injury by accident arising out of the employment. At all events—and that is sufficient for the purpose—I am totally at a loss to see how it can be affirmed that the Sheriff-Substitute was bound so to find. The appellant's counsel naturally relied upon the well-known case of *Clover, Clayton, & Company* v. *Hughes*, 1910 A.C. 242, in the House of Lords—the "aneurism" case,—which probably went as far in this region of the law as any case that has yet been decided. But the facts there were not the same as the facts here; and it is important to observe that the decision of the majority (and it was a very narrow majority) was expressly put upon the view that there was evidence upon which the learned County Court Judge, upon a conflict of evidence, was entitled to hold as he did in favour of the workman. That view is not applicable here. The Sheriff-Substitute has held upon the facts that the man has not proved that he sustained an accident within the meaning of the statute; and among the facts, as your Lordships know, we have it that this man suffered from an advanced disease of the heart of long standing, which was bound to manifest itself sooner or later, and might do so even when he was not engaged in active exercise; that the duty of lifting these hutches was among his ordinary daily duties; and that it is not proved that the lifting of the hutches on 20th May 1910 accelerated the progress of the disease. In that state of the facts, it seems to me that this is really a clear case, and that we should not be right if we were to hold that the arbiter was not entitled to find as he did. I see no reason to doubt that the finding was correct, but at all events it seems to me impossible to say that it was not such as the arbiter was entitled upon the facts to arrive at.

LORD SALVESEN—I entirely agree. I think this is a very clear case indeed. It would have been a difficult case perhaps if the Sheriff-Substitute had decided the other way, but having come to the conclusion that there was no evidence that the progressive disease from which this man suffered had been in any way affected by the work in which he was engaged, it seems to me that he could come to no other result than that the man did not suffer injury by reason of any accident arising out of his employment.

LORD GUTHRIE—I agree. The appellant's argument depended upon three mistaken assumptions. The first is that the question raises the correct issue, whereas the proper question is not whether the arbiter was justified, but whether he was entitled, to find as he did. The second is that the appellant can make use of facts which the arbiter has not found in answer to difficulties put to him, which he could not answer without bringing in these facts, but although it is the practice of counsel, when hard pressed, to take this course, it is obvious that we cannot look at statements by medical men or by fellow workmen which the Sheriff-Substitute has not accepted. And third, the appellant seems to have mixed up pain and disease. There may have been excessive strain, and that may have produced pain. The question is, Did that contribute to the progress of the disease. But the Sheriff-Substitute has held on that question that it is not proved that the lifting of the hutches accelerated the progress of the disease. That seems to satisfy the test laid down by the Lord Chancellor when he says in the case of *Clover, Clayton, & Company*, p. 247, that the question is, "Did he die from the disease alone or from the disease and employment taken together, looking at it broadly. Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?"

I therefore agree that the question should be answered as your Lordship proposes.

The Court answered the question of law by declaring that the arbitrator was entitled to find on the facts stated that the appellant had not proved an accident within the meaning of the statute.

Counsel for the Appellant—Watt, K.C.—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents — Horne, K.C.—Pringle. Agents—W. & J. Burness, W.S.

Saturday, January 20.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

COPELAND *v.* WIMBORNE.

Process—Reclaiming Note—Review—Prior Interlocutor—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 28 *and* 52—*Act of Sederunt* 10*th March* 1870, *sec.* 1, *sub-sec.* 3, *and sec.* 2.

An interlocutor allowing a proof by writ or oath was not reclaimed against within six days.

Held that it did not become subject to review on the presentation of a reclaiming note against a subsequent interlocutor.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), enacts, section 28—"Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section (*dealing with the procedure after Record closed, and Adjustment of Issues*) . . . shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming note against it to one of the Divisions of the Court, by whom the cause shall be heard summarily. . . ." Section 52—"Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date

. . . to the effect of enabling the Court to do complete justice, without hindrance from the terms of any interlocutor which may have been pronounced by the Lord Ordinary. . . ."

The Act of Sederunt of 10th March 1870 enacts, section 1—"That the 27th section of the said Act [*i.e.*, the Act of 1868] shall be altered to the effect of substituting for the enactments thereof the following provisions:— . . . (3) If the parties are at variance as to whether there shall be proof, or as to what proof ought to be allowed . . . the Lord Ordinary shall appoint the cause to be enrolled in a roll to be called the Procedure Roll . . . and after hearing the parties in the said roll the Lord Ordinary shall pronounce such interlocutor as shall be just. . . ." Section 2—"That the provisions of the 28th section of the said statute shall apply to all the interlocutors of the Lord Ordinary hereinbefore referred to, so far as these import an appointment of proof or a refusal or postponement of the same."

