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accords with the result in the only decision which is supposed to have been made in the state of Michigan on this subject. See *Weed et al. v. Lyon et al.* in Harr. (Mich.), 363.

Had that decision been made by the highest judicial tribunal of the state, or been shown to accord with a settled usage and practice under these statutes affecting the title to real estate, we should have felt bound to conform to it, as a part of the local law. 9 Cranch, 87; 2 Pet., 58, 85; 6 Wheat., 119; 10 Id., 152; 11 Id., 361; 1 Brock., 539.

But though entitled to respect and weight, that case has not been treated as a precedent to control this, because the judgment was not in a court of the last resort, and is said to have been appealed from, but further proceedings defeated by some accident.

Let a certificate be sent down, that in the opinion of this court, the recording of the mortgage from Hale to Lyon was sufficient to give it validity and priority under the laws of Michigan.

*THOMAS MANEY AND OTHERS, PLAINTIFFS IN ERROR, [*55
v. THOMAS J. PORTER, DEFENDANT.

The decision of a state court upon the merits of a controversy between two parties, one of whom had sold, and the other purchased, an interest in lands which, it was thought, could be acquired as Indian reservations under a treaty with the United States, cannot be reviewed by this court under the 25th section of the Judiciary Act.

The party against whom the state court decided, instead of setting up an interest under the treaty, expressly averred that no right had been obtained.¹ In such a case, this court has no jurisdiction.

THIS case was brought up by writ of error to the Supreme Court of Errors and Appeals for the state of Tennessee, under the 25th section of the Judiciary Act.

¹The record must show a complete title under the treaty, and a decision against its validity. *Hickie v. Starke*, 1 Pet., 94; and the party prosecuting the writ must have claimed title for himself under the treaty; a claim for a third person is not sufficient. *Owings v. Norwood*, 5 Cranch, 344; *Verden v. Coleman*, 1 Black, 472.

While the jurisdictional facts must appear from the record, yet it is not necessary that the record should show in express terms that the Constitution, or a law, or treaty of the United States was drawn in question. It is enough if the proceedings set forth in

the record show that a decision was made by the state court of one of the questions specified in section 25 of the Judiciary act. *Miller v. Nicholls*, 4 Wheat., 311; *Wilson v. Marsh Co.*, 2 Pet., 241; *Satterlee v. Matthewson*, Id., 380; *Harris v. Denny*, 3 Id., 292; *Crowell v. Randall*, 10 Id., 368; *Craig v. Missouri*, 4 Id., 410; *Davis v. Packard*, 6 Id., 41; *Murray v. Charleston*, 6 Otto, 432; *Minnesota v. Batchelder*, 1 Wall., 108; *Rector v. Ashley*, 6 Wall, 142; *Walker v. Villavaso*, Id., 124.

It is not enough that it appears that such a question might have arisen, or

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have been applicable; it must appear that it did arise, and was decided. *Crowell v. Randall*, 10 Pet., 368; *Chouteau v. Marguerite*, 12 Id., 507; *Commercial Bank v. Buckingham*, 5 How., 317; *Maxwell v. Newbold*, 18 Id., 511; *Railroad Co. v. Rock*, 4 Wall., 177; *The Victory*, 6 Id., 382; *Hamilton Co. v. Massachusetts*, Id., 632; *Furman v. Nichol*, 8 Id., 44; *Aldrich v. Aetna Co.*, Id., 491; *Gibson v. Chouteau*, Id., 314; *Hurley v. Street*, 14 Id., 85; *Cockroft v. Vose*, Id., 5.

If it appears that the state court could not have rendered the judgment it did render without passing on the question, jurisdiction is shown. *Armstrong v. Treasurer of Athens Co.*, 16 Pet., 281; *Medberry v. Ohio*, 24 How., 413. In *Brown v. Atwell*, 2 Otto, 327, the court say: "We have often decided that it is not enough to give us jurisdiction over the judgments of the state courts for a record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it." See also *Citizens Bank v. Board of Liquidation*, 8 Otto, 140.

