(c) *Under the New York ordinance.* In a case relating to a cab plying for hire in New York, the doctrine of the English courts

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not inconsistent with such a view, cannot, I think, be regarded as evidence of a contract of service, but rather (primâ facie, at least) as more consistent with that of a contract of hiring. In this case, therefore, where the cabman is under no control as to his movements by the cab owner; where he may make special bargains with the public; where he does not and cannot reasonably be expected to know the risks he encounters; where he primâ facie pays instead of receives; where he is not carrying out his master's orders; where the perils are unknown to him and change from day to day; where there is no notice of dismissal, but only a refusal to supply cab and horse on nonpayment; and where there are no correlative duties beyond those of bailor and bailee, and statutable duties of each respectively to the public,—I feel obliged to come to the conclusion that the cabman is not the servant of the cab owner in the sense (to use the term above quoted) of rendering the latter exempt from liability to the former in cases where a party not bearing the relation of master and servant would be liable."

Byles, J., considered that, if the case had arisen before the hackney carriage acts were passed, or in a place where they were not applicable, the relation of the parties would have been the same as that which would have resulted from a contract by the owner of a horse and cart, to allow another man to have the entire and exclusive personal use and control of them at so much a week or so much a day, for the purpose of carrying, for the driver's profit, passengers or goods within the limits of a town, but without reserving to himself (the owner) any right to direct where the horse and cart should go, provided they were used within the prescribed limits, and were returned within the agreed time. Such a contract, he considered, would fall within that class of bailments called *locatio, i.e., contractus quo de re fruendâ vel faciendâ pro certo pretio convenit.* Certain expressions used by Lord Campbell in *Powles* v. *Hider* were admitted to be inconsistent with this view, but it was pointed out that these, as not being necessary to the decision of the case, were perhaps extrajudicial. That case, the learned judge remarked, "was decided on the hackney carriage acts there cited, and on the relation created by those Acts as between the proprietor and the public. Here, on the contrary, we are dealing with the rights and liabilities of the proprietor and driver *inter se.* The driver, as between the cab owner and himself, seems to me to have the complete and exclusive control and disposition of the vehicle within a certain district, and not to be a servant of the proprietor, and therefore by the terms of the contract entitled to be furnished with a suitable, at least with a quiet or manageable, horse. But, even on the supposition that the relation existing between these parties *inter se* was not analogous to that of bailor and bailee, but was that of master and servant, I think, nevertheless, in the present case that there was evidence of the defendant's liability. For, in this case, there was the personal interference and superintendence of the master, the now defendant, in the supply of the horse, and therefore evidence of his personal negligence causing injury to his servant, by sending the servant out with an untried, vicious, and dangerous horse, not reasonably fit and proper for the work; the master having had the means of knowing the horse's character, and the servant having had no such opportunity."

Willes, J., was of opinion that the driver was a servant, but the proprietor's want of knowledge of the defective qualities of the horse necessarily involved the consequence that the action could not be maintained (see chapter X., *ante*). "It would be a remarkable hardship," he said, "to