time prevails at any given date, will not be construed as limited to Scotland. We were told that by the existing laws the fishings in England and Ireland all close before those of Scotland. Should it ever come to be otherwise, so that our markets should be legally supplied with salmon after the close of all the Scotch rivers, I should not be prepared to construe this Act so as to put buyers to the proof of where the fish which they bought were in fact caught. It may be that the framers of the clause under consideration have, by ignoring the very obvious consideration of guilty knowledge, made it imperative or nearly so, but taking it as it stands I should be averse to put upon it any avoidable construction which would expose really innocent people to conviction under it.

I think the question in this case ought to be answered in the affirmative, with the result that the appeal shall be dismissed and the Sheriff's judgment affirmed.

The Lord JUSTICE-CLERK and LORD CRAIGHILL concurred.

The Court answered the question in the affirmative, and dismissed the appeal.

Counsel for Complainer (Appellant)—Sol-Gen. Robertson—Moody Stuart. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Respondent—Guthrie. Agents—Boyd, Jameson, & Kelly, W.S.

COURT OF SESSION.

Wednesday, February 3.

FIRST DIVISION.

[Lord Trayner, Ordinary.

MACKENZIE *v.* MACKENZIE AND ANOTHER.

Succession—Executor—Right of Co-Executors to Administer—Interdict.

One of three co-executors, conceiving himself to have the right in accordance with the testator's intentions to regulate the disposal of a particular part of the estate, made arrangements for its disposal without consulting with, and against the will of, the others. *Held*, in a process of interdict at their instance, (1) that he had no such right, and (2) that notwithstanding that he had, in the belief that he had such right, and with much expense, made arrangements for the disposal of that part of the estate in a particular way, his co-executors, who objected to the manner of disposal, were entitled to interdict against it.

John Whitefoord Mackenzie of Lochwards, W.S., Edinburgh, died on 8th November 1884, leaving a general disposition and settlement dated 21st July 1874, with codicil thereto dated 14th March 1881. By this disposition and settlement Mr Mackenzie disponed and conveyed his lands of Lochwards and Lochmiln to his son John Mackenzie and his heirs, and disponed and assigned his whole other heritable and moveable property to John Mackenzie and to his daughters Helen Miller Mackenzie and Elizabeth Mackenzie, and their respective heirs, share and share alike, *per stirpes*, under certain burdens. The executors nominated were the testator's son and his two daughters, viz., John Mackenzie, Helen Miller Mackenzie, and Elizabeth Mackenzie, who were duly confirmed. The testator also left a letter to his son in the following terms:—

"*April 24th*, 1879.

"My Dear John—At my death you will find my will in the fire-proof small box.

"As soon as possible take out confirmation.

"You will of course consider it prudent to sell the library as soon as possible.

"Chapman will be the best man to employ, but you must insist *that it shall be entered in the sale catalogue alphabetically*, and not according to his usual practice, just as the books may come to his hands.

"My catalogue in 3 vols. will assist him.

"Confirmed 5 Dec. 1880. J. W. M."

This letter was enclosed in an envelope addressed "To my Son."

The testator's library was very large and valuable.

On 8th November 1885 Mr John T. Mowbray, W.S., who acted for the Misses Mackenzie, wrote to Mr Mackenzie as follows:—"I have learned their [the Misses Mackenzie] views about the auctioneer to be employed, and am desired to inform you that they wish the sale of the books to be entrusted to Mr Chapman; and on learning that you have given him the necessary instructions I shall arrange for giving him possession of the books in order to their removal."

On 11th November Mr Mackenzie replied:—"With regard to the sale of the library, the principal object is to secure that it is disposed of to the greatest advantage to my sisters and myself. I have consulted with several persons of experience in such matters, and, following the advice I have received, have resolved to employ Mr Dowell to sell the library. Unless I felt that there were strong reasons to the contrary, I would certainly have carried out the suggestion in my father's letter of 24th April 1879." He stated that his reasons for employing Mr Dowell were—"*First*, Mr Dowell is already entrusted with the sale of the furniture and other articles belonging to my father's estate, and I am told that to give him also the sale of the books would benefit both their sale and the sale of the furniture and other articles: *Second*, Mr Dowell has a large staff of qualified assistants, and ample accommodation for the sale of the library: and *Third*, I am informed by several parties well able to judge that Mr Dowell is the best qualified person in Edinburgh to dispose of the library. I understand that had it not been for the suggestion made by my father you would also have been of the same opinion with reference to this matter as I am."