There is no jurisdiction where the decision of the state court is *in favor* of the validity of the law or treaty drawn in question. *Gordon v. Caldwell*, 3 Cranch, 268; *Fulton v. McAfee*, 16 Pet., 149; *Strader v. Baldwin*, 9 How., 261; *Linton v. Stanton*, 12 Id., 423; *Roosevelt v. Meyer*, 1 Wall., 512; *Ryan v. Thomas*, 4 Id., 603. But see *Trebilcock v. Wilson*, 12 Id., 687, overruling *Roosevelt v. Meyer*, *supra*. But where the decision of the state court is *against* the validity of a patent for land granted by the United States to one of the parties, jurisdiction is conferred notwithstanding the fact that the decision is *in favor* of a similar authority set up by the adversary party. *Reichart v. Felps*, 6 Wall., 160.

Nor does jurisdiction attach where the decision of a state court of a question specified in section 25, may have been rested on some point in the case not within the purview of that section, and that point is broad

enough to sustain the judgment. *Rector v. Ashley*, 6 Wall., 142; *Insurance Co. v. The Treasurer*, 11 Id., 204; *Klinger v. State of Missouri*, 13 Id., 257; *West Tennessee Bank v. Citizens Bank*, Id., 432; *Steines v. Franklin County*, 14 Id., 15; *Kennebeck R. R. v. Portland R. R.*, Id., 23; *Commercial Bank v. Rochester*, 15 Id., 639. Nor where nothing appears in the record to show on what grounds the decision of the matter in which the Federal question is alleged to be involved was made. *Caperton v. Bowyer*, 14 Wall., 216.

Jurisdiction will be assumed where the Supreme Court can see that a Federal question was raised, though obscurely, even where the court have "a very clear conviction that the decision of the state court was correct." *Pennywit v. Eaton*, 15 Wall., 380.

In the leading case of *Murdock v. City of Memphis*, 20 Wall., 590, which was the first case in which the court felt called upon to decide whether the act of Feb. 5th, 1867 (14 Stat. at L., 385) was a repeal of section 25 of the Judiciary Act of 1789, and to construe the later enactment, it was held that the act of 1867 as it is now found in Rev. Stat., § 709, did repeal section 25 of the Judiciary Act. The court construed the new enactment at length, and lay down the following propositions as flowing from it:

1. That it is essential to the jurisdiction over the judgment of a state court, that it shall appear that one of the questions mentioned in the act must have been raised and presented to the state court.

2. That it must have been decided by the state court, or that its decision was necessary to the judgment or decree rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws, or authority of the United States.

4. These things appearing, the Supreme Court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

5. If it finds that it was rightly decided the judgment must be affirmed.

6. If it was erroneously decided against plaintiff in error, then the

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The case was this: Thomas Maney, one of the plaintiffs in error, on the 4th of October, 1836, gave his note to the defendant in error, for \$5,000, payable eight months after date. Suit was afterwards brought on this note, and judgment recovered in the State Circuit Court, from which Maney appealed to the Supreme Court of Errors and Appeals, where the judgment was affirmed against him.

He then filed his bill in the Chancery Court, and obtained an injunction. The defendant in error answered, and upon the hearing, the injunction was dissolved and the bill dismissed; and this decree was affirmed in the Supreme Court of Errors and Appeals against the said Maney and the other plaintiffs in error, who were his securities in the appeal bond. It is from the last mentioned decree that the present writ of error was brought.

In order to understand the character of the controversy in the state court, and the points in issue between parties, it is proper to state that by the 14th article of the treaty with the Choctaw Indians, made at Dancing Rabbit Creek on the 27th of September, 1830, it was stipulated that each Choctaw head of a family, being desirous to remain and become a citizen of the States, should be permitted to do so by signifying his intention to the agent of the United States within six months from the ratification of the treaty; and should thereupon become entitled to a reservation of one section of 640 acres, to be bounded by sectional lines,—one half that quantity for each unmarried child living with him over ten years of age,—and a quarter section for each child under ten; to adjoin the location of the parent. And if they resided on such land intending to become citizens five years after the ratification of the treaty, a grant in

Supreme Court must further inquire whether there is any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

7. But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or

issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then the Supreme Court will reverse the judgment of the state court, and will either render such judgment as the state court should have rendered, or remand the case to that court, as the circumstances of the case may require.

This construction of Rev. Stat., § 709, was applied in *Railroad Co. v. Maryland*, 20 Wall., 645; *Moore v. Mississippi*, 21 Id., 639; *Citizens Bank v. Board of Liquidation*, 8 Otto, 142; *Myrick v. Thompson*, 9 Id., 297; *Tennessee v. Davis*, 10 Id., 283; *Bonaparte v. Tax Court*, 14 Id., 595.

