go into the discussion of what he meant, by the word "Cozens" to the Paper, as pleaded wd be relevant, if Dr C. be at Liberty to receive the Plea: the Statute has many Requisites; if most of them are complied with, & only one omitted, the Will cannot be pronounced for; if the Will was made in his Sickness & he afterwards recovered, &c. not pronounce for the Will: Shann did properly; his answer, No shews clearly, those ..... Papers pleaded were nothing in his Estimation: but those Papers might be explanatory of those Ambiguous Expressions, "All my Cozens" yes yes, may be earnest or peevish. Shann told him a verbal Will wd be sufficient, as there was a sufficient number of Witnesses present: this no more than saying there are Witnesses, for if he had directly nuncupated, tho, he had not answerd Shann, instead of saying "he knew it," it wd have been the same; or to that effect; it cd be only a positive Answer to what Shann said. the Rogatio Testium, is the Evidence the Statute requires to shew it is a deliberate Act: there may be many other ways to shew the deliberation, but the Statute requires this; there shall be a bidding, according to the Civil Law; Would the Words attend, come hither, have been Evidence of a Capacity & Intention to nuncupate? I dont think those words are equivalent; for I allow that such Equivalence is sufficient; but this is not pleaded; as the Rogatio Testium is in my Opinion necessary by the Statute, I cant indulge myself in a latitude & therefore I think this Allon cannot be received. I remember in the Case of Atkenson & Henley. Decr 1758. an Allon was rejected for want of the Rogatio Testium.

Plea rejected

D

Prerogative
3d Sess. July 7

Dr Wynne

No 125.

Pyefinch v Palmon ol: Pyefinch.

Q Is the Plea admissible?

Alexander — Dr Wynne — Dr Calvert — Stevens

This is a Question on the revocation of a Probate, for want of Jurisdiction, (wch has been granted at Hereford) for that purpose a Citation issued from this Court, & also to shew Cause why Probate of a Will dated 8 July 1762. should not be granted to Jn Pyefinch Brother of the Decd.

We are now before you on the admission of an Allegation of wch 3 Art: pleads, that Wm Pyefinch the Decd, gave directions for the Will of y 8th of July 1762, the Contents whereof are set forth in the annexed Paper: the Execution is also pleaded

Art. 2. That the sd Will was left in the Custody of Jas Wellington, (one of the Witnesses) to be taken care of by him

Art. 3. That the Testator died 18 May: 1763. without Children or Parents, leaving a Widow & Brother, the Parties in this Cause.

That before & after the making such Will, he professed a great regard & affection for his Brother, & declared to several Persons that he had given his Wife for life, the Interest of his Personal Estate, & made his Brother Exor, & residuary Legatee. That this Will remained in the hands of Jas Willinton 'till 6 Decr when the Decd sent his Servant Hughes to him for the Will, wch was given to him, after which the Decd returned it & bade him lock it up, not tell his Mistress, that he had made his Will. In this State the Will remained, till a Week after the Decds death, when the Mistress got it into her Custody, & read it, way angry & tore off the Seal in the presence of ... Skief. That it is now in the Custody of Mary Pyefinch, or since the cancelling thereof has been destroyed by her Order, without any Copy being taken. That A contains the Substance thereof wch is known to Henry Jones the Drawer, Wellington, who was a Witness, & W. Skief who heard the

Original Will read over by many Pyefinch. The Prayer is that Probate of Paper (A) containing the Substance of the cancelled Will may be granted to the Brother.

Dr Calvert... my Client is sole Exec: in a Will dated 16 Aug: 1760. they pray Probate of Paper A till an authentic Copy of the Original Will is produced, wch they allege to be destroyed.

Object to the Allon, as being too closely drawn; they have not pleaded by whom the Paper was drawn up, nor when, which is material, as it must have been subsequent to the Deeds death; the Will was made 8 Years ago, how can Jones & Wellington speak to the Contents at this distance of Time? they dont appear they ever saw the Will. It is not pleaded that the Will survived the Deed. The Story is incredible, if she intended so secretly her Husbands Will, that she shd read it over before a Witness, & then cancel it. How did it pass from Hughes to Palmore? did he give it up? that shd be accounted for; it is proper you shd be satisfied what is become of it now; the Paper exhibited is drawn out in the form of a Will, as regularly as if it was a Copy.

Dr Wynne... The Dr admitted that Copies have been pronounced for, where there was Evidence, the Will was destroyed: it is immaterial who drew it, or when it was drawn; it is not a Paper you are to pronounce for, but it will lead to a proof of the Original Will, which we say was read after the Decds death, consequently was seen; it is not the Paper, but the Substance you wd pronounce for on the Evidence of these Persons, who have already made Affidavits, tho, they can't be read; The Dr called on us to produce Cases, I answer it is improper we are now only on the Admission of an Allon. We dont call it an authentic Copy, we only plead it as the Substance, wch is sufficient for praying it, till the authentic Copy or Original is produced; what Strengthens our Prayer, is, the Widow having herself destroyd it. She got possession of it, by having the Keys; it was locked up in the Deeds House: this is not the first time a Woman has acted indirectly. She is under an Asignation to bring in all Scripts &c. but has not brought in the Cancelled Will therefore we cant suppose it exists; it is sufficient if we can prove it subsisted after the Testators death, that she suppressed it, & that this, is the Substance of it.

Judge... When Papers are destroyd by Accident, or by a Party interested, & the Substance is ascertained the Contents may be pronounced for; if you can prove the Testator made a Will subsequent to hers; its Subsisting after his Death, her destroying it, & what the Contents were, they may be pronounced for; They assume the proof of these Particulars, therefore the Allon in general is admissible tho, it wd have been stronger, if the time of its being drawn up had been ascertained; if Wellington was the Drawer, he is the most proper person to account for the Contents, but the material Question is, wht this is the Substance of the Will wch was destroyd. I think the Allon may be received, as it stands, tho, unless they can prove the Will subsisted after the Decds Death, or in other words, the 6th Article, it is in vain to oppose the written Will...

Plea admitted..

Prerogative
Jenner

No 126

Ryley ol: Prosser v Ryley

Bishop.

Q Shall a pretended Wife be admitted to offer Evidence to prove herself the Person intended to be benefited by the Husband Will, not a lawfull Wife?

Dr Wynne

Dr Marriot

Dr Marriot..... I must insist Mrs Prosser has no right to give a Plea, in order to prove the Intention of the Testator; there being nothing on the face of the Will, wch tends to a description. The general Law is, that Legacies are void for Incertainty, viz. a Person leaves a Legacy to his Servant John, & he has 2 Servants named John. There is no legal Certainty in the Pltf so as to admit her to plead. There is a legal Certainty in my Client: the Construction then is in our favor, for the Ct must construe according to