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United States

THE PROVINCIAL COURT AND THE LAWS OF MARYLAND: 1675-1715

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The legal historian of the American colonial period labors under the handicaps that few judicial opinions were rendered or preserved, that most judgment and minute books yield information of limited value and that the available file papers consist of process or pleadings (as opposed to briefs or memoranda of law). In only scattered instances has the survival of the papers or the precedent book of a lawyer illuminated the legal process. Unfortunately, paucity of source material has not prevented sweeping generalizations as to the quality of the colonial judiciary, the competency of the colonial bar and the nature of the law administered by the colonial courts – generalizations which frequently take little account of time spans or jurisdictional differences. Related is the tendency to place too great reliance upon statutory material, generally available in printed form, and to disregard and leave unread the court records, largely in manuscript and frequently not easy of access.

It is the purpose of this paper to set forth certain observations and conclusions, based largely upon examination of manuscript material, as to the administration of justice by one colonial court for one period – the Provincial Court of the province of Maryland for the years 1675-1715 (the years 1675-89 were under proprietary rule, the period 1692-1715 under royal government).[1] The Provincial Court, held by commission, was the principal common law court of original jurisdiction in both civil and criminal matters;

[1] For the earlier printed records of the Provincial Court (still in process of publication by the Maryland Historical Society) see the Archives of Maryland (hereinafter M.A.), Volumes 4, 10, 41, 49, 57, 65-69. The manuscript judgment books of the court from 1679 to 1715 are at the Hall of Records, Annapolis, Md., in libers designated by clerical initials as follows: WC (1679-84), TG (1682-1702), DS No. A (1684-87), SS (1688-89), DS No. C (1692-93), TL No. 1 (1694-96), TL No. 2 (1696), HW No. 3 (1697), IL (1698), WT No. 3 (1699-1701), WT No. 4 (1702), TL No. 3 (1703-05), TB No. 2 (1705-06), PL No. 1 (1706-07), PL No. 2 (1707-09), PL No. 3 (1709-10), TP No. 2 (1711-12), IO No. 1 (1713), and VD No. 1 (1713-16).

it also exercised appellate jurisdiction, largely civil, over the county courts, courts of limited original jurisdiction, both civil and criminal.[2] By various acts of Assembly the Provincial Court and the county courts exercised concurrent jurisdiction over popular actions and actions under remedial statutes.[3] During the proprietary period the acts of the Provincial Court were subject to review by the Governor and Council, although seldom resorted to, and under royal rule by a Court of Appeals.[4] The Provincial Court was selected for study because during this period its records consistently disclose (1) the reasons advanced by counsel in support of motions in arrest of judgment (a widely used procedural device), (2) the reasons in support of writs of error or appeals taken from judgments of the county courts and, to a lesser degree, (3) the reasons advanced by counsel in support of demurrers. Few colonial court records are as revealing for such a sustained period and under two forms of government.

This study made of the Provincial Court records affords considerable insight into such subjects as the extent to which the court was concerned with application of broad principles of substantive law as opposed to details of procedure; the role played by acts of Assembly in the administration of justice; the function of the court in the extension of Acts of Parliament (both pre-settlement and post-settlement) to the colony; the extent to which the common law of England (including such elements as local custom and the law merchant) was reflected in the substantive

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[2] For some commissions see 15 M.A. 8-9, 110-11, 129-30, 357-58; 17 *id.* 250, 431-32; 66 *id.* 141-42; WC, 635-36; DS No. C, 10-11, 38-40, 49-50, 323; TL No. 1, 1-2, 120-22; HW No. 3, 131; WT No. 3, 1-3, 612-14; WT No. 4, 165-68; TB No. 2, 65; PL No. 1, 233. For acts of Assembly relating to writs of error to and appeals from the county courts to the Provincial Court see 2 M.A. 562; 7 *id.* 71; 13 *id.* 444; 22 *id.* 469; 26 *id.* 286; 29 *id.* 336; 38 *id.* 6, 59. The distinction between proceeding by writ of error or by appeal is vague, as is any use made of the bill of exceptions of English practice. These commissions and acts also leave ambiguous the appellate jurisdiction of the Provincial Court in criminal matters. For a case in which the Provincial Court upheld an information by the Lord Proprietor below the minimum jurisdictional amount fixed by act of Assembly see 68 M.A. 93-94. See also 68 *id.* 104-05, 215-16.

[3] For discussion of a representative period (1696-99) see Court Records of Prince Georges County, Maryland, 1696-1699, Amer. Leg. Records—Vol. 9. (ed. J. H. Smith and P. A. Crowl, 1964) lix-lxiii (hereinafter PGCC).

[4] For the review jurisdiction of the Court of Appeals see Proceedings of [redacted] Maryland Court of Appeals, 1695-1729, Amer. Leg. Records —Vol. [redacted]. C. T. Bond and R. B. Morris, 1933) 1-206.

and procedural law of the province; the significance in judicial administration of elements such as local custom and usage, and rules and orders of court; the extent to which English cases, authorities or maxims of law were cited or relied upon; the growth of any system of provincial precedents; the effectiveness of the Provincial Court in raising the standards of the county courts; and the learning and competence of the provincial bar.

