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Notice of Appeal and Grounds

(Filed March 9, 1934)

ESSEX COUNTY CIRCUIT COURT

LYDIA A. FOX, by Leonard J. Fox and
Lydia H. Fox, next friends, and
LEONARD J. FOX and LYDIA H. FOX,
Plaintiffs,

v.

LEO MINAHAN and ALFRED MINAHAN,
individually and co-partners trad-
ing as MINAHAN BROTHERS, and
FRED RAMSAUER,
Defendants.

10

20

To: SEYMOUR & SEYMOUR, Esqs, Attorneys for
defendants, Leo Minahan and Alfred Min-
ahan, individually and co-partners trading
as Minahan Brothers, and

HAROLD J. BROWN, Esq., Attorney for de-
fendant, Fred Ramsauer:

TAKE NOTICE, that the plaintiffs appeal from
the whole of the judgment entered in this cause
to the Court of Errors and Appeals, the court of
last resort in all causes in New Jersey, on the
following grounds:

30

1. That the Circuit Court erred in directing
a verdict in favor of the defendants, Leo Mina-
han and Alfred Minahan, individually and co-
partners trading as Minahan Brothers, and
against the plaintiffs.

40

Notice of Appeal and Grounds

2. That the Circuit Court erred in entering judgment for the defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, without the rendition of a verdict by the jury.

10 Dated March 5th, 1934.

GREEN & GREEN,
Attorneys for Plaintiffs.

Service of within and copy acknowledged this 6th day of March, 1934.

HAROLD J. BROWN,
Attorney for Defendant
Fred Ramsauer.

20

State of New Jersey, }
County of Essex, } ss.:

HAROLD B. DOMB, being duly sworn according to law on his oath deposes and says that on the 6th day of March, 1934, he served within upon Seymour & Seymour, Esqs., by delivering copy thereof to Secretary, Anna E. Cox, at 284 Main St., Orange, and explaining contents.

30

HAROLD B. DOMB.

Sworn and subscribed this }
6th day of March, 1934. }

M. WESTERVELT-MARR
Notary Public of New Jersey
My Commission expires March 2, 1936.

40

Summons

(Filed July 8, 1931)

THE STATE OF NEW JERSEY, to Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, and Fred Ramsauer.

10

(SEAL) YOU ARE SUMMONED to answer the annexed complaint of Lydia A. Fox, by Leonard J. Fox and Lydia H. Fox, next friends, and Leonard J. Fox and Lydia H. Fox, in an action at law in the Essex County Circuit Court.

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the said Court, at Newark Within Twenty Days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

WITNESS, Hon. Newton H. Porter, Judge of the said Court, at Newark this 7th day of July 1931.

JOHN H. SCOTT,
Clerk.

30

GREEN & GREEN,
Attorneys.

40

Complaint

(Filed July 8, 1931)

10 The plaintiffs, Lydia A. Fox, who is a minor under the age of 14 years, by her next friends, Leonard J. Fox and Lydia H. Fox, her father and mother, who have been admitted by the Court to prosecute this action as her next friends, and Leonard J. Fox and Lydia H. Fox, residing in the Town of Irvington, County of Essex and State of New Jersey, say that:

FIRST COUNT

20 1. On or about May 17th, 1931, defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, were the owner of a certain automobile truck which figured in the accident hereinafter set forth.

30 2. On the date aforesaid, said automobile truck was in charge of and operated by the defendant, Fred Ramsauer, as agent, servant or employee and in and about the business of the defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers.

40 3. On the date aforesaid, plaintiffs, Lydia A. Fox, Leonard J. Fox and Lydia H. Fox were passengers in the automobile of Mildred Nicholas, which automobile was being driven in a northerly direction in and along Eastern Parkway, near its intersection with Sixteenth Avenue, public highways in the Town of Irvington, County of Essex and State of New Jersey.

Complaint

4. On the date aforesaid, at the intersection of Eastern Parkway and Sixteenth Avenue, defendant, Fred Ramsauer operating automobile truck of the defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, in a westerly direction, drove said automobile truck into and against the automobile of Mildred Nicholas, in which the plaintiffs were passengers. 10

5. Defendants were careless and negligent in the operation of their automobile truck in that they drove the same at an excessive rate of speed, thereby losing proper control thereof, failed to give any warning of the approach of their automobile truck by blowing a horn or otherwise, they failed to exercise reasonable care in operating said automobile truck, failed to have proper brakes and crippled and defective condition of brakes was known to defendants before the accident, they allowed an operator in an unfit condition to operate their automobile truck and by reason of these and divers acts of negligence, the collision aforesaid occurred. 20

6. As a result of the negligent acts of the defendants, the infant plaintiff, Lydia A. Fox received and sustained severe injuries as follows: concussion of and injury to brain, injury to ear and ear drum affecting hearing of said infant plaintiff, severe injuries to face necessitating sutures and resulting in scarring of face, and permanent disfiguration, and affecting the facial appearance and possible paralysis of face of said infant plaintiff, severe cuts on face, head and scalp, multiple lacerations, contusions and abrasions about the face, forehead and scalp, injury to eyes and eyelids, possibly affecting sight 30 40

Complaint

10 thereof, conjunctival hemorrhage, severe shock and injury to nervous system, said infant plaintiff underwent and is still undergoing great pain and suffering both of body and mind, has been permanently injured, and has sustained other permanent injuries, the exact nature of which are as yet unknown to infant plaintiff, all of which have caused her and still cause her great pain and deprive her of the normal movements of her face and body and hamper her normal bodily movements and said infant plaintiff will lose and be deprived of the great gains and profits and advantages which she might and otherwise would have derived if she had not been so injured.

20 7. By reason of the aforesaid negligent acts of the defendants, said infant plaintiff was confined to her bed and will be confined to her bed for a long period of time.

SECOND COUNT

30 1. Plaintiff, Leonard J. Fox and Lydia H. Fox repeat the allegations of the First Count and make them a part hereof, as if fully recited herein.

40 2. As a result of the injuries sustained by their infant daughter, plaintiffs, Leonard J. Fox and Lydia H. Fox, were, are and will in the future be forced to expend large sums of money for medical attendance and other expenses incident to their daughter's injuries in an endeavor to cure their said daughter of the same and will lose and be prevented and deprived of great gains and profits which they might and otherwise would have derived if their said daughter had not been so permanently injured.

Complaint

THIRD COUNT

1. Plaintiff, Leonard J. Fox, repeats the allegations of paragraphs 1 to 5 inclusive of the First Count and makes them a part hereof, as if fully recited herein. 10

2. As a result of the negligent acts of the defendants, this plaintiff received and sustained severe injuries as follows: lacerations, contusions and abrasions about the face and head, severe cuts on right side of face, resulting in distortion of face, impairment of facial expression and causing permanent disfiguration, injury to eyes, possibly affecting the sight thereof, concussion of and injury to brain, severe injury to right shoulder, right knee and right chin, surgical shock, severe injury to nervous system, plaintiff underwent and is still undergoing great pain and suffering both of body and mind, has been permanently injured, and has sustained other permanent injuries, the exact nature of which are as yet unknown to plaintiff, all of which have caused him and still cause him great pain and deprive him of the normal movements of his face and body and hamper his normal bodily movements. 20
30

3. As a further result of the aforesaid injuries, said plaintiff was forced to expend large sums of money for hospital bills, medical attendance, etc., for his injuries and will in the future be forced to expend large sums of money, in an endeavor to cure himself of the same.

4. As a further result, said plaintiff was unable to perform his usual duties and will in the future be prevented from performing his usual 40

Complaint

duties, thereby sustaining great loss of earnings therefrom.

FOURTH COUNT

10 1. Plaintiff, Lydia H. Fox, repeats paragraphs 1 to 5 inclusive of the First Count and makes them a part hereof, as if fully recited herein.

