day and that the clerk for his default pay all costs and damages accruing thereby. The same result obtained in *Magruder v. Tracey's Administrator.* [94]

In both cases new writs were sued out returnable in the March 1698/9 term. Appearances, imparlances and continuances took the cases over to the October 1699 court. At this court Joshua Cecil appear for Small, the administrator, and demurred to the writ. For causes of demurrer Cecil stated that the writ did not provide upon whom or what execution should be levied, whether upon the body of Small or upon the goods and chattels of Tracey, the decedent, for no execution could be awarded against the body or goods of an executor or administrator *de bonis propriis* until a writ of *devastavit* had been legally returned against such executor or administrator that they had wasted the estate of decedent or that the executor or administrator had pleaded some false plea to the perpetual bar of the debt sued for. Further, if the judgment to be affirmed in the writ was supposed to be made upon the goods and chattels of the decedent Charles Tracey, as it must be if any was obtained, the writ should have mentioned why Brooke did not seek to have execution against defendant for the debt and damages to be levied upon the goods and chattels which were decedent's at the time of his death and which the writ made no mention of. By reason of this uncertainty in the writ no judgment could be entered, for the count or declaration had to be agreeable and conform to the writ, the plea in bar to the count or declaration; none must be narrower or broader than the other, citing Coke, *First Institute,* f. 303a. Wherefore, for want of a sufficient writ of *scire facias* to warrant and maintain a judgment to be affirmed by such writ, defendant prayed judgment for his damages and costs. [95]

To this demurrer William Stone, attorney for James Brooke, stated that he ought not to be barred from having his *scire facias* by anything alleged in defendant's plea and for replication said that the writ was well brought by mentioning therein David Small to be the administrator of Charles Tracey, that execution might safely be awarded against the goods and chattels of decedent and not against Small as executor or administrator *de bonis propriis.* That Small had wasted the estate of the decedent or had pleaded any false plea to the bar of the plaintiff's debt sued for were "but meer Niceyties in Law and alltogather contrary to the Cusome and Practice of this Province and not Sufficient to preclude the Said Plantiffe from haveing Judgment affirmed upon the Said Scire facias." Stone accordingly prayed judgment of the court whether defendant's plea was "not alltogather Dillatary Visious and Eronious" and further prayed judgment for the debt and costs. To this Cecil rejoined that the replication was not sufficient in law to bar defendant's plea in demurrer or to maintain the writ and put himself upon the court, as did Stone.

The court adjudged that the demurrer be quashed and that the *scire facias* be good. It further adjudged that Brooke recover against Small, as administrator, the debt and damages referred to in the writ as also 556 pounds of tobacco in additional costs and charges, the recovery to be out of the goods and chattels of Tracey at the time of his death come into the hands of Small to be administered. In *Magruder v. Tracey's Administrator* the case followed the same course upon return of the writ, Magruder being represented by John Meriton as attorney.

Transfer

In several instances causes were removed to the Provincial Court by means of a writ denoted *habeas corpus* (presumably *habeas corpus cum causa*) or certiorari.

94. *Infra* 438–39.
95. *Infra* 549–53.