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.

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[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.

Anonymous.

After argument, by *M. Levy*, for the plaintiff, and by *W. Tilghman*, for the defendant, IREDELL, Justice, delivered the opinion of the court, in which the conveyance to the lessor of the plaintiff was considered as entirely colorable and collusive; and therefore, incapable of laying a foundation for the jurisdiction of the court.

The rule made absolute.

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Special jury.—Tales.

A *tales* may be awarded, in a case marked for trial by special jury.

IN a cause marked for trial by special jury, nine jurors only appeared; and the question arose, whether the court (who wished to consider it with a view to establish a precedent) could award a *tales*, on the application of the plaintiff.

Levy and *Ingersoll* suggested, that the supreme court of Pennsylvania had so construed the 12th section of the act of assembly (2 Dall. Laws, 265) as to exercise the power of ordering a *tales* in the case of special, as well as of common juries, whenever the plaintiff required it; and also whenever the defendant required it, if he had a rule for trial by proviso.[1] The same power is exercised in England on general principles. Sell. Pr. 476.

Lewis observed, that the supreme court held, that the Pennsylvania act, and not the English practice, must regulate the proceedings with respect to juries; and the case of a *tales*, in trials by special jury, though admissible at common law, might not have been adopted by the legislature, on account of the inconveniences which the practice tended to introduce. But whatever may have been the previous law, the legislative rule must be pursued; and *expressio unius est exclusio alterius.*

Rawle conceived, that the 29th section of the judicial act (1 U. S. Stat. 88) settled the question. In the first part of the section, the provision for impanelling juries is general, obviously including both special and common juries; and as there is the same generality of expression in the latter part of the section, when provision is made for returning a *tales*, it ought also, by a parity of construction, to be extended to both cases.

PETERS, Justice.—I have no doubt of the power of the court to order a *tales* in special jury causes. It might have been done, I think, under the act of assembly; but unquestionably, it may be done under the act of congress. There ought, however, to be such a discretion in using it, as to prevent any injury to either party; and therefore, a trial should not be forced on, without a reasonable delay to bring in the jurors that had been regularly selected.

IREDELL, Justice.—The act of congress seems to remove every difficulty. It makes no distinction (and the court can, therefore, make none) between the case of a special and of a common jury. If this provision had not existed, the subject would have occasioned much doubt in my mind.

[1] Hubley *v.* White, 2 Yeates 133.