

\*SAMUEL PACKER and others v. HENRY NIXON, Administrator of  
MATTHIAS ASPDEN, deceased.

*Certificate of division.*

Questions respecting the practice of the circuit court in equity causes, which depend upon the exercise of the sound discretion of the court, in the application of the rules which regulate the course of equity proceedings, to the circumstances of such particular case, are not questions which can be certified on a division of opinion of the judges of the circuit court, under the act of 1802, ch. 32.

CERTIFICATE of Division from the Circuit Court for the Eastern District of Pennsylvania.

At January term 1835, this case was before the court (9 Pet. 483) on an appeal ; and the decree of the circuit court was reversed, without a decision on the merits, for the purpose of amending the proceedings, by entering an allegation of the domicil of the testator, the construction of whose will was the subject of controversy ; and introducing proof in relation thereto ; and also to allow the introduction of other parties claiming the estate of the testator. After the coming in of the mandate of this court, certain other proceedings took place in the circuit court ; an amended bill was filed by the original complainant, containing the allegation of domicil, which was considered necessary by the supreme court ; and numerous petitions, to be allowed to become parties, were presented by other persons. Among these, Janet Jones and Mary Poole, filed their bill, claiming the whole estate of the testator, as heirs-at-law and next of kin of John Aspden, of London ; whom they averred to have been heir-at-law of the testator, and as such entitled to his whole estate, real and personal, under his will. John A. Brown also filed a bill, claiming the whole personal estate of the testator, as the administrator of John Aspden, of London. He took out letters of administration in Pennsylvania, upon the estate of John Aspden, as the attorney of the children of John Aspden, of London.

Henry Nixon, the defendant, filed an answer to all these bills ; and subsequently, under leave to amend his answer and plead, filed an amended answer, with certain pleas thereunto annexed. \*In these pleas, he averred certain proceedings to have taken place in the court of [\*409 chancery and court of exchequer in England ; in which, he alleged, *inter alia*, that Janet Jones and Mary Poole instituted those suits, for the same subject-matter, and that John A. Brown's bill was in the same right, and also for the same matter. No affidavit was made to these pleas, by the executor, as they were filed at the instance of the counsel of one of the parties, in the execution of a purpose to allow all matters which were claimed as important to the full consideration and proceedings in the case, to be brought forward and exhibited for the consideration of the court.

On the 14th of November 1835, the counsel for Mrs. Poole and Mrs. Jones, and the counsel for John A. Brown, administrator of John Aspden, of London, moved for a rule to show cause why the pleas in bar should not be stricken off, as containing averments of matter *in pais*, not verified by affidavit. On the same day, the counsel for John Aspden, of Lancashire, moved for a rule on Mrs. Poole and Mrs. Jones, and on John A. Brown, administrator to John Aspden, of London, to show cause why they should

Packer v. Nixon.

not be required to elect on which bill or petition they would proceed ; and to abide by the one elected and abandon the other.

On the 6th of January 1836, on the hearing of these motions, the following questions occurred, upon which the opinions of the judges were opposed : 1st. Whether it is necessary that an affidavit be made to the pleas in bar to the petition of John A. Brown, or to any part thereof ; and if so, to what part ? 2d. Whether the rule moved for by Ingersoll and Sergeant, on the 14th day of November 1835, in the following words : " Mr. Sergeant, for John Aspden, of Lancashire, moves for a rule on Mrs. Poole and Mrs. Jones, and on John A. Brown, administrator of John Aspden, of London, to show cause why they should not be required to elect on which petition or bill they will proceed, and to abide by the one elected and abandon the other (J. R. Ingersoll, for the executor, Mr. Nixon, makes the same motion as Mr. Sergeant)," ought to be granted or not ? And the said judges being so opposed in opinion upon the questions aforesaid, the same were then and there, at the request of Ingersoll, counsel for Henry Nixon, and Sergeant, counsel for John Aspden, of Lancashire, stated under the direction of the judges, and \*ordered to be certified under the seal of the court, to \*410] the supreme court, at their next session to be held thereafter ; to be finally decided by the supreme court.

