

of one James Cobb, not produced before the auditors, that he had paid Richard Charlett about five years previously 900 pounds of tobacco on the account of decedent William Graves. It thereupon appearing to the court that plaintiff was indebted to defendant in the amount of 16 pounds of tobacco, judgment was given for defendant.<sup>63</sup>

At the time the matter of appointment of auditors was before the Assembly the House of Delegates also resolved that "the severall Courts of Common Law within this Province make Rules for the Speedy bringing to tryall of those Actions wherein Merchants are Suitors."<sup>64</sup> However, no such rules appear in the *Liber*. It should also be noted that only one instance of arbitration appears in the *Liber*.

#### *Judgment*

In a substantial number of cases judgment *non prosequitur* or a nonsuit was entered against plaintiff, apparently on motion of defendant, for failure to prosecute his writ. Many entries are barren of any specific reasons for such judgment or nonsuit. However, in some cases it appeared that plaintiff had failed to file a declaration; in others, that neither plaintiff nor his attorney appeared when the action came up for trial but defaulted; in still others, that plaintiff had filed his declaration but refused to prosecute the writ and declaration any further. In *Clarke v. Williams* (November 1696) defendant pleaded the general issue and put himself upon the country. However, plaintiff's attorney "Refused to Joyne Issue to the Defendant Whereby the Said Defendant Remains by the Said plantiffe unproceuted." The court thereupon adjudged that plaintiff take nothing by his writ and awarded defendant costs and charges.<sup>65</sup>

Apparently at one time, June 1698, the court was of the opinion that too many actions were pending and unprosecuted for it ordered that "all Actions depending in this Court Shall Come to tryall the next Court: or Else Judgments or Nonsuites to be Awarded on them upon the neglect of any of the Attorneys Conserved therein." However, despite this warning only three nonsuits were entered at the August term.<sup>66</sup>

As noted earlier the court in numerous instances entered (1) judgment by default; (2) judgment by *cognovit actionem*, *cognovit* or confession; (3) judgment *nihil dicit*; (4) judgment by *non sum informatus*; (5) judgment *non prosequitur*; and (6) judgment of nonsuit. Normally such judgments carried an award of costs and charges for plaintiff or defendant, as the case might be. In one case use of a writ of inquiry of damages is found. Judgments *quod recuperet* were given (1) following decision by the court on either an issue of fact or question of law; (2) upon the verdict of a jury; or (3) upon the return of auditors. While the *Liber* shows a number of actions marked "agreed", it was not customary to have judgment entered upon such settlements. Judgment *nil capiat per breve* appears in a few cases.

A form of provisional judgment appears in *Willson's Executors v. Mockeboy*, in August 1699, in which defendant pleaded payment of part of the account sued on but could produce no proof thereof. The court therefore awarded judgment for the plaintiff with the proviso that "if the Said Mackeboy make appear any part of the Said Debt be paid by the next Court then it is ordered that it be allowd out of the aforesaid Judgment."<sup>67</sup>

63. *Infra* 312-13.

64. 19 *MA* 229, 246, 359.

65. *Infra* 85-86.

66. *Infra* 350.

67. *Infra* 531-32.