for the convenience of the United States, arbitrarily to abolish the writ and its return, the declaration, the issue and the continuances; and not only to undo all that has been previously done, but by an entry of common bail, to engraft, in effect, this falsehood upon the record, that Mr. Holker was arrested in April 1792.

But after all, I will not anticipate an opinion, upon a case, in which an *alias* shall be regularly taken out, and continued from term to term; though my present impressions are unfavorable, even on that ground, to the plaintiff's doctrine. The multiplication of suits, the perplexity of entries, and the oppressive vexation of successive bail-bonds, each for the full amount of the demand, are effects that could not be easily tolerated in the administration of justice. I have not heard, during the discussion, of any principle or usage of law, that would reconcile them to my mind: but this is not the foundation of the present decision; for, the irregularity in the teste and return *of the *alias capias* is a sufficient reason to reject the plaintiff's motion. [*380

The rules discharged.(*a*)

HANCOCK, administrator, *v.* HILLYERS.

Assessment of damages.

On a judgment, by agreement, "for what may be due," in an action upon a promissory note, the plaintiff cannot issue execution, until the damages are assessed.[1]

THE defendant had given a promissory note to the plaintiff, for a specific sum, on which, in different modes, there had been several partial payments. Before any settlement of accounts, however, the defendant entered into an agreement, that judgment should be entered against him by an attorney, "for the amount that may be due." In pursuance of this agreement, judgment was confessed, generally, on the 12th of March 1796; and on the 14th of May following, without any previous trial, writ of inquiry, or notice to the defendant, a *fi. fa.* was issued and levied, for the full amount of the promissory note.

(*a*) The cause (which was *indebitatus assumpsit*) came on for trial before CHASE and PETERS, Justices, at April term 1798, when, after the opening was commenced by *Rawle*, for the plaintiff, it was discovered, that the plea of "*non assumpsit*" was entered in short, and that the statute of limitations had also been pleaded; though the jury were only sworn to try the *issue*, and not the *issues*, joined between the parties.

CHASE, Justice.—The whole proceeding is to my mind unintelligible and irregular. There is only one of the parties to the contract, and only one of the defendants named in the writ, before the court; and no process of outlawry has been prosecuted against the others: how shall we proceed to give judgment? Again, to what is the plea of *non assumpsit* to be applied? Is it, that the appearing defendant did not assume himself, or that he did not jointly assume with the other defendants? And how comes the plea of the statute of limitations to be added, without the leave of the court? But the counsel will have time to reflect upon these difficulties. For the jury are not sworn even in this irregular state of the record, to try the issues between the parties; and therefore the court, on its own authority, will direct the juror last qualified to be withdrawn.

A juror was, accordingly, withdrawn, and the action continued until the next term

[1] See Weikel *v.* Long, 55 Penn. St. 238.

Thomas, thereupon, obtained a rule to show cause why the defendant should not be allowed a set-off for the amount of his payments, and that, in the meantime, proceedings on the execution be stayed.

The rule was afterwards opposed by *Lee*, the attorney-general, who contended, that the regular relief was by application to the equity side of the court, for an injunction; which *would only be granted, upon the *381] defendant's bringing the money into court, or giving security to pay the balance.

But it was answered, by *Rawle* and *Thomas*, that the amount due must be ascertained, before any use could be made of the agreement to enter judgment. It was the express stipulation of the parties; and as the judgment has been improperly entered at common law, it is on the same side of the court that relief should be sought. The courts in England and in Pennsylvania are in the constant practice of staying the proceedings on executions, which are issued either for more than is due, or before the day of payment. See 1 Bac. Abr. 195.

By the Court.—The agreement is to enter judgment *for what may be due.* The plaintiff has no right to decide the question. It is evident, from the terms of the agreement, that there was something to settle; and the plaintiff, either by arbitration, or by a jury, should have proceeded to make the settlement, with notice to the defendant, before he entered the judgment; or, at least, before he issued the execution.

The rule made absolute.

Maxwell's Lessee v. Levy.[1]

Jurisdiction.

A deed colorably executed, for the purpose of giving jurisdiction to the circuit court, will not sustain the jurisdiction.[2]

Ejectment. On a rule to show cause, why this ejectment, and many other cases depending on the same principle, should not be stricken off the record, upon a suggestion that the court had no jurisdiction, it appeared, that the lessor of the plaintiff was a citizen of Maryland, resident there, and that the defendant was a citizen of Pennsylvania, resident here. But as soon as the ejectment was instituted, a bill for discovery was filed against the lessor of the plaintiff, on the equity side of the court, in which it was alleged, "that the conveyance of the premises in controversy to the lessor of the plaintiff, was made by Morris, a citizen of Pennsylvania, for no other purpose than to give jurisdiction to the circuit court;" and the answer to the bill admitted, "that the lessor of the plaintiff had given no consideration for the conveyance; that his name had been used by way only of accommodation to Morris;" but it was not directly said, that it was for the purpose of creating a jurisdiction in the federal court.

---

[1] s. c. 4 Dall. 330, where it is more fully reported.

[2] Smith *v.* Kernochen, 7 How. 198; Jones *v.* League, 18 Id.; Barney *v.* Baltimore, 6 Wall. 280; Hurst *v.* McNeil, 1 W. C. C. 70; Starling *v.* Hawks, 5 McLean 318. The opinion of Mr. Justice Story to the contrary, in Briggs *v.* French, 1 Sumn. 251, is not law. But see Newby *v.* Oregon Central Railway Co., 1 Sawyer 63.