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## BREVIA ADDENDA

### John Marshall's Preparation for the Bar— Some Observations on His Law Notes

By WILLIAM F. SWINDLER \*

IN THE WINTER OF 1779-80 there was a lull in the Revolutionary campaigns and, wrote a onetime captain in Colonel Daniel Morgan's 7th Virginia Regiment, "I availed myself of this inactive period for attending a course of lectures given by Mr. Wythe . . . of William and Mary College. The vacation began in July when I left the university, and obtained a license to practice law."<sup>1</sup> With this characteristically laconic statement the future Chief Justice John Marshall disposed of his preparation for the bar. Marshall's biographer suggests that the young soldier had previously been exposed to Blackstone, Thomas Marshall, his father, having been one of the subscribers to the first American printing of the *Commentaries* in 1771-72.<sup>2</sup> There is a passage in the Chief Justice's own autobiographical sketch which tends to corroborate this proposition,<sup>3</sup> although the words may be more rhetorical than factual.

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<sup>1</sup> Adams, ed., *An Autobiographical Sketch by John Marshall*, 6 (1937). This brief manuscript, from the Clements Library of the University of Michigan, and the 1818 letter from Marshall to Joseph Delaplaine of Philadelphia, first published in Smith and Watson, *American Historical and Literary Curiosities*, I, No. 6 (1847), constitute virtually all of Marshall's own comments on his life and career.

<sup>2</sup> Beveridge, *The Life of John Marshall*, I, 56 (1916, 1944). Cf. *Commentaries on the Laws of England. In four books. By Sir William Blackstone, Knt. one of his Majesty's judges of the Court of Common Pleas. Re-printed from the British copy, page for page with the last edition. America: Printed for the subscribers, by Robert Bell, at the late Union library, in Third-street, Philadelphia, 1771-1772.* The copy of the fourth volume of this title, with the signatures of Thomas and John Marshall, is in the Library of the College of William and Mary.

<sup>3</sup> "About the time I entered my eighteenth year, the controversy between Great Britain and her colonies had assumed so serious an aspect as almost to monopolize the attention of the old and the young. I . . . devoted more time . . . to training a militia company in the neighborhood, and to the political essays of the day, than to the classics or to Black-

The only reference to the *Commentaries* which are in Marshall's own hand appear in his Law Notes, which were compiled in the spring or summer of 1780; and the Law Notes, in turn, are the sum of the documentation of Marshall's preparation for the law. They were compiled, as internal evidence indicates, between the end of May and the end of August, 1780, when Marshall was admitted to the Virginia Bar. The original manuscript, now carefully laminated and rebound, is in the library of the College of William and Mary; it will doubtless form the nucleus for the editorial project on the Marshall papers which has been made possible by grants from the National Historical Publications Commission and the General Assembly of Virginia. In addition, the notes are currently being annotated for a research report to be deposited in the library of the Marshall-Wythe School of Law.

The reason for this project in annotation is illustrated in the excerpt from the Law Notes which follows. Apparently no previous researcher consulting the manuscript has recognized the significance for legal history of the nature and function of the Law Notes. They embrace the major part of 238 manuscript pages (with 44 blanks) and treat more than 70 subjects from Abatement to Limitation of Actions. They are, for the most part, abstracted from the corresponding subjects in the first three volumes of Matthew Bacon's *New Abridgement of the Law*, the third edition of which was published in 1768.<sup>4</sup> The other two sources from which some of the notes are drawn are the *Acts of the Assembly Now in Force in the Colony of Virginia*, published by authority of the colonial legislature in Williamsburg in 1769,<sup>5</sup> and Blackstone's *Commentaries*. The selectivity

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stone." Adams, *loc. cit.*, 5. Beveridge quotes from the Delaplaine letter (which he entitled an "Autobiography") a statement that "from my infancy I was destined for the bar." Beveridge, *op. cit.*, I, 56, n. 3.

<sup>4</sup> The first edition of the Abridgement was published in 1736, edited by "A Gentleman of the Middle Temple." In the Library of Congress copy of this edition, George Wythe's bookplate appears in Volume II and his autograph in Volume IV. The set was given to Thomas Jefferson and by him to his nephew, Dabney Carr, in 1806. Marshall's marginal citations copied from Bacon provide the clue to the edition used by him; i.e., the references to Lord Raymond's Reports do not appear until the third edition of 1768. While they are also in subsequent editions, including the fourth edition of 1778, it is hardly to be conceived that in the following eighteen months of intensifying military operations in the southern theater, a copy of the fourth edition would have reached Virginia during the time of Marshall's study.

