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

pursuer handed the defender a memorandum in these terms—'241 Eglinton Street, Glasgow, 18th May 1910. From Edgar's Antique Stores, dealer in furniture, curios, gold and silver watches, rings and jewellery of every description.—Bought of M. Edgar, set mahogany chairs, 6 small, 2 arms, for £120.—William C. Hector, 164 Bath Street. Same as two shown.' When the defender agreed to buy the chairs he had only seen two of them, an armchair and a small chair, these being all that were in the pursuer's shop. The chairs were sold without a guarantee that they were antique. On 1st June the pursuer delivered ten chairs to the defender, and was paid £95 to account of the price. The pursuer granted a receipt in these terms—'Received £95 in part payment of £145 for set antique mahogany chairs. June 1st 1910.' (Signed) 'M. Edgar.' On 4th June he called upon the defender for payment of the balance of £50. Between the 1st and 4th of June the defender had ascertained, what has been proved to be the fact, that the chairs were not antique but were reproductions, and refused to make payment. He had contracted to buy originals, not copies. He was thus in error as to the identity of the subject-matter of the contract.'

"The defender's evidence is that the pursuer made statements to him which left the impression in his mind at the time that the chairs were antique, and what he was looking for. The material statements made by the pursuer to the defender before the contract was entered into were that 'We could not get such work done now-a-days, and if we could we could not get the class of wood to do it, and we could not get the men to do it.' The pursuer also said he thought they ought to be put in a museum, because they were too good for use. These were all statements calculated to influence the mind of a purchaser, who was in search of the antique. The fact in regard to the chairs that the pursuer so represented is that the pursuer had bought first of all eight of them from Alexander Bissett & Sons, cabinetmakers and upholsterers, 235 Hope Street. Mr Bissett was examined as a witness, and depones that he warned the pursuer, on more than one occasion, against selling them as antique chairs. In his interview with the defender the pursuer told him he found he could only give him eight chairs, because the people who had them had sold two of them to somebody else. It plainly appears from the evidence that the pursuer conveyed the impression to the defender that what he was getting was a set of ten chairs. It was not the case that there was a set of ten, two of which had been already sold. Bissett says he never told the pursuer that he had sold the other two, because he had never bought them then. He got other two chairs from the firm in London who make these things on the pursuer's representations that he could sell other two. In spite of this the pursuer told the defender at the meeting on the 18th of May that he had examined all the chairs himself, and that he could answer for them, and made this statement in consequence of an apprehension the defender had that some of the chairs which he had not seen might have been broken and replaced by reproductions. As has been already pointed out, the defender had only seen two of the chairs when he made the contract. The conclusion, therefore, to which I have come is that the defender's essential error was induced by what the pursuer told him at the meeting on the 18th of May. It is necessary to advert to one passage in the defender's evidence, in which he is represented as assenting to the view that the pursuer told him he could get no history of the chairs, and that he could give him no guarantee. This passage in the proof is not consistent with what the defender says earlier in his evidence, or indeed with what the pursuer admits in his own examination. As regards the receipt granted by the pursuer on the 1st of June, he states he would not have signed it if he had noticed the word 'antique' in it, but I do not think this can be taken off his hands."

On 19th December 1910 the Sheriff-Substitute (CRAIGIE), after a proof, pronounced the following interlocutor—"Finds in fact (1) that the defender bought, under essential error induced by the representations of the pursuer, ten chairs at the price of £145, the representations being that said chairs were antique, whilst in fact they were not so; (2) that on 1st June 1910 the defender, whilst unaware of the true nature of said chairs, paid £95 to account of said £145: Sustains the plea-in-law for the defender in so far as it bears that the contract of purchase of the chairs was induced by the misrepresentations of the pursuer: Repels the pleas for the pursuer, and assoilzies the defender from the conclusions of the petition: Sustains the counter-claim for defender and decerns against the pursuer for £95."

The pursuer appealed to the Sheriff (MILLAR), who on 31st March 1911 adhered.

The pursuer appealed, and argued—The seller gave no guarantee that the chairs were antique, and there was no fraud. The fact that the chairs were intrinsically worth the price distinguished the case from that of *Patterson* v. *Landsberg*, May 24, 1905, 7 F. 675, 42 S.L.R. 543. The present case was not that of a wholesale dealer who knew all about the articles, but of a middleman. The passive acquiescence of the seller in the self-deception of the buyer would not entitle the latter to avoid the contract—*Smith* v. *Hughes*, 1871, L.R., 6 Q.B. 597. The defender might have bought the chairs believing they were old, but the question was whether he had bought the chairs believing that they were warranted old, and on the evidence this was disproved. *Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469, was a case of essential error, and it did not apply here, because there was no error as to the identity of the thing sold—Pollock on Contract, p. 598. On the evidence there was here no representation of fact as to the chairs, but only of opinion. But even if there was a misrepresentation of fact,

the defender must show that he relied on that and not on his own judgment.

