that the claimant, Mr Baillie, is preferable, and entitled to be served heir of provision to the deceased Mr William Walker under the settlement 1752,—and remitted to the macers to proceed in the service."

On the 3d July they "adhered."

For Mr Baillie, A. Lockhart. *Alt.* J. Burnet. *Reporter*, Barjarg.

OPINIONS.

The Court was unanimous. The word *heirs* was held to be pliable; the intention of the testator was clear: The only ambiguity arose from a country writer deviating from his style-book. An ingenious reclaiming petition was offered, but on the 3d July was refused without answers. Concerning it the President observed, that the petition took many things for granted, which he apprehended were contrary to the principles of the law of Scotland.

This decision, however, was reversed on appeal.

1766. *July* 4. The INCORPORATION of SHOEMAKERS in Edinburgh *against* WILLIAM MURRAY, Shoemaker in Edinburgh.

[*Kaimes' Select Decisions*, 320, *Dictionary*, 1962.]

BURGH-ROYAL.

It is lawful for a freeman to join stocks with an unfreeman.

THE incorporation of shoemakers in Edinburgh is an ancient incorporation. In 1586 they obtained a seal of cause from the magistrates and town council of Edinburgh. It proceeds upon the narrative, "that our sovereign Lord's lieges are greatly skaithed and defrauded by unsufficient work of ignorant persons, labourers, both in black work and barked leather." It orders, "that no freeman of the said craft, being burgess, pack or peel, can be partner with unfreemen, nor make conventions with them, under the pain of ten pounds, or tinsel of his freedom." This seal of cause was confirmed in 1598 by a charter from King James VI. For the better enforcing thereof, each member at his admission makes oath "that he shall be leal and true in his craft and vocation in serving the lieges, and shall obey the deacon and masters for the time; shall defend the liberty of the craft, conform to equity and the uttermost of his power, and shall keep all the general statutes and ordinances made, or to be made, for utility and welfare of the craft, without revocation therefrom, and shall not colour nor fortify any unfreeman, nor pack and peel with them, &c. under the pain of perjury and defamation."

In February 1764, William Murray was admitted a freeman of the incorporation of shoemakers in Edinburgh. In August 1764, he entered into an agreement with Alexander Learmonth, tanner in Edinburgh, no freeman of the incorporation of shoemakers. By this agreement it was provided that each of them should advance an equal sum of money to be employed in the trade of

tanning leather and making shoes: That the former branch should be conducted solely by Learmonth, and under his name; the latter branch in like manner by Murray; and that the profit and loss upon each branch should be divided equally between the partners. The incorporation of shoemakers considered this contract as inconsistent with Murray's duty and oath in quality of a freeman shoemaker: they threatened to bring a complaint against him before the magistrates of Edinburgh: upon this, Murray, with consent of Learmonth, cancelled the contract. Notwithstanding this, the deacon and treasurer of the shoemakers, with concourse of the procurator-fiscal, brought a complaint against Murray before the magistrates of Edinburgh, accusing him of perjury, and of violation of the privileges of the incorporation, in so much as he had entered into copartnery with Learmonth, by which Learmonth, an unfreeman, was to receive part of the profit arising from shoes made by Murray, a freeman. This complaint concluded for L.100 sterling, in name of damages and expenses to the incorporation; for a fine of L.100 sterling to the procurator-fiscal; that Murray should be found to have forfeited his freedom, and that he should be otherwise punished, according to the demerit of his offence.

On the 25th June 1765, the magistrates "found that Murray, by the contract entered into by him with Learmonth, an unfreeman, did unlawfully communicate to him the benefit arising from the freedom of the incorporation; but, before answer as to the consequences thereof, ordained the pursuers to condescend on what proof they offer to bring of the said contract having taken effect, and of the damages." Murray removed his cause into the Court of Session, by advocation. On the 14th January 1766, the Lord Kennet, Ordinary, remitted the cause *simpliciter*. On the 18th February 1766, he adhered to this interlocutor: Murray prepared a reclaiming petition, to which answers were put in.

ARGUMENT FOR MURRAY THE DEFENDER:—

The inductive reason of the Seal of Cause 1586, is, that the lieges may not be imposed upon by ignorant workmen: this was obviated by the contract, for the management of the shoemaking branch of the business was committed solely to Murray, a freeman shoemaker. Neither have the exclusive privileges of the incorporation been violated; for all the shoes were to be made by a freeman, and this is all that the incorporation can claim. It does not vary the case, that the profit and loss upon this trade were to be divided between the partners. The partners might have blocked out the shoes in Edinburgh, sent them out of Edinburgh to be sewed, and then brought them in again, and have sold them ready made; or Learmonth might have bargained with Murray for half the shoes that he could make, and then have bargained with him to sell that half, and Murray's own half, at their joint risk. Such bargains would have been lawful, and there is no material difference between them and the bargain in controversy. Packing and peeling with unfreemen is a thing different from the present case. It means that abuse whereby an unfreeman is permitted to use the name of a freeman, and thereby carries on the business of the incorporation without being a member of it. The freeman who thus lends his name is said to pack and peel with unfreemen.