On 16th November Mr Mowbray wrote to Mr Mackenzie in answer, maintaining that the decision of the matter did not rest with him (Mr Mackenzie), and adding—"If you expected any weight to be given to the opinions to which you refer, I think you should have mentioned who the parties are by whom they were given. . . . I have, as you requested, communicated your letter to your sisters, who desire me to say that they

require the sale to be entrusted to Mr Chapman, and will not agree to Mr Dowell being employed."

On 25th November Mr Mackenzie wrote to Mr Mowbray as follows:—"With regard to the library, I intend to instruct Mr Dowell to proceed with the arrangements for the sale thereof;" and on 27th November 1885 Mr Mowbray wrote to Mr Mackenzie as follows:—"With regard to the library, I am desired by your sisters to say, that unless you withdraw your intimation, that you are 'to instruct Mr Dowell to proceed with the arrangements for the sale thereof,' they will be under the painful necessity of informing Mr Dowell that they do not concur in your instructions, and will not recognise anything that may be done under them. I shall be obliged by your letting me have an immediate answer as to this, that I may know how to proceed."

On 1st December Mr Mackenzie wrote to Mr Mowbray as follows:—"With regard to the sale of the library, I have to state that I do not intend to withdraw the intimation I have already made, that Mr Dowell is to be instructed to proceed with its sale;" in consequence of which Mr Mowbray, of the same date, wrote to Mr Dowell as follows:—"*The late Mr John Whitefoord Mackenzie's Estate.*—Mr John Mackenzie informs me that he has given, or is to give, instructions to you to sell the library which belonged to his father, in reference to which I beg to intimate to you that Mr Mackenzie's sisters have each an equal share with him in the property of the library, which therefore cannot be sold without their concurrence, which they have not given." Mr Mowbray sent a copy of this letter to Mr Mackenzie on 2d December. Mr Mowbray on 29th December wrote to Mr Mackenzie and suggested that there should be a meeting of the executors and beneficiaries interested in the trust-estate, in answer to which Mr Mackenzie wrote on 30th December—"It is quite unnecessary to call a meeting of the executors in order that measures may be taken for the sale of my father's library. In terms of the intimation I made to you on 11th November, this matter has been placed in the hands of Mr Dowell, who is most actively proceeding in order that the sale may take place in March."

On 2d January 1886 an advertisement was inserted by Mr Mackenzie's instructions in the *Scotsman* newspaper, to the effect that the library of the late John Whitefoord Mackenzie, W.S., would be sold by Mr Dowell on Monday 22d March and twenty following days (Saturdays excepted).

The Misses Mackenzie then presented a note of suspension and interdict against their brother John Mackenzie, and against Alexander Dowell, auctioneer, to have the respondents interdicted from selling the library in question, or advertising it for sale without the concurrence and assent of the complainers.

In the answers lodged to this note it was stated that "the respondent gave instructions to Mr Dowell in virtue of the powers conferred on him by his father's letter of 24th April 1879, and as agent in the executry. Further, explained that the respondent gave said final instructions to Mr Dowell on 21st December 1885, after many previous meetings and negotiations about the matter. He considered Mr Dowell the party qualified to dispose of the library for the best advantage of both the complainers and the respondent. Mr Dowell, after receiving said final instructions to prepare for a sale, commenced with the preparation of a catalogue, and has had several assistants actively engaged in that work since the last-mentioned date. The cataloguing and arranging of the books is a work of great labour, and attended with much expense. There are at least 8000 works, consisting of at least 15,000 volumes, and Mr Dowell has had assistants engaged in the work, who up to 6th January would have performed work which would have occupied one man ninety-three days, and a great deal more still requires to be done, besides the printing and advertising which is now in progress. Unless Mr Dowell is allowed to finish the work and carry out the sale, the work already done by him will be thrown away, and the sale cannot take place during this winter, which is the proper season for selling such a library. . . . The executry estate will be exposed to serious loss by the preparation for the said sale being now stopped, whereas no interest of the complainers can suffer by matters being now allowed to proceed under Mr Dowell's charge."

