveals a similar even distribution. Marshall represented the appellant (the person appealing) 54 percent of the time, and the appellee 46 percent.

Although the available figures are much less reliable, it is possible to look at the varying emphases of Marshall's practice through the lens of the side he represented in litigation. In his real estate practice, Marshall represented the plaintiff 56 percent of the time, and the defendant 44 percent. In Marshall's commercial practice, this trend was reversed; he represented the defendant more often (60 percent of the time) than the plaintiff. Similarly, in the representation of decedent's estates, the young advocate appeared on behalf of the defendant in the majority of cases.

There was also much variety in the nature of the cases which Marshall litigated. The young lawyer immersed himself in litigation involving a wide assortment of causes of action.

Causes of Action

While Marshall's litigation practice incorporated diverse causes of action, the types of cases he engaged in before the courts of Virginia can in large part be grouped into general categories which assist in understanding this portion of his professional duties.
The largest of such groupings--amounting to over one-third of Marshall's trial practice--were those causes of action based upon a conception of one party "owing" another person: actions in debt or assumpsit, or related actions such as detinue or replevin, or--occasionally--causes sounding in trespass on the case.137 Of these, "debt" actions were the most numerous, totalling over 20 percent of John Marshall's litigation practice.138 In general, "debt" was the name of a common law action appropriate to recover a specific sum of money.139 But within the general category of debt lay cases of greatly differing characteristics. Some debt actions in Marshall's practice arose out of unforeseen situations. In the case of Johnston v. Wiatt, the defendant Wiatt had arranged to make a trip overland. Johnston, the plaintiff, requested that Wiatt purchase some goods on Johnson's behalf, and had given the defendant money with which to do so. Unluckily, during the course of his travels Wiatt's horse spooked and ran off, with the accompanying loss of the saddlebags containing the plaintiff's money. An action of debt ensued.140 Far more common were actions of debt based on written documents. Marshall's papers reveal a few cases of debt grounded on bills of exchange, but the overwhelming majority of these sorts of cases were debt suits connected to a bond executed by the defendant.141 The function of the simple bond was to secure the payment of the debt. For example, if one party lent money to another, he would require the borrower to execute a bond. The form of the bond generally obligated the borrower to pay the lender a large fixed sum if the condition contained within the bond was not satisfied (that is, unless the original debt were repaid within a specified length of time.) If the debtor did not meet his obligation, the lender could bring suit on the penal amount in the bond. Because the
borrower had signed and sealed the bond, he was precluded from denying its operation. His only recourse was to plead satisfaction of the condition [that he had repaid the debt]; this was the typical issue before the jury. The transactions underlying such bonds were various. While at times it was a mere monetary loan, at other times it was more complex. In

1784 Marshall recorded a fee "Recd. from Mr. Perfect to bring suit against Page's Exrs. on a bond to convey etc." More specific was the language of the bond underlying the debt action in the case of Smith v. Lowry. There the transaction was "one Wagon & Team consisting of four horses in Hand Delivered to the said John Lowry by the said John Smith For which the said John Lowry . . . is to give and Deliver unto the said Jn Smith . . . two male Negroes Between the age of Sixteen and Twenty five years which negroes are to be healthy Sound & Sound in Mind and Well Grown and under a Good Character."

Sometimes an action in debt was inappropriate for a case involving "owing;" for example, when the promise to pay had to be implied by law from the situation or the relationship between the parties. In such cases, the cause of action often used was labelled "assumpsit." Marshall's practice included occasional cases of this nature (approximately 7 percent of the "owing" cases). In Braxton v. Beall, for instance, the lower court judgment had been based on a plea of indebitatus assumpsit, the facts alleging that the defendant was indebted to the plaintiff in the amount of £6000, for goods sold and delivered, at the defendant's request, to a third party.

Another form of action arising in Marshall's practice which can be categorized under the general rubric of "owing" cases was that of "detinue." Detinue was the cause of action appropriate for the recovery
of personal chattels (together with damages) from one who had acquired possession of them lawfully but retained them without right. About 16 percent of the "owing" cases in Marshall's practice were in detinue. Most of these cases where the chattel was identifiable involved "Detinue for Slaves." In at least one case, however, the action was for a mare valued at thirty pounds. A similar cause of action that appeared in Marshall's law practice was "replevin." Replevin was the form of action brought to recover the possession of goods unlawfully taken. Apparent­ly, the actions of replevin and detinue were nearly interchangeable in eighteenth-century Virginia. In one of Marshall's cases the plaintiff first sued in the county court in replevin; failing there, he filed a suit in detinue in the General Court. Sometimes Marshall's activities involved what were called "replevin bonds." A replevin bond was normally executed to protect the officer who served a writ of replevin [in all probability the sheriff], as well as to indemnify the defendant if his property were wrongfully taken.

The action of "trespass on the case," or, more commonly, simply "case," was the form of action adapted to the recovery of damages arising from the wrongful act of another, and was often used when the other forms of action would not lie. In practice, an action in "case" was often interchangeable with that of assumpsit. John Marshall's annotations in such actions did not often clarify when this form of action was being utilized for "owing" cases as opposed to other sorts of wrongs. But it is clear that at least on occasion Marshall's trial practice included actions of trespass on the case in owing situations. In Tomlin v. Kelly, for instance, an action in "case" appeared "for goods sold & delivered." Often, "case" would be the chosen form of proceeding in actions that
appeared to be more contractual in nature. John Marshall argued this very point in the case of *Muir & Wiatt v. Martin Key*. This was an original action in the General Court, sounding in case. The controversy was based on a contract under seal, the plaintiff alleging that the defendant had failed to deliver tobacco. Marshall for the defendant argued that the wrong cause of action had been utilized, asserting that an action on the case would not lie when there was a contract under seal. The judges, however, allowed the case to go to the jury.\(^{156}\) Nor was this the only such instance of a blurring of the causes of action. In another action two causes between the same parties were heard on the same day. The first form of action was in debt and was dismissed. The second sounded in case, alleging damages for the wrongful breach of the contract, and was permitted to go to the jury.\(^{157}\)

Although "owing" cases accounted for the larger portion of John Marshall's litigation, a second significant category of his trial practice related to "land causes" such as actions in ejectment, suits to quiet title, caveats and other land-related controversies. In all, such land-based actions made up nearly 18 percent of Marshall's litigation practice.\(^{158}\) The most common form of proceeding in this area was a suit in ejectment. Over 50 percent of the land-related causes of Marshall's trial practice were of this nature.\(^{159}\) At common law, "ejectment" was the name of an action which lay for the recovery of the possession of land, and for damages for its unlawful detention.\(^{160}\) One of the few ejectment actions where the factual details still survive is the case of *Payne v. George*. There the plaintiff claimed "in ejectment for two Plantations . . . two Gardens and four hundred and fifty acres of Land with the appurtenances." A jury trial found for the plaintiff, and granted one penny damages. The
court then granted the land and damages to the plaintiff (but gave the defendant eight months to vacate the premises).\(^161\) A second cause relating to land which was common in John Marshall's trial practice was that of an action to "quiet title" (amounting to over 20 percent of the land-related controversies).\(^162\) This was a proceeding to establish the plaintiff's title to land by bringing into court an adverse claimant and there compelling him either to establish his claim or be forever after barred from asserting it.\(^163\) Marshall's experience with actions to quiet title in his early years at the bar came chiefly in the aftermath of the Hite v. Fairfax decision. It will be recalled that Marshall had appeared in that major case adjudicating the title to lands in Virginia's Northern Neck. The decree in that litigation had been final as regards Lord Fairfax, but the court had left the door ajar for further litigation between the Hite interests and all others holding land in the disputed area. Indeed the Court of Appeals invited such activity when its decree permitted such parties to submit their petitions for equitable relief within three months of the decision.\(^164\) John Marshall thereafter filed bills seeking to quiet title for at least ten occupants of the Northern Neck. Yet another form of action involving land has been discussed previously. Marshall spent nearly 20 percent of his time litigating land causes in the form of caveats—a kind of equitable process designed to stay the granting of a patent for land.\(^165\)

A third overarching category of causes in John Marshall's trial practice could be labelled "personal" causes; that is, those actions which involved some form of harm to the individual: assault and battery, slander, or trespass on the case. This category would also include causes requiring writs of habeas corpus. In all, these "personal" causes accounted for
another 20 percent of Marshall's litigation practice.\textsuperscript{166}

Cases involving the most immediate threat to individuals were actions of assault and battery. Marshall recorded his activity in many such cases; indeed, 40 percent of the "personal" causes he labelled as actions in "Trespass, Assault and Battery." That annotation described causes traditionally referred to as "trespass vi et armis" (trespass with force and arms)—an old common law action which lay for the recovery of damages for any injury caused by the defendant's use of direct force against the plaintiff or his property.\textsuperscript{167} Marshall's declaration on behalf of one of his clients clearly demonstrates a typical factual situation: "Edward Robertson complains of William Hobson [and others] . . . that . . . with force and Arms viz. with Sticks, Fists, Clubs Knives and Swords in and upon the said Plaintiff . . . an assault did make thrice did then and there beat, wound, bruise maime and cruelly entreat so that his life it was greatly despaired and then other enormityes to and upon him to his damage fifteen hundred pounds & he therefore sues."\textsuperscript{168}

A cause involving less of a physical threat to the individual but one nonetheless damaging to him was that of trespass on the case. This cause lay for the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied by direct force. Another 30 percent of John Marshall's "personal" causes of action sounded in "case."\textsuperscript{169} A more specific example of a personal cause was that of slander. Simply put, this action involved the speaking of false and malicious words about another. Marshall's endeavors in this area (which amounted to somewhat over 10 percent of his "personal" causes) can be demonstrated by the answer filed in the case of Kellum v. West, where the defendant "says that he is not guilty of speaking those feigned,
Finally, personal causes would include those actions labelled "habeas corpus" which refer to the familiar writ that commanded deliverance from legal confinement. Marshall recorded several instances of cases of "habeas corpus;" unfortunately, there were also several other forms of habeas corpus writs which related to such lesser activities as removing a cause from one court to another. It is impossible to ascertain in which sorts of "habeas corpus" cases Marshall engaged.

The grouping of causes of action under the general heads of "owing causes," "land causes" and "personal causes" accounts for over 70 percent of the litigation practice of John Marshall. The remainder of his trial practice consisted of more isolated types of cases, such as ones in admiralty or usury. But regardless of which cause of action a case sounded in, the litigation could not be initiated without some method of "pleading" to isolate the relevant issues involved.

**Pleading**

Suits at common law were begun by a process known as "pleading." In this process the parties to an action alternately presented written statements of their contentions, with the ultimate goal being to narrow the field of controversy until there remained a single point, affirmed on one side and denied on the other (called the "issue") upon which the parties proceeded to trial. John Marshall captured the essence of pleading in his argument in the case of *Pickett v. Claiborne*: "All pleading is founded in reason, and the object is to promote, not to prevent, the attainment of justice."
the facts and circumstances constituting his cause of action (its counterpart in equity was called a "bill"). The formalized nature of the declaration is demonstrated by Marshall's purchase of sheafs of preprinted declarations in which only the blanks needed to be filled in with specific information relating to each case. Above all else, the declaration had to be specific. In Straughan v. Lamkin, Marshall represented on appeal the plaintiff below who had won a judgment. The higher court reversed the decision, stating that "the suit was brought by summons and petition for uncertain damages pretended to be sustained by reason of a suffered breach of contract." Similarly in Byrd v. Holcombe the plaintiff had drafted a declaration in debt on a bond, but had not spelled out the penal provisions of the bond. John Marshall for the defendant argued that this was improper; the court agreed, and nonsuited the plaintiff.

