

It is contended by plaintiff that Mullen, while thus in personal charge of the omnibus, was the servant of defendant, and that, therefore, the latter was responsible for Mullen's negligence.

Applying to this case the rule stated in *Saunders v. City of Toronto*, 26 A. R. 265, the test as to whether the relationship of master and servant existed between defendant and Mullen is whether defendant had the right to exercise personal control over Mullen when in charge of the omnibus.

The agreement between them is silent upon the point. Nevertheless, its true meaning is, I think, quite apparent.

Defendant's object was to secure free transportation by the omnibus for his guests. Mullen so understood it, and agreed to furnish such free transportation. The attainment of that result was the whole object of defendant, it being immaterial to him who drove the vehicle, provided the desired end was attained. It was no term of the agreement that Mullen was to be in personal charge of the omnibus. So far as appears, it was intrusted to him at his own discretion, to be used or remain idle, except that defendant's hotel should enjoy free service. Subject to this qualification, for the whole 24 hours of each day, Mullen was entitled to the use of the omnibus for his own benefit. The full enjoyment of this right would necessarily have involved changes of horses and drivers. Yet this right he would not have been able to enjoy if he were defendant's servant, for, as his servant, he would not, without his authority, which he had not, appoint other servants in his stead, or hire other horses, on defendant's account. Thus, regard for Mullen's rights makes it necessary to reject the contention that the relationship of master and servant existed between the parties. Apart, however, from this illustration of the impossibility of giving effect to the agreement if Mullen were held to be a servant, it is to be observed that the parties themselves did not stipulate, and defendant never attempted to control Mullen, as to the manner in which he should perform his contract, nor did Mullen submit to defendant's directions. That Mullen considered himself entitled to manage the omnibus according to his own uncontrolled discretion is shewn by the fact that on one occasion, of his own motion and without consultation with defendant, he appointed his son to drive in his place. In one respect only