Argued for the defender—The general question was one of representation, and as such the case was independent of fraud. The kind of case which would warrant rescission varied greatly between innocent misrepresentation and fraud or strong suspicion of fraud. In the present case statements had been made for the purpose of stimulating a belief in the subjects as antiques, and that they had a history and had come from a source which was quite consistent with their genuineness. The pursuer had held himself out as a dealer in antiques. He had admitted that the articles were faked, and he had concealed from the purchaser the fact that he had been warned by the dealer from whom he purchased the chairs that he must not sell them as antiques. It was sufficient for defender to show that he attached importance to pursuer's statements as inducing him to buy, and that entitled him to rescission. If, however, pursuer was right in saying that the articles were of the value sold, he had suffered no loss and could sell them elsewhere.

At advising—

LORD MACKENZIE—The question in this case is whether the Sheriff-Substitute and the Sheriff were right in holding that the defender is entitled to set aside a contract of sale on the ground of essential error induced by the misrepresentation of the pursuer.

[*His Lordship here narrated the facts of the case*]—In such a case a misrepresentation made by the seller, even if innocent, if it induced the contract, will be a ground for rescinding it. Upon this matter I refer to *Stewart* v. *Kennedy*, 17 R. (H.L.) 28, and the opinion of Lord Kyllachy in *Woods* v. *Tulloch*, 20 R. 477, 30 S.L.R. 497. There is no question on the evidence that the defender believed he was buying antiques. That he had grounds for this belief is apparent from the expert evidence in the case. The chairs were what is termed in the parlance of the trade "faked." Although the appearance of age, and other appearances presented by the chairs in question may not constitute by themselves misrepresentations; although the case is not analogous to that of *Patterson* v. *Landsberg & Son*, 7 F. 675, the appearance of the chairs cannot be left out of view as an element in the case. It cannot be said that the defender had only to look at the chairs in order to see that although he was contracting to get one thing he was getting another. I agree with the Sheriff that a case of fraud has not been established against the pursuer. The question, however, in the case is, whether the defender's essential error was induced by misrepresentations made to him by the pursuer.

[*After a further narrative of the facts*]—I take the same view as the Sheriff-Substitute in regard to what passed between the pursuer and the defender at their meeting on 4th June.* It is only fair to the pursuer to recognise the fact that £145 was not an unfair price for the chairs, and that if the chairs had been genuine they would have been worth a great deal more. The defender, however, does not seem to have been possessed of the necessary knowledge to be aware of this fact. For the reasons above stated, I am of opinion that he is entitled to be relieved of his bargain.

I therefore think the judgments appealed against should be affirmed.

LORD PRESIDENT—I cannot conceal from myself that I have had considerable difficulty in coming to a decision in this case, because I think the line is very narrow in a case like this. The seller here had three great points in his favour—first, that he did not get a price which was more than the fair market value of the articles sold; second, that the buyer saw at least two of the articles purchased, and, it may be presumed, formed his own opinion about them; and third, that the case falls far short of anything like fraudulent misrepresentation on the part of the seller. The latter point is admitted by both the learned Sheriffs, and especially by the learned Sheriff who saw the parties. But in the end I have come to the same conclusion as has just been expressed by Lord Mackenzie.

I do not think that the law on this matter is anywhere better expressed than by Lord Blackburn in the case of *Kennedy* v. *Panama, &c., Mail Company* (1867, L.R., 2 Q.B. 580). Lord Blackburn says at p. 587 "... Where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration .... the principle of our law is the same as that of the civil law, and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." In the course of the passage from which I have quoted, Lord Blackburn refers to the illustration of Ulpian which has been so often quoted, and which I may read in Mr Mackintosh's translation instead of the original Latin—"If I buy a female slave, supposing her to be a virgin when she is not so, the sale will stand, for there was no mistake about the sex. But if I sell you a slave woman, and you suppose you are buying a slave boy, the contract is an absolute nullity, because there is a mistake

* "The attitude of the pursuer, as spoken to by Cummings and Miss Bilsland, was not, on the 4th of June, that of a merchant who had sold, without any representations to a customer, chairs. His attitude, as I read the evidence, was that of a merchant who had not supplied what he had professed to sell, or to be more accurate, what he had sold."