The plaintiff's declaration was normally followed by the defendant's "answer." This was the pleading by which the defendant endeavored to resist the plaintiff by either denying the allegations of the declaration or by confessing them and alleging new matter which the defendant believed would prevent recovery. Of course, the defendant's defense depended upon what the plaintiff had alleged in the declaration. In the early years of John Marshall's practice there are relatively few cases in which records have survived providing information as to the matters pleaded as a defense. While the small sample makes any conclusion speculative, it is clear that the normal practice was to plead the "general issue," that is, to plead a general denial of the plaintiff's allegations. This preserved all of the defendant's options. In Marshall's practice, the defendant pleaded one form or another of general denial (its title depended
upon what cause of action the plaintiff had brought) in over 50 percent of the identifiable cases.\textsuperscript{181} In some instances (about 30 percent of the total), the plea in defense was of "conditions performed" or "payment,"\textsuperscript{182} while in a few cases the response to the plaintiff alleged that either insufficient information had been provided with which to form a rebuttal, or that the plaintiff had followed improper procedures.\textsuperscript{183}

In reviewing the pleading process it is interesting to note the high percentage of cases in John Marshall's practice that actually resulted in the joinder of issue. Over 90 percent of his cases survived beyond the pleading stage. Less than 10 percent of the defendants confessed judgment, and there is little evidence of cases going to plaintiffs on default judgments.\textsuperscript{184} Once the issue was joined, there was further activity prior to the actual trial.

**Pre-Trial Activities**

Evidence survives for at least some of John Marshall's legal initiatives prior to the commencement of trial, and serve to illuminate the nature of pre-trial proceedings. One of the first and most fundamental tasks of the trial lawyer was to ensure that the opposing party appeared on the appointed day in court. This was generally accomplished by a procedure entitled "bail." In civil actions, bail was the proceeding whereby certain third persons undertook to guarantee the attendance of the defendant. Normally these third persons, or "sureties," would execute a "bail bond," binding themselves to secure the defendant's appearance. If he should fail to appear, the bond provided that the sureties would pay the amount which the plaintiff stood to recover.\textsuperscript{185} An example of the process of "standing bail" can be found in the court papers surrounding one
of Marshall's cases, *Hindman & Co. v. Ball*. The bail bond stated "the said Burges Ball [the defendant] will pay and satisfy the Condemnation of the Court or render his body to prison in Execution for the same, or that the said William McWilliams [the surety] will do it for him." Another case demonstrates how complicated this procedure could become. *Chrisman v. Trents* was a suit against the surety, who had allegedly agreed to stand bail for the defendant in the original action. The sheriff had permitted the original defendant to depart, and the surety had refused to stand bail in his stead. In the lower court, the plaintiff had won an action against the surety. On appeal, John Marshall represented the surety and argued that the plaintiff's cause of action in reality should have been directed toward the sheriff for wrongfully releasing the defendant. The court agreed with Marshall and reversed the judgment. 186

Another method of securing the attendance of the defendant was by writ of attachment. The purpose was to take the defendant's property into legal custody, so that it might be applied on the defendant's debt to the plaintiff once it was established. If the defendant failed to appear in court, he would forfeit this security. Thus in *Haskins v. Ellyson* the sheriff was "hereby commanded [to] attach so much of the Goods and Chattels of the [defendant] as will be sufficient to satisfy and pay [the amount claimed by the plaintiff]." 187

Sometimes Marshall as attorney for the plaintiff felt that his client's cause could not afford to wait for the matter to be decided at trial. In such instances, he would apply in equity for an injunction, seeking an order restraining the defendant from continuing the activity which was injurious to his client. In *West v. King*, Marshall represented a plaintiff in a dispute over land. To prohibit the defendant from
selling the disputed parcel, Marshall prayed an injunction. Chancellor Wythe noted: "Let an injunction issue the Complainant giving bonds in the penalty of eighty pounds with such security as if excepted to, may be proved sufficient." 188

One option frequently followed was the settlement of litigation out of court. In the case of Monroe v. Johnston, the plaintiff alleged that £400 was owed him. Marshall, for the defendant, offered to confess judgment to a somewhat lesser sum, on the condition that the plaintiff grant his client twenty days in which to prove further discounts in the amount owed. The plaintiff agreed and the matter was thus settled. Sometimes such settlements would be enforced by a bond. In Brickhouse v. Brickhouse, the parties executed a bond to ensure the payment of the agreed-upon settlement. Under the terms of the bond, "whereas there is a lawsuit depending . . . between [the parties] and [the defendant] has undertaken to compromise and make up the said suit," if the defendant paid the agreed-upon amount by a certain date, the bond would be void. Otherwise the penal amount of the bond would be assessed against him. 189

When a lawyer represented the defendant, the appropriate action often was to seek the dismissal of the suit entirely. Sometimes he secured this through negotiation with the opposition, and the case would be dismissed "by the consent of the parties." At other times he would rely on the court. Willis v. White serves as an example. The court ordered that "These suits are dismissed the Pltf. not further prosecuting . . . the Deft. . . recover against the said Pltf. their costs." 190 In Lewis v. Richardson, the court went even further. The court allowed "for [plaintiff's] false clamour . . . the Defendant . . . to recover against the Plt. One hundred and fifty pounds of Tobacco for his nonsuit . . ." 191
It was at this stage also that motions could be filed before the court. For example, in one case an appeal had been dismissed by the superior court. The next day, "On the motion of the Appellants by their Attorney, and for reasons appearing to the Court, It is ordered that this Appeal be reinstated on the Docket." As will be seen, this was also the appropriate time for a motion for a continuance.

Another pre-trial activity that engaged an attorney's attention and which sought to avoid the time and expense of trial was the alternative of arbitration. In such instances the opposing sides would agree on the procedure to be followed: "The parties mutually submit all matters in difference between them relative to this suit to the final determination of [three appointed arbitrators], whose award, or the award of any two of them, is to be made the Judgment of the Court." Another pre-trial activity that engaged an attorney's attention and which sought to avoid the time and expense of trial was the alternative of arbitration. In such instances the opposing sides would agree on the procedure to be followed: "The parties mutually submit all matters in difference between them relative to this suit to the final determination of [three appointed arbitrators], whose award, or the award of any two of them, is to be made the Judgment of the Court."193

Occasionally the time before trial was utilized to secure the testimony of key witnesses who might be unavailable at the actual trial. Typical was the case of Cotteral v. Jordan, in which the defendant sought leave to take a deposition de bene esse of "an aged and infirm witness." The court granted the request, provided proper notice was given to the plaintiff.194

Last but not least, many of an attorney's endeavors in the time before trial were directed toward seeking more time before trial. Continuances were a fact of life in eighteenth-century litigation. Such delays in litigation could be at the behest of either party. In Goodloe v. Brock, "on the motion of the defts. by their attornies these suits are continued until April Court next at the Costs of the Defendants." When the case came up the next year, both sides sought delay: "by consent of the parties this suit is continued till April Court next."195 Relatively few
court records of Marshall's cases survive to permit analysis of delay in litigation. Those that do are revealing. In those cases where continuances can be discerned, half were continued five or more times. Of course this meant that it took a significant amount of time to complete an action. Looking to the length of time it took to conduct a lawsuit in Marshall's early practice (from the filing of the declaration to final adjudication), one finds an average span of four and one-half years. Marshall--perhaps unwittingly--made a fitting commentary on the impact of lawyers in a letter to one of his clients: "The defendants have employed a lawyer to keep off judgement so that it will be a considerable time before judgements can be obtained."

Eventually, most cases came to actual trial, whereupon John Marshall and his fellow members of the bar endeavored to try the issue that had been formulated at the pleading stage.

**Before the Bar**

The nature of court reporting in the early years of John Marshall's legal practice places severe constraints on analysis of courtroom activity. Few descriptions of actual trials exist, and those that do focus upon the legal arguments put forward by the lawyers rather than on the more mundane aspects of litigation. This is particularly true of Marshall's practice during this period. Most of his cases were before the bar of the General Court. Our knowledge of his activity there derives chiefly from the reports of one astute observer who was predominantly interested in detailing the twists and turns of the law (St. George Tucker). Nevertheless the existing documentation does provide some glimpse of Marshall in action in the courtroom.
Before turning to Marshall's presentation of his clients' cases, it should be noted that he did not always work alone. In many cases Marshall worked in close collaboration with other attorneys. In those cases where such information is discernible, Marshall was the sole counsel nearly 90 percent of the time. But this figure is slightly misleading. When the case was an original cause of action, he indeed was highly likely to work alone. However, when cases were on appeal, John Marshall acted as a co-counsel nearly 40 percent of the time. For example, in *Bates v. Fuquay*, a case on appeal to the General Court, Marshall worked closely with co-counsel John Taylor. In their presentation, Marshall was responsible for arguing a procedural issue concerning the validity of a stipulation agreed to in the court below, while his co-counsel addressed the substantive issue of the entailment of slaves. The lawyers with whom Marshall collaborated represented some of the greatest names of the Virginia bar: Charles Lee, Edmund Randolph, Jerman Baker, John Taylor, and Paul Carrington, to name a few. Even when Marshall represented his clients' interests without assistance in the courtroom, he often worked closely with other attorneys. When cases were on appeal, the cause in the lower court had generally been handled by a lawyer practising at the county court level. The records reveal that Marshall received cases from such lesser lights as Griffin Stith of the Northampton County Court and Gabriel Jones in Staunton. In at least one instance, Marshall took over the existing practice of a prominent attorney. When Edmund Randolph was elected governor of Virginia in 1786, he ran a notice in the Richmond newspaper stating that because being governor was incompatible with practising law, "I beg leave to inform my clients that John Marshall, Esq., will succeed to my business in general." And it also worked in
the other direction. Marshall transferred more than one-third of the cases which he had begun in his first eight years of practise to other lawyers (chiefly because he chose not to practice in most district courts after the 1788 reorganization). Predictably, many of the recipients of this largess were familiar. When the case of Stringer v. Burton's exrs. was transferred from the General Court to the Accomack District Court, the lawyer Marshall chose to handle the litigation was Griffin Stith.

Whether acting as sole counsel or joining with other attorneys on behalf of a client's cause, the legal arguments that John Marshall presented before the courts of Virginia were highly diverse. At times, Marshall's rhetoric was directed toward principles of substantive law. In the case of Bailey v. Morris' Estate, for example, a declaration in detinue stated that the executor "detains" slaves but did not allege "possession" of them. Marshall argued that for a cause in detinue to succeed, the plaintiff had to allege "possession." The court agreed. In another case, Marshall addressed his attention to partnership law, asserting that one partner could bind another by his actions (the court disagreed). Yet another case found Marshall arguing a technical legal point concerning the passing of a reversion to slaves by a residuary clause in a will.

If the occasion warranted, John Marshall could also turn procedural technicalities to his clients' advantage. Rice v. Jones involved a will contest that had been resolved in the North Carolina courts, although the lands at issue were in Virginia. Marshall argued for the jurisdiction of the Virginia courts over the matter, and won. In Dandridge's Exrs. v. Allen, he represented on appeal the defendant below who had lost a judgment in detinue for two slaves. On appeal, Marshall argued that the
special verdict was not precise enough. He won; the decision was reversed and a new trial ordered. In a case Marshall had inherited from Edmund Randolph, the key issue was the admission of testimony by a witness to an assault case. The young lawyer maintained that the witness was an interested party since the defendants had made him promise to pay part of the damages if a lawsuit resulted from the incident. Again, the court agreed with Marshall's argument.