20 2. As a result of the negligent acts of the defendants, this plaintiff received and sustained severe injuries as follows: possible fracture of skull, concussion of and injury to brain, severe cuts and wounds on scalp and forehead, injury to ears and ear drums, affecting hearing of this plaintiff, injury to face and nose, resulting in paralysis of face, multiple contusions and abrasions of the face and forehead, resulting in distortion of face, impairment of facial expression, and permanent disfiguration, severe shock and injury to nervous system, traumatic neurasthenia, loss of great quantity of blood, plaintiff received other lacerations, contusions and abrasions about the entire body, underwent and is still undergoing great pain and suffering both of body and mind, has been permanently injured, and has sustained 30 other permanent injuries, the exact nature of which are as yet unknown to plaintiff, all of which have caused her and still cause her great pain and deprive her of the normal movements of her face and body and hamper her normal bodily movements.

40 3. By reason of the negligent acts of the defendants, said plaintiff was confined to her bed and will be confined to her bed for a long period of time, has been permanently injured and has been prevented from following her usual occupation and performing her usual duties and will in the future be prevented from following her usual occupation and performing her usual duties.

Complaint

FIFTH COUNT

1. Plaintiff, Leonard J. Fox repeats the allegations of the Fourth Count and makes them a part hereof, as if fully recited herein.

2. At the time and times hereinbefore mentioned, this plaintiff was and is the husband of the plaintiff, Lydia H. Fox.

3. As a result of the injuries sustained by his wife, the plaintiff, Leonard J. Fox was, is, and will in the future be forced to expend large sums of money for medical attendance incident to his wife's injuries in an endeavor to cure her of the same and will also be compelled to expend large sums of money for household expenses.

4. As a further result of the injuries to his wife, Leonard J. Fox has been, is, and will in the future be deprived of the services, society and consortium of his wife, the plaintiff, Lydia H. Fox.

Plaintiff, Lydia A. Fox by Leonard J. Fox and Lydia H. Fox, next friends, demands as damages from the defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, and Fred Ramsauer, the sum of \$15,000.00 on the First Count; the plaintiffs, Leonard J. Fox and Lydia H. Fox demand from the defendants the sum of \$5,000.00 on the Second Count; the plaintiff, Leonard J. Fox demands from the defendants the sum of \$10,000.00; on the Third Count; the plaintiff, Lydia H. Fox demands from the defendants the

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Petition for Appointment of Next Friends

sum of \$25,000.00; on the Fourth Count and the plaintiff, Leonard J. Fox demands as damages from the defendants on the Fifth Count, the sum of \$5,000.00.

GREEN & GREEN,
Attorneys for Plaintiffs.

10

Petition for Appointment of Next Friends

(Filed July 11, 1931)

*To the Honorable Judges of the Essex County
Circuit Court:*

20

The petition of Leonard J. Fox and Lydia H. Fox, of the Town of Irvington, County of Essex and State of New Jersey, respectfully shows, that:

1. They are the father and mother, respectively, of Lydia A. Fox, a minor under the age of 14 years, to wit: of the age of 4 years.

30

2. They are advised that said minor has a good and just claim against the defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, and Fred Ramsauer, for injuries sustained by the said minor as the result of an automobile accident which occurred on May 17th, 1931, with automobile owned by the defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, which automobile was carelessly and negligently driven by the defendant, Fred Ramsauer.

40

Petition for Appointment of Next Friends

3. The said minor is about to commence an action for injuries sustained as aforesaid, against the defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, and Fred Ramsauer, in this Court.

Your petitioners pray that they may be appointed next friends for the said minor, Lydia A. Fox, to prosecute the said action for her.

10

And your petitioners will ever pray, &c.

LEONARD J. FOX.
LYDIA H. FOX.

We, Leonard J. Fox and Lydia H. Fox, above named, do hereby consent and agree to accept the appointment of next friends, as above prayed, of Lydia A. Fox, a minor under the age of 14 years, to wit: of the age of 4 years, to prosecute an action for damages in her behalf, as a result of injuries sustained by her, as set forth in the foregoing petition.

20

IN WITNESS WHEREOF, we hereby subscribe our names, this 2nd day of July, 1931.

LEONARD J. FOX.
LYDIA H. FOX.

30

Witness:

SOL HERSHIPS.

State of New Jersey, }
County of Essex, } ss.:

SOL HERSHIPS, of full age, being duly sworn according to law, upon his oath deposes and says, that:

40

Order Appointing Next Friends

1. He was present and saw Leonard J. Fox and Lydia H. Fox subscribe their names to the foregoing petition, and written consents, the same having been by him first read to the said Leonard J. Fox and Lydia H. Fox.

10 2. He further says that he knows the infant, and in his opinion, the said infant, Lydia A. Fox, is under the age of 14 years, to wit: 4 years.

SOL HERSHIPS.

Sworn and subscribed to before me }
this 2nd day of July, 1931. }

ELIZABETH GREENBERG,
Notary Public of N. J.

20

Order Appointing Next Friends

(Filed July 11, 1931)

30 Upon reading and filing the petition filed in this Court by Leonard J. Fox and Lydia H. Fox, setting forth that they are the father and mother of Lydia A. Fox, a minor under the age of 14 years, and praying that said Leonard J. Fox and Lydia H. Fox may be appointed next friends of the said Lydia A. Fox, for the purpose of prosecuting an action against the defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, and Fred Ramsauer, and the said minor being advised that she has a good cause of action; and

40 Upon reading the written consents of the said Leonard J. Fox and Lydia H. Fox, to the said appointment, and affidavit of Sol Hershrips, veri-

Answer

fyng the age of the said Lydia A. Fox, and stating that the petition and consents were signed in his presence:

It is, on this 3rd day of July, 1931, on motion of Green & Green, Attorneys for Plaintiffs, ORDERED, that Leonard J. Fox and Lydia H. Fox be admitted to prosecute said cause of action for the said Lydia A. Fox, in the above stated court, against the said defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, and Fred Ramsauer, as the next friends of the said Lydia A. Fox.

10

WM. A. SMITH,
Circuit Court Judge.

20

**Answer of Defendants Leo Minahan and
Alfred Minahan**

(Filed August 5, 1931)

The defendants, Leo Minahan and Alfred Minahan individually and as partners trading as Minahan Bros., residing in the City of East Orange, County of Essex and State of New Jersey say that:

30

ANSWER TO FIRST COUNT

1. These defendants admit the allegations contained in Paragraph 1 of the complaint filed herein.

2. These defendants deny the allegations contained in Paragraph 2.

40

Answer

3. These defendants have no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 3 herein and leave plaintiff to their proof thereof.

10 4. These defendants deny the allegations contained in Paragraphs 4, 5, 6 and 7 herein.

FIRST SEPARATE DEFENSE TO FIRST COUNT

That said alleged injury and damage to the said plaintiffs was not caused through the negligence of these defendants nor of their servants, agents, or employees, while engaged in and about the business of these defendants.

20

SECOND SEPARATE DEFENSE TO FIRST COUNT

The negligence of the plaintiffs, their servants, agents, employees or common adventurers contributed to and was the cause of injury and damage complained of.

ANSWERS TO SECOND COUNT

30 1. These defendants repeat their answers to each and every allegation in the First Count as the answer to Paragraph 1.

2. These defendants deny the allegations contained in Paragraph 2.

SEPARATE DEFENSES TO SECOND COUNT

40 These defendants repeat the defenses to the First Count as the defenses to the Second Count.

Answer

ANSWERS TO THIRD COUNT

1. These defendants repeat the answers to the allegations contained in Paragraphs 1 to 5 inclusive of the First Count as the answer to Paragraph 1 herein. 10

2. These defendants deny the allegations contained in Paragraphs 2, 3 and 4 herein.

SEPARATE DEFENSES TO THIRD COUNT

These defendants repeat the defenses to the First Count as the defenses to the Third Count herein.

ANSWERS TO FOURTH COUNT 20

1. These defendants repeat their answers to Paragraphs 1 to 5 inclusive of the First Count as the answer to Paragraph 1 herein.

2. These defendants deny the allegations contained in Paragraphs 2 and 3 herein.

SEPARATE DEFENSES TO FOURTH COUNT 30

These defendants repeat the defenses to the First Count as the defenses to the Fourth Count.

