No. 21.

1749. *November* 7. SMITH *against* TAYLOR.

Two nieces of a defunct brought an action against a nephew, the nearest of kin, on this ground, that the defunct, while on death-bed, having made a written testament, verbally desired his nephew to divide his effects equally between the nieces and himself, which allegation they referred to the defender's oath. He acknowleged that so the defunct had signified his will, but that he had never consented to it. The Lords found that writing was essentially necessary to a settlement, and therefore sustained the defunct's appointment only as a legacy to the exent of £.100 Scots to each of the nieces.

Kilkerran.

*** This case is No. 9 . p. 6594. *voce* IMPLIED WILL.

1762. *March* 5.

KATHARINE CRAIG *against* WILLIAM LINDSAY, ISOBEL SYME, and Others.

No. 22.

The heir may challenge a legacy by a minor, if there are no free moveables after payment of the moveable debts.

John Craig, at his death, left a son William, and a daughter Katharine, both infants. To William he gave his land, worth about 400 merks yearly; to Katharine he gave a bond of provision for 3600 merks, payable by her brother.

The tutors of William, during his minority, saved out of the rents of the land estate 2200 merks.

William died in minority. He made certain settlements in favour of his tutors and their relations; (*vide* decision 14th December 1757, No. 68. p. 8956.) and, *inter alia*, made a testament while *in liege poustie*, whereby he legates to Isobel Syme 200 merks. This deed contained a power of revocation.

The sums contained in this deed, and that referred to in the decision 14th December 1757, Katharine Craig against Lindsay and others, exhausted the whole moveable subjects of William.

Katharine, upon her brother's death, brought a reduction of his deeds, and, *inter alia*, of this one. The ground of reduction of this deed was, that William could not legate, in respect he had no free moveables to answer the legacy, after paying the moveable debts.

Answered for Isobel Syme: There is a distinction betwixt a testament executed on death bed and one executed *in liege poustie*. With regard to the first of these, it is true, that a person when on death bed cannot make a testament to dissapoint the heir of his claim of relief to be relieved of the moveable debts out of the moveable subject: But this arises not from the incapacity to convey to the prejudice of such relief, but only from the incapacity of conveying it to the prejudice of the heir upon death bed. On the other hand, when the testament has been executed by one when *in liege poustie*, that is, when he is in good health, though in prejudice of the heir's claim of relief, it would be good; because the law of death bed does