A question of some interest is the extent to which Marshall cited legal authority—both British and American—in the course of his arguments before the courts. Positive conclusions concerning Marshall's reliance upon legal authorities to buttress his arguments at trial are not possible. The uneven nature of the surviving documentation of his early litigation practice, together with the deficiencies in the reports of these cases, preclude rigorous analysis. What can be ascertained, however, is that Marshall did commonly rely on such authorities in his presentations before the bar of the Virginia courts. Of the cases which permit this sort of analysis, it appears that he cited some form of legal authority nearly 50 percent of the time. By far the largest number of citations by the young lawyer pertained to English case law. Marshall cited English cases which had been handed down as early as 1607, and as recently as 1781. Moreover, the range of courts quoted was impressive. By far the most cited court was that of King's (or Queen's) Bench. But Marshall also relied on cases from Chancery, the Exchequer Chamber, Common Pleas and Nisi Prius. In addition to formal court cases, he also drew on orders of the Privy Council and even grants by the Crown. Other sources of legal ammunition were the major English treatises on the law: Blackstone, Coke on Littleton, Bacon's Abridgment, and Swinburne on
Wills. Marshall even cited in one case Christopher Saint German's dialogue between Doctor and Student. 214

Neither was it uncommon for an attorney to have to come to grips with Virginia authority in the course of his trial practice. In Keisel v. Donnally, for example, the issue on appeal from the Augusta County Court to the General Court was whether a Virginia law allowing sureties to recover damages was applicable in that case. 215 In one interesting case Marshall was directly involved in the construction of Virginia statutes. Hannah v. Davis was an action before the General Court by descendants of an Indian named Bess. A special verdict of the jury had determined that Bess had been held as a slave, and the matter at issue involved the status of Bess's descendants. Marshall argued that a 1682 law making most Indian servants slaves had been superceded by a 1705 act stating that tributary Indians should be treated "as if . . . an Englishman." The court agreed. 216 In at least one instance, Marshall convinced the court to depart from English practice and to establish its own rule. In Robertson's Will, a case heard before the General Court, Marshall argued for the validity of a will that the testator had neither written in his own hand nor signed (although he had assented to it). The English rule was that such a will was invalid. But the court followed Marshall's reasoning and held the will enforceable. 217

While John Marshall unquestionably utilized legal authorities to strengthen his arguments, the portrait would not be complete without noting that the young advocate did not always rely on his own research. Marshall often looked to other attorneys in this respect. Nowhere was this tendency clearer than when St. George Tucker noted in his summary of a case, "Marshall advocated the will, & relied wholly on the Authorities adduced by Carrington." 218
Having presented the case before the judge or jury, Marshall's next legal hurdle was to enforce the judgment, if in favor of his client, or, if unfavorable, to consider the possibility of further legal action.

Judgment and Beyond

The termination of the trial phase of litigation was the "judgment" of the court: the official determination of the respective rights and claims of the parties. But there were various routes to this final determination. If the action had been tried before a jury, the judgment would be based upon the jury verdict. Otherwise the justices of the court formulated the final decision. In all of John Marshall's trial practice, he litigated approximately one-third of his cases before a jury; the remainder of his trial advocacy he directed solely to the bench. Most cases argued before the judges resulted in a clear outcome: over 90 percent of all cases decided by the judiciary were unanimous decisions. When a jury was involved, the verdict was usually of a general nature: "The defendants have not paid the debt in the declaration mentioned amounting to four hundred pounds Pennsylvania money of the value of three hundred and twenty pounds current money of Virginia . . ." But sometimes the jury had a more limited function. In Stringer v. Burton's Exrs., the attorneys removed from the jurisdiction of the jury the finding of certain facts: the lawyers "agreed and stated the following facts in lieu of a verdict of a Jury therein . . ." The heart of the case was the proper construction of Virginia statutes, a matter within the province of the justices. Once the General Court had construed the laws, the "jury was ordered to assess the value of the slaves" at issue in the case. Often the jury was asked to formulate a "special verdict"--the
specific finding of the facts of a case by a jury, leaving to the court the application of the law to the facts thus found. In Tomlin v. Kelly the jury found as follows: "we find for the plaintiff £100:9:6 1/2 damages if the court shall be of the opinion, that an action can be maintained . . . otherwise we find for the defendant." In turn, the court intoned: "This day came the parties by their attorneys, and thereupon the matters of Law arising upon the Special Verdict in this cause being argued it seems to the Court that the Law is for the Defendants." The court proceeded to award judgment for the defendant.

Whether the final outcome rested upon a jury verdict or not, the judgment had certain distinguishing characteristics. For example, it was often closely related to the plaintiff's original demand. In over two-thirds of Marshall's cases, the ultimate award matched the amount sought by the plaintiff in his declaration. However, in one quarter of the cases, the judgment was for less than the original demand. Surprisingly, in two instances judgment was for more than the plaintiff's original request. Moreover, most judgments granted awards in the prevailing monetary units of the time: pounds, shillings and pence. Usually the award was in "current money," but there were instances of judgments stipulating payment in "specie" or "sterling." Occasionally the amount granted would be stated in terms of another monetary unit of the time, tobacco. Of course, if the litigation concerned land the award might be in "acres."

Normally, the judgment was recorded in a standard format prescribed by statute. When suit had been upon a bond, for example, the judgment was rendered on the penal amount of the bond--usually double the amount of the
defendant's actual obligation to the plaintiff, plus interest. However, the judgment contained a provision permitting the defendant to escape this penalty. Typical language would be "... but this Judgment is to be discharged by the payment of [one-half of the penal amount] with Interest thereon to be computed after the rates of five percentum per annum [from the date of the disputed transaction] until paid and the damages and Costs."228

The addition of interest, costs and damages to the award was commonplace. The going rate of interest was five percent, usually charged from the date of wrongdoing (not the date of the judgment). In addition, when the plaintiff failed to prevail he was often socked with the costs of the litigation. It was standard for a plaintiff to pay such expenses when he did not prosecute his action. In Henderson v. Brooke, the plaintiff failed to appear after the jury had been impanelled, so the court ordered judgment for the defendant. The court added "that the Defendant ... recover against the said Plaintiff five shillings for his non suit ... ."229 Similarly, in Lewis v. Richardson the court nonsuited the plaintiff, ordering him to pay the defendant 150 pounds of tobacco and costs.230 Even when the case went to trial, the plaintiff was in danger of incurring such a penalty. In the case of Glascock v. Dowdall, after the jury found the defendant not guilty in an action of trespass on the case, the court stated: "Therefore it is considered by the Court that the Plaintiff take nothing by his Bill, but for his false clamour ... the Defendant ... recover against the said Plaintiff his Costs by him about his defense in that behalf expended."231 But it was not always the plaintiff who bore the costs of litigation; defendants were assessed costs in nearly 20 percent of the actions (in one instance the burden was
divided equally: "The parties to bear the cost"). When a defendant lost, damages were sometimes assessed in addition to the recovery, interest and costs. Usually these were nominal—damages of "one penny"—apparently to demonstrate that the defendant had truly been in the wrong. Normally, court costs were a combination of currency and tobacco: "50 shillings, or 500 lbs. of tob[acco]." Sometimes, special assessments would supplement the standard court costs. In Kuhn v. Hoomes, the losing party also paid "witnesses attendance 6126 lbs tob & 3[shillings]" and "execution 23 lbs tob." At least at times it appears that John Marshall as attorney acted as a receiver for the costs assessed. His account book lists such receipts as five pounds "From Parsons fees taxed [in a suit against] Johnstons Exrs."

A clear pattern emerges when one looks at the judgments awarded in Marshall's litigation practice. Over his first eight years of trial work, the plaintiff won judgment approximately two-thirds of the time. Recalling the earlier discussion of the types of actions in Marshall's practice, this is not surprising. Many "debt" suits, for example, were based upon bonds executed by the defendant, which in effect admitted the obligation. Thus it was not unexpected that the plaintiff won the overwhelming majority of these cases--over 92 percent. Many other causes of actions had similar ratios.

Having won a judgment, however, did not assure a plaintiff satisfaction. He had to secure its "execution," that is, its implementation. Marshall's practice illustrates several ways in which this could be accomplished. If a judgment debtor proved recalcitrant, the normal procedure was for the plaintiff's attorney to secure a writ of execution from the court. In one of Marshall's cases, after the plaintiff had won an
ejectment action, the court specified that "a writ of habere facias Possessionem [rough translation: to make to have possession] is awarded to cause [the plaintiff] to have possession." A more common method was by writ of fieri facias. This was a judicial order to the sheriff commanding him to levy the amount of the judgment from the goods and chattels of the judgment debtor. Marshall's records reveal that he played an active role in this phase of the litigation process. Besides several notations referring to actions in "attachment," he noted at one point that "I have in my hands on the [execution against] Goode [£] 42-5 & the amount of the [execution] v. Wood." Marshall further noted of these executions that they were "both paid off."

The losing party also was not without remedy. For instance, he could delay execution on a judgment for a term by giving a "forthcoming" or "replevy" bond. This protected the property of the judgment debtor from execution by assuring that the property would be forthcoming when required. The most immediate substantive legal tool available to a party facing execution of a judgment was the injunction. This was a writ issued by a court of equity prohibiting the plaintiff from going forward, and could only be utilized if execution of the judgment would be unjust or inequitable. John Marshall's trial practice provides examples of this sort of situation. In Overstreet v. Randolph, Marshall's client, Overstreet, had contracted to pay Randolph £300 for a slave. The seller, Randolph, had acted so unfairly in this transaction that under normal circumstances Overstreet would have been discharged from his obligation to pay. But Randolph had assigned (transferred the contract to a good-faith purchaser (one who knew nothing of Randolph's fraud), who secured a judgment against Overstreet for failing to pay the contractual amount.
Marshall, on behalf of Overstreet, sought an injunction to stay the execution of this judgment (the court ultimately refused to grant the injunction). Barrett v. Floyd presented a more complicated situation. In that case a British merchant ship had stranded and sprung a leak in the Chesapeake. Floyd had boarded her and begun to salvage the cargo. Barrett also appeared, and the two decided to work together. They agreed that if the ship were thereafter determined to be a "prize" under admiralty law, Barrett would get a specified percentage of what was salvaged. If it were not constituted a prize, Barrett should get only whatever he carried off the ship. Most of the cargo was thus saved. The ship was subsequently declared a prize, and Barrett was awarded the agreed-upon percentage. But this did not please him, since as it turned out he had carried off more than the agreed percentage of the cargo. To improve his lot, Barrett instituted a suit at law in the county court and obtained a judgment against Floyd. When Barrett sought execution of this judgment, Floyd obtained an injunction in the High Court of Chancery. Marshall's records contain several references to his participation in "injunction" actions (twenty-nine instances are noted); and, while it is impossible to assume that all were post-judgment situations, these would appear to have been the most common use of that writ.

Of course either side also had the option of taking an appeal from the decision of the trial court. When a party chose this course, there appeared to be a fairly standard procedure which was followed. As an adjunct to the appeal, Marshall would often seek a writ of supersedeas. This, in effect, prohibited the court below from issuing an execution on the judgment. Meanwhile, the appellant also would execute an "appeal bond," an obligation guaranteeing the winning party below satisfaction of
his judgment if the appeal failed. When the appeal came before the higher court, a typical entry in the court records would relate that "This day came the parties by their Counsel and this cause was heard upon the transcript of the record, sundry exhibits now produced and the arguments of Counsel on both sides . . . ." The appellate court would proceed to render final judgment in the matter.

We have now peeked over John Marshall's shoulder and glimpsed him at work in his law practice, both in his office and in the courtroom. But the life of a young lawyer establishing a practice in Virginia's capital city inevitably engulfed Marshall in other activities related to his law practice, but not of it. To these we now turn.
CHAPTER FOUR

RELATED ACTIVITIES

John Marshall spent the major portion of his early professional life performing legal duties for a growing clientele. But the very nature of being a lawyer in late eighteenth-century Virginia forced upon him activities which were not inherently within the scope of a law practice. The most obvious of these tangential duties sprang from Marshall's relationship with his clients. Individuals accustomed to relying upon the young lawyer for legal advice and representation quite naturally also turned to him for assistance in handling other aspects of their lives. Moreover, the prominence resulting from a successful law practice in the state capital almost inevitably threw John Marshall into the political arena. Finally, Marshall's familiarity with the local business climate and the real estate market led him to a role as businessman and speculator.