ANSWERS TO FIFTH COUNT

1. These defendants repeat their answers to each and every allegation of the Fourth Count as the answer to Paragraph 1 herein.

2. These defendants have no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 2 herein. 40

Reply

3. These defendants deny the allegations contained in Paragraphs 3 and 4 herein.

SEPARATE DEFENSES TO FIFTH COUNT

10 These defendants repeat the defenses to the First Count as the defenses to the Fourth Count.

HOLMWOOD & CREIGHTON,
Attorneys for Defendants.

We hereby consent to the filing of the within answer as of time.

GREEN & GREEN,
Attorneys of Plaintiffs.

20

—————

Reply

(Filed August 19, 1931)

Plaintiffs, in reply to the answer filed by the defendants, Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers, say that:

30 1. They deny the separate defenses to the First, Second, Third, Fourth and Fifth Counts.

GREEN & GREEN,
Attorney for Plaintiffs.

40

Rule to Plead

(Filed February 3, 1932)

It appearing that the defendant, Fred Ramsauer, did not file pleading within the time limited by the rules of Court; and

10

It further appearing that the plaintiffs did not take advantage of the failure of the defendant, Fred Ramsauer, to so plead before or at the term next after such failure:

It is, on this 2nd day of February, 1932, on motion of Green & Green, attorneys for plaintiffs, ORDERED, that the defendant Fred Ramsauer plead to the complaint filed herein and served upon him, within twenty days after service upon him of this order, otherwise plaintiffs may proceed to enter judgment by default; and

20

IT IS FURTHER ORDERED, that a true copy of this rule (which may be certified as such by attorneys for plaintiffs) be served upon the defendant, Fred Ramsauer, in the same manner as a summons is served.

Let this rule be entered in the minutes.

30

NELSON Y. DUNGAN,
Circuit Court Judge.

40

Answer of Defendant Fred Ramsauer

(Filed February 29, 1932)

Defendant, Fred Ramsauer, in answer to the plaintiffs' complaint says:

10

FIRST COUNT

1. He has no knowledge or information sufficient to form a belief as to the contents of paragraph 1.

2. He admits paragraph 2.

20

3. He has no knowledge or information sufficient to form a belief as to the contents of paragraph 3.

4. He denies the contents of paragraph 4.

5. He denies the contents of paragraph 5.

6. He denies the contents of paragraph 6.

7. He denies the contents of paragraph 7.

30

SECOND COUNT

1. He repeats his answers to the contents of the First Count and makes them part of this count.

2. He denies the contents of paragraph 2.

THIRD COUNT

40

1. He repeats his answers to the contents of paragraphs 1 to 5 inclusive of the First Count and makes them part of this count.

2. He denies the contents of paragraph 2.

Answer

3. He denies the contents of paragraph 3.
4. He denies the contents of paragraph 4.

FOURTH COUNT

1. He repeats his answers to the contents of paragraphs 1 to 5 inclusive of the first count and makes them part of this count. 10
2. He denies the contents of paragraph 2.
3. He denies the contents of paragraph 3.

FIFTH COUNT

1. He repeats his answers to the contents of the Fourth Count and makes them part of this count. 20
2. He has no knowledge or information sufficient to form a belief as to the contents of paragraph 2.
3. He denies the contents of paragraph 3.
4. He denies the contents of paragraph 4. 30

SEPARATE DEFENSE TO ALL COUNTS

Plaintiffs, Lydia A. Fox, Leonard J. Fox and Lydia H. Fox, were all guilty of contributory negligence in that they failed to keep a proper lookout; in that being aware of impending danger they failed to warn the operator of the automobile in which they were riding concerning said danger; in that they failed to use due care for their own safety; in that they interfered with 40

Reply

10 the operation of the automobile in which they were riding so as to cause the driver of the same to lose control thereof; in that they voluntarily placed themselves in positions of danger; in that they rode in an automobile with knowledge that said automobile was not equipped with the proper safety appliances and in that they were generally careless and negligent.

HAROLD J. BROWN,
Attorney for Defendant
Fred Ramsauer.

Reply

20 (Filed March 5, 1932)

Plaintiffs, in reply to answer filed by the defendant, Fred Ramsauer, say that:

They deny the allegations of the Separate Defenses to All Counts.

GREEN & GREEN,
Attorneys for Plaintiffs.

30

Order Substituting Attorneys

(Filed May 3, 1933)

40 Application having been made to the court by Seymour & Seymour, for an order substituting them as attorneys for the defendants Leo Minahan and Alfred Minahan, individually and copartners trading as Minahan Brothers, in the above entitled action, and it appearing that Holmwood & Creighton have consented to the making of this order,

Judgment

It is, on this 1st day of May, 1933, ORDERED that Seymour & Seymour be and they are hereby substituted as and appointed attorneys for the said defendants in place and stead of Holmwood & Creighton.

WORRALL F. MOUNTAIN, 10
Judge.

We consent to the making of the foregoing order.

HOLMWOOD & CREIGHTON,
Attorneys.

Judgment

(Auto Case) Action at Law. 20
1931 On Verdict by a Jury And by Direction
of the Court.

Judgment for the defendants.

Judgment Entered June 1, 1933.

Damage \$ 500.00

“ \$2,000.00

“ \$2,500.00

Costs \$ 124.56

Costs \$ 73.95 Defts. 30

Judge JOSEPH L. SMITH.

This Action was tried before Judge Joseph L. Smith with a jury at the Essex Circuit Court on June 1, 1933.

The cause having been heard and submitted to the jury they render their verdict as follows:

They find in favor of the plaintiff Lydia A. Fox, by friends and against the defendant Fred Ramsauer for the sum of Five Hundred Dollars 40

Judgment

10 (\$500.00) damage, they also find in favor of the plaintiff Leonard J. Fox and against the defendant Fred Ramsauer for the sum of Two Thousand Dollars (\$2,000.00) damage, they find in favor of the plaintiff Lydia H. Fox and against the defendant Fred Ramsauer for the sum of Two Thousand Five Hundred Dollars (\$2,500.00) damage. They further find by Direction of the Court in favor of the defendants Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers and against all plaintiffs.

20 Whereupon it is adjudged that the plaintiff Lydia A. Fox, by friends recover of the defendant Fred Ramsauer, the sum of Five Hundred Dollars (\$500.00) damage, the plaintiff Leonard J. Fox recover of the defendant Fred Ramsauer the sum of Two Thousand Dollars (\$2,000.00) damage, the plaintiff Lydia H. Fox recover of defendant Fred Ramsauer the sum of Two Thousand Five Hundred Dollars (\$2,500.00) damage besides their costs which are taxed at One Hundred Twenty-four Dollars and Fifty-six Cents. The complaint of the plaintiffs be dismissed and 30 the defendants Leo Minahan and Alfred Minahan recover of the plaintiffs costs which are taxed at Seventy-three Dollars and Ninety-five Cents.

Judgment Signed and Entered June 1, 1933.

C. W. PARKER,
A. J.

Book 119 Page 286 Circuit Court Judgments.

Case

ESSEX COUNTY CIRCUIT COURT

LYDIA A. FOX, by Leonard J. Fox and
Lydia H. Fox, next friends, and
LEONARD J. FOX and LYDIA H. FOX,

010

v.

Action at Law

LEO MINAHAN and ALFRED MINAHAN,
individually and as partners trad-
ing as MINAHAN BROTHERS, and
FRED RAMSAUER.

Thursday, May 24, 1933.

020

Before—Hon. JOSEPH L. SMITH, J., and a Jury.

For the plaintiffs appear GREEN & GREEN (by
HARRY GREEN).

For the defendants Minahan Brothers appears
ARTHUR B. SEYMOUR.

For the defendant Fred Ramsauer appears HAR-
OLD G. BROWN.

30

A jury is called and sworn.

Mr. Green opens for plaintiffs.

Mr. Seymour opens for defendants Minahan
Brothers.

Mr. Brown opens for defendant Ramsauer.

WILLIAM J. CARSON sworn in behalf of
plaintiffs. (Testimony omitted.)

