

XI. CIVIL PROCEDURE

In Maryland during the 1696–99 period there was no comprehensive regulation by statute of procedure in civil actions. However, as will appear, there were a number of acts of Assembly covering various phases of civil procedure. In the main the procedure found in the *Liber* followed the outlines of English practice. The absence of file papers for Prince Georges County for the period makes difficult any definitive judgment as to how closely procedure in civil actions adhered to the standards of English practice and procedure in areas not specifically regulated by the laws of the province.

The commissioners were authorized by statute to make and ordain such rules and orders for the well governing and better regulating of county courts, the officers thereof and the suitors therein as in their discretion seemed requisite. To enforce such rules and orders the justices were authorized to inflict fines, not exceeding 100 pounds of tobacco for each offense, for the use of the poor of the respective county. These rules and orders were to be fairly transcribed by the several county clerks and at every county court set up at the court house door that persons might view them and regulate themselves accordingly.¹ In some counties, such as Charles and Baltimore, the county courts, pursuant to the statutory authorization, promulgated comprehensive rules and orders for the civil side.² However, no such compilation has been found in Prince Georges.

Process

The original writs of English practice issuing out of Chancery were not used in Maryland at this time—except perhaps to a limited extent in the Provincial Court. The first step in the commencement of a civil action in the county court was to obtain the issuance by the clerk of the court of a writ referred to in the *Liber* merely as a “*capias*”—the writ known in English practice as a *capias ad respondendum*. It is at times referred to as the “original writ” in an action. Although the form was not prescribed by the laws of the province and none of such writs issued by the court during the period has been found, it is believed they adhered in substance to the form of the English prototype. In effect the sheriff was commanded to take the defendant, if found in his bailiwick, and have his body before the county court at a specified date to answer plaintiff in a specified plea.³ Whether in practice the plaintiff or his attorney, under his or their hands, was required to give the clerk of the court a “titling” setting forth the nature and form of the writ is not apparent from the *Liber*.⁴ No rule has been found, comparable to that in Charles

1. 13 MA 521; 22 *id.* 463.

2. CCCR, *Liber S*, No. 1, 61–64; BCCP, *Liber G*, No. 1, 287, 417, 551–59. See also the less detailed rules adopted by Kent County Court on March 23, 1695/6. KCP, *Liber I*, 580–82.

3. For the form of *capias* in use in St. Marys County Court in 1694 see PMCA 46. See the comment of Kilty that 25 Ed. III, St. 5, c. 17 “is considered to have been in force as far as it gave the writ of *capias* in debt and detinue . . .” *Op. cit. supra* 220. Presumably *capias* in actions of trespass on the case was allowed by virtue of the extension of 19 Hen. VII, c. 9 to the province. Kilty, *op. cit. supra* 229.

4. The Baltimore County Court rules and orders contained the following: “Ordered that the Clerk of this Court doe not at any time Issue forth any Writt or Summons at request of any person or persons before such person or persons shall by themselves or Attorney give from under his or their hands a Titling for such Writt or Summons as aforesaid Therein Setting forth the Nature and forme of such writt which Titling the said Clerk Shall precisely follow on penalty and forfeiture of Answering to the Party greived all Cost and Damage he or they shall Sustain by meanes of any Error or Mistake in the forme of such Processe as aforesaid.” BCCP, *Liber G*, No. 1, 552. In