Assisting Clients

John Marshall's legal clients relied upon him for a number of non-legal tasks. One of the most visible of these was his role as a sort of "land agent." Marshall became deeply involved in assisting individuals in their rush to secure land in the western, "Kentucky" regions of Virginia. At times his assistance was no more than ensuring that his former comrades-in-arms received the land bounty certificates.
that were their due. There are numerous examples of Marshall attesting that a former soldier had served under him during the Revolution. At other times Marshall handled the entire real estate transaction for his client, as when Charles Tyler of Prince William County granted the young lawyer a power of attorney to dispose of Tyler's Kentucky land. We have seen how Marshall acted as an intermediary between his surveyor father and a land claimant. Perhaps most representative of his role as "land agent" was the assistance he provided James Monroe in 1784. In January Marshall promised Monroe that he would seek out the Speaker of the House of Delegates, John Tyler, in an effort to expedite Monroe's land bounty certificate. In February Marshall noted that things were moving apace, informing his client that "four Dollars were expended on your Land warrant which is now in the hands of the Surveyor." By December, Monroe was seeking his attorney's advice on the disposition of his western lands. Marshall responded: "I do not know what to say to your scheme of selling out. If you can execute it you will have made a very capital sum, if you can retain your lands you will be poor during life unless you remove to the western country but you will have secured for posterity an immense fortune. I should prefer the selling business & if you adopt it I think you have fixed on a very proper price."

In addition to his efforts as a land agent, Marshall also acted as business agent and financial manager for many of his clients. It was not uncommon for the advocate to serve as a purchasing agent. In 1787 Marshall purchased "one negro wench named Dicey with her child" from John B. Johnson for seventy pounds, then immediately transferred his acquisition to his client: "For the within mentioned sum of seventy pounds
The young lawyer acted similarly as intermediary between William Heth and several Richmond mercantile firms with respect to the purchasing power of Heth's tobacco. Marshall proved himself to be a tough negotiator in the interests of his clients. While James Monroe attended Congress in Annapolis his creditors began to get restive. Marshall wrote Monroe: "I am pressed warmly by Ege for money & your old LandLady Mrs. Shera begins now to be a little clamorous. I shall be obliged I apprehend to negotiate your warrants at last at a discount." But a month later Marshall was ecstatic. "I have been maneuvering amazingly to turn your warrants into cash. If I succeed I shall think myself a first rate speculator." Marshall's business acumen is suggested by a marginal note in the same letter: "The ten shillings added to the £100 is the discount on the negotiation of the bill I have insisted on your being allowed for." The extent to which Marshall immersed himself in the business affairs of his clients is evidenced by a remarkable letter to Arthur Lee. The lawyer begins the correspondence by noting that "of the tobacco you left in my hands I have sold eight Hoxheads . . ." Most of the rest of the letter Marshall devoted to explaining why he sold the tobacco one shilling under the market price. In the process, he demonstrated his business abilities. "It is my hope & opinion that Tobacco is rising in its price," Marshall wrote, "but as your tobacco pays a monthly tax in consequence of its age, loses in its weight, & is entirely at your own risk, I thought it not safe to hazard the passing away of the present market." Marshall went on to explain why he had sold under market. He reasoned that the age of Lee's tobacco "obliged me too to be content with 35 [shillings] for your tobacco at a
time when the current price for your commodity (where the notes are new) was 36 shillings." Moreover, Marshall feared the recurrence of a recent example of price fixing by tobacco buyers which the lawyer said "was occasioned by a combination among the Merchants & such combinations may again take place."  

Marshall also acted as a fiscal agent on behalf of his clients. He often functioned as a banker, receiving large amounts of money which he credited to his clients' accounts. In December 1784, for instance, Marshall "Received for Broadhead on interest [and military] warrants a total of over 1200 pounds." The young "banker" also provided advice as to the market value of warrants, so that clients could determine when to liquidate their holdings. Marshall wrote to William Heth: "Pryor, the other day wished to purchase a fine horse from Colo. T. M. Randolph, his price was £100 in cash payable in six months or £130 in Military certificates. I tell you this that you may attend to the disposal of yours." The lawyer-fiscal consultant even went so far as to lend money to his clients. His account book contains several references such as "From Mr. Nelson for money lent him . . .," and "James Alexander . . . repaid me . . .." The banker's role played by the young advocate extended to disbursing funds from his clients' "account." Marshall wrote Monroe: "Let me assure you that I will punctually comply with every requisition you may make on pecuniary subjects or any other within my reach."  

Another time he wrote the same client that "Banks has applied to me for a considerable sum on your account but I presume your letter to him was on that subject. I hurry every applicant as well as possible." Similarly, Marshall once directed an acquaintance to "Give my compliments to Colo. Mercer & let
him know that there now lies in the Treasury for him £100 of which I will give immediate information to his brother in Fredericksburg."\(^{262}\)

Marshall's services to his clients did not stop at business and financial dealings. Many seeking special favors or privileges turned to him as a conduit to the centers of power. Marshall apparently had the ear of the governor. In a letter to John Alexander, Marshall mentioned that he would speak to Governor Randolph "about the amendment to your bill."\(^{263}\) Similarly, the advocate intervened with the governor on behalf of James Wilkinson when the latter sought a passport for safe passage down the Mississippi River. But it was not to be. "It is with a great deal of mortification I tell you that I have failed in obtaining the passport I applied for," admitted Marshall, "... the Governor ... told me to-day that to grant the passport as an official act was entirely improper because it could only extend to the limits of Virginia. ... I am much chagrined at my disappointment."\(^{264}\) Marshall sometimes advanced the causes of those seeking appointment to public office. In 1785 he promised to place George Muter's name in nomination for a judgeship in Kentucky, if circumstances permitted.\(^{265}\) At other times Marshall discouraged such entreaties. When William Heth sought a preferred appointment from the Council of State, his lawyer advised against such course, stating "I shall not therefore mention this matter to Monroe or Lawson unless you wish me to do so."\(^{266}\) Marshall also petitioned the Virginia General Assembly in the interests of certain clients. For example, in November 1787 he drafted a petition on behalf of John Kelly, whose house had been occupied by Virginia troops during the war. The lawyer alleged that "While they were in possession of the said house they burnt it down. Your petitioner prays that the
honble. the genl. assembly may take his case into consideration & grant him relief . . . "267

It was not a coincidence that John Marshall's clients saw in him the possibility of gaining favor within the circles of power. During his early years at the bar young Marshall was closely connected to the ruling elite of the Commonwealth. This was in large part due to his political actions, which in turn were an outgrowth of his legal practice.

Political Activities

No lawyer of prominence could avoid becoming deeply involved in politics, and John Marshall was no exception. He was elected or appointed to numerous public positions during his time at the Richmond bar. For a brief time—from late 1782 until the spring of 1784—Marshall was a member of the governor's executive council, the Council of State. In that role he served as advisor and counsellor to the governor. In February 1783, for instance, the Council considered a complaint to the governor that a magistrate for New Kent County was unfit and should be removed. Marshall and his fellow counsellors decided that the law permitting the governor to look into the actions of magistrates was "repugnant to the Act of Government, contrary to the fundamental principles of our constitution and directly opposite to the general tenor of our Laws."268 On another occasion Marshall and James Monroe served as a kind of subcommittee to examine the progress made in the settlement of accounts against the continental government. The two were not pleased with what they found. "Upon enquiry & examination . . . we
have reason to suspect great abuses have taken place and very dishonourable misapplications of the public money; We therefore take the Liberty to suggest to your Excellency & the Council the propriety of making some pointed exertion to call those who have been thus employ'd and entrusted with the public property in every line to an immediate Settlement." But all did not go well with the young lawyer's venture into the top echelon of government. The local judiciary sought his resignation, apparently because by continuing his law practice Marshall threatened their independence in deciding a case where one of the lawyers was a formal advisor to the governor. Marshall eventually succumbed to this pressure, writing James Monroe in April 1784 that "I am no longer a member of the Executive, the opinion of the Judges with respect to a Counsellors standing at the bar determined me to retire from the Council board." He elaborated in a letter to Arthur Lee that "the uncertainty of, together with the disagreeable circumstances attending publick office have induced me to resign my seat in the Executive & I am now standing at the General Court bar."

Marshall had begun his political career in the House of Delegates. He had completed his legal studies and left the army by 1781, but he found no legal business to pursue (most of the courts were closed due to the British invasion). Consequently, he engaged in politics. He ran for a seat in the legislature from Fauquier County, and won. The House did not pay very well (ten shillings a day), but at least it paid something, and at any rate it was an important step for an ambitious young lawyer. Marshall first took the oath of office in May 1782, and he remained a member of the House for most of the early years of his law practice (from 1782-1784 he was a delegate from Fauquier; after
1786, from Henrico County [Richmond]). Marshall apparently was a
diligent member of the legislature. Pay vouchers for the sessions of
1782 and 1784 reveal that the young legislator averaged over one hundred
days a year in attendance. He was immediately appointed to the
important Committee for Courts of Justice, and in later sessions was
also a member of the standing committees on Propositions and Grievances,
and Privileges and Elections.

The duties and services Marshall performed while in the legislature
were varied. Predictably, he was active in drafting bills. As early as
1782 Marshall assisted in the drafting of a bill which made it easier
for persons to enter "vacant" lands. Most of his other drafting
efforts involved changes to the commonwealth's court system. In 1784 he
authored a bill designed to counteract the improper granting of
certificates by county courts. In 1786 a proposal written by Marshall
(although he was not a member of the legislature at the time) would have
restructured the General Court's criminal jurisdiction, while in 1788 he
drafted a bill which permitted lawyers to practice in both inferior and
superior courts. Marshall also participated actively in the work
of legislative committees. In addition to his regular committee duties,
the leadership entrusted him with special assignments. In his first
session, the young legislator was appointed to a committee to examine
the statutes of Virginia with an eye toward recodification. In 1784 he
joined Spencer Roane on a committee preparing a bill to revise the
county court system. Marshall also participated on several
important legislative commissions. For example, when Virginia had ceded
the Northwest Territory to the federal government, it had been agreed
that certain of the state's expenses would be reimbursed. But the first settlement offer was considered by most Virginians to be far too low. Marshall was appointed to a commission to investigate the matter. The report of Marshall's group was strident: "... unless Congress will ... reimburse Virginia the amount of which she has actually and bona fide, expended and paid for the conquest and protection of the ceded North Western Territory, [we recommend that Virginia] withhold all monies on the requisitions of Congress, until such amount shall have been reimbursed ..." 278

Nor was John Marshall's career limited to political positions at the state level; he held places of importance at the local level as well. In July 1785, the Richmond voters chose him to fill a seat on the city's governing body, the Common Hall. The duties of the Common Hall were mainly legislative in character, and it is clear from the minutes of that body that Marshall's participation in its deliberations was active and regular. 279 At the organizational meeting of his first term on the Common Hall, Marshall was also chosen to be the Recorder for the city of Richmond. This was akin to being the "city attorney;" in addition to keeping records, he was expected to prosecute actions on behalf of the city. 280 The office of Recorder gave Marshall the status of "magistrate" and empowered him to take oaths. For example, in 1787 the Recorder affirmed that a Nathaniel Wilkinson had appeared before him and sworn that he had received no money while he was commander of the Henrico County militia. 281 As Recorder, Marshall was also expected to participate in the activities of the other governing body of the city, the Hustings Court. The Hustings Court was somewhat comparable to a county court, exercising authority over many criminal
and civil matters arising within the limits of the city of Richmond.\textsuperscript{282} An example of the type of case which came before the Hustings Court was that of the Commonwealth v. Garrett and Johnson. This was an arraignment of two defendants charged with "Burglary and felony, in breaking and entering the dwelling house of John Tisdall.\textsuperscript{.}" The Hustings Court decided to remand the defendants to the next session of the General Court; in the meantime, they were consigned to jail.\textsuperscript{283}

John Marshall's active involvement in law and politics did not occupy so much of his time as to preclude business enterprises in his own behalf. Indeed, the young professional's law practice uniquely situated him to speculate in western lands.