* * *

CLARA VAN NESS sworn in behalf of plain-
tiffs. (Testimony omitted.)

40

Case

JOHN T. ENGLISH sworn in behalf of plaintiffs. (Testimony omitted.)

* * *

HENRY SKIRBST sworn in behalf of plaintiffs. (Testimony omitted.)

10

* * *

EDWARD WOLOWINA sworn in behalf of plaintiffs. (Testimony omitted.)

* * *

MACLYN BAKER sworn in behalf of plaintiffs. (Testimony omitted.)

* * *

GEORGE W. STANSBURY sworn in behalf of plaintiffs. (Testimony omitted.)

20

* * *

MILDRED I. NICHOLAS sworn in behalf of plaintiffs. (Testimony omitted.)

* * *

LYDIA H. FOX sworn in behalf of plaintiffs. (Testimony omitted.)

* * *

ESTHER MIDDLETON sworn in behalf of plaintiffs. (Testimony omitted.)

30

* * *

LEONARD J. FOX sworn in behalf of plaintiffs. (Testimony omitted.)

* * *

Mr. Seymour: If the Court please, I desire to move for a nonsuit as to the defendants Leo Minahan and Alfred Minahan, on the ground that it is not shown, nor is there any presump-

40

Leo M. Minahan, direct

tion which can be drawn from the evidence or the pleadings that at the time of this accident the truck owned by the Minahan Brothers was being operated upon that Sunday morning on and along 16th Avenue, a public highway, by the driver Ramsauer, while he was in and about the business of the Minahan Brothers or acting within the scope of his employment. 10

(Counsel argue.)

The Court: At this time I will deny the motion and grant an exception.

Mr. Seymour prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

20

LEO M. MINAHAN, one of the defendants, sworn in behalf of defendants Minahan Brothers.

Direct examination by Mr. Seymour:

Q. Mr. Minahan, where do you live? A. 354 Harrison Street, East Orange.

Q. Are you a member of the firm of Minahan Brothers? A. I am.

Q. Composed of yourself and your brother Alfred? A. That is right. 30

Q. What is your business in that firm? A. Contracting.

Q. How long have you been engaged in such business? A. About six years.

Q. Where was your office in May, 1931? A. In 1931 it was on Houston Street, Newark, most of the time.

Q. Were you engaged in any work during that year? A. Yes, sir. 40

Q. The spring of that year? A. Yes, sir.

Leo M. Minahan, direct

Q. Where? A. Near Bernardsville—just outside of Bernardsville.

Q. What was that work? A. It was a development for a cemetery.

10 Q. During what months of the year were you engaged in that work? A. We were up there in April and May, and then from June on to about November.

Q. What was the nature of your work at that cemetery development? A. We had a steam shovel working there and three trucks.

Q. How many trucks? A. Three.

Q. One of the trucks was this truck that has been mentioned in this case, is that right? A. That is right.

20

By the Court:

Q. What were you doing up there? A. Grading? A. Grading, yes, sir.

By Mr. Seymour:

Q. Did you have in your employ in that work at the cemetery development a man by the name of Ramsauer? A. We did.

30 Q. Was this Mack truck used at the cemetery work? A. It was.

Q. Will you state how Mr. Ramsauer came to take that truck away from the cemetery? A. He brought—

Mr. Green: If the Court please, I object to that. That is so general.

The Court: It is a question of agency, a very important question in this case.

40

Mr. Green: I object to the question as now framed.

Leo M. Minahan, direct

The Court: I will sustain the objection to the form.

Q. How did that truck get to Newark or in the vicinity of Newark, Mr. Minahan, if it was engaged in the work at Bernardsville? A. The Bernardsville job had shut down for a while. The three trucks were standing there, doing nothing. This particular truck brought a load of top soil down to my house, and brought a load of top soil down to my brother's house, and then a job came up in Caldwell for a truck, and we kept the truck down here in order to do that job. That job was done on a Saturday and a Monday, and the truck also worked on Tuesday and Wednesday—that is—

10

Q. What dates? A. May 9th, 11th, 12th, and 13th. The truck didn't work Thursday, Friday or Saturday.

20

Q. Where did the truck work from the 9th to the 13th? A. May 9th and May 11th it worked in Caldwell. May 11th and May 12th it worked for the United Engineering Company at Orange.

Q. Orange? A. Yes.

Q. Who drove that truck on those days for this work? A. Fred Ramsauer.

30

Q. When it got through with the Orange work what day was that? A. Wednesday.

Q. That was the 12th? A. The 13th, I think.

Q. What happened after that? A. After the 13th?

Q. Yes. A. Fred Ramsauer took the truck back to his yard and kept it there.

Q. When was it first put in his yard? A. May 9th.

Q. How did it come to be put in his yard? A. Well, when it went up to Caldwell, and on a

40

Leo M. Minahan, direct

10 Saturday I went up to Caldwell, on a Saturday afternoon, to pay him, and I asked him if there was anybody there—anybody around to see whether or not the Caldwell job—there was anybody living there who was doing the job. We were hiring the truck to somebody else, and there was nobody to watch the truck, so I told him we couldn't keep it in Caldwell over Sunday; that we would have to put it somewhere else; so I told him I would like to put it down in his yard, or if he wanted to, he could put it over in one of the other drivers' yards. The truck was only down here temporarily, and was to go back to Bernardsville.

20 Q. Now, at that time did you have any garage or space to put the truck of your own in Orange or Newark or vicinity? A. No.

By the Court:

Q. What do you mean to put it in his yard?
A. Where he lived.

Q. You mean in back of his house? A. I mean in back of his house or alongside of his house. He said it would be all right to put it in his yard.

30

By Mr. Seymour:

Q. And that was what day again? A. May 9th.

Q. On Monday morning it showed up again for the job in Caldwell? A. That is right.

Q. How long did it remain on the jobs in Caldwell and Orange? A. Until Monday night on the Caldwell job and until Wednesday night on the Orange job.

40

Q. And what did you instruct Mr. Ramsauer to do? A. Well, he just put it back in his yard again.

Leo M. Minahan, direct

Q. Did the truck work in your business on Thursday, Friday, Saturday and Sunday following? A. No, sir.

Q. On May 17th was it engaged in any business of yours—Sunday, May 17th? A. No, sir.

Q. You have heard the testimony in this case as to the happening of this accident at the corner of 16th Avenue and Eastern Parkway? A. I have. 10

Q. Did you have any business in or about that vicinity or any business in and about which the truck should have been taken out?

Mr. Green: I object. That calls for a conclusion.

Mr. Seymour: If the Court please, the man knows what his business is or was on that day. 20

The Court: I will allow it.

Plaintiffs' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: What instructions, if any, did he give the driver to use that truck that day?

Mr. Seymour: Yes, I was coming to that, your Honor. 30

The Court: I will sustain the objection to the form of the last question.

Q. Did you give your driver Ramsauer any permission to use your truck on Sunday, May 17th? A. I did not.

Mr. Green: I object, if your Honor please, to what he said, and it seems to me that calls for a conclusion. 40

Leo M. Minahan, direct

The Court: Well, he has already answered the question.

Mr. Green: I ask that it be stricken out.

The Court: I will let it stand.

10 Plaintiffs' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Green: Of course, I was timely, if your Honor please, in my objection.

The Court: The question was answered before you objected.

Mr. Green: I know, but I got up instantly, and the witness shot it out.

The Court: Proceed.

20 Q. Did you give Mr. Ramsauer any instructions as to the truck after the Orange job was finished? If so, what were they?

Mr. Green: If your Honor please, I object, unless the witness states what he said to Ramsauer; otherwise it is purely a conclusion.

The Court: That is what he has asked him.

30 Mr. Green: If he will say what he said to him, that is different. I object to that question.

The Court: I will allow it.

Plaintiffs' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40 Q. Can you answer that, Mr. Minahan? A. What is the question?

Leo M. Minahan, cross

Mr. Seymour: Will you repeat it?

(Question read.)

Witness: No, I did not.

