deposed to the Delivery & Pains to keep it a secret —

Depos: that Mr Beauclerck frequently visited Lady Bolingbroke at Tunbridge Wells, when Lady Pembroke was out that the Couch in the Opposite Room was found tumbled after Mr B & Ly B. had been there, & the Windows almost shut — Depos: to frequent Visits of Mr B to Ly B. in London & Ly B. sending him with a Bank Note to Mr B. to get changed, that Mr B. c^d not do it then but came & staid with Ly B. till between 11 & 12 at Night; that Dep^t going in to take the Things away, saw Ly B. with a handful of Money, shakeing it about, & as Dep^t was going out, she called him back & gave him a Guinea — That Mr B. behaved as Master of the House at Taplow, & one Day, Dep^t being in the Parlor, Mr B. said, "Come, my Lady, let us shut up the Windows, & go to Chap^l" which she complied with, ordered the Windows to be Shut, & Candles to be brought, tho, it was then quite Daylight, & 1 Hour & half before Dark — When Ly B. was ill of the Measles, Mr B came three times a day, & always went up to her Bedchamber — He depos: to Ly B's increase of Size & Appearance of being with Child & confirms Dr Hunter's Account —

was Mr Beauclerks Postilion, depos: to driving Mr B. constantly to Lady B's at Taplow, & to his being desired at the time Ly B. lay in to come & clean the Knives &c

Access of the Husband must be proved & not presumed — — — —

The Question before me, is, wh^r the Birth of a Child on the 19th of August connected with other Circumstances, amount to Proof of Adultery; the Presumption would have been, that the Child was the Husband's, if there had not been strong Circumstances amounting to a Contrary Proof from Ly Bolingbroke's Separation from her Lord, prior to the time this Child must have been begot — The Secrecy observed between Ly B. & Dr Hunter is material; there is no Evidence from which I can suppose Ld B had any Intercourse with Lady B: the manner in which the Child was brought into the world is very particular: Ld B. is unacquainted with it. Mr Beauclerk was in the House, & went up to Lady B's Bedside as soon as the Delivery was compleated; Ld B's Note is dated the 7th of Septr Ly B. was brought to Bed the 19th of Aug^t: Ld B. knew nothing of the Delivery; it is not to be conceived the Birth of the Child of a Noble Family w^d be kept Secret; all these Particulars shew Ld B. was not the Father; the facts of Powder & Dirt being found on the Couch, are material, when connected with other Circumstances; I have no doubt to pronounce Lady Bolingbroke guilty of Adultery & that the Child was not Ld B's — Where both Parties have violated the Law, a Question may arise how far either are entitled to the Benefit of the Law; I don't say the Observation applys to this Case, because here was no Parting by Consent, but an Elopement on the part of Ly B. who went first from her Lords House to the Duke of Marlboroughs (her Brother's) House, therefore Ly B. hav^g gone away & there being sufficient Evidence of Adultery, from the Birth of the Child & other Circumstances, I think Ld B. is entitled to a Sentence of Divorce from Bed & Board.

Divorced

E Term: 1 Session 1769 — Prerogative — Dr Dyne

No. 151. — Adderley — Ashby v Hay & Thrale — H Stevens

Can a legatee who has rec^d his Legacy oppose the Will & cite the Exors to prove in solemn form?

Hil. Term last

Dr Harris — Dr Wynne

Richd Milson is the Deed, he made his Will dated the 12th of May 1767 & appointed his Wife Dorothy Hay, then Milson, & his Daur Joanna Milson, now Thrale, Exors, who proved the Will, & were afterwards cited to bring in the Probate, & shew cause why Admon sh^d not be granted, to Elizabeth Wife of Samuel Ashby, the lawfull Daur of the Deed; Stevens appeard under Protest for the Exors, he was ordered to extend that Protest, which he has accordingly done so, & states that the Deed bequeathd by his Will, Seven Leasehold Houses to his Daur Eliz^t Ashby, for her separate Use, & if she died without Issue before the Expiration of the a^fd Leases, then he bequeaths them to his three other Children, to be equally divided amongst them; we say Mr Ashby assented to this Legacy, took possession of the Houses, & received the Rents & Profits thereof by herself or Samuel her Husband, & therefore cant now oppose the Will, having acquiesced therein & been in quiet Possession 10 Months; the Question then for us is,

wh^r a legatee in possession of a legacy under a Will, is barred from contesting that Will, so long as she continues possess^d of the Legacy?

I dont contend that a Legatee in a Will, having received his Legacy cannot in any possible Case, call upon the Exors to prove, by Witnesses; as for Instance, where it appears the Testator made a subsequent Will, whereby the Legatee is more benefitted than he is in the former Will, but then he must bring in the Legacy

Hil. T. 1767 — a Person so circumstanced, was benefitted 10 £ under a Will, but said there appeared a subsequent Will, which revoked the other, you overruled the Protest made in that Case, but ordered the Legacy to be brought into Court, this Determination is in point; It goes to shew, a Party taking out a Citation, must state such a Case as entitles him to take it out; the Possession is admitted, she having received the Rent, but say in Excuse, she did not know she could controvert the Will; here is no Pretence of any thing having come to her Knowledge since the Possession if you allow Excuses of this Sort, there would be no such thing as quieting Possession — The Court will not say, a Party who is a Legatee, retains all Rights, as next of kin, in the same manner, as if stripped of every thing; it w^d afford Next of kin a fine Opportunity of plaguing one another, if they as next of kin, could avail themselves of the Rule, not to be liable to Costs — I suppose you will hear, that it is a favorable Case, for that all Wills are prima facie, by the old Practice required to be proved by Witnesses;

I think in all Cases where a Legatee sets up a Subseq^t Will, you tho order the Party to make an Affidavit, that at the time he received the Legacy he knew not of the Subsequent Will, or that he had power to call it in —

Dr Harris — The Dr was right in supposeing I should call it favorable, for I do say, that by Law, the Exors sh^d prove the Will by Witnesses; the Protest does not say that the Legacy sh^d be restored, but that the Legatee cant now call upon the Exors to prove — This not necessary to bring in the Legacy, for if the Will is established, the Legacy is paid; if set aside, my Client w^d have the Admon, as next of kin, because the Widow is in mala fide, & as you can grant admon to the Widow or next of kin, you w^d prefer the Person who discovered the Fraud, before that Person who committed