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and the complainants be permitted to proceed according to chancery practice; and the defendants be required to answer, without *oyer* of the documents prayed for, or a service of the bill in French, as prayed for. Whereupon, it is now here ordered and decreed by this court, that it be so certified to the said circuit court, with directions to proceed accordingly.

*18] *The Lessee of EFFIE COONS and others, Plaintiff in error, v. CHARLES P. GALLAHER, Defendant in error.

Error to state courts.

It is not sufficient to give the supreme court jurisdiction in the case of a writ of error to the supreme court of a state, that the question as to the construction of an act of congress, might have been raised and might have been decided, and was involved in the case; it must appear, either in direct terms, or by necessary intendment, that it was in fact brought to the notice of the court, and decided by it. *Crowell v. Randell*, 10 Pet. 398, cited.¹

ERROR to the Supreme Court of the State of Ohio. The original action of ejectment was brought in the court of common pleas of Clinton county, and taken thence by appeal to the supreme court; where it was tried, and a verdict and judgment given for the plaintiffs, at May term 1833. Afterwards, a new trial was ordered; and on a case stated, a judgment was rendered by the court in favor of the defendant. The plaintiff prosecuted this writ of error.

The case was argued, on the merits, by *Leonard*, for the plaintiffs; and by *Buck*, for the defendant. The decision of the court having been given on the question of jurisdiction, those arguments are omitted.

TANEY, Ch. J., delivered the opinion of the court.—This case arises upon an action of ejectment, which was decided in the supreme court of the state of Ohio, for the county of Clinton; and being brought here from a state court, we have no authority to revise the judgment, unless jurisdiction is given by the 25th section of the act of 1789.

The land is situated in what is usually called the Virginia military district, and at the trial, both parties derived title under the act of congress of March 2d, 1807, which was passed for the purpose of extending the time for locating Virginia military land-warrants, between the Little Miami and Sciota rivers. The plaintiffs made title as heirs-at-law of Thomas J. Mc-

*19] Arthur, *who obtained a patent for the lands in question, in 1823, upon an entry and survey made for him in that year, as assignee of part of a military land-warrant granted to John Trezuant. The defendant, who was in possession of the land, claiming it as his own, in order to

¹ *Bolling v. Lersner*, 91 U. S. 594; *Brown v. Atwell*, 92 Id. 327; *Boughton v. Exchange Bank*, 104 Id. 427. The court has no jurisdiction, if the federal question was not, in fact, passed upon, in consequence of the view which the state court took of other points in the same. *McManus v. O'Sullivan*, 91 Id. 578; *Crossley v. New Orleans*, 108 Id. 105. If the record shows that a federal question was not

necessarily involved, the court has no jurisdiction. *Citizens' Bank v. Board of Liquidation*, 98 Id. 140; *Brown v. Colorado*, 106 Id. 95. And it is not sufficient, that the federal question was raised after judgment, on a motion for a rehearing, if not raised at the trial. *Susquehanna Boom Co. v. West Branch Boom Co.*, 110 Id. 57.

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show title out of the plaintiffs, offered in evidence an entry in the name of John Tench, assignee of part of the aforesaid warrant, to Trezuant, made on the 8th of August 1787; and a survey pursuant to the said entry, on the 7th of March 1794, which was recorded June 24th, 1796.

The plaintiffs having produced a complete legal title, as above stated, the prior survey of Tench was no bar to their recovery, unless it was made so by the act of 1807, before referred to. The first section of that act contains the following proviso: "That no locations as aforesaid, within the above-mentioned tract, shall, after the passing of this act, be made on tracts of land, for which patents had been previously issued, or which had been previously *surveyed*; and any patent which may nevertheless be obtained for land located contrary to the provision of this section, shall be considered as null and void." It seems to have been admitted in the state court, that this act of congress intended to protect those surveys only that were made by lawful authority; and that the survey of Tench was no defence, unless it appeared, that he was, in truth, the assignee of a portion of Trezuant's warrant. No assignment was produced at the trial, but evidence was offered by the defendant, from which the court may have presumed an assignment; and testimony was also introduced, on the part of the plaintiffs, to rebut that presumption. The controversy in the state court turned, it would seem, mainly on this point, which was decided in favor of the defendant; and the decision of that question certainly did not involve the construction of the act of 1807; and furnishes no ground for a writ of error to this court.

