actually carried out by the respondent's ancestors makes it impossible to reject the conclusion that *rei interventus* followed upon the imperfect lease.

LORD SALVESEN—I concur. The whole matter in controversy arises on the construction of the words "any specific agreement in writing." Are these words to be construed as confined to a probative agreement in writing as Mr Valentine contended, or as including an agreement in writing which is not probative but which has been validated and made as effective as if it had been probative by *rei interventus?* I have no difficulty in answering this question as your Lordship in the chair has done.

I only note further that the Land Court in their decision have taken the case on the same footing as if the original of this document had been in the possession of the parties, and did not lay stress upon the fact that it was only a copy. I concur in their view that when you are dealing with a document a hundred years old the mode in which the copy has been preserved is very material, and when, as here, one finds a copy engrossed in a book belonging to the landlord in the place it would naturally occupy in chronological order (which would make it evidence against him) substantially the copy is as good as the original.

LORD GUTHRIE—I concur with your Lordships in thinking that the Land Court's view of the law as regards the admissibility as evidence of the document in question is not accurate. On the second point I think there was here a specific agreement in writing, imperfect no doubt when made, but perfected by *rei interventus*.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the Appellants—C. H. Brown, K.C.—Fleming. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Respondent — Mitchell —Valentine. Agents — Robert Stewart & Scott, S.S.C.

Wednesday, July 16.

FIRST DIVISION.

[Lord Hunter, Ordinary.

AINSLIE *v.* LEITH DOCK COMMISSIONERS.

Reparation — Master and Servant—Negligence—Liability of Master for Fault of his Servant Working for Another.

The docks and their equipment, including the cranes upon the piers, belonged at the harbour of Leith to certain Commissioners. In unloading vsssels the practice was for the stevedore employed by the ship to hire a crane from the Commissioners, who made charge therefor and provided a man to work the crane. The craneman was engaged, paid, and dismissed by the Commissioners, but the stevedore was entitled to give directions to the craneman to raise or lower the load or to slew the crane round, *quoad ultra* the stevedore had no control over the craneman.

Stevedores were discharging a ship by means of a crane hired from the Commissioners and worked by a craneman of theirs. In the course of unloading the craneman instead of raising a load clear over the ship's side on to the pier swung it across the ship, hitting an employee of the stevedores and precipitating him into the hold. He sustained injuries which were fatal. In an action of damages by the representatives of the injured man against the Commissioners, *held* that at the time of the accident the craneman was not a servant of the stevedores but was a servant of the Commissioners, who were liable for his fault.

Cairns v. *Clyde Navigation Trustees*, 1898, 25 R. 1021, 35 S.L.R. 808, *followed.*

Donovan v. *Laing and Construction Syndicate*, [1893], 1 Q.B. 629, *distinguished.*

Mrs Jane Kerr or Ainslie and Georgina Ross Ainslie, the widow and daughter respectively of the deceased Robert Ainslie, *pursuers*, brought an action against the Commissioners for the Harbour and Docks of Leith, *defenders*, concluding for decree in favour of the pursuer first named for damages of £1000, and in favour of the pursuer second named for damages of £500, in respect of the death of Robert Ainslie.

The *facts* of the case were—Robert Ainslie was employed as a stevedore's labourer with Young & Leslie, stevedores, Leith. On 25th July 1918 while in that employment he was engaged with other men in unloading battens from the s.s. "Hurona," which was lying in the Imperial Dock, Leith. A chain was passed round a bundle of battens in the hold and was fastened by a hook to the ship's winch, which lifted the bundle from the hold on to the combings of the hatch. The bundle was then attached to a chain from a crane standing upon the pier, by which it was lifted over the ship's side on to the quay. The docks and equipment thereof were the property of the defenders. It was necessary for the stevedores to provide themselves with a crane to unload the ship, and it was the invariable praetice at the Leith Docks to hire one of the cranes belonging to the defenders, who imposed certain rates and charges for the hire. The sum paid covered the use of the crane and the craneman. The craneman was employed and paid by the defenders and was engaged and dismissed by them. When not employed at cranes hired out he was controlled by the defenders. On the occasion in question the craneman, while a bundle of battens was being lifted from the ship to the quay, swung the jib of the crane towards the ship so that the battens instead of being swung clear over the ship's side swung over the ship and struck Robert Ainslie, causing