<sup>5</sup> *Acts of the Assembly Now in Force in the Colony of Virginia* (Williamsburg, 1769). This was the major compilation of local legislation in the colonial period of Virginia. Until Henning's collection was published

of the subjects abstracted, and the occasional substitution of Virginia statutory material for Bacon's Parliamentary citations, makes reasonably clear that the purpose of the Law Notes was to provide a summary of the common law in Virginia as it stood at this time.

*Excerpt from the Law Notes, Annotated*

[1]

Richmond

Ambler

Polly Ambler<sup>6</sup>

A b a t e m e n t

Abatemt is a plea put in by the Deft in which he shews cause to the ct why he shou'd not be impleaded or if impleaded not in the manner & form he then is.

A plea in Abatemt to<sup>7</sup>

Peyton Short<sup>8</sup>

in 1823, this continued to be the primary reference for local statutory law, supplemented by sporadic and piecemeal printing of the acts of various sessions of the Assembly. Jefferson's library has a number of manuscript collections of colonial laws, and some for the early commonwealth; it is probable that Wythe, so long a member of the legislature, had a similar manuscript collection, but the volume printed in 1769 is the only source of Virginia statutes cited by Marshall in his Law Notes.

<sup>6</sup> Mary Willis Ambler (1766-1831) was the second of four daughters of Jacquelin Ambler of Yorktown, a Councilor of State for the Revolutionary Commonwealth. In June 1780 the Ambler family moved to Richmond following the general transfer that spring of government files from Williamsburg to the new capital city. The mention of Richmond on this page, in association with "Polly" Ambler's name, tends to suggest the date when the Law Notes were begun; cf. n. 8 *infra*. Marshall and Polly were married January 3, 1783. Mason, *My Dearest Polly*, 1-19 (1960).

<sup>7</sup> "Abatement . . . signifies a Plea put in by the Defendant, in which he shews Cause to the Court why he should not be impleaded, or if impleaded, not in the Manner and Form he then is." 1 Ba. Abr. 1. Marshall begins the opening page of his Law Notes with an almost verbatim quoting of the opening page of Bacon; but the other entries on this page, and the incomplete second sentence (probably intended to paraphrase "Of Pleas in Abatement to the Jurisdiction of the Court," 1 Ba. Abr. 2), show that the neophyte law student had other things on his mind. He undertook to improve his commonplacing when he made a fresh start on the next page.

<sup>8</sup> Peyton Short (1761-1825) was a student at the College of William and Mary in 1780-81. The minutes of Phi Beta Kappa for May 18, 1780 show that he and William Cabell were "appointed to declaim the Question whether any form of government is more favorable to our new virtue than the Commonwealth," while Marshall and Joseph Cabell were to argue the

[2]

- 1 B 8                      Two Exrs bring debt, one dies the writ does not abate
- Secus if one was dead when the writ was bought  
Action agt several Defts one dies the writ does not abate<sup>9</sup>
- 22 G 2                      Actions originally maintainable by & against  
Ch. 5. 180, 181           Exrs. &c. not to abate after interlocutory judgmt.  
Death of other party between verdict & judgmt not to be pleaded in abatement.
- Do. 184                      Process agt one returned, no Inhabitant shall abate<sup>10</sup>
- 1 B 9                        Coverture is a good plea in Abatement & may be either before the writ sued or pending the writ
- Sid. 140                      By the first the writ is abated de facto, by the  
Leon. 168, 169            second tis only abateable. Coverture pending the writ must be pleaded since the last continuance.
- If a feme sole takes out a writ & after marries the deft may plead in Abatemt or in chief<sup>11</sup>

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proposition. The minutes for June 3 indicate that Short "being unprepared was silent on ye occasion," but that Marshall presented his argument as assigned. "Records, Phi Beta Kappa Society of William and Mary College," 4 *Wm. & Mary Coll. Q.* (1st ser.), 236 (1895). One may conjecture that Short's name was written down by Marshall in connection with this debate, sometime between the two dates.