Since, as will appear, the Provincial Court, in dealing with appeals and motions in arrest, was largely concerned with procedural matters in civil causes, the discussion below is organized in terms of the successive stages in a civil action, commencing with original process. A brief treatment of the few criminal proceedings deemed significant follows the discussion of the civil side.

In Maryland in most actions no original writ issuing out of Chancery was used; the *capias ad respondendum,* mesne process in England, served as original process. In a few cases it was asserted that no *capias* or other process had issued or been served in the county court (or that the record failed to show such issuance or service), that the wrong form of process was employed (*capias* instead of a summons), that *capias* instead of a bill was used in an action against an attorney, that the form of the *capias* was improper (not following "the Register"), that the *alias capias* did not agree with the original writ, that the form of the return was improper or that the return had been made by the wrong officer (under-sheriff rather than sheriff).[5] In many instances it was asserted that a material variation existed between the writ and the declaration such as in the form of action (writ in debt, declaration in detinue), in the number, name, capacity or description of parties or in the amount sued for.[6] In several cases counsel contended that the defect was not cured by "the Statute of Jeofailes," presumably meaning Stat. 18 Eliz. I, c. 14 (An Act for Reformation of Jeofails) or 21 Jac. I, c. 13 (An Act for the Further Reformation of Jeofails).[7] Although Chancellor Kilty in his

[5] DS No. C, 389-93; TL No. 1, 225-28, 551-52; TL No. 2, 128-30, 140-42; HW No. 3, 238-39; WT No. 4, 100-08, 108-16; TL No. 3, 120-24; PL No. 3, 656-58, 668-74. For the court's opinion that *capias* might issue against an executor or administrator see 67 M.A. 6.

[6] 68 M.A. 26-27, 170-173; WC, 269-73, 506-09, 624-28, 803-04 (motion to abate granted); DS No. A, 74-79, 404-06; DS No. C, 287-91; TL No. 1, 516-18, 810-11; HW No. 3, 80-88; WT No. 3, 399-406, 583-93, 664-68; TB No. 2, 25-28.

[7] DS No. A, 85-87; TL No. 1, 553-54. For a short-lived provincial Act for the Reformation of Jeofailes in Maryland (1697) see 38 M[redacted]03.

well-known report regarded both these statutes as extending to the province, the arguments of counsel at times appear to disregard any such extension or to narrow any application.[8]

From an early date acts of Assembly had provided for or regulated attachment of property as initial process in specified circumstances.[9] In contrast to the use of *capias ad respondendum* but few causes involved alleged failure to comply with the statutory provisions governing attachment as initial process, as opposed to final process.[10] This perhaps illustrates the virtue of colonial legislation which, even if departing from common law standards, provided a degree of certainty not available when the common law of England or selective portions thereof were received in the province by usage or custom.[11]

In numerous cases reasons on appeal or in arrest were directed at deficiencies in the declaration; these reasons ranged widely in content. Some characterized the pleading as uncertain, insufficient, contradictory or wanting in form in general terms; others attacked lack of specificity in matters such as when and how a debt arose, the time and place of demand for payment, when and what promise was made, the nature of the consideration, the nature of the breach, the value of goods sued for, the time and place of an alleged conversion.[12] In other instances allegations were totally lacking as to essential elements of a cause of action such as an assumption, consideration, demand for payment or performance, damages incurred, the delivery of goods or bills of exchange, the representative capacity of the plaintiff, etc.[13] Some declarations failed to set forth, annex or make tender of essential

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[8] J. KILTY, A REPORT OF . . . ENGLISH STATUTES . . . 216-17, 235, 237 (1811).

[9] 1 M.A. 232, 361; 2 *id.* 206; 7 *id.* 606; 13 *id.* 522; 26 *id.* 220; 30 *id.* 236.

[10] TL No. 1, 516; VD No. 1, 363-66.

[11] Counsel in a 1694 appeal characterized the 1692 act regulating attachments as "a new law and directly in face of the law of England though convenient for this province to follow." TL No. 1, 37-44.

[12] WC, 188-91, 269-73; DS No. A, 24-25 (emphasis upon the nature of the consideration in determining the form of action), 85-87, 301-06, 533-34; DS No. C, 125-32, 137-41, 356-61; TL No. 1, 222-25, 243-46; HW No. 3, 76-79; WT No. 3, 664-68; PL No. 1, 57-60; PL No. 3, 508-12; VD No. 1, 259-65, 265-72.