The case was argued on the questions presented in the certificate, by *H. J. Williams*, for Mrs. Poole and Mrs. Jones ; and by *Coxe*, for John A. Brown, administrator. *Ingersoll* appeared for the executor, and disclaimed any other interference in the case but for his protection. *Rawle* argued the case for John Aspden, of Lancashire. The decision of the court upon the question presented in the argument was not given, as the court considered it could not entertain jurisdiction of the question certified. The arguments of the counsel are, therefore, not inserted.

STORY, Justice, delivered the opinion of the court.—This was the case of a certificate of division of opinion from the circuit court for the district of Pennsylvania, certified to this court under the act of congress of the 29th of April 1802, ch. 32, § 6.

The case was formerly before this court, and the decision will be found reported, under the name of *Harrison v. Nixon*, in 9 Pet. 483, &c. Upon the mandate in that case being returned to the circuit court, further proceedings were had in conformity thereto ; and in the course of those proceedings, the questions now propounded to this court upon the certificate arose. They are as follows : 1. Whether it is necessary that an affidavit be made to the pleas in bar to the petition of John A. Brown, or to any part thereof : and if so, to what part ? 2. Whether the rule moved for by Ingersoll and Sergeant, on the 14th day of November 1835, in the following words : " Mr. Sergeant, for John Aspden, of Lancashire, moves for a rule on Mrs. Poole and Mrs. Jones, and on John A. Brown, administrator of John Aspden, of London, to show cause why they should not be required to elect on which petition or bill they will proceed ; and to abide by the election and abandon the other (J. R. Ingersoll, for the executor Mr. Nixon, makes the same motion as Sergeant)," ought to be granted ?

We are of opinion, that the questions are not of such a nature as are contemplated to be certified to this court, under the act of 1802, ch. 32. They

Ellicott v. Pearl.

are questions respecting the practice of the court in equity \*causes ; and depend upon the exercise of the sound discretion of the court, in the application of the rules which regulate the course of equity proceedings to the circumstances of each particular case. But it is to be understood, that in the present case this general discretion is subject to the former order of this court, in regard to the making of parties, and other proceedings contained in the mandate ; when the cause was remanded at the last January term of this court, as stated in 9 Pet. 540. We shall accordingly direct this opinion to be certified to the circuit court.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Pennsylvania ; and on a certificate of division in opinion between the judges of the said circuit court upon the following questions, viz : 1st. Whether it is necessary that an affidavit be made to the pleas in bar to the petition of John A. Brown, or to any part thereof ; and if so, to what part ? 2d. Whether the rule moved for by Ingersoll and Sergeant, on the 14th day of November 1835, in the following words : "Sergeant, for John Aspden, of Lancashire, moves for a rule on Mrs. Poole and Mrs. Jones, and on John A. Brown, administrator of John Aspden of London, to show cause why they should not be required to elect on which petition or bill they will proceed, and to abide by the one elected and abandon the other (J. R. Ingersoll, for the executor of Mr. Nixon, makes the same motion as Mr. Sergeant)," ought to be granted ? and these questions were argued by counsel : On consideration whereof, it is the opinion of this court, that neither of these questions is of such a nature as are contemplated to be certified to this court under the act of the 29th of April, 1802, ch. 32. That they are questions respecting the practice of the court in the application of the general rules which regulate the course of equity proceedings to the circumstances of each particular case ; and therefore, this court have no jurisdiction to answer the same. But it is to be understood, that in the present case, this general discretion is subject to the former order of this court in regard to the making of parties, and other proceedings contained in the mandate, when the cause was remanded at the last January term of this court. It is, therefore, ordered and adjudged, that this opinion be certified to the said circuit court ; and that the cause be remanded for further proceedings.

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\*THOMAS ELLICOTT and JONATHAN MEREDITH, Plaintiffs in error, [\*412  
v. WILLIAM PEARL.

*Evidence.—Hearsay.—Impeaching a witness.—Boundary.—Adverse possession.*

At the trial of a writ of right, in the circuit court of Kentucky, a witness was offered, to prove that one Moore, who was dead, and whose name was put down as one of the chain-carriers in making the original survey, and who was subsequently present when lines were run on the same land, had declared, that a certain corner was the corner made by the surveyor, Kincaid, when the original survey was made and the line run by the direction of the surveyor, for the original survey ; the circuit court rejected the evidence : *Held*, that the circuit court did not err in rejecting this evidence