<sup>9</sup> The common law rule was that "if there were two Executors, and they brought an Action of Debt, and one of them died, . . . the Writ should not abate; for in this Case Summons and Severance lies." On the other hand, if "there be several persons named as Plaintiffs in the Writ, and one of them was dead at the time of purchasing the Writ, this may be pleaded in *Abatement*, because it falsifies the Writ, and because the Right was in the Survivors, at the Time of suing the Writ, and the Writ was not accommodated, as the Case then was." Finally: "If there were several Defendants in the original action, and one died, the Writ did not abate; because there being a joint Demand, it survived against the Residue. . . ." 1 Ba. Abr. 8.

<sup>10</sup> In 1702 the common law rule had been modified by a Parliamentary enactment prohibiting abatement in the event of the death of any of the parties if the cause of action continued to apply to the survivors. 8 & 9 Will. III, c. 11, s. 6. This is quoted verbatim in Bacon, but Marshall cites the 1748 act of the colonial assembly which incorporated the English statute into the legislation of the colony. *loc. cit.* n. 5 *supra*.

<sup>11</sup> "Coverture is a good plea in *Abatement*, which may be either



Fitz. B. 476	If a writ is false when sued out it shall abate <sup>12</sup>
1 B 10	If a writ is de facto a nullity and destroy'd so
Doct. pl. 3	that judgmt thereupon wou'd be erroneous there
El. 121	the writ is de facto abated as if an action be
185, 193, 330	brought agt a feme covert as sole, or where the Plaintiff by his own shewing had no cause of action at the time the writ was bought
	[3]
1 Sal. 2 pl. 5	abated by pleading in time, for matters in &
Ld. R. 853	before the writ cannot be taken advantage of in error.
Cr. El. 554	Tis a good plea that a stranger is tenant in com-
1 B 10	mon with the Plaintiff. <sup>13</sup>

before the Writ sued, or pending the Writ. By the first the Writ is abated *de facto*, but the second only proved the Writ abateable; both are to be pleaded, with this Difference, that Coverture pending the Writ, must be pleaded *post ultimam continuationem*; whereas Coverture before the Writ brought, may be pleaded at any Time, because the Writ is *de facto* abated; but if a Feme Sole takes out a Writ, and after marries, the Defendant was legally attached in such Suit; and therefore may plead in Chief to it any Defense he has; but such Plea must be *plus darrein continuance*." 1 Ba. Abr. 9. The marginalia in the Law Notes are from Bacon. Siderfin's Reports at 140 deals with flaws in writs generally; on pleas in abatement after last continuance, see 252. Leonard's Reports at 168-69 reprint Lee and Madox's Case, where it was held (30 & 31 Eliz.) that "by the taking of the husband, the writ sued by the woman is not abated, but only abateable."

<sup>12</sup> "If a Writ be brought by A & B, as Baron and Feme, whereas they were not married when the Suit depended, the Defendant may plead this in *Abatement*; for though they cannot have a Writ in any other Form, yet the Writ shall abate, because it was false when sued out." 1 Ba. Abr. 9, citing Fitzherbert's *New Natura Brevium*, 476.

<sup>13</sup> "Here the general Rule to be observed is, that where the Writ is *de facto* a Nullity and destroyed, so that Judgment thereupon would be erroneous, there the Writ is *de facto* abated; as if an Action be brought against a Feme Covert as Sole, this makes another Man's Property liable without giving him an Opportunity of Defending himself; which would be contrary to common Justice, and therefore the Writ is *de facto* abated. . . . So if the Return of a *Pluries Mandamus* is laid to be after the Beginning of a Term, and the *Memorandum* of the Bill is entered generally of that Term, this makes the Writ a perfect Nullity; for by the Plaintiff's own shewing he had no Cause of Action at the Time when the Action was brought. . . . Where the Writ is only abateable, it must be abated by pleading in Time, for Matters in and before the Writ, cannot be taken advantage of in *Error*. . . . So though it be a good Plea for a Defendant to say, that a stranger is Tenant in Common with the Plain-