[13] 67 M.A. 68-70; WC, 317-20; DS No. A, 24-25; TL No. 1, 230-42; TL No. 2, 128-30; IL, 104-06, 123-24; WT No. 3, 388-99; TL No. 3, 113-15, 659-62; VD No. 1, 265-72.

documents such as letters of administration, accounts or bills of exchange.[14] The manner of pleading acts of Assembly was termed insufficient, or the act relied upon was asserted not to be in force; a custom of merchants pleaded as controlling was characterized as uncertain.[15]

A substantial number of cases involved application of the form of action concept of English law. This arose in various ways. At times claim was made that the facts alleged or proven did not meet all the requirements or essential allegations of a particular form of action.[16] In other instances it was asserted that the form of action used in the complaint did not lie in the instant factual situation, that the complaint in effect combined or mixed two forms of action or that a particular action, such as account or debt, would not lie against administrators or executors.[17] It was at times more generally maintained that a declaration was not sufficient in law since, for example, certain words were not actionable in an action for slander or the facts alleged did not make out a case of malicious prosecution, or that informing by a coroner to a grand jury did not constitute slander.[18] A few cases involved dispute as to the correct method of proceeding in actions on penal statutes.[19]

After the filing of the declaration it was the usual practice in the Provincial Court and the county courts to grant defendant an

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[14] 68 M.A. 247-49; SS, 55-59 (counsel claimed that failure to present to court letters testamentary, raised upon demurrer, was not cured by the 1664 Statute of Jeofails, 16 and 17 Car. II, c. 8); DS No. C, 111-19a (defendant contended that plaintiff's failure to allege that he brought into court the bill of exchange sued on was a matter of substance not within "the Statute of Jeofailes"), 287-91; WT No. 4, 100-08, 108-16. An abatement was granted when a writing obligatory produced in court lacked the word "tobacco" in the sum. 67 M.A. 296-98.

[15] WC, 175-91; TL No. 3, 120-24; VD No. 1, 278-80.

[16] DS No. C, 304-07, 356-61; TL No. 1, 238-42, 242-46 (enumerates material elements in action for trover and conversion); TL No. 2, 133-35; HW No. 3, 159-60; PL No. 3, 493-96. As to the status of the rule of judicature that the courts were to be governed by the laws of England where the laws of the province were silent see 1 M.A. 487, 504; 13 *id.* 39, 43, 99, 103-04, 483; 19 *id.* 426; 22 *id.* 558-62; 24 *id.* 4-5, 104-07.

[17] 67 M.A. 41-50; WC, 168-69, 496-99; DS No. A, 85-87, 248-49; SS, 9-12; TL No. 1, 523-26; HW No. 3, 238-39; IL, 122-23, 124-25; WT No. 3, 583-93; PL No. 3, 497-508, 652-56.

[18] DS No. A, 33-36; DS No. C, 370-75; WT No. 3, 502-05; WT No. 4, 96-100; TL No. 3, 113-15; PL No. 3, 668-74; VD No. 1, 363-66.

[19] WC, 585-88; DS No. C, 380-85.

imparlance.[20] In a few cases it was complained that an imparlance had been denied, that the court had proceeded to judgment on the same day that an imparlance was granted, that an imparlance was granted before any declaration was filed, that the record did not show the date of the imparlance, or that the imparlance was not to a day certain.[21]

Common law pleading in the province rarely extended beyond the stage of declaration, plea, replication. The rejoinder and surrejoinder, rebutter and surrebutter of the English formbooks is seldom encountered. Nevertheless, in a fair number of cases claim was made that there had been no proper joinder of issue either in fact or in law.[22] Pleas in bar or special pleas or replications were characterized as uncertain, insufficient, imperfect, vicious or wanting in form.[23] Such defective pleas contributed to the failure to join issue. At times it was contended that resort should have been to a special plea instead of the general issue, that pleas made were inappropriate to the circumstances (*nil debet* to an action on a bond) or that defendant should have been allowed to plead over after the overruling of a demurrer.[24] In several cases it was asserted that plaintiff after replication should not have put himself upon the country but should have prayed that it might be inquired into by the country, following the English practice.[25]

Of the relatively few causes involving application of a statute of limitations, whether raised before or after verdict, most involved provincial acts of Assembly; a few concerned the applicability of

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[20] See PGCC, lxxxiv - lxxxv. In some cases it was objected that the record failed to show the appearance of a party or parties, or that an attorney appeared without filing a warrant. TL No. 2, 140-42; TL No. 3, 120-24, 662-65; PL No. 3, 652-56, 674-78; VD No. 1, 259-65.

[21] TL No. 2, 128-30, 135-37; WT No. 3, 399-406, 535-41, 547-55, 799-808; PL No. 1, 60-67; PL No. 3, 652-56, 656-68, 674-78.

[22] WC, 510-14, DS No. A, 258-60; DS No. C, 125-32; TL No. 1, 553-54; TL No. 2, 180-81; WT No. 3, 293-96, 784-91; TL No. 3, 659-62; PL No. 2, 11-17.

[23] TL No. 1, 225-28; WT No. 3, 784-91; TL No. 3, 635-42; PL No. 2, 107-12; VD No. 1, 338-42.