The complainers pleaded—"(1) As the library in question belongs jointly and in equal shares to the respondent the said John Mackenzie and the complainers, Mr Mackenzie has no right to give any orders for its sale without the consent and concurrence of the complainers, and the complainers not having given such concurrence or consent, it was *ultra vires* of the said John Mackenzie to give the instructions which he has done to Mr Dowell. (2) The letter of 24th April 1879, addressed by the late Mr John Whitefoord Mackenzie to Mr John Mackenzie, does not contain and did not confer on Mr John Mackenzie any authority to dispose of the library without the consent and concurrence of the complainers."

The respondents pleaded—"(2) In respect of the testator's letter of 24th April 1879, the respondent is entitled to take the proceedings he has done for the disposal of his father's library. (4) The interdict ought to be refused, in respect that the granting thereof will entail serious loss and damage on the executry estate, and that the complainers have no interest or title to insist on the same being granted. (5) *Esto* that the complainers had any right to interdict against Mr Dowell selling the library, they ought to have made their application therefor timeously, and not having done so, they are not now entitled to insist on interdict after expense has been incurred, and when the granting thereof will cause loss to the executry estate."

The Lord Ordinary (TRAYNER), who had previously on 7th January heard parties on a caveat lodged by the respondent John Mackenzie, and suggested an arrangement which was not carried out, on 25th January refused the note, but found no expenses due to or by either party.

"*Opinion.*—[*After referring to the discussion on the caveat*]—Now, the respondent says he has been authorised to carry through this sale—the sale of the library of his late father—by the letter of 24th April 1879, found in his father's repositories, and addressed to the respondent. He maintains that by that letter the sale of the library was separated from the realisation of the

rest of the estate, and that he, apart from the other executors, was entrusted with the management of that sale. I have said before, and I say now, that that is not, in my opinion, a sound construction of that letter. That letter, as I read it, was simply an expression of opinion on the part of the late Mr Mackenzie, that it would be prudent to sell his library, and a suggestion that a certain auctioneer whom he names would be the best man to employ for the purpose. I am far from saying that that opinion which I have just expressed is the only possible opinion to be entertained on that letter. The respondent says he was advised—and I have no doubt he was—that the result of that letter was to put him in the position of sole executor *quoad* the sale of this library; and there is no doubt a good deal to say for that view, although I am humbly of opinion that it is not sound. There is certainly this very noticeable thing about it, that the testator, who was himself a man of business, had appointed his three children, the complainers and the respondent, his executors in his deed, which is dated in 1874, and yet in 1879 wrote this letter and confirmed it in 1880. It might very well be said that he, who knew quite well what were the general powers of executors, and what were the rights of each of his children as executors under the provisions of his testament, must have intended to make some change when he left a letter of this kind addressed individually to his son. There is, I repeat, a good deal to say for the position taken up by Mr Mackenzie upon that letter—that it was direct authority to him to manage the sale of this library, and that the sale of it was in this way taken out of the general realisation of the estate, which, of course, was to be carried out by the executors. And upon that construction of the letter, which at the least was not unreasonable, Mr Mackenzie acted. I cannot blame him for the attitude he assumed, acting upon this view of his own and of his advisers. At the same time, being of opinion that it is not sound, I cannot give effect to it to the extent of holding that that letter authorised him to proceed with the realisation of this library without the concurrence and consent of his co-executors.