Q. Did you know where the truck was taken?

A. Yes.

Q. How did you know that? A. Well, I didn't know it for sure; I presumed he took it back to his yard.

10

Mr. Green: I object to that. I don't think it is proper. It is beyond the scope of the knowledge of this witness.

The Court: Strike out what he presumed.

Q. As to the putting of the truck in his yard, did you give him any instructions other than those you stated that you gave him on the Saturday before?

20

Mr. Green: I object to that, if your Honor please.

The Court: I will allow it.

Plaintiffs' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

A. No.

Q. Did you know that he was using the truck on May 17th? A. I did not.

Cross examination by Mr. Green:

Q. Mr. Minahan, how long was Ramsauer working for you? A. About six years.

Q. During that period he drove this particular Mack truck or other trucks belonging to you? A. Well, he drove this particular Mack truck most of the time.

40

Leo M. Minahan, cross

Q. You are general contractors, aren't you?

A. Yes, sir.

Q. And you have a job for a period of time and then you have a sort of lay-over, and then you have another job? A. Yes, sir.

10 Q. During rainy weather you lay up your trucks, don't you? A. Most of the time—not all the time.

Q. But during these intervals when you had lay-overs you continued Mr. Ramsauer in your employ? A. At this particular time he wasn't getting paid excepting when he worked.

Q. Well, at any time when you had a lay-over, did you pay him salary? A. Yes, up until about, I should say, eight months or a year before this time.

20 Q. So that within that eight months' period you didn't pay Ramsauer unless he actually worked? A. That is right.

Q. Now, did you have a regular place for the storage of this truck prior to May 31st? A. We did up until the time that the trucks went to Bernardsville.

Q. And from that time on you gave up your regular place of storage? A. That is true.

30 Q. Where did you store that truck since the time of the Bernardsville job and until May, 1931? A. In Bernardsville, right on the lot where it was working.

Q. That is, right on the lot? A. Near Bernardsville.

Q. During that eight months' period how did you pay Ramsauer? So much a week, so much a day, so much a load, or how? A. So much a day.

40 Q. Now, prior to the eight months' period how much did you pay him? A. So much a week.

Leo M. Minahan, cross

Q. Regardless of whether he worked or not?

A. Right.

Q. So far as Ramsauer is concerned, he having worked for you for a six year period, you had confidence in him, didn't you? A. Yes.

Q. Is that one of the reasons why you entrusted the care of this truck to him? A. Yes.

10

Q. You say that he worked on the Bernardsville job until about May 9, 1931? A. Until about May 6th, I think.

Q. Pardon me. Until about May 6th. And then you moved that truck to Essex County, is that correct? A. That is right.

Q. And for the purpose of doing work at Caldwell? A. Yes.

Q. When did that Caldwell work commence? A. May 9th. He first brought some top soil down from Bernardsville—two loads of top soil on different days. I think it was May 6th and 7th, and then went to Caldwell on May 9th.

20

Q. When he brought the top soil up did you pay him? A. Yes.

Q. Did you pay him for a full day or a fraction of a day, depending on how many hours he worked? Suppose, for example, he worked for only a part of a day, would you pay him for the entire day or the actual time spent? A. Most of the time for all day.

30

Q. He started on the Caldwell job about May 9th? A. That is right.

Q. And at that time you told him to store the truck in the back of the yard in the house in which he was living, is that right? A. You mean on May 9th?

Q. Yes, from May 9th on. A. Yes, I told him he could store it there or he could store it at the other driver's house.

40

Leo M. Minahan, cross

Q. What was the name of the other man? A. William Baub.

Q. As a matter of fact, wasn't there another man in your employ who lived in Maplewood? A. Yes.

10 Q. Is that this man? A. That is this man.

Q. Didn't you first tell him to store the truck up there one night? A. That is where the truck was, yes.

Q. There was some objection to continuing to store the truck in Maplewood? A. No, not at that particular time.

20 Q. Why didn't you continue to store the truck in Maplewood? A. At a time previous to that we had to put the three trucks in this man's yard, and I think there was some objections from the neighbors to keeping the three trucks there, but at that time he owned two trucks of his own. There was only a temporary arrangement about two years before that, but there was no objection to keeping the truck there for a few days, such as this was, when it was coming down from Bernardsville temporarily, and I told the driver he could either put it back in there or take it to his house. Of course, it would have been more convenient for him to have it at his place, because he was going out to work again Monday.

30 Q. It was at the Maplewood house two years?

A. Yes.

By the Court:

40 Q. Did I understand you to say that it would be more convenient because he was going out to work again on Monday? A. Yes, sir.

Q. Which Monday do you refer to? A. May 11th.

*Leo M. Minahan, cross**By Mr. Green:*

Q. Of course, you said the reason for storing the truck in back of his yard was that it would be more convenient to him to have the truck there to take it out when he went to his next job? A. Yes.

10

Q. Were you familiar with Ramsauer's place at that time? A. Not particularly, no.

Q. But you had been there? A. I had been in front of it, yes.

Q. Did you see the yard? A. Yes.

Q. Do you know whether Ramsauer had stored the truck there prior to May, 1931? A. Not to my knowledge.

Q. They started the Caldwell job, and when Ramsauer would go to the Caldwell job he would take the truck from the back of the yard and take it up there, and after he was through, take it back? A. The first time he went to Caldwell he took it out from the other driver's yard, and then on that Saturday he took it back to his yard, took it out the following Monday, May 11th, to the Caldwell job. He also took it out on Tuesday, May 12th, for a job at the United Engineers in Orange. He took it out again on Wednesday, May 13th, for another job with the United Engineers in Orange. It didn't go out Thursday, Friday, or Saturday.

20

Q. Now, was he due for a job thereafter somewhere? A. The truck?

Q. Yes. A. The understanding was that the truck would go back to Bernardsville. The Bernardsville job had just shut down temporarily.

Q. When was the truck supposed to go back to Bernardsville? A. There wasn't any definite date.

30

40

Leo M. Minahan, cross

Q. Was it subsequent to May 17th? That is, it was after May 17th, wasn't it? A. Oh, yes.

10 Q. So that during the intervening period—that is, between the completion of the Orange job and the recommencement of the Bernardsville job, this truck was to be kept in the back of Ramsauer's job? A. Yes, that is right.

Q. Did you pay Ramsauer any storage for keeping the truck there? A. No.

Q. So that the truck was being kept there for the convenience of your firm? A. Yes, it was a convenience to them.

Q. How large a truck was that, Mr. Minahan? A. It is what is known as a seven-ton dump truck.

20 Q. Was it a valuable truck? A. Yes.

Q. It was worth a lot of money, wasn't it? A. It wasn't worth an awful lot of money at that time. It wouldn't be worth an awful lot of money at this time, either.

Q. It was worth a couple of thousand dollars at that time? A. Well, I should say about \$1500.

Q. And, of course, you wanted that truck kept in a safe place? A. Yes.

30 Q. And you wanted Ramsauer to exercise care and supervision over that truck while it was there? A. Yes.

Q. And you wanted that done for the convenience of your firm? A. Yes.

Q. What kind of tires did the truck have? A. Pneumatic.

Q. Of course, you wanted that truck stored in a place where there wouldn't be any glass or nails to puncture the tires? A. Yes.

40 Q. Those tires are quite expensive? A. Yes.

Q. How much did a new tire cost at that time, about? A. I think about \$90.

Leo M. Minahan, cross

Q. How many wheels are there on that truck?
Was it a six-wheel truck? A. Six wheels.

Q. So that the value of the truck—that is, the new tires of the truck at that time was around \$500? A. Around that.

Q. Did you know that there was a lot of debris, glass, and other dirt in Ramsauer's yard at the time? A. No, I didn't. 10

Q. Didn't you know that in order to put the truck in that yard it was necessary to remove that debris? A. No, I did not.

Q. Didn't Ramsauer tell you that when he had a chance he would have to take that pile of dirt and glass, and so forth, away; otherwise the tires might be damaged? A. No, he did not.