### Land Speculation

John Marshall was particularly well situated to take advantage of the opportunities presented by Kentucky land speculation. The same circumstances which caused real estate to loom large in his law practice gave Marshall an edge in securing investment property for himself. His residence at Richmond facilitated access to the Virginia land office, as well as serving as a central point for the purchase of treasury warrants from Virginia residents who wished to assign them to him. At the same time, his father's position as surveyor of Fayette County (Kentucky) provided him with accurate information concerning available lands.\textsuperscript{284}

Marshall acquired most of his holdings in two ways. The first was through military warrants issued to him as a veteran of the Revolutionary War. In 1782, for example, he received "four thousand Acres of
Land, due unto the said John Marshall in consideration of his Services for three Years as Captain in the army . . ." The second method of obtaining western lands was by the purchase of "treasury warrants" (warrants issued by the state treasury upon payment of a certain sum for the acquisition of acreage). Marshall's records contain several documents illustrating the procedure followed. Normally, Marshall obtained land warrants either in his own name from the land office or by assignment from a purchaser. The warrant was then sent to his father in Kentucky, who would enter the acreage in his son's name and arrange for a survey. After the land had been surveyed (and if all was in order), the land offices would issue a "grant" confirming Marshall's ownership. In all, John Marshall obtained grants to over 40,000 acres in the Kentucky lands. Moreover, he assisted family members in obtaining another 10,000 acres of the western lands. In addition to acquiring land, Marshall also may have realized some monetary income from his land warrants. The lawyer recorded frequent receipts in his account book indicating income "by my warrants," totalling over six hundred pounds during the period studied. These entries are somewhat puzzling, but they may represent the sale of land warrants.

Not all of Marshall's real estate acquisitions were for purposes of speculation. In 1785 Marshall's father deeded his son the family plantation of Oak Hill in Fauquier County. Two years later, young Marshall purchased another 268 acres in the vicinity. The aspiring professional also acquired in 1785 "Lot 480" on fashionable "Shockoe Hill" in Richmond. This was eventually to become the site of his home and office.
The acquisition of a lot on which to permanently locate brings up yet another facet of Marshall's life which served as an adjunct to his professional career: his active participation in Richmond community affairs.

**Community Activities**

The prominence which John Marshall attained as a result of his successful career in business, law and politics naturally drew him into the vortex of community activity. He was continually investing in worthwhile causes. One popular endeavor was the effort to improve the navigation of Virginia's rivers into the interior of the state. Marshall was a subscriber to both the James River Company and the "Potowmac River Co.," investing nearly one hundred pounds in those ventures. He also contributed to the Library Society, the Episcopal church, the local chapter of the Masonic temple, and a Richmond political club.

After a fire levelled most of Richmond in 1787 (Marshall contributed £21 to "sufferers by fire"), the attorney joined forty-three other citizens as founding members of a fire company, because of "the present defenceless situation of the City, and our total inability to provide against Accidents by fire." He was also a charter member of the Virginia Constitutional Society, an organization "for the purpose of preserving & handing down to posterity those pure and sacred principles of liberty . . . by givings free and frequent information to the mass of the people" (the members were expected to submit an appropriate essay every six months). An indication of the esteem in which the community held John Marshall as a result of such activities is shown by his nomination as an officer in the militia. Marshall earned the
commission due to the "special trust and confidence, which is reposed in your fidelity, courage, activity, and good conduct."\(^{294}\)

John Marshall's attention was not always riveted upon uplifting civic matters. He also maintained—and evidently enjoyed—an active social life within his community. Being a prominent lawyer, an active politician and a gregarious person, Marshall joined in many of the social activities of Richmond. One of the highlights of the social season was the series of "Assemblies," or balls, held every two weeks in the winter and supported by subscriptions. Marshall's account book records his regular contribution to these affairs and he apparently got his money's worth. He reported, "I have been setting up all night at an Assembly. We have them in Richmond regularly once a fortnight. The last was a brilliant one . . . Never did I see such a collection of handsome Ladies. I do not believe that Versailles or saint James ever displayed so much beauty."\(^{295}\) Marshall also actively participated in several "clubs," such as a social club at Formicola's tavern and a group which met occasionally to enjoy a "barbacue."\(^{296}\) Marshall clearly enjoyed activities relating to drinking and gambling. He was a regular subscriber to the "Jockie club," which sponsored horse races in May and October. At one May meeting he noted that he "lost at race [thirty-four shillings]."\(^{297}\) Marshall wagered extensively, and kept a record of his gambling gains and losses. On the debit side, the young lawyer recorded such setbacks as "lost at whist, £19;" "lost at backgammon, £6;" "raffling, 28 [shillings];" and "lost at billiards, £3." In all, Marshall listed gambling losses of over seventy pounds, and winnings of only twenty-three pounds.\(^ {298}\) In addition, the consumption of spirits was an obvious part of the young attorney's social life. Several
account book entries refer to evenings spent in the Richmond taverns, such as the twenty-three shillings Marshall recorded he "spent at Trowers." He also kept an ample domestic supply. In the years studied, Marshall expended over one hundred pounds on purchases of wine, rum, punch, gin and beer.

Marshall clearly delighted in the social swirl of Richmond. In February of 1784 he wrote James Monroe that "the excessive cold weather has operated like magic on our youth. They feel the necessity of artificial heat, & quite wearied with lying alone, all are treading the broad road to Matrimony." Marshall often urged others to do the same. He once wrote George Muter: "I suppose you have before this collected all the comfortable things of this world except one to share them with you. How do you feel on that subject? Are you not beginning to think tis time to take up consideration of that subject?"

Marshall had a humorous way of alluding to such delicate topics. He told William Pierce that "You are in a Country where your gallantry may be serviceable in peace as in war. I know your skill in maneuvering under the banners of Venus & I doubt not but several hearts can testify your success." Marshall entertained Monroe with a hilarious description of a local courtship. "Tabby Eppes has grown quite fat and buxom, her charms are renovated & to see her & to love her are now synonimous. She has within these six weeks seen in her train at least a score of Military & civil characters . . . [which] have alternately bowed before her & been discarded. Carrington tis said has drawn off his forces in order to refresh them & has marched up to Cumberland where he will in all human probability be reinforced with the dignified character of Legislator. Webb has returnd to the charge & many think
from their similitude of manners and appetites that they were certainly designd for each other."

From his efforts at establishing a law office, through the hurly-burly of a successful legal practice, to his associated rise as a vibrant member of his community, we have followed young Marshall. What remains is to attempt some assessment of John Marshall's abilities as a lawyer.
Any attempt to assess the professional capabilities of an attorney such as John Marshall is fraught with peril. The initial stumbling block is also the largest: if Marshall was indeed a "good lawyer"—compared to whom and by what criteria? A truly adequate evaluation would require in-depth analyses of other "leading" lawyers of the Richmond bar in the 1780s, thus placing the activities of John Marshall in proper context. Since this is far beyond the scope of this study, what is left is an impressionistic view, albeit one based on bits of solid information. For example, the growth of Marshall's practice can be clearly documented, as can his success rate in the cases he litigated. Moreover, there exist some actions by contemporaries that suggest his standing in the legal community. Beyond that, however, one is left only the subjective impressions, however strong, which stem from intimate familiarity with the source material. Nonetheless, the effort is worthwhile, if only because the study of Marshall's law practice has so rarely been approached in a systematic manner. Any conclusions based upon such analysis represent an advance over previous writings.

The most objective of the approaches to the analysis of Marshall's abilities is provided by a study of the growth of his law practice in the years 1780-1788. Because such an analysis depends upon the growth
of Marshall's income as well as his caseload, there is need, first, of a brief excursion into the nature of legal fees in the practice of John Marshall.

**Legal Fees**

The overriding reality of legal fees in the early years of Marshall's practice was the fact that they were fixed by law. The General Assembly in 1782 had revived a 1761 law which set statutory limits on the fees lawyers could charge for various services. The statute established a ceiling of fifty shillings (£2-10) on "any suit at common-law," and five pounds "in all chancery suits, or . . . actions, where the title or bounds of land shall or may come into question . . . ." While some fees clearly exceeded the statutory limit for one reason or another, such a restriction understandably limited the profits of Virginia lawyers of the period.

Another important facet of legal fees in the practice of John Marshall was the method of their payment. The overwhelming majority of fees were paid in the prevailing monetary units of the time: pounds, shillings and pence. Occasionally, however, there would be a twist. In December 1784, Marshall received "From Mr. Wm. Brown 3 Guineas," which he translated into £4-4. On another occasion the lawyer recorded "From Mr. G. Pickett fees pd. in his store." George Pickett was a Richmond merchant, and apparently paid Marshall in kind from the items in his store. It appears that as a general rule Marshall demanded that his legal fees be paid in advance. Indeed the young lawyer went so far as to make this explicit when he joined with other lawyers in publishing a notice to that effect: "WE BEG LEAVE TO INFORM those,
who may wish to employ us in the business of the Court of Appeals, High Court of Chancery, or the General Court, that we have pledged ourselves to each other, not to take any cause after the 1st day of January next, without the fee and tax of the writ in hand. We except, however, the cases, in which we choose to engage gratis. Those clients, whose punctuality we have no reason to doubt, will consider us, as compelled to involve them in the same resolution, from the pain of making invidious distinctions."307 Once the fee had been received, Marshall would (at least sometimes) issue a receipt: "Recd. from Mr. Samuel Dabny forty-eight shillings for a suit instituted by him in the Genl. Court against John Hawkins."308 Sometimes the initial fee proved excessive, and Marshall would refund a portion of it. On July 20, 1784, the advocate received five pounds from Robert Price for the filing of two appeals. In October of that year Marshall noted that he "Returned [£2-14 to] Mr. Price to be deducted from fees."309

Despite the notice requiring all fees to be paid in advance, it is clear that Marshall often accepted payments on an installment basis. A typical example is the case of Cock v. Markham. In October 1787 Marshall had received a fee to prosecute this appeal. Then in April 1788 another fee for the same litigation appeared in his account book with the annotation "balance appeal."310 Similarly, in the case of Pridd v. Richardson, Marshall received a fee of eighteen shillings in September 1787. The following May, with the "suit at issue" he received another £1-12.311 Marshall also accepted other sorts of fee arrangements. Occasionally he received a "retainer" from a client, obligating him to represent that client in future legal matters.312 Another case appeared to be on a contingent fee basis. Marshall recorded an
entry "From Mann v. Caperton caveat [£1-8]--in part (to receive £10 on recovering)."\textsuperscript{313}

Regardless of how the fees were collected, John Marshall's income from fees received for his legal endeavors increased yearly. This expansion of the young lawyer's practice provides one objective criterion of his rising position in the profession.

\textbf{Growth of Practice}

When John Marshall first settled in Richmond and began his professional career, very little of his income derived from his law practice. Most of his sustenance came from his position on the Council of State and as a member of the House of Delegates. The total income Marshall received from these positions is unclear. From 1783 to 1785, however, he made several entries in his account book concerning income received "by my civil list warrants." This is a reference to his pay for service on the Council, and it amounted to a considerable sum. Marshall's income from this source rose from £100 in 1783 to £120 in 1784 to nearly £180 in 1785.\textsuperscript{314} In addition to this, he received as a member of the House of Delegates a salary of ten shillings a day plus travelling expenses. In November 1784, for instance, Marshall received a pay voucher entitling him to twenty pounds for "40 days attendance," an additional £2-14 for "travelling 135 miles" to and from Fauquier County, and two shillings, sixpence for "ferriages."\textsuperscript{315} While his records for the years 1782-1785 are far from complete, Marshall earned at a minimum an additional £160 for his service in the House of Delegates.\textsuperscript{316}
The records of Marshall's caseload and his income from the practice of law reveal the early importance of his supplementary legislative earnings; they also illuminate his rising standing in his profession. No evidence remains of any legal fees earned by Marshall in 1782. In the next year the struggling young attorney earned but fifteen pounds on six cases. By 1784 a dramatic shift had occurred. In that year Marshall handled over one hundred cases and earned over £400 in the process. From then on his practice increased impressively. In 1785 and 1786 Marshall averaged 220 cases and earned an annual income of over £750. By 1787 the rising lawyer handled over 350 cases and his income exceeded £1000. Marshall maintained that pace in the first half of 1788. In those first eight years of practice, Marshall recorded over a thousand fees and earned nearly £4000.317 Unquestionably the once struggling attorney had carved out for himself a busy and lucrative career. By 1787 the now-established lawyer found himself forced to decline an office in the local militia. "I... coud only be induced to decline acting under so honorable an appointment by a conviction that the immense load of professional business under which I at present labor woud render it impossible for me to discharge the duties..."318

One reason that John Marshall's law practice increased so dramatically may have been simple: he won cases. This suggests the second objective measure of Marshall's legal abilities: the degree of his success in representing his clients' interests.
Success Rate

In analyzing the outcomes of his cases, the conclusion is inescapable that Marshall successfully represented his clients' interests. Over the years of this study Marshall won two of every three cases in which he participated. His ability is further illuminated by tracing the outcomes of those cases involving other attorneys. When Marshall acted as the sole counsel in litigation, he won 63 percent of his cases. When he collaborated with other attorneys, his success rate was near 80 percent. Significantly, only when Marshall transferred his case to another lawyer—the only situation where he did not participate in a cause to its conclusion—did his clients' cause suffer greatly. In those cases, Marshall's clients won only 48 percent of the time. These figures imply that Marshall's presence had a positive impact on the outcome of litigation.