Walter Charles Copeland, barrister-at-law, 46 St Vincent Crescent, Glasgow, brought an action against Baron Wimborne, Glencarron House, Ross-shire, and of Wimborne, Dorset, for payment of three sums of (1) £700, (2) £899, and (3) £3500, amounting in all to £4099, which he alleged were due to him in connection with the flotation and management of the "*Rock*" Newspaper Company.

On 26th October 1911 the Lord Ordinary (GUTHRIE) pronounced this interlocutor—"... Finds that the pursuer's averments can only be proved by the defender's writ or oath: Allows to the pursuer such restricted proof, and appoints the same to be taken on a day to be afterwards fixed."

Thereafter a medical certificate was lodged in process stating that the defender was mentally unfit to be examined on a reference to oath, and that there was no prospect of such an improvement in his health as would render him fit to be so examined. In these circumstances Baroness Wimborne, the receiver on defender's estate, lodged a minute craving to be sisted as a party to the action.

On 9th December 1911 the Lord Ordinary pronounced this interlocutor — "... Sists The Right Honourable Cornelia Henrietta Maria Baroness Wimborne as a party defender in the action, in terms of the minute of sist, No. 113 of process, and holds the defences stated to the action as the defences of the minuter; and having considered the cause, finds that the pursuer has no proof by writ to offer: Finds, further, that in respect of the medical certificate, the defender Lord Wimborne is not in a state of health to emit on oath: Therefore assoilzies the defenders from the conclusions of the summons, and decerns. . . ."

The pursuer reclaimed, and moved the Court to recal both the interlocutor of 9th December 1911 and also the interlocutor of 26th October 1911, and to allow a proof *prout de jure*.

Argued for the defender—The interlocutor of 26th October 1911 having become final, was not now subject to review — Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 28, and A.S., 10th March 1870, section 1 (3), and section 2—*North British Railway Company* v. *Gledden, &c.*, June 26, 1872, 10 Macph. 870; *Stewart* v. *Clark*, March 4, 1871, 9 Macph. 616, 8 S.L.R. 402; Mackay, Manual of Practice, p. 304.

Argued for the pursuer—It was competent to review the interlocutor of 26th October 1911. A reclaiming note submitted to review all prior interlocutors of the Lord Ordinary of whatever date — Court of Session Act 1868, section 52.

LORD JUSTICE-CLERK—On 26th October 1911 the Lord Ordinary in this case appointed proof, limited to the defender's writ or oath, to be taken on a day to be afterwards fixed. This interlocutor was not reclaimed against, and on 9th December, proof by oath being impossible owing to the defender's state of health, and no proof by writ having been offered, decree of absolvitor was pronounced. The pursuer now reclaims against this interlocutor, and moves for a proof *prout de jure* of his averments. I am clearly of opinion that this motion cannot be granted. The interlocutor of 26th October 1911, by which the method of proof was settled, was not reclaimed against within six days, and therefore by the operation of section 28 of the Court of Session Act 1868, and sections 1 (3) and 2 of the Act of Sederunt, 10th March 1870, it has become final and not subject to review. The pursuer is not in a position legally to ask that he shall now be allowed any other proof than that appointed by the Lord Ordinary. He referred to section 52 of the Court of Session Act 1868, and maintained that the present reclaiming note brought under review all the previous interlocutors, including the interlocutor of 26th October, but, in my opinion, section 52 has no application to the case of an interlocutor which has become final under section 28.

This is sufficient for the disposal of the case. Reference to Lord Wimborne's oath is admittedly impossible, and no writ of the defender has been produced which can support the pursuer's claim. The pursuer being thus unable to substantiate his claim by the only mode of proof which is open to him, it follows that the defender is entitled to absolvitor. It is therefore unnecessary to consider the relevancy of the pursuer's averments, his delay in bringing the action, or any of the other points which were raised at the debate. I should only say that it is unfortunate, especially as the decision turns on a question of procedure in our Courts, that the pursuer did not have the assistance of counsel of this bar.