[24] 66 M.A. 347-50; WC, 624-28; DS No. C, 380-85; TL No. 1, 28-32, 213-17; TL No. 3, 120-24.

[25] DS No. C, 125-32 (opposing counsel answered that according to "the Statute of Jeofailes," "a mistake in joining the issue according to the veracity of forms is at an end"); WT No. 3, 556-64; PL No. 3, 668-74.

Stat. 31 Eliz. I, c. 5 to actions for forfeitures under penal statutes.[26] In several cases, late in the period, it was held by the court that the twenty-year limitation of Stat. 21 Jac. I, c. 16 did not extend to the province.[27] In a scattering of cases other pleas in bar were raised on the basis of various Acts of Parliament, including the Statute of Frauds, and acts of Assembly or by reason of incapacity to sue or misjoinder of parties.[28]

The fact that the county courts were courts of limited jurisdiction was raised in relatively few appeals. The doctrine of *coram non judice* was invoked in scattered cases involving the assumption of jurisdiction in testamentary causes (the province of the Commissary General) or equitable matters belonging in the Court of Chancery, in an action of trespass *vi et armis* (the county courts being excluded from jurisdiction in actions involving title to real property), in cases in which the cause of action was not alleged or shown to have arisen within the county of suit, in a case in which the county court proceeded to judgment after refusing to allow transfer to the Provincial Court by habeas corpus.[29] The doctrine was also invoked where the number of justices required by commission was not present or they sat under a new commission without taking the requisite oaths.[30] In several cases it was

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[26] For application of provincial acts see 66 M.A. 247-48, 262-64; 67 *id.* 199-200, 327-29; WC, 152; DS No. A, 301-06; DS No. C, 164-69, 389-93; TL No. 1, 217-22, 228-32, 551-52; IL, 104-06; TB No. 2, 11-23. For the succession of provincial acts see 2 M.A. 201; 13 *id.* 481; 26 *id.* 316; 30 *id.* 229. For Stat. 31 Eliz. I, c. 5 see WC, 188-91, 499-503.

[27] IO, 399-402 (printed in 1 HARRIS & MCHENRY 28); VD No. 1, 234-39 (printed in 1 HARRIS & MCHENRY 30).

[28] WC, 499-503 (action or information under 1676 act for publication of marriages, 2 M.A. 522); DS No. A, 297-99 (Statute of Frauds, 29 Car. II, c. 3), 301-06 (Statute of Frauds), 412-14 (contrary to 23 Hen. VI, c. 10), 565-66 (5 & 6 Edw. VI, c. 16); SS, 24-39 (provincial act against usury, 13 M.A. 120), 62-69 ("the statute of England" against usury, perhaps 12 Car. II, c. 13, and 13 M.A. 120); TL No. 1, 531-38 (no demand for payment contrary to provincial act, 13 M.A. 530); DS No. C, 148-52 (capacity of indentured servant to sue master), 380-85 (action on penal law, 7 M.A. 73); PL No. 2, 107-12 (act of Assembly); VD No. 1, 297-300 (Statute of Frauds not applicable, 1 HARRIS & MCHENRY 29).

[29] WC, 191-95 (trespass vi et armis), 269-73 (detinue for legacy); DS No. A, 333-39; SS, 13 (separation and divorce matter); TL No. 1, 551-52, 713 (testamentary cause); TL No. 2, 130-32, 140-42, 150-58 (testamentary cause); HW No. 3, 235-38; IL, 121-22; WT No. 3, 399-406, 808-15.

[30] DS No. C, 389-93; WT No. 3, 428-35.

asserted that the Provincial Court had no jurisdiction, original or appellate, over popular actions or informations on penal statutes, apparently on the theory that the action had to be brought in the county of the offense.[31]

In scattered instances counsel urged that no *venire facias juratores* had issued or been returned (or at least that the record showed no such issuance or return), that the award was improperly worded (in the past instead of the present tense) or the return was insufficient, that the record did not identify the sheriff or the jurors, that the jurors were not all freeholders or good and lawful men, that the jury was not legally qualified (one juror being plaintiff's brother-in-law; one juror an alien), that only eleven jurors had been impaneled, the law requiring twelve, or that the jury had not been sworn.[32] Perhaps surprisingly, in only one instance was complaint made that a challenge to a juror had not been admitted.[33] In one case the contention was made that failure to return the *venire facias* was not cured by "the Statute of Jeofailes" (presumably 21 Jac. I, c. 13), a contention that appears unsupported by the language of the statute.[34] Whether proof by affidavit of matter *dehors* the record was permitted does not appear from the material examined.

Few references appear to rules of evidence. Such rules had received little attention or synthesis from English commentators and scant statutory treatment in the province.[35] More frequent were arguments directed to the lack or insufficiency of evidence supporting essential elements of a cause of action such as the assumpsit, valuable consideration, reliance upon a warranty, own-

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[31] WC, 499-503; SS, 24-39; DS No. C, 380-85. Usually the provincial acts provided that popular actions be brought in any court of record in the province although a few conferred exclusive jurisdiction on the county courts. PGCC, lix - lxiii.