Marshall was consistently successful in all phases of his practice. When he represented the plaintiff, he won nearly three-quarters of his efforts (not overly surprising when one recalls that often the plaintiff had an open-and-shut case). More revealing is the fact that the young advocate won nearly 60 percent of his cases while representing defendants. Similarly, Marshall won consistently whether the action was an original one or an appeal. Only in chancery cases (in a very limited sample) did he appear to slip, winning only six times in thirteen attempts. In actions at common law, he won—as usual—over two-thirds of his cases.
While the impression may be rising that John Marshall as a lawyer was omnicompetent, the surviving documentation of his legal practice shows just as clearly that he was sometimes less than perfect in the representation of his clients' interests.

**Marshall Mistakes**

The most obvious of John Marshall's foibles was a certain absent-mindedness which sometimes affected his clients' interests. In March 1785, for example, he admitted to a client that "I cannot inform you what papers I have respecting the suit you engaged me in unless I was in Richmond [Marshall was in Warrenton at the time] and I do not recollect them all. I had drawn the ejectment sometime past & meant to have brought it up with me but when I searched I found I had left it behind me. I will send it to the sheriff as soon as possible from Richmond." Marshall was just as careless with his clients' money. Twice in one year Marshall recorded that he had repaid a client for "cash lost," once the considerable sum of thirty-one pounds. At times the attorney could not even recall whom he represented. He once wrote John Alexander that "I remember to have had some conversation with you while you were here about your suit with Bellfield but I do not recollect what it was. He has spoken to me since & has offered me very high fees indeed to take his cause. I have refused him till I see or hear from you because no consideration would tempt me to engage for him if I had promised to appear for you. I do not recollect or believe that I did, but I wish to be certain on the subject."
Some of Marshall's mistakes were of a more serious nature. In one of the chancery cases seeking to quiet title to Fairfax lands following the decision of Hite v. Fairfax, Marshall's client had his case dismissed because Marshall's bill was unspecific as to the number of acres involved, where they were situated, and how his client claimed or derived title.

John Marshall, then, clearly made mistakes during his professional career. Any evaluation of his work as a lawyer certainly must recognize this fact. It is to such a conclusion that we now turn.

Marshall as Lawyer

Concrete evidence of John Marshall's abilities has been presented, as well as examples of his miscues. In the end, however, an opinion on his true legal capabilities must go far beyond such isolated scraps of evidence, and enter the realm of subjectivity. One can admire the deft handling of complicated and disputed cross-remainders in an action such as Ashton v. West, or Marshall's mastery of technical legal arguments over the reversion of slaves by a residuary clause in a will, as in Dudley v. Crump, without being able to quantify the degree of John Marshall's expertise. Certainly such actions as that of Governor Randolph in transferring his practice to young Marshall speak well of his contemporaries' opinion of his abilities. But the historian two centuries after the fact can only assert that the surviving documentation of the first eight years of John Marshall's law practice gives the impression that John Marshall had indeed earned the appellation of "good lawyer."
This study began with the oft-repeated tale of the old farmer who refused to believe that John Marshall could be a good lawyer. Of course the old gent was subsequently proven quite wrong. The purpose of this study has been to remove the treatment of Marshall's law practice from this level of anecdote and bring it into the realm of the factual. We have, as it were, "peeked over John Marshall's shoulder" to see him at work, and have attempted to uncover the "nuts and bolts" of his law practice. This is key to better understanding of a man whose legal ideas and attitudes were later to shape a nation. We have also illuminated the nature of the practice of law in general in late eighteenth-century Virginia. A further understanding of that practice is important, not only for legal historians, but for all historians of America's early national period. In his study of Virginia's legal community in that period, A. G. Roeber concluded that "the lawyers and judges of Virginia had become an elite, an aristocracy of talent which grew out of and replaced the aristocracy of the Byrds, Carters [and] Ludwells . . . ." 328 Certainly by the mid-nineteenth century those who practised law had become the most powerful class in society. De Tocqueville agreed that they, rather than the rich, were the aristocrats of the United States. 329 Any class as powerful as this deserves and requires close scrutiny. Appreciating the daily work of leading lawyers such as John Marshall is the first step in understanding how men of his ilk came to dominate and shape American society through much of its subsequent history.
APPENDIX
A NOTE ON SOURCES AND METHOD

The preceding analysis of John Marshall's law practice requires a brief summary of the methodology underlying it. Making explicit the approach taken in the collection, organization and evaluation of the documentation underlying Marshall's practice should be helpful not only in the appraisal of the present work, but also in suggesting a point of departure for further work on the practice of law in the early national period.

The basic source used was the first volume of *The Papers of John Marshall*, containing documents, correspondence, and a rendering of Marshall's account book through June of 1788. This was greatly supplemented by the accompanying manuscript records (declarations, answers, judgments and the like) which have been collected by the editors of the Papers of John Marshall. In addition, the court records from the relevant district courts -- primarily the Fredericksburg District Court, where Marshall later practiced -- were utilized. On occasion, there are citations in this study to the records of various other district courts where a Marshall case was subsequently transferred. This was done sparingly, since Marshall was no longer handling the cases in those courts. But when those court records best exemplified the type of activities in which Marshall engaged (primarily in the "trial practice" segment of the study), they were cited as illustrative.
In addition to the traditional "literary" approach to the sources, the methodological core of the analysis rests upon the utilization of the computer to assist in the categorization and evaluation of the applicable information. The first step was to create a code book. This document was in essence a listing of the categories of information (or "variables") that the sources generated. For instance, one variable was the court in which Marshall appeared, another whether it was a case under the common law or in chancery, and so forth. Once the variables had been determined and labelled, all possible permutations of each were listed and assigned a numerical value. For example, under the variable "JM result" were listed the following: "1 = won case; 2 = lost case; 0 = unknown result."

Having completed the code book, the next step was to create a computer program to perform the sort of analyses desired. This was accomplished through the utilization of the "Statistical Analysis System," a powerful statistical package that allows the user to mold a program which conforms to the specific requirements of the current study. For purposes of the analysis of Marshall's law practice, the most important statistical tools needed were "frequency distributions" and "bivariate analysis." A frequency distribution is simply a table that reveals the number of times a given action occurred, and its percentage of the whole. For example, under the variable "side represented," the frequency table might show that Marshall represented plaintiffs 15 times or in 75 percent of the cases, and defendants 5 times for 25 percent of the total. Bivariate analysis is the combination of two variables in tabular form. For instance, a bivariate table might demonstrate how often Marshall won or lost a case depending upon whether he represented
the plaintiff or the defendant. The other statistical approach often used in this study was simple averaging -- such as the "average" duration of a case in litigation.

Once the code book was complete and the computer program in place, it was a relatively simple (if time consuming and boring) task to "code" the information from the sources for computer use. It was essentially a matter of going through the one-thousand-odd cases contained in Marshall's papers and account book, and placing the appropriate numerical value for each variable on "code sheets." These sheets, in turn, served as the basis for typing or "punching" a series of computer cards which could then be run through the computer. The result was a printout containing the desired information concerning Marshall's law practice.

It should be noted, however, that converting the information gleaned from the documents of Marshall's law practice into categories useful in the analysis of that practice was not always easy. For example, it was sometimes difficult (particularly with respect to cases appearing in Marshall's account book) to ascertain in which court a cause had been heard. The rule always followed in utilizing the source material was this: if the sources did not yield a clear basis for any categorization, that source would not be used for purposes of the analysis. Thus if it was not obvious whether or not Marshall collaborated with other attorneys in a particular case, that case was not used at all in calculations involving that variable. This conservative approach to the sources resulted in smaller samples than might otherwise have been enjoyed, but the integrity of the analysis was thereby preserved.
Despite adhering to this conservative approach to the source material, there were inevitably occasions when certain suppositions had to be made concerning the information generated by the sources. These should be made explicit. The following paragraphs address the rationale for the most important of these suppositions.

Perhaps the most troublesome problem generated by the sources, and the one least satisfactorily resolved, was the identification of Marshall's military clientele. Of course some of his military clients were easily identified in the documents. Others were more difficult to trace. It was decided to include as military clients all those who Marshall had recorded as having a military rank, such as "Capt. Williams" or "Colo. Kennedy." The risk in this is the possible confusion of active military types with mere militia officers. Counterbalancing this risk is the fact that, in a period so soon after a major military engagement, it is likely that even militia officers had recently seen active duty. Moreover, since only officers tend to appear in the records, the odds are that any estimation of Marshall's military clientele is underestimated in any event.

In the same vein, there were other occasions when categorizing the nature of the client required a supposition. For instance, Marshall was assumed to be representing a decedent's estate when the documents made that clear, or when his account book entry indicated that he was representing an "executor" or "administrator." Similarly, he was deemed to represent a commercial client when he became involved in a clearly commercial-type of activity, such as the construction of a commercial contract, or when his client was described as a company or a partnership.
The allocation of Marshall's practice into several overarching categories required a similar categorization of the source material. The distinction between his cases in common law and chancery was normally clear cut. Often the nature of the document, such as a declaration or a bill, made the type of action obvious. Marshall also commonly annotated the entries in his account book by noting when a case was in "chancery." Further actions of this type were manifest by their very nature -- such as Marshall's recording of fees for "injunctions" and the like. Cases not clearly actions in equity were deemed to come within the common law. Enough supporting documentation exists to reinforce the validity of this treatment of the sources.

Likewise, in determining whether a cause of action was original or appellate, a similar approach was taken. The most obvious method was to look to the specific evidence of this contained in the case records. Beyond that, Marshall's account book gives a further indication. He consistently noted in his entries when a cause was on "appeal." Moreover, there were other references to appeal-related actions, such as "supersedeas" and "certiorari." It was assumed that entries not cited as appellate actions were original in nature. Again, where supplementary documentation permitted this approach to be double-checked, it held up well.

Analysis of Marshall's litigation practice called forth a number of "judgment calls" concerning the information contained in the sources. An example is the matter of the court in which Marshall appeared. In the majority of cases, this information was simply not ascertainable. This variable was utilized only when the documents specifically named the court in which a cause was tried.
The analysis of Marshall's representation of plaintiff or defendant required a structured reading of the sources. Of course, this fact was an integral part of the court documents which have survived. For other sources this information was not so obvious. Fortunately, in his account book Marshall consistently followed a convention in the making of his entries. When he represented the plaintiff (say, a client named Smith), he recorded the suit as "Smith v. Jones." When his client (Smith) was the defendant, Marshall wrote the entry as "Smith ad sectam [at the suit of] Jones." Once again there are enough cases with supplementary documentation to confirm this presumption as a valid approach to the source material.

In categorizing the causes of action which Marshall encountered in his litigation practice, care was taken to record them, in the first instance at least, in Marshall's own terms, e.g., in "debt," "case," or "indebitatus assumpsit." Where possible, the subsequent description of his practice placed Marshall's own categorizations in the proper legal context (such as when actions in "case" in reality overlapped with those in "indebitatus assumpsit.")