Q. Didn't Ramsauer tell you that in order to turn that truck around, so as to make it possible for him to easily take it out, he would have to remove that dirt? A. No, he did not, because he had been taking the truck out for four days. 20

Q. On a previous occasion, Mr. Minahan, did you ever lend Ramsauer the use of the truck for a personal purpose? A. I think he was allowed when he was on the job about twice, I think. There might have been some wood on the job we were doing that he would like to take home, and he would ask us to take it home on the truck, and he did get permission to do it, but other than that I don't think he got permission to use the truck for anything. 30

Q. Didn't he use the truck on numerous occasions before that? A. No, sir; not that I know of.

Q. If he did use that truck on this occasion, wouldn't that have been satisfactory to you? 40

Mr. Seymour: I object to that.

The Court: I sustain the objection.

Leo M. Minahan, cross

Q. Did you make any inquiry of Ramsauer as to whether he was using the truck while it was stored in the back of his yard? A. No.

10 Q. Did you go up there at any time during that period to find out if the truck was being stored or being used? A. No.

Q. Weren't you interested? A. I didn't think it was necessary.

Q. As a matter of fact, didn't you know that on a previous occasion Ramsauer used the truck to move his personal effects from one house to another? A. No, I don't think I do.

Q. You say you didn't know that? A. No.

20 Q. Are you sure about that? A. I am not sure about it, no. I said he had used the truck as far as I know on two or three occasions without ^{our} permission.

Q. That was entirely satisfactory to you? A. Yes.

Q. What were the previous occasions? A. On—simply to do himself a little job, like taking wood home from a yard or something—from a job we were doing, rather. I don't mean from the yard; I mean from a job we were doing.

30 Q. He also moved his household furniture from one house to another? A. I don't know.

Q. Would you say that he didn't use it for that purpose? A. No, I would not, but if he did ask my permission, it was all right.

Q. You would have given it to him? A. I probably did, if he did it, but I am not sure. I don't remember.

40 Q. And if he had asked your permission about removing this dirt from in back of the yard you would have given that, too? A. No, sir.

Q. Will you tell us why you would give him permission on these other occasions and why you would not permit him to remove the rub-

Leo M. Minahan, cross

bish when it was for the convenience of your truck on this occasion? A. I didn't know anything about it. If I had known the rubbish had to be removed, I would not put the truck there.

Q. Well, now, Mr. Minahan, if Ramsauer had come to you and said, "Mr. Minahan, I have place in the yard, but there is a lot of debris there; now, it will be necessary to remove that debris, and I would like to use the truck," do you mean to say that you would have denied your permission to remove it?

10

Mr. Seymour: I object.

The Court: I will allow it. It is proper cross examination.

(Question read.)

20

Mr. Seymour: If the Court please, I want to state the ground of my objection and get an exception. It is entirely speculative, it is not cross examination upon any fact or testimony in the case; it is asking the witness to give his opinion as to what he would or would not do if a certain circumstance or fact had arisen. It is not cross examination upon instances in this case.

30

The Court: What is the question?

(Question read.)

The Court: I will sustain the objection to that question in the way it is framed.

Q. You told Ramsauer to store the truck in the back of his yard, and you told him nothing further, is that correct? A. No, it is not. I told him he could store the truck in his yard or he could put it in the other driver's yard.

40

Leo M. Minahan, cross

Q. And that was the extent of your instructions; you said nothing further as to the character or use of the truck? A. No.

10 Q. Then you also said on these previous occasions you had permitted him to use the truck on at least two or three occasions that you recall? A. Yes.

Q. For his own personal use. A. Yes.

Q. And you also stated that you made no inquiry as to what was being done about the truck during the period it was in the yard? A. I said I didn't think it was necessary.

20 Q. When during that week of May 9th did you pay the salary to Ramsauer? That is, did you give it to him on Saturday the 16th or Wednesday when he finished the Orange job, or when? A. I think I gave it to him on May 9th.

Q. How did you pay him? Weekly? A. No—oh, how did I pay him? Yes.

Q. Every week? A. Yes.

Q. Would you give him a check or cash? A. Cash.

Q. So you paid him May 9th? A. Yes.

30 Q. When was the next time you paid him after May 9th? A. I don't remember. Perhaps May 16th, but I am not sure.

Q. By that time when you paid him on May 9th, was there a full week's salary? A. I don't remember.

Q. And when you paid him, you think, on May 16th, was that a full week's salary? A. No, I am sure that wasn't, because he didn't work Thursday, Friday and Saturday.

40 Q. Can you recall whether you paid him any money for salary after May 16th? A. After May 16th?

Q. Yes. A. Well, I don't know. You mean for salary for driving?

Leo M. Minahan, cross

Q. Yes, for work. I don't care what it is for—working for you. A. Yes, he worked as a laborer for about five days after May 17th.

Q. So that after this accident he continued in your employ? A. He worked for about five or six days, but not driving a car—just as a laborer. 10

Q. Why didn't you permit him to drive the truck any longer? A. In the first place, he didn't have a license; in the second place, I wouldn't have permitted him anyhow.

Q. But you did continue him in your employ for the five or six days? A. Yes.

Q. He is working for you now? A. No.

Q. He has no connection with you whatever now? A. No. 20

By the Court:

Q. Was May 9th the only day that you had any conversation with this driver, Mr. Ramsauer, as to where or how he might store the truck? A. Yes, sir. I talked to Ramsauer after that as to where the truck would work.

Q. But as to where it was stored you did not? A. No, excepting what I told him. I presumed it was in his yard. 30

Q. Did you know whether after you told him he could take it either to the other driver's yard in Maplewood or to his yard, which yard he had taken it to? A. I wasn't sure. I had not seen it in his yard.

Q. Did he ever tell you where you had stored it? A. No, I don't think he did.

Q. So you didn't know whether it was up in Maplewood or in his yard, did you? A. I am not sure, excepting I presumed he put it where 40

Leo M. Minahan, cross

he was told to or where he was given permission.

Q. You say he was given permission to put it in either of those two yards? A. Yes.

Q. The question is did you know which yard he put it in? A. No, I am not sure.

10 Q. You didn't know? A. No.

Q. When he finished the Orange job, that was on Wednesday, the 13th of May, and he didn't work for you any more after that until you sent the truck on a job? I mean he would not have worked for you again until you sent the truck out on a job? A. That is right.

Q. Wednesday, May 13th was the last day you sent the truck out? A. That is right.

20 Q. Do you know how long he would have stored the truck wherever he did store it, for your convenience? A. No, I do not.

Q. But he would have to store it until such time as he was sent out on another job, I say, is that correct? A. Well, unless he said that he couldn't store it there any longer, or something like that. Then, naturally, we would have taken it away from there.

Q. But you didn't go to see where he had it stored at any time? A. No, I did not.

30 Q. You left that to him and relied entirely on him to store it in either of those places? A. Yes, sir.

Q. And how long he was to store it you didn't know either? A. No, sir.

Alfred A. Minahan, direct

ALFRED A. MINAHAN, one of the defendants, sworn in behalf of defendants.

Direct examination by Mr. Seymour:

Q. Mr. Minahan, you are a partner of Minahan Brothers, are you? A. Yes, sir. 10

Q. Did Ramsauer ask you if he could use your truck on that Sunday, May 17th? A. No, sir; he did not.

Q. Did you know that he had the truck out of the yard on that day? A. I did not.

Q. Did you give him any permission to use the truck on that date?

Mr. Green: I object to that. That calls for a conclusion. 20

The Court: I will sustain the objection.

Q. Did he have any conversation with you prior to that date with reference to his using the truck on that date? A. None whatever. In fact, my brother was handling the trucks at that time, as he usually did. I was on the job.

Q. Was he engaged on any errand for your firm on that day? 30

Mr. Green: On what day?

Mr. Seymour: Sunday, May 17th.

Mr. Green: If he knows.

A. No, sir.

Mr. Seymour: Of course, he is answering what he knows.

Witness: I beg your pardon. 40

Frederick Ramsauer, direct

Q. Was he engaged on any errand or business for you on that day, May 17th? A. No, sir.

Q. On May 17th did the Minahan Brothers have any job or work to do? A. On May 17th?

Q. On May 17th. A. On that Sunday?

10 Q. Yes. A. No, sir.

(Cross examination waived by Mr. Green.)