"But then that is not the whole matter involved here. There are some cases where a person goes beyond his authority, and does it in good faith, where the Court will not interfere with him. Here Mr Mackenzie has selected a perfectly competent man to sell the library; and that man has taken great trouble, and incurred considerable cost in the execution of the orders entrusted to him. Why should those orders not be carried out? Simply because these ladies say, 'We won't have it. We want somebody else to do it.' Is that a reasonable position in the circumstances for them to take? Are they to gain by that? Is the executry to gain by it? Or is the executry to lose anything by leaving matters as they are? I can quite understand that, if matters had been entire, and the complainers had come to the Court to ask interdict against instructions being given by one executor for the sale of the executry estate without the consent and concurrence of the other executors, that it might have been according to their strict rights that they should get what they asked; but I am very decidedly of opinion that there is no reasonable ground stated, or existing, why the proceedings taken by the respondent in perfectly good faith, for behoof of his sisters as well as of himself, should now be stopped.

"On that ground, that there is no necessity—no relevant or reasonable grounds stated—why these proceedings should be stopped, I will refuse this note; but as I have pronounced this judgment in the view of what is expedient, and not as on a construction between the parties of their strict rights *hinc inde*, I will not allow expenses to either side."

The complainers reclaimed, and argued that the matter was one of strict legal right. Two executors out of three objected to the proposed sale, and the third was not entitled to carry it through in opposition to their express wishes.

The respondent replied—(1) By the letter of 24th April 1879, which was confirmed in 1880, he had sole charge of the sale of the library. (2) But supposing that construction of the letter was not correct, the respondent had taken steps in good faith to realise the library; the person selected by him to sell the library was quite competent, and considerable cost had been incurred in the execution of the order entrusted to him. The executry estate would suffer loss if he was not allowed to sell; at any rate, the complainers had alleged no prejudice.

Before advising the case the Court directed information to be obtained as to whether Mr Chapman could undertake to prepare a catalogue in due time, and conduct the sale on or about 22d March and twenty following days. It was stated that he undertook to carry out the sale on or about the date mentioned, and to issue catalogues one month before the commencement of the sale.

At advising—

Lord President—In this case I agree with the Lord Ordinary in holding that the letter of 24th April 1879 did not give the respondent, as one of the three executors of the late Mr Mackenzie, the exclusive right of managing and disposing of this library, and that being so, it appears to me that the question of right between the parties is perfectly clear.

When co-executors differ in opinion, then the desire and opinion of the majority must prevail. That being so, it is clear therefore that the sisters in the present case were entitled to be consulted as to when this library was to be disposed of, and any preference which they might have to one place rather than another fully considered, especially when the place they desire is the place favoured by the father in the letter I have referred to.

The only qualification which I desire to make to this general statement of the law is, that if it was shown that a majority of co-executors were about to do something damaging to the executry, and prejudicial to the minority and to the general body of beneficiaries, then no doubt the Court would interfere and protect the minority against the actings of the majority.

Nothing, however, of that kind has been shown here, and in the existing state of matters I am for granting the interdict craved.

Lord Mure concurred.

Lord Shand—I agree in the opinion expressed by your Lordship. I think, looking both to the

correspondence and the pleadings, that Mr John Mackenzie's actings are to be explained by the circumstance that all along he has been under an entire mistake as to his legal rights in the matter.

He seems to have thought that the letter of 24th April 1879 conferred on him the absolute right of disposing of this library. I agree with your Lordship in thinking that this is an entirely mistaken view of this letter. It really amounted to nothing more than this, a suggestion to his executors, which they might act upon or not as they thought best for the benefit of the executry estate.

That being so, the state of matters here is just this—One executor and a beneficiary desires to realise a portion of the trust-estate in one way, while his two co-executors propose to realise it in another. If we were to adhere to this interlocutor we would be affirming the proposition that an executor was to be found entitled so to act merely because matters are not in the position in which they were at first.

I think that these two ladies are entitled to have a voice in deciding how this library is to be disposed of, all the more as it is not suggested that what they are proposing will in any way prejudice the executry estate.

LORD ADAM—I concur in the construction proposed by your Lordship of the letter of the deceased Mr Mackenzie.