him to fall into the hold, whereby he sustained injuries which proved fatal. The defenders *averred* that the stevedores had the sole control over the discharge of the ship, and the craneman was *pro hac vice* the stevedores' servant.

The defenders *pleaded, inter alia*—"2. The death of the said Robert Ainslie not having been caused by the negligence of the defenders or of those for whom they are responsible, the defenders should be assoilzied."

The case was tried before Lord Hunter and a jury, who on 6th June 1919 found for the pursuers and assessed the damages payable to the pursuer first named at £500, and to the pursuer second named at £100.

The defenders obtained a rule upon the pursuers to show cause why a new trial should not be granted.

At the hearing on the rule the following authorities were referred to:—*Cairns* v. *Clyde Navigation Trustees*, 1898, 25 R. 1021, *per* Lord Trayner at p. 1023, 35 S.L.R. 808; *Quarman* v. *Burnett*, 1840, 6 M. & H. 499, *per* Parke, B., at p. 507; *Jones* v. *Corporation of Liverpool*, 1885, 14 Q.B.D. 890; *Anderson* v. *Glasgow Tramway and Omnibus Company, Limited*, 1893, 21 R. 318, 31 S.L.R. 240; *Rourke* v. *White Moss Colliery Company*, 1877, 2 C.P.D. 205; *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*, [1893], 1 Q.B. 629, *per* Lord Esher, M.R., at p. 631; *Union Steamship Company* v. *Claridge*, [1894], A.C. 185, *per* Lord Watson at p. 187; *Connelly* v. *Clyde Navigation Trustees*, 1902, 5 F. 8, *per* Lord Kinnear at p. 13, 40 S.L.R. 14; *M'Cartan* v. *Belfast Harbour Commissioners*, 1910, 2 I.R. 470, 1911, 2 I.R. 143.

LORD MACKENZIE—In this case we are asked to set aside the verdict of the jury in favour of the pursuers, on the ground that there was not evidence upon which they were entitled to come to the conclusion that they reached. In doing so the jury must have formed an opinion upon the crucial point in the case—whether the craneman, who, it is admitted, was guilty of negligence, was at the time when the accident happened a servant of the Leith Dock Commissioners or not.

The deceased Robert Ainslie was in the employment of a firm of stevedores, and was engaged in the discharge of the s.s. "Hurona" in the Imperial Dock, Leith. In order to discharge the ship it was necessary for the stevedores to provide themselves with a crane, and in accordance with the practice of the docks at Leith they entered into the contract (a form of which is produced) for the use of the crane subject to payment of the rates and charges exigible. In argument we were told that, theoretically, it was possible for the stevedores to get a crane elsewhere, but the universal practice, it was admitted, is for the stevedores to enter into such a contract as was made here with the Leith Dock Commissioners. The payment made by the stevedores covered the use of the crane and the craneman. During the discharge of the vessel, while battens were being lifted from the deck to the quay, the craneman, whose name was Dickson, swung the jib of the crane inboard instead of towards the shore, with the result that Robert Ainslie was caused to fall into the hold of the vessel; he sustained serious injuries and died the same day.

Now it was argued to us that although Dickson was undoubtedly the general servant of the Commissioners, yet in consequence of the contract made by the stevedores he was *pro hac vice* the servant of the stevedores, and that accordingly the Leith Dock Commissioners are not responsible for the negligent act which caused the death of Ainslie.