FREDERICK RAMSAUER, one of the defendants, sworn in behalf of defendants Minahan Brothers.

20 *Direct examination by Mr. Seymour:*

Q. Mr. Ramsauer, you are the Fred Ramsauer who has been mentioned as the driver of this truck, are you not? A. Yes, sir.

Q. On that May 17th that you had this truck out had you asked permission of either of the Minahan brothers to take that truck out? A. No.

Q. So far as you know, do you know if they knew you had it out?

30

Mr. Green: I object to that. He is his witness.

The Court: I wil sustain the objection to the form of the question.

Q. What did you take that truck out for that day? A. I was cleaning up the yard at that time for the truck.

40 Q. Whose yard? A. The yard where I kept the truck.

Q. Did you clean up the rubbish? A. Rubbish and some stuff. I did that the day before that.

Frederick Ramsauer, direct

Q. And you took it where? A. Down to Wilson Avenue, Newark.

Q. And you took it out and were on your way back? A. Yes, I was on my way back, about two blocks from the house.

Q. Did you take that load of rubbish to the dumps at the direction of the Minahan brothers or either one of them? A. No, sir. 10

Q. Whom were you doing it for? A. Well, for myself and the landlord.

Q. Your landlord? A. Yes. He helped load it.

Q. What was your landlord's name? A. Maz-curkewecz.

Q. He helped you to do it? A. And I done it on my own hook. 20

Mr. Green: Your Honor, to save time, Mr. Brown can examine Mr. Ramsauer now.

The Court: Is there any objection?

Mr. Seymour: No objection.

Direct examination by Mr. Brown:

Q. Mr. Ramsauer, you were driving the truck on 16th Avenue in a westerly direction, is that right? A. That is right. 30

Q. Before you reached the corner how fast were you driving the truck? A. Oh, I was coming down—I wasn't going any faster than 14. You see, there is a governor on there. The Mack truck has a governor. I never opened the governor as long as I drove it.

Q. Will you tell the jury just what happened as you came to Eastern Parkway and 16th Avenue? A. I made a swing into 16th Avenue—into Eastern Parkway. When I got towards the fence Miss Nicholas came along with her car and ran right into my front wheel. 40

Frederick Ramsauer, direct

Q. Show the jury by your finger, starting here (indicating), the course of the truck that you were driving. Take the pointer. You understand that this is Eastern Parkway (indicating)?

10 A. Yes, and here is the fence over here (indicating). I was coming down 16th Avenue from Grove Street—I came across into Grove Street, shot down 16th Avenue, and made a swing into Eastern Parkway. I was just beyond the center line—that is, the tar line—I was already past the corner—and Miss Nicholas came along. The first thing you knew I was bumped against my front wheel. I jammed on the brakes, jumped out quick, asked if she was hurt, and she said, “No,” and I asked her for her license, and
20 she says, “No, the police will be here,” and she told me the number after the accident.

Q. Did you move the truck after that? A. Yes, I did.

Q. Where did you move it to? A. Backed it up in front of a water hydrant that is on the opposite side.

Q. After you backed it up to the water hydrant— A. (Interposing.) That was after I asked Miss Nicholas whether she was hurt.

30 Q. And then you got off the truck again? A. Yes.

Q. Had the police patrol arrived up to that time? A. Up to that time, no.

Q. So that neither Officer Carson nor Officer Skirbst were there until you had moved the truck? A. I had already moved the truck; yes, sir.

40 Q. Will you describe the point on the truck where it came in contact with the Chevrolet? A. The left front wheel—left front mudguard.

Q. Which part of the left front wheel? A. Of the truck?

Frederick Ramsauer, direct

Q. Of the truck. A. Well, the driver's side, the side that I sat on.

Q. Was it the front part of the left front wheel or the rear part of the left front wheel? Let me draw it. Here is a picture of it. Is that approximately the way a Mack truck looks like? A. Yes, it is a bull dog. Right in here (indicating). That is where the front part of the Chevrolet was. 10

Q. Indicating the rear— A. (Interposing.) Between the tire and the mudguard.

Q. —part of the front wheel and the fender adjacent thereto? A. Yes, sir; because I jumped on the mudguard here (indicating) a little bit, so as to bend it back.

Q. What part of the Chevrolet was in contact with that part of the truck? A. The radiator, the bumper. The hood was smashed back. The glass was broken. 20

Q. How fast were you going at the time of the impact, Mr. Ramsauer? A. Why, I judge about 14.

Q. How long did it take to stop after the impact? A. Oh, it didn't take a minute—just a second to jam on the brakes, and they locked.

Q. Where you came down here on 16th Avenue (indicating), where were you the first time you saw the Chevrolet with relation to— A. (Interposing.) I was swinging right into Eastern Parkway. 30

Q. At what point—not when making the swing. A. I was beyond this corner here (indicating). I was past the tar line.

Q. Where was the truck at the time you first saw the Chevrolet? A. Swinging into Eastern Parkway. 40

Frederick Ramsauer, direct

Q. Starting to swing or finishing the swing?

A. To start to swing towards the fence.

Q. How far away was she at that time? A. Oh, I judge when I seen her it must be about 10 feet or so.

10 Q. Up Eastern Parkway? A. Yes. She was coming towards South Orange Avenue.

Q. Have you any idea as to how fast she was going? A. Well, I judge anywhere from 20 to 25.

Q. Did the Chevrolet make any turn or attempt to avoid hitting you? A. That I can't say.

20 Q. Did it slow down at all? A. I can't tell whether or not she slowed down, to tell you the truth. You couldn't tell that, sitting in the back of the cab of the Mack.

Q. Did you slow down to make the turn? A. Yes, I slowed down. You always have to slow down to turn a corner.

Q. How far away from this southeast curb line were you when you were making the turn—that is, the nearest point you were to this curb? A. I had to swing over this way (indicating) to make a wide turn.

30 Q. How many feet were you away from this curb (indicating) at the nearest point you were to that curb? A. Oh, about 10 feet. That is a very narrow street. The street ain't over 22 feet wide. It is one of the narrowest streets up in Irvington.

40 Q. As I understand it, did you run into the Chevrolet or did the Chevrolet run into the truck? A. It looked to me the Chevrolet ran into the wheel of that truck, because if I ran into it, there wouldn't have been nothing left.

Frederick Ramsauer, direct

Q. Then you got out of the truck and you saw Miss Nicholas? A. I saw Miss Nicholas; yes, sir. I asked if anybody was hurt, and she says, "Yes," and by that time Mrs. Fox was taken to the hospital, and I asked her for her license, and she told me the police would come.

10

Q. Speak up a little so this last juror can hear what you say. A. Yes, sir.

Q. Will you repeat what you just said?

(The last answer is read by the stenographer.)

Q. Now, were you intoxicated at that time, Mr. Ramsauer? A. Well, no, I wasn't intoxicated, no.

20

Q. Had you had anything to drink at all? A. Yes, I admit I had two drinks.

Q. Where did you have the two drinks? A. Down in Wilson Avenue, Newark.

Q. And that was on your way back from the— A. (Interposing.) Yes, that was three quarters of an hour before I got hurt—before I had the accident.

Q. Did you have anything before you started? A. No, sir.

30

Q. Did you have anything at any other time that day? A. No, sir. I don't make a habit of it.

Q. Who was with you on the truck? A. My landlord.

Q. He was also with you when you had the drinks? A. Yes, sir.

Q. And he was with you all the time? A. All the time.

Q. At the scene of the accident? A. Yes, sir.

40

Q. And when you went in the patrol? A. Yes, sir.

Frederick Ramsauer, cross

Q. Were you nervous after the accident? A. Naturally, I would be nervous when you have an accident and worry about it.

10 Q. On the way up in the police patrol did you get sick? A. Well, I think I did—kind of sick to the stomach, worrying about the wife and that. My wife was in bed at the time.