I do not think that under it the respondent had the right of disposing of this library apart from his sisters. They have fixed upon Mr Chapman as the proper person to dispose of these books, and they are confirmed in their selection by their father's letter. Mr John Mackenzie, on the other hand, thinks differently, and he says that after taking advice he has decided to employ Mr Dowell. Now, in that state of matters I do not see that any case has been presented for departing from the rule stated by your Lordship, all the more so as no case of prejudice to the executry estate has been established.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to him to pass the note and grant interdict as craved.

Counsel for Complainers — Asher — Low. Agent—John T. Mowbray, W.S.

Counsel for Respondents—D.-F. Balfour, Q.C.—Jameson. Agents—Waddell & Mackintosh, W.S.

Friday, February 5.

FIRST DIVISION.

[Sheriff of Lanarkshire.

JOHN & JAMES WHITE *v.* THE STEAMSHIP "WINCHESTER" COMPANY.

*Shipping Law — Charter-Party—Demurrage—Specified Number of Lay-days—Quarantine—*Vis major

It is an implied condition of the running of the lay-days under a charter-party that the ship shall not only be at the place of loading, but also that the owner shall be in a position to place her at the disposal of the charterer to receive cargo; if, therefore, a ship on entering at the port of loading is put into quarantine, this is a *vis major* which impedes the shipowner in fulfilling his contract, and the lay-days do not begin to run.

In a charter-party by which the shipowner was to load a cargo of "say about 2800 tons," there was this clause—"Cargo to be supplied at the rate of not less than 140 tons per running day, Sundays excepted," after which demurrage was to become due at a stipulated rate. The vessel under charter was to proceed from Port Said to different ports on the Turkish coast in order to load the cargo. At that time vessels from Egypt were subjected to quarantine in all Turkish ports. The shipowner and charterer were ignorant of this fact when the charter-party was entered into. The ship sailed to the first of her ports of loading and was there allowed to take on board part of the cargo; she then went on to the next port, distant a few hours sail, but was prevented from loading any cargo until she had undergon etwenty days' quarantine. The loading thus occupied eighteen days more than the stipulated lay-days. *Held* that the shipowner could not maintain an action for demurrage against the charterer.

Paterson & Company, merchants, Smyrna, in November 1883 chartered the s.s. "Winchester" from Blindell, Dale, & Company, who represented The Steamship "Winchester" Company, Limited. The charter-party was concluded in behalf of owners and charterers by J. & R. Young & Company, Glasgow, and contained the following provisions:—"That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall (after discharge of present cargo, if any), with all convenient speed sail and proceed to *Ikinjik and Gulf of Macri* (*say in Gulf of Macri at Macri &/or Conjek*), or so near thereunto as she can safely get, and there load from the said merchants, or their agents, a full and complete cargo of *ore, say about* 2800 *tons*, . . . and being so loaded, shall therewith proceed to *Glasgow, and discharge cargo*, . . . on being paid freight at and after the rate of (12/) *twelve shillings stg. per ton of* 20 *cwts. delivered.* (The Act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, navigation, steam, boilers, and machinery, of whatever nature and kind soever, during the said voyage, always excepted.) . . . *Cargo to be supplied at the rate of not less than* 140 *tons per running day, Sundays excepted*, are to be allowed the said merchants (if the ship is not sooner despatched) for loading, *and to be discharged on berthing as customary as fast as steamer can deliver.** And ten days on demurrage, over and above the said lay-days, at *eight*pence per nett register ton per day. . . . The cargo is to be brought to and taken from alongside at merchants' risk and expense."

The "Winchester" at the date when the charter-party was signed, was lying at Port Said. On 21st August 1883 the following notice had appeared in the *London Gazette*:—"Vessels from Egypt, including those which come through the Suez Canal or from Cyprus, will, if they have had suspicious incidents on board during the voyage, be subjected to twenty-five days' quarantine in Turkish ports."

* See this sentence explained *infra* in Sheriff-Substitute's note.