[32] 67 M.A. 41-50; 68 *id.* 157-58; WC, 681-90; DS No. A, 258-60; DS No. C, 164-69, 173-76; TL No. 1, 210-13; IL, 123-24, 124-25; WT No. 3, 399-406, 565-72; TL No. 3, 669-73, 673-78; PL No. 1, 60-67; PL No. 3, 668-74, 674-78.

[33] DS No. A, 258-60.

[34] DS No. A, 85-87.

[35] 67 M.A. 41-50 (use of affidavit, no opportunity to cross-examine); WC, 175-91 (plaintiff can't be witness in own cause; depositions and affidavits not admissible since can't cross-examine), 850-52 (act specifying evidence to prove foreign debts, 2 M.A. 209); SS, 16-24 (garnishee's testimony should not have been accepted, acceptance induced perjury). See also PGCC, xcix - c.

ership of property, authority as administrator or executor, jurisdictional facts, or the endorsement of bills of exchange sued upon.[36] While many sections of the Statute of Frauds (Stat. 21 Car. II, c. 3) were regarded as extending to the province, the Provincial Court in a 1714 case involving a 1679 will signed, sealed and published in the presence of two witnesses only overruled arguments grounded on the statute.[37] In only a few cases was the overruling of a demurrer to evidence or the exclusion of evidence asserted to constitute error.[38] Variation between the declaration and the proof adduced was ground for complaint in several causes.[39]

A number of reasons on appeal or in arrest came within the category of improper jury conduct. Most significant were the failure to return a special verdict when so directed, the failure to accept or consider evidence and the rendering of verdicts outside the joinder of issue.[40] Other conduct included a premature commencement of deliberations, the consideration of evidence furnished by a party or other person without the court's knowledge, rendering a verdict in the absence of plaintiff (probably an attempt at a nonsuit), being swayed by the hearsay of one juror, and the separating after agreeing upon but before rendering a verdict.[41] The method used to present such matters outside the record to the court is not apparent nor is it at all certain that such reasons were even considered by the court.

The Provincial Court records cast little light upon the nature of the instructions given to juries; the county court records ex-

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[36] DS No. A, 85-87, 503-09, 573-74; DS No. C, 105-11, 157-62, 287-91, 389-93; TL No. 1, 546-48; WT No. 3, 799-808; TL No. 3, 673-78, 678-81. See also DS No. C, 125-32 (witness not summoned according to law); TL No. 1, 228-32 (perjury by plaintiff).

[37] VD No. 1, 297-300 (1 HARRIS & MCHENRY 29); KILTY, *op. cit. supra* note 8, at 240-42. *Cf.* WC, 292-96; DS No. A, 297-99.

[38] 67 M.A. 107-08; 68 *id.* 4-6; WC, 261-67; PL No. 1, 68-71.

[39] 68 M.A. 212-15; DS No. A, 85-87, 301-06; TL No. 1, 228-32, 232-38, 523-26.

[40] WC, 681-90; DS No. A, 33-36, 152-54; DS No. C, 389-93; TL No. 1, 232-38; TL No. 2, 121-22; WT No. 3, 556-64, 792-99; VD No. 1, 300-03.

[41] DS No. A, 467-70; TL No. 1, 217-22, 230-42; WT No. 3, 565-72; TL No. 3, 648-54; PL No. 3, 668-74. See also 66 M.A. 354-55 where a nonsuit was granted in the Provincial Court when it was shown that a nonsuit had been granted on the same cause of action in Calvert County Court when the plaintiff failed to appear to the verdict.

amined add nothing. A few early instructions are rudimentary and reflect a bench not trained in the law nor able in this particular to rely upon English formbooks.[42] While it seems unlikely that the bench of the later period, particularly judges such as Thomas Smithson, would have been content with such rudimentary instructions, the fact remains that in only two cases, both appeals, were jury instructions claimed to be inadequate or erroneous.[43]

A substantial number of cases involved consideration of the respective roles of judge and jury. The justices of the county courts were charged with improperly determining matters of fact without a jury, such as assumpsit or nonassumpsit, whether a servant was free, whether a party plaintiff was an alien or whether an estate had been fully administered.[44] Most common, however, was the objection that no writ of inquiry had issued to determine the amount of damages.[45] As to the jury, it was charged that they improperly took it upon themselves to decide questions of law. Frequently, juries were accused of deciding that plaintiff had no cause of action; in a few instances juries were charged with disregarding instructions from the bench in points of law.[46] In one case the parties put themselves on the court, rather than on the county, but the issue was nevertheless tried by a jury.[47]

Jury verdicts were assailed as contrary to the evidence or based on insufficient evidence, as inconsistent with the declaration, as failing to award damages where appropriate or awarding excessive damages, or as not within the scope of the issue joined.[48]

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[42] For an early charge see 49 M.A. 270.

[43] DS No. A, 301-06, 470-75.