The question of what is meant by "control" is one which has been much debated throughout the course of the case. In my opinion, if the evidence is of such a character that the jury were entitled to take the view that the control was strictly limited, then the defenders' contention that their general servant was *pro hac vice* the servant of the stevedores fails, and in my view there is ample evidence to warrant that conclusion. I refer in the first place to the evidence of the crane superintendent in the employment of the defenders, and he defines what is meant by "control." The question is put to him—"You say that the crane is under the control of the stevedores—how does the stevedore control the craneman?" And the answer is—"He gives him the signal to lift, lower, or slew; he also tells him if he is wanted to work overtime." And the evidence of Young & Leslie's manager is to the effect that the only control the stevedores have over the craneman is to give a signal or pass the word as the case may be. So also a partner of the firm of James Cranston & Company, stevedores, Leith, speaks of the practice. The question is put to him—"In fact, is the whole position this, that they do the hoisting of the cargo from the ship's deck to the shore and the only control you have is to give the man a signal when you are ready to start?" and the answer is "Yes."

Now upon that evidence the jury were entitled to take the view that the crane and the craneman had not been made over unreservedly to the stevedores, but that the contract entitled the stevedores to the use of the crane for the strictly limited part of the operation of discharge which consisted in raising and lowering and swinging. In so far as the control by the stevedores involved giving a direction by sign or by word of mouth to raise or lower or swing right or left, then, no doubt, they had control; but when it came to the manner in which the craneman was to do his work, how he was to employ his power, how he was to use his brake, and how he was to manipulate his crane, that was entirely outwith the control of the stevedores, and in carrying out any of these operations Dickson was and remained the servant of the Leith Dock Commissioners.

An analogy has been suggested during the course of the argument with the fare who hires a taxi-cab. He has control to the extent of indicating where the driver is to

go, whether he is to go to the right or the left, and possibly under certain circumstances whether he is to drive fast or slow, but as to the method by which the driver is to attain his end, the manner in which he is to drive his car, the speeds he is to put on at particular parts of the road, these are entirely and altogether outwith the control of the fare.

In my opinion the case raises a question of fact, and there being evidence on which the jury were entitled to come to the conclusion which they reached, that in the ordinary course would end the matter. We have, however, had a full citation of authority in this case, and during the main part of the argument the controversy was whether the case of *Cairns* v. *Clyde Trustees* (1898, 25 R. 1021, 35 S.L.R. 808), or the case of *Donovan* v. *Laing, &c., Construction Syndicate* (1893, 1 Q.B. 629) was most like this case, and which of these cases was applicable.

I think it is impossible, if the question is whether a principle is to be extracted from the cases, to extract any other principle applicable to the present case than what was laid down by the Judges who decided the case of *Cairns*, and the test which was applied by Lord Trayner. I may say that I am quite unable for my own part to distinguish the facts in *Cairns* from the facts in the present case, and I think that if a rubric is written for the present case it will merely be an echo of the rubric written in the case of *Cairns*. The test applied by Lord Trayner was this—"I think the defenders never parted with the possession of their crane. They retained possession by the hands of their own servant; they could refuse to work it if and when they pleased; and the craneman was so completely under their control that if they ordered him to abstain from working he must obey. The only control which it is pretended the stevedore had was the control involved in telling the craneman to lower the crane at one time and raise it at another. I think it extravagant to call that control—the control which a master has over a servant is something more than that."

So in the present case it is apparent that if Dickson, the craneman, had given dissatisfaction to Young & Leslie, the stevedores, they could not have dismissed him. All they could have done would have been to go to Dickson's employers, the Leith Dock Commissioners, and lodge a complaint with them.

Lord Trayner goes on to say that the case is analogous to the carriage cases, that "the hirer of a carriage has so much control over the coachman as entitles him to order the coachman to go or to stop at his pleasure, but such control does not make him the coachman's master or responsible for the coachman's fault."

