

Downes *v.* Scott.

vania assets; nor would the rules of evidence be sufficient in separate suits, pending in the same court, for different parcels of property, even between the same parties. And therefore we certify to the Circuit Court, that the evidence introduced "touching the plea in bar" is no estoppel to the representatives of John Aspden of *London, in so far as they seek to recover the assets of Matthias Aspden's estate in the course of administration by the Orphan's Court of Philadelphia county. Further than this, we do not pretend to determine on the effect of the evidence, as we are not aware that any controversy now exists in the Circuit Court in regard to any other assets.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the evidence introduced "touching the plea in bar" is no estoppel to the representatives of John Aspden of London, in so far as they seek to recover the assets of Matthias Aspden's estate in the course of administration by the Orphan's Court of Philadelphia county; whereupon it is now here ordered and decreed by this court, that it be certified to the said Circuit Court accordingly.

Dissenting, Mr. Chief Justice TANEY and Mr. Justice McLEAN.

RICHARD CHARLES DOWNES, PLAINTIFF IN ERROR *v.* WILLIAM S. SCOTT, DEFENDANT.

The second section of the act of the 29th of May, 1830, providing, that "if two or more persons be settled upon the same quarter-section, the same may be divided between the two first actual settlers, if by a north and south, or east and west line the settlement or improvement of each can be included in a half-quarter-section," refers only to tracts of land containing one hundred and sixty acres, and does not operate upon one containing only one hundred and thirty-three acres.

Therefore, where tenants in common of a tract of one hundred and thirty-three acres applied to a State court for partition under the above act, the

Downes v. Scott.

judgment of that court cannot be reviewed by this court, when brought up by writ of error under the twenty-fifth section of the judiciary act, because the right asserted does not arise under an act of Congress. The writ of error must be dismissed.

THIS case was brought up from the Ninth Judicial District Court of the state of Louisiana, by a writ of error issued under the twenty-fifth section of the judiciary act.

Mr. Crittenden, for the defendant in error, moved to dismiss the writ for the following reasons. Because,—

*501] *1st. Said writ of error is directed to the "Judge of the Ninth Judicial District Court of the state of Louisiana," when in truth no writ of error lies from this to that court.

2d. Said writ is for alleged error in a judgment of the said District Court of Louisiana, when in truth this court has no jurisdiction to judge of or correct said error if it exists, and no power to reverse said judgment upon writ of error.

3d. That the record filed in this case, or what purports to be such, is not duly certified, or legally authenticated and verified,—the certificate of "John T. Mason, clerk of the Ninth District Court, Parish of Madison, La.," being no evidence of the truth or verity of any record which this court has power to judge of on writ of error.

4th. The subject-matter of said suit and judgment, and the parties thereto, were proper matters and subjects of the jurisdiction of the courts of the state of Louisiana, and there is nothing therein to give this court any cognizance or right to revise or reverse said judgment, and the same is final and conclusive.

The motion was argued by *Mr. Crittenden*, for the defendant in error, and *Mr. Mason* (Attorney-General), for the plaintiff in error.

Mr. Justice McLEAN delivered the opinion of the court.

This writ of error brings before us a judgment of the Supreme Court of Louisiana, under the twenty-fifth section of the judiciary act of 1789.

On the 15th of June, 1837, a patent was issued by the United States to Elijah Evans and Levi Blakeley for one hundred and thirty-three acres and eight hundredths of an acre, being lots numbered one and three of section six in township sixteen of range thirteen east, in the district of lands subject to sale at Ouachita, Louisiana. The patentees having settled upon the above tract, and each having made improvements thereon, claimed a preëmptive right under the act of the 29th of

Downes *v.* Scott.

May, 1830. The second section of that act provides,—“That if two or more persons be settled upon the same quarter-section, the same may be divided between the two first actual settlers, if by a north and south, or east and west, line the settlement or improvement of each can be included in a half-quarter-section.”

