of the Minors, or the Circumstances of Confidence in the Deed but on the Residuary Legatee being of Age, & having a Right; the Court is ministerial; I decree the Admon to Mary Peachy, she giving an Inventory, & Security to justify...

Admon decreed to Mary Peachy

Arches
3 Sep: July 2

Greene — Sawyer & Darnbrook v Silverides, others — No 124. — Fuller
Dr Wynne — Dr Calvert — Dr Harris for A Johnson.

Q. Are ye Solemnities of ye Statute of Distributions complied with?
Q. Is there a proper Rogatio Testium.
Q. Shd the Plea be received to proof?.....

Dr Wynne... This is a Business of bringing into the Registry, an Admon obtained by Thos. Silverides & 4 other Cozens German, next of Kin, to shew cause, why it shd not be revoked, & Admon with a Nuncupative Will annexd be granted to Roger Darnbrook & Wm Sawyer, the 2 Universal Legatees therein named, who bring in an Allon propounding the said Will.

Legatees

1 Art: pleads the death of Silverides of Sadcaster 27 Jan. 1767, a Batchelor, leaving Thos. Silverides, Eliz. Frank, Martha Dixon, & Anne Johnson his Cozens German, & next of Kin; also Robert, Wm, Hannah Darnbrook, Children of Wm Darnbrook, by Hannah his Wife, who was (whilst living) another Cozen German, also Wm Sawyer (the other Party in this Cause) John, Hannah, Francis, Richard, Joseph, & Frances Children of John Sawyer by Frances another Cozen German of Decd—

2d Art: pleads, that 27 Jan: 1767 Robt Silverides being then in the House of his usual Habitation, & sick of the Illness whereof he soon after died, viz. Wedy 28 Jan: having a mind to make a nuncupative Will, did in the presence of Thos Sharn his Apothecary Wm Blades, & Rebecca Wise, nuncupate his last Will, as follows; "Being asked by Sharn, if he had settled his Affairs, he answerd, "No— Sharn then saying it was proper he should, Decd answerd "Yes, Yes— Sharn said a Verbal Will wd do, as there were a sufficient "number of Witnesses present; Decd replyd, "he knew it would" or "words to that Effect, & then declared, that "all his Cozens shd have "100l apiece, that none of them shd have more than another of "his Effects, but all of them shd be alike" or Words to that Effect this the Witnesses attest

Dr Calvert... I am Council for 3 of the Admons, who are first Cozens, 3 Darnbrooks, 6 Sawyers who are first Cozens once removed. The Admons are cited to bring in the Admon by Darnbrook & Sawyer as 2 universal Legatees named in the nuncupative Will. But it cant be received as such, the Legislature having prescribed certain forms without which, no Nuncupative Will can be good; the Deficiency in this Case is the Rogatio Testium; unless it be proved that the Testator, at the time he nuncupated, bid the Persons present or some of them, bear Witness, that such was his Will, or to that Effect, it is not valid. I understand, the Testator must call the Witnesses, & bid them take notice, other words tantamount will not avail— The Decd cant be said to be conusant of this Will; all the Questions are Sharn's, the Decds Answer, Yes, Yes, indicates rather, that he was desirous to rid himself of Sharns Importunity— The Statute requires 3 Ws there are many Cases where equal Satisfaction may be obtained from the Depon of 2, but the form required by the Statute, cant be dispensed with, such a deficiency cant be supplied, any Solemnity omitted, is fatal. The 3d Art: pleads, that previous to the nuncupative Will, the Decd set about making a written Will, gave Instructions for it, & ordered 100 to each of his Relations, but was so weak, he cd not finish it; how can these Instructions apply? if their Completion was prevented by the hand of God, they might be propounded as a written Will, but how do they apply to establish a nuncupative Will? if he was so weak as not to be able to go on with the Instructions, he must be less able at the Nuncupation; all Collateral Relations may be included in the word Cozens, but there are many determinations that none shd come in who can not make out an Interest under the Statute of Distributions, if that is the Rule, Darnbrook & Sawyer can not come in: there can be no Reference from that Paper to this; it is not sufficient to induce

you to admit these Persons; if it could be used at all, it must be as a written Will; besides it shd be annexd as part & explanatory of the Nuncupative Will.

Dr Harris... I am Council for Anne Johnson; the Question is on the Admission of the Allon, wch does not depend on setting forth what the Statute requires, but the matter is quite foreign to the Paper propounded; when Effects are left in such words as these, they must go according to the Statute of Distributions; if they extended to them, they wd go to all Relations— The Law is very express; Nuncupative Wills are looked on very unfavorably: the Preamble says, to prevent Frauds; the Rogatio Testium is the principal point, at least one of the most essential; it was dangerous to talk; the Statute to remedy this, required the solemn Rogatio, to distinguish between such a serious Act, & common Talk; this is a Rogatio Testatoris, not Testium: the Article mentions a Paper intended to be written; this very paper cuts up the Nuncupative Will: It cant prevail either as a written or nuncupative Will, by their Account, it was revoked by another.

Dr Wynne... I am Council for the Universal Legatees the Decd said all his Cozens shd have 100l apiece; by this Clause he did appoint these is a Rogatio Testium; if the Testator at the time directs his discourse to one of the Persons present, & bid him take notice, it is sufficient; I allow the forms prescribed by the Statute are strict; that 2 Ws cant establish a nuncupation, tho, a 3d had heard the purport mentioned by the Decd a day or two before, or after, & therefore Sir Ed: Simpson rejected such a Nuncupative Will; you see the Testator had been attempting to make a Will: why is not an Apothecary or Physician as proper to enter into such a Discourse as a Clergyman, who is directed by the Canon Law to put a dying Man in mind of his Will; if blue Conversation passed, it wd be within the Statute; the Decd was prepared to make his Will; wch is as much within the Spirit & Intention of the Statute as can be; it not being the design of the Legislature to check Will making but only to prevent Frauds, & to introduce Certainty; there have existed Cases, where there were 3 Ws to a Will, & tho, one was perjured, yet as the Statute was complied with, the Will was established. Tho, you can go beyond the Statute, if your Conscience can be satisfied of the fairness of the Transaction you will go as far as you can in the Construction; an Earnestness may as well be supposed from the Repetition of Yes, Yes. it will be tantamount; Acts are stronger than words to make a Rogatio Testium; the facts are sufficient to establish Intention & Capacity; I wd allow that the words "all my Cozens," standing substantively, wd be too general to have effect, as a Man's Estate wd be reduced to nothing if so shared out; if the meaning can be collected out of the Will, the Ct will allow parole Evidence to establish it, otherwise not. Selwyn v Brown. Ld Cheyneys Case 5 Co. Rep. 68. parole Evidence was admitted. We plead a declaration of his Intention; it was no executed Paper, therefore cd be only propounded as a Testamentary Schedule, from the Execution of wch the Testator was prevented by Death.

Dr Hay. Judge... I shd be unwilling to reject any Plea, where on the Evidence, there is a bare possibility, that the Party propounding the Paper cd avail himself; but the Statute is peremptory, so that I cant go beyond the Line laid down; the Admissibility depends on the Consequence, flowing from the proof of the 2d Article, wh cd pronounce for the Will, if the matter of that Article shd be fully proved; the meaning & the Extent of the word Cozens wd be a subsequent Consideration, & cant be attended to, when the propriety of the Will is examined; if that cd be received to proof, you might