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fee simple was to issue ; the reservation to include the improvement held by the head of the family at the time of the treaty, or a portion of it.

The bill filed by Maney stated, that in December, 1835, the *56] defendant informed him that many Indians had within the time prescribed *signified to the agent of the government their intention to remain under the above article of the treaty, whose names he had neglected to register and certify ; and that in consequence of his neglect, the lands to which they were entitled, with the improvements, had in many instances been sold, and had passed into the possession of the purchaser ; and those who still retained possession of their reservation had become much alarmed ; that Gwinn and Fisher had undertaken to secure these reservations to the Indians entitled, or to obtain for them an equivalent ; and had made contracts by which the Indians were to give them one half (and in some cases more), if they succeeded ; that Gwinn and Fisher had employed the defendant in error to assist them in the business ; that he held their obligation for twenty-five sections of these claims ; that he had no doubt of success ; that the matter had already been before Congress, and it had been ascertained that a majority of both Houses were in favor of it ; that he was confident a law would pass authorizing commissioners to be appointed to investigate and decide upon these claims, and that the reservations would be made good to the persons entitled ; and that if Congress did not pass the law, the rights could be enforced in the courts of justice ; that the defendant in error represented these Indian claims as of great value, and said that they had been already located on good lands, which were worth ten dollars per acre, and proposed, as a matter of favor, to sell a portion of his interest to Maney : and that he (Maney), having himself no knowledge upon the subject, and relying altogether on the statements of the defendant in error, purchased from him one undivided half part of his claim to the twenty-five sections above mentioned for \$10,000 ; and thereupon gave two notes of \$5,000 each for the purchase money, and received from the defendant a covenant to convey.

The bill further stated, that for reasons therein set forth the complainant became dissatisfied with his purchase, and thought he had been deceived ; and in March, 1836, he applied to the defendant to rescind it, who refused ; but that afterwards, in October, 1836, he agreed to take back the one half of these claims ; and thereupon the two notes before mentioned were cancelled, and the note on which the judgment was rendered was given by Maney, and a covenant

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made by the defendant to convey, according to this contract; that at the time the last mentioned agreement was made, as well as before, the defendant had agreed that he would take back the lands and rescind the whole contract if the complainant desired it, in case Congress should pass a law authorizing a commission to examine into and decide upon these claims; that he and Gwinn and Fisher would continue their exertions to secure the titles, and that a law authorizing a commission to inquire into their validity would place them beyond reasonable doubt.

The bill further states, that the law proposed was passed by Congress; *but that the defendant had re- [*57] fused to rescind the contract, and had not continued to give his attention to the business as he promised; that he had sold out the residue of his interest; that Gwinn and Fisher, as the complainant understood, had likewise sold out their interest, or nearly all of it; that none of the claims had been secured, and the complainant did not think it probable that they would be obtained by the assignee of the Indians; that he had never received any thing in land or money, and apprehended that he never would; and prayed an injunction to restrain the defendant in error from suing out execution on the judgment at law, and that the contract might be rescinded and set aside.

This is the substance of the bill, which is a very long one, going into much detail, and stating conversations which Maney alleges he held with the defendant in error, and with others, upon the subject; but which it is unnecessary to set out at length, as they are not material to the point upon which the case was disposed of in the Supreme Court.

The defendant put in his answer, denying and putting in issue all the material allegations in the bill; and it was upon this bill and answer, and the proofs taken upon the matters thus in issue, that the decree was made upon which this writ of error was brought.

The case was argued by *Mr. Brinley* for the plaintiff in error; and by the Attorney-General, for the defendant.

As the decision of the court rested entirely on the question of jurisdiction, all those parts of the argument which involved the merits of the case are omitted in the report.

Mr. Brinley rested his argument in favor of the jurisdiction of the court upon the proposition that the contracts of the Indians were held to be valid because they had a right or authority to make them under the state laws of 1829 and

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1830; and that the authority exercised under those laws was repugnant to the treaty of 1830, and to the laws of the United States; and that the decision of the state court was in favor of the authority thus set up.

Mr. Mason, Attorney-General, contended that the facts in this case were not sufficient to sustain jurisdiction.

Mr. Chief Justice TANEY delivered the opinion of the court.