[44] DS No. C, 105-11, 148-52; TL No. 1, 520-23, 553-54; HW No. 3, 235-38; WT No. 3, 583-93; TL No. 3, 659-62; VD No. 1, 259-65. See also the objection that an action against an attorney by bill should be tried by the court and not by a jury. 66 M.A. 425-26.

[45] DS No. C, 111-19a, 304-07; TL No. 1, 531-38; TL No. 2, 130-32, 133-35; WT No. 3, 573-79; PL No. 2, 3-7, 7-11; PL No. 3, 508-12, 678-83.

[46] WC, 322-25; DS No. A, 51-53, 467-70; SS, 62-69; DS No. C, 125-32, 132-37, 176-80; TL No. 1, 528-31; TL No. 2, 121-22; HW No. 3, 93-95; TL No. 3, 662-65; PL No. 2, 345-48.

[47] TL No. 1, 538-41.

[48] 66 M.A. 347-50, 67 *id.* 68-70; WC, 317-20, 506-09, 681-90; DS No. A, 470-75, 573-74; SS, 59-62; DS No. C, 370-75, 375-78; TL No. 1, 549-50; TL No. 2, 121-22; HW No. 3, 93-95; WT No. 3, 393-96, 379-88, 388-99; PL No. 2, 63-64; TL No. 3, 113-15.

A few were attacked as uncertain or conditional but there was some recognition that, being given by laymen, verdicts tended to be defective in form.[49]

Judgments were objected to as uncertain or defective in form or as deviating from the jury verdict, as inconsistent with the cause of action as laid in the declaration (declaration in trespass on the case, judgment in debt; judgment exceeded the amount of the debt sued for), or as erroneous as a matter of law.[50] On occasion objection was made that the judgment included no provision that defendant be *in misericordia* or that an amercement was provided where *capiatur pro fine* would have been proper.[51]

In a few cases it was asserted that an award of costs was uncertain, that costs were wrongly awarded, or that the costs awarded were excessive.[52] In one case costs were scaled down from almost 6,000 pounds of tobacco to 400 pounds, the damages found, pursuant to Stat. 43 Eliz. I, c. 6 and 22 and 23 Car. II, c. 9.[53]

As to final process, in most personal actions *capias ad satisfaciendum* was employed, although there was use of *fieri facias* and *elegit*. In real actions *habere facias possessionem* and *habere facias seisinam* are found. In addition, by acts of Assembly attachment was available as final process.[54] Of the isolated cases involving final process most are concerned with erroneous practices under the statutory attachment procedure.[55] Others concern the

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[49] WC, 16-19; SS, 62-69; WT No. 3, 388-99; PL No. 2, 345-48; PL No. 3, 493-96, 668-74.

[50] DS No. A, 333-39; DS No. C, 173-76, 176-80; TL No. 1, 523-26; TL No. 2, 135-37, 150-58; HW No. 3, 232-34; IL, 123-24; WT No. 3, 379-88, 784-91; WT No. 4, 96-100; PL No. 1, 68-71; PL No. 3, 678-83; VD No. 1, 259-65.

[51] WC, 510-14; HW No. 3, 235-38 (not aided by "Statute of Jeofailes"); TL No. 3, 105-08 (not aided by "Statute of Jeofailes"); PL No. 2, 11-17; PL No. 3, 678-83.

[52] WC, 510-14; DS No. A, 333-39; SS, 16-24; HW No. 3, 235-38, 238-39; WT No. 4, 100-08; TL No. 3, 234-41.

[53] DS No. A, 4.

[54] See the acts listed in note 9 *supra*.

[55] TL No. 1, 37-44, 527-28; TL No. 2, 133-35, 137-40; TL No. 3, 350-52; PL No. 2, 11-17; VD No. 1, 363-66. See also the pro[redacted] of the attachment of debts secured by bills or specialties held by [redacted]ns outside the province. 66 M.A. 422-24.

issuance of execution before judgment entered, variance in amount between judgment and execution and the undervaluation of property taken by the sheriff on execution.[56]

The writ of *scire facias* was commonly employed in the province to revive judgments, consistent with English common law practice. Some objections were raised that such writs contained material omissions or significant variations from the judgment or record upon which based; on one occasion deviation of the sheriff's return from the common law *scire feci* was grounds for objection.[57] Material variation between the judgment entered on the *scire facias* and the writ and/or the judgment supporting the writ was ground for appeal.[58] The imposition upon defendant of a further amercement in *scire facias* proceedings was also claimed to constitute error.[59]

At times clerical standards in the county courts were lax; this laxity was seized upon by some counsel in their reasons of appeal. Defects specified include clerical errors as to the date of hearings, discrepancies as to the justices present, inclusion of absent commissioners, omission of the date and place of judgment, omission of appearances, imparlances, continuances and pleas, failure to indicate whether trial was by jury or court, etc.[60]

In a small group of cases reversal of county court judgments upon writ of error or appeal was based on failure to afford due course of law. In most of these cases the reason of appeal given was that appellant had not been summoned but had been condemned unheard, contrary to law and Magna Carta (c. 29).[61]

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[56] DS No. C, 111-19a, 389-93; TL No. 1, 531-38.