LORD DUNDAS—I agree. The interlocutor of the Lord Ordinary of 26th October sustained the defender's third plea-in-law, found that the pursuer's averments could

only be proved by the defender's writ or oath, and allowed to the pursuer "such restricted proof," on a day to be afterwards fixed. That interlocutor was allowed to become final, because it was not reclaimed against within six days. I do not think the reclaimer can pray in aid, as he sought to do, the 52nd section of the Court of Session Act 1868, by which in general terms it is provided that every reclaiming note brings under review all prior interlocutors of the Lord Ordinary, because it seems to me that the section cannot mean that such a reclaiming note is to bring up an interlocutor which by force of an earlier section of the same statute has already become final. I am not aware of any decision precisely settling the point, but that is the view laid down by Mr Mackay in his standard text-book on the subject at p. 304, where he says that the wide power of section 52 is subject to two limitations, one of which is that interlocutors settling the mode of proof are final if not reclaimed against within six days. If this view be correct, as I think it is, I agree that it ends the matter, because while it is technically competent to reclaim against the interlocutor of 9th December, still if the earlier interlocutor is not subject to review there is really nothing left to reclaim about. It is not necessary for us to say whether Lord Guthrie's decision of 26th October was right or wrong. I have formed no concluded opinion upon that matter, although I see no reason to doubt that it is right. But I desire to add, and I think it is perhaps fair to the pursuer to do so, that, speaking for myself, I have much graver doubts than the Lord Ordinary says he has—and he says he has some—as to whether there is really here any relevant case at all. Although I have read the record more than once, and have heard it read, I have the greatest difficulty in formulating in my own mind what sort of contract is founded on. We were told that it is a contract of agency; on the other hand parts of the record seem to point to a contract of service. I confess I have not been able to discover with any degree of clearness what were the duties or services undertaken to be performed by the pursuer, or upon what terms, or to whom. It is unnecessary to form any decided or concluded view upon that matter, but I think it right to say that, as at present advised, I have very great doubt whether there are really here the bones of a relevant case at all.

LORD GUTHRIE was not present.

The Court adhered.

Counsel for Pursuer and Reclaimer—Party. Agents — Sturrock & Sturrock, S.S.C.

Counsel for Defenders and Respondents — Sandeman, K.C. — Wilton. Agents — Davidson & Syme, W.S.

Saturday, January 20.

FIRST DIVISION.

[Sheriff Court at Glasgow.

EDGAR *v.* HECTOR.

Sale—Rescission—Essential Error—Innocent Misrepresentation—Sham Antiques.

A dealer in modern and antique furniture sold to a purchaser a set of mahogany chairs having an appearance of antiquity, two of which the purchaser saw at the time of the sale. In an action against the purchaser for the balance of the price the latter refused to pay on the ground that the chairs were modern imitations, and counter claimed for rescission of the contract and repayment of the money paid. It was proved that the chairs were intrinsically worth the price at which they had been sold, but that the pursuer had made certain general statements about them which led the purchaser to believe that they were antique, and had granted a receipt bearing to be for part payment of "set antique mahogany chairs." *Held* that the defender was entitled to set aside the contract of sale on the ground of essential error induced by the representations of the pursuer.

Melvin Edgar, dealer in modern and antique furniture, 241 Eglinton Street, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against William Cunningham Hector, artist, Glasgow, *defender*, for the sum of £145, being the price of a suite of eight small and two ribbon-back mahogany chairs sold by the pursuer to the defender.

The defender pleaded—"(1) The contract of purchase having been induced by the verbal misrepresentations of pursuer, and the misrepresentation arising from the actual appearance of the chairs, the contract should be rescinded and decree granted in favour of defender for £95 and expenses."

The pursuer pleaded, *inter alia* — "(3) The pursuer having made no representation or guarantee as to the chairs, defender's counter-claim should be rejected and decree should be granted in terms of the pursuer's crave with expenses. (5) The defender having purchased said chairs on his own judgment and not in reliance on pursuer's skill, cannot found on any opinions expressed by him in the course of the negotiations."

The following *narrative* of the *facts* of the case and the *import* of the *evidence* is taken from the opinion of Lord Mackenzie (*infra*)—"The pursuer carries on business in Glasgow, and designs himself as a dealer in antiques. On 18th May 1910 he sold to the defender six small and two arm ribbon back mahogany chairs at the price of £120; the defender agreed to pay the pursuer a further sum of £25 if the pursuer could procure for him two additional small chairs. On the same date the