Finally, it was sometimes possible to determine whether a cause was heard by the bench or tried before a jury. This variable was utilized only when the documentation made this clear -- such as when an argument was presented to the bench on appeal, or when the records revealed the naming of a jury, its verdict, or the like.
This brief sketch of the methodology and approach to the sources is intended only to highlight the most important aspects of the substructure of this analysis. Anyone pursuing an expanded or related study should of course develop his or her own conceptualizations, approaches, and assumptions. It is hoped, however, that this study of Marshall's practice will serve as a first step in the much-needed understanding of law practice in the early national period. As the conclusion to this study suggests, lawyers were to play an increasingly dominant role in nineteenth-century American life. It behooves us to make every effort to see these men in their own terms; that is, within the frame of reference of their day-to-day professional existence.
NOTES


4Ibid., vols. 1 and 2.

5Ibid., 1: xxiv.

6Ibid., xxiv, xxiii.

7Adams, xxiii.

8Marshall, 1: xxvi; see also Adams, xxi. For a more detailed description of the sources and methods used in this analysis, see the Appendix, supra, pp. 82-88.


10Ibid., 40.


13Marshall, 1: 41; Stites, 14.

14Stites, 16; Beveridge, 1: 161.

15Beveridge 1: 170; Marshall, 1: 41.

16Stites, 17; Beveridge, 1: 170.

17Account Book, September, 1783 [Marshall, 1: 294].

18£3-14/8; Account Book, December 1, 1784 [Marshall, 1: 318 n. 33].

89.

Ibid., September 7, 1785 [Marshall, 1: 338 n. 26].


Ibid., 1787 [Marshall, 1: 368-400].

£1-8 for "lime for the office" and £3-7 for paper and paint; Account Book, March 10 and 31, 1787 [Marshall, 1: 374].

Ibid., 1788 [Marshall, 1: 400-413].

Ibid., 1785 [Marshall, 1: 319-47].


In 1786, £3-17/6; in 1787, £5-12/10; in the first half of 1788, £1-16.


Henry Cowper, Reports of Cases Adjudged in the Court of King's Bench 1774-78 (London, 1783); Account Book, June 5, 1785 [Marshall, 1: 333].

William Brown, Reports of Cases argued and determined in the High Court of Chancery . . . Trinity Term . . . 1778 (to Hilary Term, 34 Geo. III) (London, 1785-1794); Account Book, April 29, 1787 [Marshall, 1: 381]; see also ibid., January 14, 1788 [Marshall, 1: 374].

A Collection of all such public acts of the general assembly . . . passed since the year 1768 . . . (Richmond, 1785), Account Book, October 5, 1785 [Marshall, 1: 341]; Acts passed at a general assembly . . . in the year . . . one thousand seven hundred and eighty six (Richmond, 1787), Account Book, October 10, 1787 [Marshall, 1: 374].


From February, 1783, through June, 1788, 1037 client names appear. This understates the case, since there are, for example, 13 references to "Mr. Jones" and 10 to "Mr. Smith."

Beveridge, 1: 170; Baker, 83.

Baker, 78; Stites, 23.


In 1784, fees of £36-18 out of a total income of £419-7/4 can be attributed to military clients. For 1785 the figures are £124-5 out of £750-3/5. For the entire period under study, Marshall derived £240-5/6 from military clients out of a total income of £3616-11/4 (approximately 7%).


Cullen, "St. George Tucker," 34; Smith, 3-4.

Marshall, 1: 170-72; Smith, 4-5.

Cullen, "St. George Tucker," 34-35; Smith, 5-6.


Cullen, "St. George Tucker," 38.

Ibid., 42-43.

Ibid., 89, 95-96.

See ibid., 102, 113-14.


Roebber, 109-110, 121.


Supra, p. 6.

Marshall to Arthur Lee, April 17, 1784 [Marshall, 1: 120].

April, 1785. See Stites, 25.

Account Book, July 26, 1786 [Marshall, 1: 357].

Some 76 cases out of a total of 96, or 79.1%. Of course with the change in court structure in 1788, many of the cases brought originally before the General Court were transferred to the district courts. Of the 57 cases so transferred, Marshall probably retained only those 24 cases which were relocated to Fredericksburg, Petersburg, or Richmond. [22 cases were transferred to Fredericksburg, 1 to Richmond and 1 to Petersburg. See Marshall, 2: xx1-xxii].

Only 15 of 96 cases, or 15.6%. Marshall's records also list another 91 cases which he labelled "chancery" without further specification.

Fully 72 of the 75 cases before the General Court were "original" actions; only 3 were on appeal from the county court. It is therefore likely that many of Marshall's cases "on appeal" were directed not to the General Court or High Court of Chancery, but to the Court of Appeals itself.

Of the 763 total cases, 626, or 82.0%, came under the common law. Only 137 (17.9%) fell within the equity jurisdiction.

Supra, p. 15. Recall that a limited sample had indicated that Marshall appeared before the General Court 80% of the time, while 16% of his appearances were before the High Court to Chancery.
For the entire period, £533-5/8 in fees are attributable to chancery cases, or 14.7% of the total. The percentage could be underestimated because of Marshall's tendency to record fees without descriptive comment.

Account Book, April 5, 1788 [Marshall, 1: 406].

Minute Book, Fauquier County, 1784-1786, 47 [Virginia State Library].

See William Waller Hening, ed., The Statutes at Large: Being a Collection of All the Laws of Virginia . . . (Richmond, 1809-1823), 6: 335 (1753).

Extract from Tucker-Coleman Papers, Swem Library, College of William and Mary [Marshall: 1: 236-37]

There were 650 cases of an original nature (83.8%), and 124 appeals (16.0%).

Measured as a percentage of caseload, the yearly figures are: 1784, 4.3%; 1785, 6.5%; 1786, 7.1%; 1787, 14.9%; 1788, 16.2%. Appellate work as a percentage of income was: 1784, 3.5%; 1785, 7.6%; 1786, 5.2%; 1787, 12.1%; 1788, 14.8%.

In the General Court, 52 cases [73.2%] were original, 19 [26.7%] appellate. In the High Court of Chancery, 13 [92.8%] seemed to be of an original nature, while only one [7.1%] arose from a lower court. A similar analysis can be directed toward Marshall's common law/chancery practice as a whole. Of the common-law actions, 85% (510 out of 600) were original. On the chancery side, 92% (120 out of 130) were of that nature.

See generally Baker, 83, 86; Stites, 22-23.

The Virginia Gazette, Nov. 2, 1782 [Marshall, 1: 88-89].


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Subsequent to the Hite v. Fairfax decision (Daniel Call, Reports of Cases Argued and Decided in the Court of Appeals of Virginia (Richmond, 1833), 4: 69 (1786)), Marshall filed bills in chancery for several clients seeking to quiet title to their land in the Northern Neck.

Account Book, April 12, 1787 [Marshall, 1: 377].
85 Power of Attorney, March 12, 1788 [Marshall, 1: 250].
87 Ibid., Nov. 2, 1786 [Marshall, 1: 365].
88 Ibid., June 27, 1787 [Marshall, 1: 384].
89 In 4 Call 69 (1786). See Marshall, 1: 150-64.
90 Fifty-four out of 1040 cases can be clearly identified with his real estate practice (5.2%). Approximately 3.2% of his fees can be attributable to landed causes. This certainly underestimates this portion of his practice.
92 Nine of the 24 instances (37.5%) involved advice on a will.
94 Five of the 24 cases, or 20.8% were of this nature.
96 Six of the 24 recorded instances were for establishing a will. The reference to Carrington is in Account Book, April 11, 1785 [Marshall, 1: 325].
98 Marshall represented the estate 53 times (60.9%) and was in opposition 34 times (39.1%).
99 In 1784, .9% of his cases and .5% of his income derived from estates. In 1785 the figures were 3.2% and 4.0%; in 1786, 1.3% and 1.0%; in 1787, 3.9% and 6.7%; in 1788, 9.5% and 10.1%.
100 A total of 41 of 48, or 85.4%, were common law actions.
101 Fully 41 of 45 (91.1%) were original; only 8.8% were on appeal.
102 A total of 33 cases can be discerned which positively relate to a commercial practice; again, this underestimates this segment of his practice.
103 Account Book, April 22, 1788 [Marshall, 1: 408 n. 7].
104 Ibid., Nov. 15, 1787 [Marshall, 1: 397].
105 Ibid., April 16, 1787 [Marshall, 1: 378].
106 Ibid., April 18, 1786 [Marshall, 1: 353 n. 87].

107 Marshall to Cadwalader Jones, Jan. 17, 1787 [Marshall, 1: 202-203]. It was common to utilize as currency, as here, warehouse receipts for tobacco.


112 Marshall represented commercial clients 11 times (37.9%), and opposed commercial interests 18 times (62.1%).

113 Twenty-six cases were common law (86.6%); 4 (13.3%) in equity.

114 No case where a commercial client can be identified is an appellate action.

115 Nine cases are before the General Court; 1 is before the Henrico County Court.

116 In 1784, he represented 1 criminal client; in 1785, 5 such clients; in 1786, 3. Over the entire period only .9% of his practice was criminal.


118 The fees Marshall charged for advice were always among his lowest and did not increase in proportion to the every-larger fees he was receiving for other cases; therefore, as a percentage of income, Marshall's receipts for "advice" remained remarkably stable. In 1784, 4.3% of his cases involved advice to clients, while 3.6% of his income was thus attributable. In 1785, the figures are 4.2% and 3.5%; in 1786, 9.8% and 4.4%; in 1787, 9.3% and 4.4%; in 1788, 12.8% and 6.1%. For the entire period, Marshall saw 8.3% of his legal activities attributable to advice, while only 4.3% of his income was so derived.

119 Supra, pp. 22-23.


122 Marshall to Leven Powell, Dec 9, 1783 [Marshall, 1: 108-09].

Marshall to John Breckinridge, May 1, 1787 [Marshall, 1:232].


Account Book, Nov. 9, 1787 [Marshall, 1: 397 n. 63].

Out of 1094 cases, 712 clearly involved litigation. This is all the more impressive when it is recalled that the courts of Virginia were closed until 1782, and that Marshall's cryptic recordkeeping certainly under-reports litigation-related activity.

Marshall earned £877-0/4 representing defendants, and £867-4/2 representing plaintiffs. The percentage distribution is precisely the same as before: 49.7% for plaintiffs; 50.3% for defendants.

For appellant, 55 out of 102 appeals, or 53.9%; for appellee, 47 of 102, or 46.1%. Three of Marshall's appellant clients had been plaintiffs below, and 2 defendants (the information is not available in the other cases). For appellees, 4 had been plaintiffs; 2 defendants.

Marshall represented the plaintiff 20 times (55.5%) and the defendant 16 times (44.4%). He represented the plaintiff 10 times in actions to quiet title (chiefly in the aftermath of the Hite v. Fairfax case [supra, p. 22]; in ejectment actions, he represented the plaintiff 6 times, the defendant 14.

He represented the plaintiff 12 times, the defendant 18.

Marshall represented the plaintiff 15 times (39.5%), and the defendant 23 times (60.5%).

Marshall's records list 52 cases described as one form or another of "debt" actions; another 6 cases were based on assumpsit, 14 were in detinue, while 15 involved replevin of goods. At least 15 actions sounded in trespass on the case, but in all probability not all of these were grounded on a conception of "owing." Altogether [discounting actions in "case"] 87 cases, or 34.7% of the total fell into this category. It should be noted that a very few cases (only one was found in Marshall's practice) sounded in "covenant"--an action based on a sealed document. The action of debt was preferable.

They constituted 52 of 251 total cases, or 20.7%.

Of the 52 debt cases, 3 were clearly based on a bill of exchange; fully 29 were grounded on a bond.


Black's Law Dictionary, s.v. "assumpsit."

Six appear, or 6.8%: three are labelled "indebitatus assumpsit," while others are described as "assumpsit on a promissory note," or just "assumpsit." Note the small nature of the sample. It is suggestive only.

Tucker-Coleman Papers, Swem Library, College of William and Mary [Marshall, 1: 221-30].

Black's Law Dictionary, s.v. "detinue." Milsom, 263. Note that in detinue the idea of "wrong" as well as "owing" creeps in.

There were 14 of 87, or 16.0%.

Five of the 14 detinue cases were for slaves. Regarding the mare, see Ware v. Conway, Fredericksburg District Court, Dist. Ct. Records, 1789-1792, 45-46 (Va. State Library).