[57] 68 M.A. 217-18; HW No. 3, 235-38; WT No. 3, 187-89; TL No. 3, 234-41, 654-59; PL No. 1, 71-75; VD No. 1, 254-56. See also a return held insufficient when service was made on a Sunday. 67 M.A. 42.

[58] HW No. 3, 235-38.

[59] *Ibid.*

[60] WC, 261-67, 510-14; DS No. A, 443-46; DS No. C, 125-32, 169-72; IL, 123-24; TL No. 3, 669-73; PL No. 3, 652-56; VD No. 1, 265-72. See also the answer of the Dorchester County Court upon a petition. 67 M.A. 167, 356-58.

[61] SS, 13; TL No. 1, 548-49, 552-53. See also DS No. A, 92-93 (defendant not notified to answer); DS No. C, 169-72 (ex parte examination of evidence against defendant); TL No. 1, 523-26 (plaintiff allowed delay in filing declaration until defendant absent), 531-38 (court refused to allow substitution of attorneys); TL No. 1, 713 (ex parte judgment); TL No. 2, 150-58 (default judgment after refusal to allow removal to Provincial Court by habeas corpus); WT No. 3, 547-55 (case tried ex parte), 784-91 (court arbitrated matter).

However, it should be noted that some of these cases involved matters before the county courts on petition and not in due course of law. In a 1688 appeal from Calvert County appellant contended that in an attachment proceeding there should have been a jury trial of the issue whether the garnishee had goods of the defendant in his possession, otherwise plaintiff was

> "cut off from his just remedy to prove and recover his debt by jury, contrary to the *Magna Carta* and the Law of this Province."[62]

In a 1696 appeal from Somerset County by a sheriff amerced for returning a writ "*cepi sed fugit*," it was asserted that there was no original writ, no declaration filed, no issue joined:

> "There is not one true step made according to the rules of law or proofs, practices of any court that it follows, but the least of one regulated by the *Laws of England* or any of the dominions thereunto belonging toward obtaining of the said judgment but is altogether new, impracticable, arbitrary and destructive to the liberty of the subject."[63]

In comparison with the civil side, in relatively few criminal proceedings were motions in arrest or to quash made or writs of error issued. However, the objections made as to irregularities in proceedings ranged widely and were successful in slightly more than half the cases. In many cases the indictment was attacked as failing to possess the requisite certainty, to give the mystery or occupation of defendant, to set forth the locus of the crime (the county courts having limited territorial jurisdiction), to charge an offense against any act of Assembly then in force, to allege facts constituting a felony as charged, or to make accusation of a criminal offense (as opposed to trespass *vi et armis*), or to have been brought within a year of the crime charged.[64] Also important

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[62] SS, 16-24.

[63] TL No. 2, 180-81. See also TB No. 2, 23-25.

[64] TL No. 1 (no *animus furandi* charged; taking of wild animal not a felony), 442-43, 502 (*cf.* 385), 543-45 (indictment omitted words "vi et armis" and "feloniously"; "as one hundred felonies do not make one treason one hundred trespasses cannot make one felony. . . . This indictment being laid in trespass cannot come within the penalty of our law against thieving and stealing or any penal law of this province nor can there be any felony without *animus furandi, actus non reum facit nisi mens sit rea*"); TL No. 2, 122-24 (acts did not constitute theft, defined as *contrectatio rei alienae fraudulenta, cum animo furandi, in-*

were attacks upon the composition or conduct of the grand jury or the petty jury – *no jurors* of the vicinage (defendant's county) were included, the jurors were not all freeholders or persons of good repute, an insufficient number of jurors returned the true bill, the jurors were not sworn; attacks upon trial procedure – failure to provide a copy of the indictment, use of interested or discredited witnesses, premature trial, proceeding *coram non judice*, use of depositions circumscribing cross-examination, the refusal to allow special defenses (absence of *animus furandi* in a theft case); the improper return of a *venire facias;* improper jury conduct (separating before agreed on verdict); the assumption by the court of jury functions (determination of the amount of damages in four-fold damage cases); a verdict not warranted by the evidence; and verdicts uncertain and judgments defective in form in not specifying the penalty or punishments.[65] As in civil cases, the record at times was assailed as defective and some apparent procedural faults (no *billa vera* found) were probably clerical omissions.[66] In a few instances it was asserted that defects were not cured by "the Statute of Jeofailes."[67]

As a result of the study made of the Provincial Court records and related material for the period 1675-1715 the following conclusions are offered:

(1) The Provincial Court, in those areas of adversarial contest laid open by its records, was much more concerned with

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vito illo domino cujus res illa fuerit, BRACTON, DE CORONA, 1. 3. c. 32); HW No. 3, 80-88; IL, 57-60; WT No. 3, 208-13, 233-38, 250-52, 782-83; TL No. 3, 108-10, 242, 433-34, 563-65; TB No. 2, 1-11, 211-15; PL No. 1, 159-60, 160-61; PL No. 2, 224-25. The status of the statutory "rule of judicature" in criminal proceedings is somewhat uncertain, see note 16 *supra*.

