

Case No. 443.

{2 Dall. 382.}<sup>2</sup>

ANONYMOUS.

Circuit Court, D. Pennsylvania.

April Term, 1797.

JURY—IMPANELING—SPECIAL JURY—TALESMAN.

The court has power to order a tales in special jury causes.

[Cited in *Hall v. Perott*, Case No. 5,942.]

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. Ed. p. 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. 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 12th section of the judicial act, (1 Swift's Ed. p. 67, [see section 29, 1 Stat. 88,]) settled the question. In the first part of the section, the provision for empanneling juries in 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, District Judge. 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, Circuit 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.

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<sup>2</sup> [Reported by A. J. Dallas, Esq.]