- 1 B 13                      Whenever it appears on record that the Plaintiff  
12 Mod. 418              has sued out two writs against the same De-  
5 Co. 61                   defendant for the same thing the second Writ shall  
                                abate.<sup>14</sup>
- 1 B 14                      Whatever destroys the Plfs action & disables him  
Vent. 249                  forever from recovering may be pleaded in bar but  
2 Ld. R. 984              the Deft may sometimes plead it in Abatement.
- As in replevin the Deft may plad [sic] property  
                                in himself or in a stranger either in bar or in  
                                Abatemt.
- 1 B 14                      If a Deft pleads matter in bar & concludes in  
2 Mod. 64                  abatement or matter in abatement & concludes in  
Ld. R. 593                  bar this shall be deemed a plea in bar.<sup>15</sup>  
Contra 2 Ld. R.  
1018
- 1 B 15                      Where the matter of Abatemt appears on the face  
Moor. 30                   of the record the plea shall begin & end with a  
5 Mod. 136                  petit judicium de brevi but where the matter is

tiff, yet if he does not plead it in *Abatement*, he shall not have the advantage of it in Arrest of Judgment." 1 Ba. Abr. 10. The marginalia include a citation from *Doctrina placitandi*: "Queux pleas abate le breve en tout; & queux en parte tantsolement," and cases from Croke's Elizabeth, viz.: *Hunt et ux. v. Gilburne* (plea of local custom bars writ), at 121; *Devered v. Ratcliffe* (improper criminal procedure), at 185; *Tassall v. Shane* (accord to pay less sum cannot be pleaded in satisfaction), at 193; and *Barry v. Stanton* (a devise is a breach of condition not to alien), at 330. From Salkeld's King's Bench Reports Bacon cited the rule that a matter of disability which might have been pleaded to the action is not pleadable to a *scire facias* on judgment; cf. 2 subpgh. 5, citing therein the case of *West v. Sutton* (1 Anne) from 2 Ld. Raymond's Reports, 853. "Jointenancy" was held pleadable in abatement, although not admissible in evidence on the general issue, in *Deering v. Moore*, reprinted in 2 Croke's Elizabeth, 554.

<sup>14</sup> Verbatim from 1 Ba. Abr. 13, which cites the case of *King v. Fowler* (12 Will. III) in 12 Modern Law Reports, 418. Bacon's other citation is from the case in 5 Coke's Reports, 61, *Robert Bradshaw's Case* (10 James I).

<sup>15</sup> Virtually verbatim from 1 Ba. Abr. 14, which cites *Presgrave v. Saunders* (2 Anne) from 2 Ld. Raymond's Reports, 984-85. The same rule was held in *Stubbins v. Bird et al.* (27 & 28 Chas. II) in 2 Modern Reports, 63 at 64, and in *Medina v. Stoughton* (12 Will. III) in 1 Ld. Raymond's Reports, 593. But Holt, C. J., held *contra* in *Crosse v. Bilson* (2 Anne), in 2 Ld. Raymond's Reports, 1016 at 1018. Virginia courts

de hors the Deft shall only end his plea with a petit judicium.<sup>16</sup>

Pleas in abatement are not to be recd but on oath  
Suits shall not abate for want of form if there  
be matter sufficient in the pleading.<sup>17</sup>

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subsequently adopted the older view, as having the greater weight of authority; cf. *Stephens v. White*, 2 Wash. 203, decided 1796, and *Payne and Fairfax v. Grim*, 2 Munf. 297, decided 1811.

<sup>16</sup> Verbatim from 1 Ba. Abr. 15; in the fifth edition, the editor of Bacon observes: "This Distinction is not now often attended to, nor is it perhaps material." Bacon here has paraphrased the passage in Moore's Cases at 30, *sub. tit.* "Brief de abatement." The last sentence in this entry in the Law Notes and from Bacon is from the case of *Bowers et ux. v. Cook* (7 Will. III) in 2 Modern Reports, 136.

<sup>17</sup> "By the Statute of 4 Anne, c. 16, for Amendment of the Law, no dilatory Plea is to be received unless on Oath, and probable cause shown to the Court." 1 Ba. Abr. 1n. The second sentence is a summary of various propositions appearing in 1 Ba. Abr. 11, 12. Marshall omitted all reference to half a dozen pages on Abatement in Bacon, since these related to personal impediments or personal privileges which were not recognized in Virginia Law.