Another point has been raised in the argument here, on the part of the plaintiffs in error. It is contended, that the proviso in the act of 1807 applies only to conflicting patents and surveys, made under different warrants from the state of Virginia; and that it does not extend to a case like the present, where the controversy arises upon assignments made by the same individual, upon the same warrant. *Undoubtedly, such a point might have been raised and decided in the state court, upon [*20 the case presented by the record; and if it had appeared, that such a question, upon the construction of the act of congress, had been raised, and had been decided against the plaintiff, it is very clear, that the judgment could have been revised in this court. But the record does not show, that this point was raised by the plaintiff, or decided by the court. It is not sufficient, that the point was involved in the case, and might have been raised, and might have been decided. It must appear, either in direct terms, or by necessary intendment, that it was in fact brought to the notice of the court and decided by it. This is the rule settled in the case of *Crowell v. Randall*, 10 Pet. 398; in which all of the former cases upon the subject were reviewed and considered.

In the aspect in which the case comes before us, there was no controversy in the Ohio court, in relation to the construction of the act of 1807; and it would seem, from the record, to have been conceded on all hands, that Tench's survey was a good defence, if the assignment from Trezuant could be established. Indeed, if there was any point raised, and decided upon the construction of the act of congress, the decision appears to have been in favor of the right claimed, and not against it. The plaintiffs in error, at the trial in the state court, produced a complete legal title; and the survey

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of Tench, as we have already said, would have been no defence to the action, unless it was made so by the act of 1807. It was the defendant, therefore, and not the plaintiff, who invoked the aid of the statute, and claimed the right under it. The decision was in his favor, and by that means, a mere equitable title, which, upon general principles of law, would have been no defence against the legal title produced by the plaintiffs, was adjudged to be a good and valid defence, under and by virtue of this act of congress. The decision, therefore, was in favor of the right claimed, and not against it; and if the construction of the statute is, upon this account, to be regarded as drawn in question, the judgment given would afford no ground for the jurisdiction of this court.

In either view of the subject, therefore, the writ of error must be dismissed, for want of jurisdiction.

*21] *SUSAN MAYBURY, Appellant, v. JOHN MCPHERSON BRIEN and other, Appellees.

Dower.—Delivery of deed.

Dower is a legal right; and whether it be claimed by suit at law or in equity, the principle is the same.

On a joint-tenancy, at common law, dower does not attach. No title to dower attaches on a joint seisin of real estate; the mere possibility of the estate being defeated by survivorship, prevents dower.

If the husband, being a joint tenant, convey his interest to another, and thus at once destroy the right of survivorship, and deprive himself of the property, his wife will not be entitled to dower.

The time of the delivery of a deed may be proved by parol.

By the common law, dower does not attach to an equity of redemption; the fee is vested in the mortgagee, and the wife is not dowable of an equitable seisin.

When the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase-money in whole or in part, dower cannot be claimed as against rights under the mortgage; the husband is not deemed sufficiently or beneficially seised, by an instantaneous passage of the fee in and out of him, to entitle his wife to dower as against the mortgage. It is the well-established doctrine, that of a seisin, for an instant, a woman shall not be endowed.

APPEAL from the Circuit Court of Maryland.

The case was presented to the court, on a printed statement, and a printed argument, by *Mayer*, for the appellant; and was argued by *Meredit* and *Nelson*, for the appellees.

A bill was filed in this cause, by the appellant, as widow of Willoughby Mayburry, claiming dower from John Brien, purchaser of the estate, in real estate, in Frederick county, designated as "The Catoctin Furnace, and all the lands" (described by the names of tracts) "annexed or appropriated to it," and also claiming rents and profits from the death of Willoughby Mayburry. The real estate in question was conveyed by Catharine Johnson, Baker Johnson and William Ross, as executors of Baker Johnson, to Willoughby Mayburry and Thomas Mayburry, by deed, dated 5th March 1812. By deed, *dated 9th May 1813, Thomas Mayburry conveyed *22] to Willoughby his undivided moiety in the estate; and by deed of the same date, Willoughby mortgaged to Thomas, all his (Willoughby's)