[65] TL No. 1, 502 (defendant offered "several Acts of Parliament for the maintaining the rights and privileges of the subjects of England that all persons criminal ought to be tried by a jury of their equals"); TL No. 2, 122-24; HW No. 3, 80-88; IL 52-57, 57-60, 119-21 (trial held at June court for orphans *coram non judice*); WT No. 3, 208-13 ("if there be no law of the Province for jurors of the vicinity then *The Laws of England* are consequently in force especially where they so much relate to the Liberty of the subject"), 233-38, 239-47 (judgment on information entered a *misericordia* instead of a *capiatur*); TL No. 3, 105-08 (*capiatur* should have been entered, not put in mercy), 108-10, 433-34, 435-37; TB No. 2, 1-11; PL No. 1, 160-61; PL No. 2, 224-25.

[66] HW No. 3, 80-88; IL, 119-21; WT No. 3, 208-13; PL No. 2, 224-25.

[67] HW No. 3, 80-88; IL, 52-57; TL No. 3, 105-08.

rulings on procedural matters, some of a detailed nature, than with the general application of principles of substantive law.

(2) Relatively few cases before the court involved application or construction of acts of Assembly, apart from some procedural aspects (attachment, limitation of actions, regulation of writs of error to and appeals from county courts).

(3) The court's role in the extension to the province or application of Acts of Parliament was limited to a few of the many enumerated by Chancellor Kilty as extending to the province. It seems likely that greater preservation of the arguments made in opposition to appeals and to motions in arrest would disclose a more significant utilization of the several statutes of jeofailes.

(4) Most of the law argued before the court consisted of the common law of England or some provincial modification thereof. Some resort was had to the law merchant, little to English local custom and usage.

(5) Provincial custom and usage is scarcely discernible, except to the extent that occasional reference is made to judicial practice. That this was attributable to the operation of any statutory "rule of judicature" seems doubtful. While a substantial number of procedural rules and orders of court were promulgated, their significance in an adversarial context was slight.

(6) Few references to English cases or authorities appear in the records. However, it seems likely that citation of cases and authorities was reserved for oral argument. From other sources it is clear that by the royal period, at least, a substantial number of English law books was to be found in the province.[68] The court records do reveal significant resort to the maxims of English law, both in Latin and in English.

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[68] English law books included COKE'S INSTITUTES, DALTON, THE COUNTY JUSTICE and OFFICE AND AUTHORITIE OF SHERIFES, BROWNLOW, WRITS JUDICIAL, several books by WILLIAM SHEPPARD, WEST, SYMBOLEOGRAPHY, FITZHERBERT, NEW NATURA BREVIUM, MOLLOY, DE JURE MARITIMO, ST. GERMAIN, DOCTOR AND STUDENT, OFFICE OF THE CLERK OF THE PEACE, COMPLEAT CLARK, COMPLETE ATTORNEY, GODOLPHIN, ORPHANS LEGACY; or TESTAMENTARY ABRIDGMENT, WENTWORTH, OFFICE AND DUTY OF EXECUTORS, MARCH, ACTIONS FOR SLAUNDER, HERNE, THE PLEADER, KILBURNE, CHOICE PRESIDENTS UPON ACTS OF PARLIAMENT RELATING TO THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE, RASTELL, TERMES DE LA LEY, STAUNFORD, PLEES DEL CROWN; English reports such as Coke, Owen, Croke, Plowden, Bridgman, Brownlow and Goldesborough, and various reports in abridged form; and various collections or abridgments of Acts of Parliament.

(7) While general and particular propositions of law were confidently urged by counsel as if constituting a *Corpus Juris Terrae Mariae* there is virtually no basis for concluding that any recognized system of provincial precedents existed.

(8) The role of the Provincial Court in supervising the exercise of judicial powers by the county courts was largely *ad hoc*. Too few cases came up from any one county court to permit effective imposition of higher procedural standards in the administration of justice or to insure uniformity of provincial substantive law. At times the Provincial Court, apparently in the interests of substantive justice, in effect impeached the record sent up and rejected arguments of counsel grounded upon clerical laxity or ignorance.

(9) The relatively small group of lawyers handling most of the cases before the Provincial Court, by standards fair to the time and place, were learned, astute and competent. Colonial practice had many complexities and pitfalls unknown to the English barrister or attorney; to use mere membership in the Inns of Court as a bench mark for colonial practitioners is fatuous.

As a contribution to legal history generally, it is hoped that this paper will stimulate similar examination of manuscript court records in other jurisdictions with a view to further testing of some of the generalizations as to colonial law and authority currently accepted in many quarters.