about the sex." There is another passage of Ulpian to be found in the same excellent book of Mr Mackintosh, which goes even nearer to the precise class of trouble which we have here, and it is this—"But what if both parties were mistaken about the nature and quality of the thing? For example, if I thought I was selling and you thought you were buying gold, when it was bronze; or suppose that an heir bought from his co-heirs at a fancy price a bracelet described as being of gold, but afterwards found to consist in great part of alloy—it is certain that the sale is good because there is some gold in it. For if a thing which I took to be pure gold contains an admixture of gold, the sale stands; but if bronze be sold as gold the sale is void." In applying that to the matter in hand, the whole matter I think comes to be whether the set of chairs were sold and bought as antiques. Now I agree that there has been no representation and no warranty by the seller; but, for the same reasons as Lord Mackenzie has detailed, it is quite clear that the seller certainly induced the buyer to consider that he was buying a set of old chairs which were got from somewhere as a set, and about which the seller was in a position to say "You can get no such workmanship nowadays." That being so, I think here there was a misrepresentation as to the real thing itself, and not merely as to the quality of the thing, and therefore upon the whole matter I come to the same conclusion as Lord Mackenzie, and to which the learned Sheriffs have come, though I do not do so, perhaps, on precisely the same grounds.

LORD KINNEAR, who was absent at the advising, concurred in the opinion of the Lord President.

LORD JOHNSTON was present at the advising, but delivered no opinion, not having heard the case.

The Court affirmed the interlocutors of the Sheriff and Sheriff-Substitute, of new assoilzied the defender, and sustained his counter-claim for £95.

Counsel for Pursuer and Appellant—Wilson, K.C.—King Murray. Agent—James M'William, S.S.C.

Counsel for Defender and Respondent—Constable, K.C.—J. A. T. Robertson. Agents—Laing & Motherwell, W.S.

Friday, January 26.

FIRST DIVISION.

[Lord Hunter, Ordinary.

BROWNE AND OTHERS *v.* D. C. THOMSON & COMPANY, LIMITED.

Reparation—Slander—Slander of a Class—Collective or Individual Action—Innuendo—Averments—Relevancy.

A newspaper published an article entitled "Sinister Side-lights on Home Rule—Irish Incidents showing Feeling toward Britain.—By One who has Lived in Ireland," and containing the following passage— . . . . . .

"Religion makes all the difference in everything in Ireland, This incident will show what it can do and has done.

"Two years ago, in Queenstown, County Cork, instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants were to be discharged. One shopkeeper, a Roman Catholic, refused to discharge an assistant he had had for a number of years. The consequence was that his shop was proclaimed, and in three months he had to close and clear out, his stock being sold for next to nothing. He and his family left for Britain, where, as he said, he could employ an atheist if he liked. . . . . ."

In an action of damages at the instance of certain clergy of the Roman Catholic Church in Ireland the pursuers averred that they were the persons referred to, and that they had been falsely and calumniously charged with abusing their religious influence over the Catholic laity to procure the indiscriminate dismissal of all Protestant shop assistants in the employment of Catholics in Queenstown, and with ruining the business of a Roman Catholic shopkeeper who had refused to discharge a Protestant employee.

Held that the pursuers' averments were relevant to sustain the innuendo, that they were entitled to sue for damages as individuals, and issue *allowed.*

On 10th October 1911 the Most Reverend Robert Browne, Bishop of the Roman Catholic Diocese of Cloyne, Ireland, residing at Bishop's House, Queenstown, County Cork, and certain other clergymen of the Roman Catholic Church there, brought an action against D. C. Thomson & Company, Limited, publishers and proprietors of the *Dundee Courier*, in which they claimed damages for slander in respect of an anonymous article which appeared in the *Courier* on 15th August 1911, entitled—

"*Sinister Side-lights on Home Rule.*

"*Irish Incidents showing Feeling toward Britain.*

"*By One who has Lived in Ireland.*"

The portion of the article of which the pursuers complained is quoted *supra in rubric.*

The pursuers averred—"(Cond. 1) . . . The pursuers are the sole persons who exercised religious authority in name and on behalf of the Roman Catholic Church in Queenstown aforesaid in the year 1909. During that year the pursuers alone were the 'Roman Catholic religious authorities' of Queenstown, and alone had power and jurisdiction to issue instructions to the members of their religious institutions. . . . (Cond. 4) The portion of said article, which is in the following terms—[*Here followed the portion complained of*]—was written and published by the defenders of and concerning the pursuers.