That was a judgment of the Second Division of this Court, having fully before them the case of *Donovan*. In the initial stages of this case *Donovan* was urged upon us as containing opinions from which a principle was to be extracted adverse to the principle that was applied in the case of *Cairns*.

Lord Moncreiff in *Cairns'* case took the view that *Donovan* was distinguishable, and he distinguishes it on three grounds—"First, the craneman who was engaged by the wharfingers was not forced upon them, he was supplied to them along with a crane at their request by the defendants; they were not bound to take him, and they could dismiss him. Secondly, the contract under which the crane and craneman were supplied was not to supply them for a single job, but whenever they might be required. Lastly, for the time crane and craneman were placed unreservedly at the disposal of the wharfingers."

Speaking for myself, it appears to me that one may read *Donovan* as meaning this—that there the wharfingers were free to go and select from anyone within an undefined area who could supply them with a crane (and craneman) the one which they considered best suited for their purpose, and having themselves that liberty of unlimited choice, and having exercised their judgment and supplied themselves, they then proceeded to take away the crane and craneman and apply them to their own particular purpose. That seems to me to be the feature of *Donovan's* case, which makes it different from the case of *Cairns* and from the present case.

But although there appeared throughout a considerable part of the argument before us to be an evenly balanced debate, Mr Wilson with great frankness tabled the case of *M'Cartan* v. *Belfast Harbour Commissioners*, [1911] 2 I.R. 143. That appears to me to be conclusive of the present question. *M'Cartan* v. *Belfast Harbour Commissioners* was a case decided in 1910 by the Court of Appeal in Ireland, and then it went to the House of Lords. The facts there were that M'Cartan brought an action against the Belfast Harbour Commissioners, and the persons who made the contract were in the position of stevedores. The only point of difference between that case and the present is one which would be rather in favour of the Belfast Commissioners, because there was as a term of the contract a stipulation that the hirer was to be liable for all loss and damage arising from an improper use of the crane. What happened there was that while the plaintiff was filling a bucket in the hold, an empty bucket while being lowered by the crane descended with great speed and violence and struck the plaintiff, who was seriously injured. The person through whose negligence that accident happened was a man of the name of Duffy. Apparently the way in which that case was left to the jury was on a query in these terms—"Had the hirer authority to control Duffy otherwise than in respect of the time and place of movement of the crane and the time of raising and lowering the buckets?" and the answer was "No." Applying that verdict, the Court of Appeal in Ireland held that the plaintiff was entitled to a verdict, and that decision was affirmed by the House of Lords.

Now, *mutatis mutandis*, if the same question had been put here with reference to the stevedore and Dickson, in my opinion there

was ample evidence which would entitle the jury to return an answer in the negative.

It is instructive to see how the matter was dealt with in the judgments delivered in the House of Lords in *M'Cartan's* case. The Lord Chancellor commences by saying that he regards this case as purely one of fact in which no point of law is in dispute, and "the question on which the decision hinges is this—Was the man whose negligence caused this accident acting as servant of the defendants in doing what led to the mishap, or as servant of the master of the vessel which was being unloaded? For the man who is the general servant of one person may, if lent to some-one else for a particular employment, become his servant for anything done in that particular employment."