Black's Law Dictionary, s.v. "replevin."


Black's Law Dictionary, s.v. "replevin bond."

Black's Law Dictionary, s.v. "case," "trespass on the case."

Bushrod Washington, Reports of Cases Argued and Determined in the Court of Appeals of Virginia (Richmond, 1798), 1: 190-92 (1793) [Marshall, 1: 380].


A total of 44 of the 251 identifiable causes of action (17.5%) related to land.

There were 23 of the 44 total, or 52.3%.

Black's Law Dictionary, s.v. "ejectment."

District Court Order Book, Northumberland County, 1789-1793, 72 (Va. State Library).

Ten of the 44 total were actions to quiet title, or 22.7%.

Black's Law Dictionary, s.v. "quiet."


See supra, pp. 19-20. Eight of 44 cases (18.1%) were caveats.

A total of 52 of the 251 identifiable causes of action (20.7%) were "personal" causes.

A total of 21 of 52 cases (40.4%) were labelled trespass, assault and battery. See Black's Law Dictionary, s.v. "trespass vi et armis."

Robertson v. Hobson, Prince Edward District Court Records at Large, 1789-1792, 282 (Va. State Library).

See Black's Law Dictionary, s.v. "trespass on the case;" 15 of 52 causes (28.8%) sounded in case.

See Black's Law Dictionary, s.v. "slander;" Kellum v. West, Accomack County District Court Order Book, 1789-1791, 4-7; Ibid., 1789-1797, 21; Six of 52 cases (11.5%) were in slander.

There were 10 citations to "habeas corpus," or 19.2% of the personal causes. See Black's Law Dictionary, s.v. "habeas corpus," "habeas corpus ad faciendum et recipiendum."

These groupings account for 72.9% of the total. This underestimates the situation, since many of the remaining causes are non-specific in Marshall's records.

Black's Law Dictionary, s.v. "pleading."

In 4 Call 99, 102 (1787).

Black's Law Dictionary, s.v. "declaration."

See supra, p. 7. Although Marshall's Account Book lists several purchases of sheafs of preprinted declarations, the only completed one remaining in the extant papers for this period is in the case of Havely v. Hammersly. See Marshall, 1: 234.
A general denial was pleaded in 12 of the 22 cases (54.5%). Among such denials were pleas of "not guilty," "non assumpsit," "non detinet," and "nil dicte." 

A total of 7 of the 22 cases, or 31.8%.

Two cases (9.1%) alleged insufficient information, while one asserted the use of improper procedures.

There were 83 cases clearly at issue (90.2%); 8 had the issue confessed (8.77%); while only 1 (1.1%) resulted in a default judgment.

Fredericksburg District Court Records, 1789-1792, 221 (Va. State Library); Casebook, Tucker-Coleman Papers [Marshall, 1: 209].

Prince Edward District Court Records at Large, 1789-1792, 203 (Va. State Library).

Prince Edward District Court Records at Large, 1789-1792, 430 (Va. State Library).

Fredericksburg District Court Records, 1789-1792, 210-11; Accomack District Court Order Book, 1789-1791, 36-38.

See, e.g., James v. Cobbs, Prince Edward District Court Order Book, 1789-1792, 112 (Va. State Library); Winchester District Court, Frederick County Superior Court Order Book, 1789-1793, 354 (Va. State Library).

Ibid., 127.


District Court Law Orders A, 1789-1793, 58, 156 (Va. State Library).
In the 30 cases where continuances can be determined, the median was 5 continuances; the modal category was 6 such delays (23.3% of the total).

The average filing date was April, 1786. The average termination date was October, 1790. Because of the delays involved with the transition to the district courts, this probably overstates the case.

JM to Battaile Muse, April 1, 1787 [Marshall, 1: 207].

See Casebook, Tucker-Coleman Papers, Swem Library, College of William and Mary.

The nature of Marshall's collaboration with other attorneys is discernible in 85 cases. Of these he was sole counsel 75 times (88.2%) and co-counsel 10 times (11.8%). On appeal, Marshall collaborated in 7 cases, and worked alone in 12.


See Baker, 87.

Marshall transferred 26 cases (34.7%) of his cases in this manner.


Casebook, Tucker-Coleman Papers [Marshall, 1: 211-12].


At 4 Call 89 (1786).

Casebook, Tucker-Coleman Papers [Marshall, 1:207-09].

Latham v. Gaines, Fredericksburg District Court Record Book, 1789-1792, II2-16 (Va. State Library).

Citations are found in 30 of 62 cases, or 48.4%.

There were 21 citations to cases in the King's Bench; 4 to Chancery; 2 to the Exchequer Chambers; and 1 each to Nisi Prius and Common Pleas.

Staunton District Court Order Book, 1789-1793, 107-8; 1789-1797, 42, 56 (Va. State Library).

Ibid. [Marshall, 1: 218-21].

Ibid. [Marshall, 1: 184-85]. See also Braxton v. Beall [Marshall, 1: 221-30], where Judge Mercer overruled attorney citations to English precedent.


Black's Law Dictionary, s.v. "judgment."

Of 75 cases where it can be determined, the court decided the case 47 times (62.6%) while a jury was involved 28 times (37.3%).

The judges were unanimous 43 of 47 times, or 91.5%.

McKewen v. McKeen, Frederick County Superior Court Order Book, 1789-1793, 66 (Va. State Library).


Black's Law Dictionary, s.v. "verdict."

See 1 Washington, 190-92.

Twenty-two of 32 judgments matched the original declaration (68.7%); 8 awards were for less than the plaintiff demanded (25%); 2 (6.2%) were for more.

There were 34 instances of awards in pounds, shillings and pence "current money;" 1 each of "specie" and "sterling." Two cases were in dollars and cents, and 8 were in land acreage.

Campbell v. Reid, Frederick County Superior Court Order Book, 1789-1793, 60-61 (Va. State Library). Note that 20 of 32 cases (62.5%) involved "judgment bonds."

Frederick County Superior Court Order Book, 1789-1793, 57 (Va. State Library).

Ibid., 127.
Frederick County Superior Court Order Book, 1789-1793, 24 (Va. State Library). Costs were also assessed on appeal; see Moore v. Moore, ibid., 193.

The plaintiff was assessed costs 36 out of 46 times (78.3%); defendants 9 times (19.6%); costs were shared once.

Nominal damages were awarded in 12 of 14 cases, or 85.7%.

Thirty-two of 35 cases (91.4%) were of this nature.


The plaintiff won judgment 39 of 57 times (68.4%).

The plaintiff won 26 of 28 "debt on bond" cases -- 92.8%. Likewise, the plaintiff won 3 of 4 ejectment cases, and all of the suits to quiet title.

Payne v. George, District Court Order Book, Northumberland County, 1787-1793, 72 (Va. State Library).

Black's Law Dictionary, s.v. "fieri facias."

Account Book, December 1786 [Marshall, 1: 368].


Black's Law Dictionary, s.v. "injunction."

George Wythe, Decisions of Cases in Virginia by the High Court of Chancery (Charlottesville: The Michie Co., 1900), 47; 3 Call 531-37 (1790).


Power of Attorney, March 12, 1788 [Marshall, 1: 250].

103.


252 Bill of Sale, July 3, 1787 [Marshall, 1:232-33].


255 Ibid., April 17, 1784 [Marshall, 1: 120-21].

256 Marshall to Arthur Lee, April 7, 1784 [Marshall, 1: 118-20].


261 Ibid., Dec. 12, 1783 [Marshall, 1: 111].

262 Ibid., May 15, 1784 [Marshall, 1:123].


269 Report to the Council of State, Mar. 25, 1783 [Marshall 1: 99-100].

270 Marshall to James Monroe, April 17, 1784 [Marshall, 1: 120-21].

271 Marshall to Arthur Lee, April 17, 1784 [Marshall, 1: 118-20].

272 Beveridge, 1:164; Stites, 20.

273 He attended 78 days in two sessions in 1782; 139 days for the sessions of 1784, averaging 108.5 days per year.
274 Beveridge, 1: 202, 204, 209; Stites, 21.

275 Legislative Bill, Nov. 30, 1782 [Marshall, 1: 89-91].


277 Baker, 91, 94.


280 Ibid.


283 Minute Book, Richmond City Hustings Court [Marshall, 1: 173-174].

284 Marshall, 1:101


286 Marshall, 1: 100-104. See, for example, the history of "Land Office Warrant No. 4583," in Marshall, 1: 104-107.


293 Subscription, April 13, 1785 [Marshall, 1: 140-42].
Commission, July 5, 1787 [Marshall, 1: 233].


Marshall lists six contributions to "clubs" totalling £2-16. He paid £5-15/8 for six barbecues.


Account Book, Feb. 12, 1785 [Marshall, 1: 322 n. 54].

Marshall recorded no less than twenty-five of such purchases, totalling £104-9/4.


Marshall to George Muter, Feb. 11, 1787 [Marshall, 1: 204].


See 11 Hening 182 (1782); see also 7 Hening 124, 400 (1761).


Receipt, Dec. 21, 1785 [Marshall, 1: 145].


Ibid., Oct. 8, 1787 [Marshall, 1: 393]; ibid., April 2, 1788 [Marshall, 1: 405].


See, e.g., ibid., May 2, 1788 [Marshall, 1: 410].

Ibid., Aug. 1, 1785 [Marshall, 1: 335].
The total income from this source was £102-10 in 1783, £119-14 in 1784, and £177-16 in 1785.

Pay voucher, Nov. 27, 1784 [Marshall, 1: 128].

In 1782, he earned £44-18; in 1784, £91-13/6; in 1785, £23-6/6. These records are certainly incomplete.

In 1783, Marshall had 6 cases and earned £15-3/9. In 1784, the figures were 116 and £419-7/4; in 1785, 216 and £750-3/5; in 1786, 224 and £781-11/10; in 1787 355 and £1143-61; in the first half of 1788, 148 and £506-18/11. In all, Marshall handled 1065 cases and earned £3616-11/4.


Where the result is known, Marshall won 65 of 97 cases, or 67.0%. When he was sole counsel, he won 32 of 51, or 62.7%. When he collaborated, he won 7 of 9 (77.7%). When the case was transferred to another attorney, Marshall's side won 11, lost 12 (47.8%).

Marshall won 26 of 36 for plaintiffs (72.2%), and 21 of 36 for defendants (58.3%).

In original actions, Marshall won 43 of 68 (63.2%); on appeal, he won 19 of 26 (73.0%).

He won 59 cases and lost 25, for 68.2%.


Hyatt v. Hite's Representatives [Marshall, 1: 190 n. 4].

Roeber, 254.

Alexis de Tocqueville, Democracy in America (New York, 1949), 1: 278.
Primary Sources

Published Sources

Call, David. Reports of Cases Argued and Decided in the Court of Appeals of Virginia. Richmond: Privately printed, 1833.


Washington, Bushrod. Reports of Cases Argued and Determined in the Court of Appeals of Virginia. Richmond: Privately printed, 1798.


Court Records (Available in the Virginia State Library, Richmond)

Accomack County District Court Order Book, 1789-1791; 1791-1794; 1789-1797

Augusta County District Court Order Book, 1789-1797.

Court of Appeals Order Book, I; II; III.

Fauquier County Court Minute Book, 1781-1784; 1784-1786.

Franklin County District Court Order Book, I, 1789-1793.

Frederick County Superior Court Order Book, I, 1789-1793.

Fredericksburg District Court Law Orders, A, 1789-1793.
Fredericksburg District Court Records, 1789-1792.
Henrico County Order Book, I; II; III; IV; V.
Northumberland County District Court Order Book, 1789-1793.
Prince Edward County District Court Order Book, 1789-1792.
Prince Edward County District Court Records at Large, 1789-1792.
Prince William County District Court Order Book, 1793; 1794-1798.
Prince William County District Court Records at Large, 1793.
Prince William County Land Causes, 1789-1793.
Staunton District Court Order Book, 1789-1793; 1789-1797.
United States Circuit Court, Virginia, Order Book I.

Other Unpublished Sources

Tucker-Coleman Papers. Swem Library, College of William and Mary

Secondary Sources


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