That this is the meaning of the expression, appears from the incorporation-oath, where the offence is described to be colouring or fortifying an unfreeman. That such must be the sense of those words is evident from this; that it is impossible to colour the work, or fortify the workman, where he is ignorant of the business, and never intends to practice it.

ARGUMENT FOR THE PURSUERS :—

The words of the seal of cause are most explicit, "shall not be partner with unfreemen, or make conventions with them." The words of the oath are no less explicit, "shall not colour or fortify any unfreeman." If those words have any meaning at all, they have this, that an unfreeman cannot be directly assumed as a partner in the trade of making and vending shoes within the liberties of the burgh; and that the words have been so understood, is evident from this, that no attempt, similar to the present one, was ever made by any freeman shoemaker. The present contract being plainly a convention with a partner who is an unfreeman, it is in vain to put imaginary cases where it is said a freeman might admit an unfreeman into a share of his profit or loss. Here, Murray, by communicating his profits and losses with Learmonth, communicates every privilege of the incorporation which he himself enjoys, [*N.B.* The communication of losses is not a privilege;] and by it Learmonth became as much a shoemaker as Murray, with this exception, that he had not the education of a shoemaker, [that is, he was a shoemaker in every thing but the making of shoes.] It is impossible that the seal of cause should prohibit a freeman from lending his name to an unfreeman who could make shoes, and yet allow him to lend his name to one who could not. The judgment of the magistrates, in this case, is agreeable to two judgments pronounced by the Court of Session, 18*th February* 1757, *Incorporation of Hammermen* and *Shoemakers in Glasgow* against *James Dunlop*,—Faculty Collection. Those decisions proceeded on the general nature of incorporations and the import of the words packing and peeling.

On the 4th July 1766, the Lords "advocated, and assoilyied."

Act. D. Rae. *Alt.* T. Monro.

OPINIONS.

ALEMORE. The judgment of the Magistrates is erroneous, for the freeman carries on the business of shoemaking. This very question was determined for the defender in England, where a brewer associated a gentleman into his trade.

PITFOUR. The incorporation plan is monopoly, as they would hinder a man, however skilful, from working, unless of the company, so they would endeavour to hinder a freeman from getting credit.

COALSTON. Without credit, manufactures cannot be carried on, nor even incorporations themselves subsist. The words of the seal of cause are so wide, that, literally interpreted, they would be absurd. *Shall not make conventions*, does, in strictness of speech, exclude all intercourse or bargains between freemen and unfreemen.

KAIMES. The case of the incorporation of Glasgow, was *toto cœlo* differ-

ent. There, an unfreeman was in effect the master; here a freeman is master: and, as he cannot borrow money, he associates an unfreeman for profit and loss.

AUCHINLECK. The rational interpretation of the seal of cause is, that no conventions shall be made that are prejudicial to the incorporation; but here the convention is not prejudicial to the incorporation, however it may affect the rich members who may carry on the business upon their own stocks, without foreign assistance.

HAILES. I do not think that King James VI., by his charter 1598, could authorise the Magistrates to try perjury without a jury. The seal of cause must be the rule, not the oath; if the oath goes farther than the seal of cause, no action can lie upon it. I doubt whether the oath can be administered at all: we complain of the bad consequences arising from the multiplicity of oaths established by statute; for them the land mourns; and shall we authorise oaths conceived in terms vague and obscure, and imposed without authority of statute.

PRESIDENT. Such corporation oaths are established by custom: they have some sanction from a late judgment, *Douglas* against *The Magistrates of Musselburgh*. In the case of *Glasgow*, an unfreeman carried on the business under the name of a freeman; but here the freeman acts in his own name, and takes the benefit of an unfreeman's money. Unfreeman, in the seal of cause, and in the corporation oath, is an unfreeman of the same trade.

1766. *July*. MR JAMES REID, Minister of the Gospel at Beith, *against* The HERITORS of that Parish.

STIPEND.

Minimum of a Stipend.

THE parish of Beith is between two and three miles long, and as many broad: the minister's house and church are centrical: the number of persons in the parish is 800, so that there may be about 300 examinable. The parish is situated in Fife, upon the high-road, at about equal distance from the North Ferry and Kinross. In 1650, the Commisioners for Plantation of Kirks modified to the minister of Beith the following stipend:—3 chalders oats, 1 chalder bear, 500 merks in money, and 40 merks for communion elements. There is a sum mortified to the minister of this parish, being 1400 merks, whereof he ought to receive the interest.

In 1764, Mr Reid pursued the heritors for an augmentation.

On the 5th March 1766, "The Lords Commissioners modified the constant stipend to be one chalder of bear, and L.633:6:8 Scots for stipend, with L.40 money, foresaid, for communion elements, by and attour the interest of 1400 merks mortified to the minister of this parish."