One notices that all the noble and learned Lords are careful to say that they cast no doubt upon the conclusion reached in the case of *Donovan*, although Lord Dunedin certainly expresses disagreement with the test which is applied by Lord Justice Bowen in these terms—"We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by employer is meant the person who has a right at the moment to control the doing of the act." That is expressly negatived by Lord Dunedin, who in a later part of his judgment says he prefers the test put by Bowen, L.J., in *Moore* v. *Palmer* (1886, 2 T.L.R. 781)—"The great test was this, whether the servant was transferred or only the use and benefit of his work." The principle involved in *Donovan's* case and in *M'Cartan's* is stated by Lord Dunedin to be that "which is compendiously described by the brocard *respondeat superior*." The question in *M'Cartan's* case was whether Duffy was controlled by the defendants, who gave him his orders every morning, paid him his wages, and could at any moment have dismissed him, and told him to leave his crane and the harbour premises. This, as Lord Dunedin points out, however, though uncontroverted is not conclusive — "As Lord Watson said . . . in the case of the *Union Steamship Company* v. *Claridge* ([1894] A.C. 185), 'that the servant of A may, on a particular occasion and for a particular purpose, become the servant of B notwithstanding that he continues in A's service and is paid by him, is a rule recognised by a series of decisions.' . . ." "Was this the case when, in Lord Watson's words, the servant of A became the servant of B? That is the question that was really before the jury. Now I agree that the precise form of the question as put was not very happy. On the other hand I think we had an intelligible and satisfactory account from the learned counsel who was at the trial of how the question came to be put in that form," and then he puts the question left to the jury which I have already read. "Now," Lord Dunedin goes on, "I read that as meaning, and I think it was intended to mean, that the general authority and control of the defendants over Duffy had not *pro hac vice* been surrendered by them and transferred to Chambers, but that the control given to Chambers was limited to the right to give directions to move the crane alongside the hold and to lower or raise the bucket. Any control, however limited, is not *per se* enough to transfer the service, and the jury has not held this control to be sufficient so to transfer it." "If similarity of facts were a test—which, as I have already said, is, I think, fallacious—then the case of *Cairns* v. *Clyde Navigation Trustees*, decided by the Second Division of the Court of Session, is a case more on all fours with the present than *Donovan's* case. I refer to Lord Trayner's judgment in that case, with which I entirely agree."

What the jury had to consider in the present case, and did consider, was exactly what the jury had to consider and decide in *M'Cartan's* case, and I can see nothing wrong in the principle that they applied, nor in the way in which they reached their conclusion consistently with the whole evidence in the case.

For these reasons I am of opinion that the verdict must stand.

LORD SKERRINGTON—I really have nothing to add to the expositions which your Lordship has given as to the import of the evidence in the present case and as to the result of the authorities, with both of which I entirely agree.

The question which the jury had to decide was purely one of fact, namely, whether the defenders had made out their allegation that the services of this craneman had on the occasion in question been transferred to the stevedore in such a manner as to constitute the craneman the servant of the stevedore. There was, I think, ample evidence to entitle the jury to answer that question in the negative, and, for my part, I would go further and I would say that the verdict seems to me to have been the right and proper verdict for them to return upon the evidence which they had before them.

LORD CULLEN—I am of the same opinion. I think the jury were quite entitled to hold that the power of control which the stevedore had was of that very limited kind which in the Irish case of *M'Cartan* ([1911] 2 I.R. 143) was regarded as not making the craneman the servant of the hirer.

LORD HUNTER—I concur. The question involved in this case appears to me to be a mixed question of fact and of law. On the assumption that the case of *Cairns* (1898, 25 R. 1021, 35 S.L.R. 808), to which there has been frequent reference, was well decided, I do not think it possible to take the view that the jury were not entitled to return the verdict which in point of fact they did.

In view, however, of the contrary verdict which was returned in the case of *Connolly* (1902, 5 F. 8, 40 S.L.R. 14), of certain expressions of opinion in that case, and also of the English decision of *Donovan* ([1893] 1 Q.B. 629), I confess that at one time I thought the law as laid down in *Cairns* ought to be more fully considered than by a bench of judges which could not overrule that decision. In the course of the argu-

ment, however, we were referred to the authoritative case in the House of Lords of *M'Cartan* v. *Belfast Harbour Commissioners* ([1911] 2 I.R. 143) in which the case of *Donovan* and also the case of *Cairns* came up for consideration. In that case the House of Lords refused to disturb the verdict of a jury given in what appear to me to be quite similar circumstances to the present. Lord Dunedin in the course of his opinion, reviewing the different authorities, expresses approval of the opinion of the Lord Ordinary in the case of *Cairns*. That being so I think it would be a waste of time on our part if we were to have any further argument upon a question which is now authoritatively decided.