The plaintiff applied, by petition, to the Ninth District Court of Louisiana for a partition of the above tract, which, it seems, was submitted to a jury, and on the trial of which “the judge charged the jury that the act of Congress of May 29th, 1830, entitled ‘An act to grant preëmption rights to settlers on the public lands,’ was not applicable to the case before the court and jury; that the said act had no binding force as to the dividing or partitioning ^[*502] lands granted to settlers on the same quarter-section or fractional quarter-section after issuing a patent therefor, but that such division and partition must be in conformity with the laws of Louisiana and the principles of equity and justice.” To which charge an exception was taken, and on which an appeal was prosecuted to the Supreme Court of the state, which affirmed the judgment of the District Court.

How the parties to this suit became interested in the tract of land above patented does not appear from the record. In the petition and answer, they are represented as owners of the premises, and they are treated as such by the District and Supreme Courts of Louisiana.

The second section of the preëmption law above cited refers to a quarter of a section, which contains one hundred and sixty acres; and as the tract of which partition is demanded is less than a quarter, it does not come within the law. Had application been made for a division of the tract to the proper department of the government, before the emanation of the patent, it could not, as we suppose, have been considered as coming within the act, so as to authorize a partition and a patent to each of the claimants. A patent having been issued to the claimants for the tract jointly, as tenants in common, and they having conveyed the land, which has become vested in the parties to this record, it is now a question on what principle a division shall be made.

If the parties entitled to the preëemptive right might have applied for a partition under the act of Congress, but preferred taking the patent as issued, it is difficult to perceive how the present claimants could go behind the patent, in the assertion of a right which was waived by those with whom it originated. The patent vested in the patentees a joint interest as tenants in common, and the same interest was conveyed

Michoud et al. v. Girod et al.

through their grantees down to the present owners. It does not appear, and the court cannot presume, that any greater or different right was conveyed than that which is shown on the face of the patent.

In this view, we think the decision of the Louisiana court was correct. It directed a partition on equitable principles, under the local law, reserving to each claimant his improvements. And it appears from the facts in the case, that this could not be done by straight lines running north and south or east and west.

As the right asserted in this case by the plaintiff does not arise under an act of Congress, this court has no jurisdiction by the twenty-fifth section.

There seems to have been no allowance of the writ of error, and it was directed to the District instead of the Supreme Court of Louisiana. As this court can only revise the judgment of the highest court in the State which can [503] exercise jurisdiction in the case, the writ of error should be directed to such court; unless *the record shall have been transmitted to an inferior tribunal. But, independently of these irregularities, we think that this court have no jurisdiction under the act of Congress, and on this ground this suit is dismissed.

ANTOINE MICHOUËD, JOSEPH MARIE GIROD, GABRIEL MONTAMAT, FELIX GRIMA, JEAN B. DEJAN, AINÉ, DENIS PRIEUR, CHARLES CLAIBORNE, MANDEVILLE MARIGNY, MADAM E. GRIMA, WIDOW SABATIER, A. FOURNIER, E. MAZUREAU, E. RIVOLET, CLAUDE GURLIE, THE MAYOR OF THE CITY OF NEW ORLEANS, THE TREASURER OF THE CHARITY HOSPITAL, AND THE CATHOLIC ORPHAN'S ASYLUM, APPELLANTS, *v.* PERONNE BERNARDINE GIROD, WIDOW OF J. P. H. PARGOUD, RESIDING AT ABERVILLE, IN THE DUCHY OF SAVOY, ROSALIE GIROD, WIDOW OF PHILIP ADAM, RESIDING AT FAVERGES, IN THE DUCHY OF SAVOY, ACTING FOR THEMSELVES AND IN BEHALF OF THEIR CO-HEIRS OF CLAUDE FRANCOIS GIROD, TO WIT, LOUIS JOSEPH POIDEbard, FRANCOIS S. POIDEbard, DENIS P. POIDEbard, WIDOW OF P. NICOUD; JACQUELINE POIDEbard, WIFE OF MARIE RIVOLET; CLAUDINE POIDEbard, WIDOW OF P. F. POIDEbard; AND M. R. POIDEbard, WIFE OF ANTHELME VALLIER, AND ALSO OF