Upon examining the bill in this case, it is not easy to determine, from the loose manner in which it is drawn, whether the complainant claimed the relief he asked for on the ground that the representations made to him by the defendant were false and fraudulent; or on the ground that the consideration for which the note was given had failed, because the defendant was unable to convey him a title to the Indian reservations.

*58] It is evident, however, that the suit was not brought to uphold *any title or right which the complainant claimed under the Choctaw treaty, or under the law of Congress which he states to have been passed upon the subject. For he does not ask for a conveyance of the reservations, nor of the Indian title to them. And he does not even aver that these claims are valid, or that he has any title to them; but, on the contrary, charges that none of the claims had been secured, and states that he did not think it probable that they would be obtained by the assignees of the Indians. And as the case has been removed here from the decision of a state court, we have no right to review it unless the complainant claimed some right under the treaty with the Choctaws or the act of Congress, and the decision of the state court had been against the right, title, or privilege specially set up by him; and even in that case, the power of revision given to this court extends no further than to the particular question thus raised and decided against the party. In the case before us, no such title, right, or privilege was claimed by the bill, and of course no decision was made against it in the state court. We therefore can exercise no jurisdiction in the case, and are not authorized to examine any questions of fraud or failure of consideration, or breach of contract, which the bill may be supposed to present, and upon which the court of the state of Tennessee may now decide.

Upon referring to the reports of this court, it will be seen that the 25th section of the act of Congress of 1789, under which this writ of error is brought, has been often the subject of examination and comment in this court, and the construction

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of the section and the practice under it well settled by many decisions. It is unnecessary to repeat here what the court have said upon former occasions. It is very clear, that this case is not within the provisions of the section, and the writ of error must therefore be dismissed for want of jurisdiction.

JAMES ERWIN'S LESSEE, PLAINTIFF IN ERROR, v. JAMES DUNDAS ET AL.

Although, by the law of Alabama, where an execution has issued during the lifetime of a defendant, but has not been actually levied, an *alias* or *pluries* may go after his death, and the personal estate of the deceased levied upon and sold to satisfy the judgment, yet this is not so with respect to the real estate.¹

By the common law, the writ of *fi. fa.* has relation back to its *teste*, and if the execution was tested during the lifetime of a deceased defendant, it might be taken out and levied upon his goods and chattels after his death.² But if an execution issues and bears *teste* after the death of the defendant, it is irregular and void, and cannot be enforced against either the real or personal property of the defendant. The judgment must first be revived against the heirs or devisees in the one case, or personal representatives in the other.³

Such is the settled law where there is but one defendant.

Where there are two defendants, one of whom has died, the judgment cannot be enforced by execution against the real estate of the survivor alone; and as it has to issue against the real estate of both, the real estate of the deceased is protected by the same law which would govern the

¹ In *Clark v. Kirksey*, 54 Ala., 219, it was held that a sale of lands made under an *alias* or *pluries* execution issued after the death of the defendant in continuation of a *lien created during his life*, is valid without any revival against the heirs. *S. P. Dryer v. Graham*, 58 Ala., 623. But where at the time of defendant's death there is no execution in the hands of the sheriff, though one had been previously issued and returned without levy, and none is issued for several terms thereafter, a sale under an *alias* or *pluries* subsequently issued confers no title on the purchaser. *Brown v. Newman*, 66 Ala., 275.

A sale of land under a *venditioni exponas* issued after the death of the judgment debtor, without revival against the heirs, is void. *Harman v. Hann*, 9 Baxt. (Tenn.), 90.

In Pennsylvania, the death of either party after *fi. fa.* issued does not prevent the issuing of the *vend. exp.* A

sci. fa. is unnecessary. *Bleecker v. Bond*, 4 Wash. C. C., 6.

Leave of court to issue execution should not be granted more than a year after the death of the judgment debtor, without proof that his heirs and personal representatives have had an opportunity to pay the judgment on demand, and that property available to pay debts has come to their hands. *Eaton v. Youngs*, 41 Wis., 507.

As to the proceedings required to be taken in Indiana, to enforce a judgment against the lands of a deceased judgment debtor, see *Faulkner v. Larrabee*, 76 Ind., 154.

² CITED. *Taylor v. Doe*, 13 How., 290.

³ RELIED ON. *Mitchell v. St. Maxent*, 4 Wall., 243. CITED. *Puckett v. Richardson*, 6 Lea (Tenn.), 61. *S. P. Kane v. Love*, 2 Cranch C. C., 429.