The LORD PRESIDENT was absent.

The Court discharged the rule and of consent applied the verdict.

Counsel for the Pursuers—Watt, K.C.—J. A. Christie. Agents—Murray Lawson & Macdonald, W.S.

Counsel for the Defenders—Wilson, K.C.—Skelton. Agents—Gillespie & Paterson, W.S.

Friday, July 18.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

SHANKLAND & COMPANY *v.* JOHN ROBINSON & COMPANY.

Contract — Essential Error — Representations Made by Seller Rendered Untrue—Failure to Inform Intending Buyer of Change.

A firm of straw-rope manufacturers, relying on the truth of representations made by the prospective sellers that the Government would not interfere with the sale and delivery of articles about to be exposed at an auction sale, arranged to purchase a traction engine at the auction sale. After these representations had been made, and before the auction sale took place, it came to the knowledge of the sellers that Government intervention inhibiting the delivery of or impressing the articles was possible, although they still had good grounds for believing it very unlikely. The sellers failed to inform the buyers of this, and they in reliance on the original representations proceeded to effect their proposed purchase. On their failure to obtain delivery of the engine owing to action by the Government, the buyers stopped payment of the cheque which they had sent to the sellers, who thereupon sued for the price of the engine. *Held* (*dis.* Lord Salvesen) that the defenders were entitled to rescind the contract, the concealment of the change of facts having induced essential error in their minds with regard to the subject-matter of the contract.

Shankland & Company, merchants and contractors, Glasgow, *pursuers*, brought an action against John Robinson & Company, straw-rope manufacturers, Wigan, *defenders*, for payment of the sum of £587 10s., the price of a traction engine alleged to have been purchased by the defenders from the pursuers at a sale by auction on 17th January 1918.

The pursuers pleaded, *inter alia* — "(1) The sum sued for being due and restingowing by the defenders to the pursuers, decree should be pronounced as craved."

The defenders pleaded, *inter alia*—"(6) The pretended sale by auction having been entered into and the bids made by the defenders under essential error induced by the false and reckless representations and assurances of the pursuers, the sale is void or voidable and ought to be set aside."

The following *narrative of the facts* is taken from the opinion of the Lord Justice-Clerk :—"While the pursuers' averments are not as precise and pointed as they might have been, the record, fairly read, sets forth that Mr Robinson was in urgent need of an engine which he could have for immediate use by his company, and that on seeing the pursuers' advertisement, and being aware of the demands the Government were making for such engines as he wanted, and of the powers they had of commandeering them, he went to Hamilton on or about 9th January in order to ascertain from the auctioneers—whose address was the only one given at which inquirers could get information—whether if he bought the engine he might rely on getting delivery of it after the sale, so as to have it conveyed to England without interference by the Government. He went to Hamilton accordingly, and there saw both Mr Reid, the auctioneer's clerk, and also Mr Shirlaw, the auctioneer, himself. I think it is established by the proof that he fully explained his position to both of these gentlemen, and especially the importance which he attached to delivery being given immediately after the sale on payment of the price, without any impediment due to Government interference. In my opinion it is proved that both Mr Reid and Mr Shirlaw gave him the assurances he required and stated to him that the arrangements which had been already made removed any risk of Government interference, so that he could rely on getting delivery without delay or difficulty after the sale of any article he bought, so as to enable him to have them sent off at once to England for the use by his firm in the ordinary course of their business. In all this I think all the parties acted perfectly honestly and in entire good faith. On the day after this Mr Robinson interviewed Mr D. Shankland at Cupar on the same subject. At Cupar Mr Robinson made the same inquiries and got the same information and assurances, all parties again being perfectly honest and acting in the best of faith. I think it is also proved that but for the information and assurances Mr Robinson would not have bought the engine. Up to this time the Government had not interfered in the matter. But on 15th January