Q. Your wife was in bed? A. Yes, sir.

Q. Did you vomit? A. I did; yes, sir.

Q. Did you do that— A. (Interposing.) I done that after I was examined by the doctor, see?

Q. After you were examined by the doctor? A. Yes.

20 Q. Tell the Court and the jury what the examination by the doctor consisted of. Tell us just what happened from the time you saw the doctor until after he finished his examination? A. Well, he took me in the receiving ward of the Irvington General Hospital. I was by Officer Carson, and Dr. Baker told me to stand up. I stood up straight. He looked at the pupils of my eyes. He made me stretch my arms out, point to the fingers. Then he said to Carson, "Take him out to the wagon and take him down to headquarters." That is all I remember what he said.

30

Q. Did he ask you to walk a line? A. That I don't remember. I can't recall.

Q. Did he ask you to touch your fingers in front or touch your nose with your fingers? A. That I can't recall. I just remember the three.

Cross examination by Mr. Green:

40 Q. Ramsauer, what were these two drinks that you had? A. Rye whiskey.

Q. Big shots? A. What?

Frederick Ramsauer, cross

Q. Were they big shots of whiskey? A. No, they weren't big shots.

Q. Were they big shots, little shots, or what?

A. Well, not exactly.

Q. Good sized shots of whiskey? A. Yes.

Q. Do you remember it was rye whiskey? A. It tasted like rye to me. 10

Q. You took it straight, didn't you? A. Yes, sir.

Q. And it was after you had that whiskey and you were driving back when this accident occurred? A. Yes.

Q. Of course, you don't recall just what happened at the time of the accident, do you? A. What do you mean I don't recall?

Q. Do you recall how it happened? A. I recall how it happened, yes. 20

Q. Do you recall specifically the details of how you were going down 16th Avenue? A. I can recall how I came home.

Q. All right. You got in 16th Avenue at what street? A. Springfield Avenue.

Q. About where? A. Right where she starts.

Q. That is about how many blocks this side of Eastern Parkway? A. I should judge about 26 blocks—24 or 26 blocks. 30

Q. This side of 16th Avenue? A. Yes, sir.

Q. And you kept on going on 16th Avenue? A. All the way up 16th Avenue; yes, sir.

Q. At Grove Street there is quite a hill? A. Yes, sir.

Q. And you came down that hill? A. Came down that hill; yes, sir.

Q. You say you have a governor that controls your speed at 14 miles an hour? A. Yes, sir. 40

Q. A governor does not work down hill, does

Frederick Ramsauer, cross

it? A. No, sir. You can't go any faster unless they are out of gear.

Q. You can coast down? A. You can coast down, yes, naturally.

10 Q. And the governor does not work, does it? A. No, the governor can't stop it.

Q. Do you know whether there was a car following behind you on 16th Avenue? A. No, I don't recall.

Q. Do you recall whether you zigzagged on 16th Avenue? A. No, sir.

Q. Will you say you did not zigzag? A. No, I would not say I didn't.

Q. You heard the testimony of Mrs. Middleton? A. Yes, I did.

20 Q. She said that you zigzagged on 16th Avenue a couple of blocks. A. Yes.

Q. Did you zigzag? A. No, I don't want to deny it when I don't know it.

Q. What time did you have breakfast that morning? A. I didn't eat breakfast in the morning.

Q. Of course, you had no lunch then? A. No.

Q. So you had these drinks on practically an empty stomach? A. Empty stomach is right.

30 Q. After you had these drinks you were feeling pretty good? A. No.

Q. No effect whatever? A. No, I didn't feel good.

Q. As you approached the intersection of Eastern Parkway at 16th Avenue did you make an observation to the right or to the left to see if there were approaching vehicles? A. I always look to my right.

40 Q. Did you do it on this occasion? A. I did, yes.

Frederick Ramsauer, cross

Q. Are you sure about that? A. I looked to the right, yes.

Q. You saw nothing on your right? A. I didn't see nothing on my right when I made the swing.

Q. Did you do anything else? A. Did I do anything else? 10

Q. Yes. A. No, I didn't do nothing else; I had the collision then.

Q. After you made an observation to your right and saw nothing, then you swung over to the left? A. Swung to the left.

Q. Without looking? A. Into Eastern Parkway.

Q. You didn't make an observation to the left? A. No. 20

Q. You just swung? A. Swung right for the fence.

Q. Did you do anything else? A. I don't know what you mean.

Q. Did you do anything else in operating the truck? A. Why, yes, just stepped on the gas so as to get around.

Q. Did you blow a horn? A. No, I didn't blow no horn.

Q. Did you put your hand out to the left? A. No. 30

Q. But you just made this left-hand turn in a southerly direction around Eastern Parkway, and you put your foot on the gas? A. That is it.

Q. What is the maximum of your truck? A. 14 miles an hour with the governor.

Q. So that at the time you made the left-hand turn this truck was going at its top speed? A. At about 14, yes. 40

Frederick Ramsauer, cross

Q. It is a pretty heavy truck? A. Oh, it weighs around 13,000 pounds.

Q. What do you call it? What tonnage? A. Seven ton bull dog.

10 Q. That is about the biggest sized truck? A. No, they run bigger than that.

Q. That is a good sized truck, isn't it? A. Well, it is pretty fair.

Q. And your cab—what was that? An open body—that is, a regular body, or closed? A. Dump body.

Q. And then there is a cab? A. Cab.

Q. There is a cab in back of the front wheels? A. Yes—a big hood.

Q. That cab sets up quite high? A. Yes.

20 Q. And you have a good view point from where you are sitting on the driver's seat? A. Yes, sir.

Q. Is there anything on the southeast corner to interfere with your view of anything coming from the south? A. A four-family house.

Q. How close does that set to the corner? A. What? The four-family house?

Q. Yes. A. It would be about 12 feet off the curb.

30 Q. That is, 12 feet off 16th Avenue? A. 12 feet off 16th Avenue and 12 feet off Eastern Parkway.

Q. As you got to Eastern Parkway, if you had looked down Eastern Parkway, for about what distance could you have seen? A. Well, on one side there was a fence on a park up there, or a hill, rather—I could see about as far as the continuation of 16th Avenue. That is, about.

40

Frederick Ramsauer, cross

Q. No. I mean looking down in a southerly direction, how far down could you have seen when you got to the intersection and made your left-hand turn? A. Oh, I could see as far as 18th Avenue.

Q. You could see a long distance down? A. Yes, you can see a long distance. 10

Q. Did you see the Chevrolet coach at any time before you struck it? A. After it was too late, yes. I already made the swing around the corner when I seen it.

Q. You said in answer to Mr. Brown's question that your truck was about 10 feet from the southeasterly curb? A. Yes.

Q. In fact, wasn't it a little closer? A. I don't say I was. 20

Q. Wasn't the rear of your truck closer than that? A. Oh, yes, the rear—not the front.

Q. I am talking about the rear. Wasn't the rear of your truck closer than that? A. The rear might have been 2 feet, for all I know.

Q. When you answered counsel's question you were referring to the front of your truck? A. Yes.

Q. With regard to the actual point where the collision occurred, did the collision occur on Eastern Parkway? A. On Eastern Parkway. 30

Q. Will you take a look at the blackboard and see whether or not that shows about the point where the contact occurred? Is that about right? A. That is about right, yes.

Q. You were examined at the Irvington General Hospital about how long after this accident? A. Oh, I judge about twenty minutes after.

Q. And do you recall getting out of the cab of your truck? A. I do; yes, sir. 40

Q. Do you recall falling? A. No, sir.

Frederick Ramsauer, cross

Q. You didn't fall? A. I didn't fall; no, sir.

Q. You didn't stagger? A. I wouldn't say I didn't stagger, but I didn't fall; no, sir.

Q. You were taken to the hospital in a police patrol? A. Yes, sir.

10 Q. With Officers Carson and Skirbst. A. Skirbst, yes.

Q. And then they called for the doctor, or was the doctor there? A. The doctor was right in there when I got there.

Q. So that you were examined within 20 minutes of the happening of the accident? A. 20 minutes after the accident.

20 Q. And all you recall are those three tests? A. Yes, the standing up straight test, holding up the arms—

Q. You don't recall the others at all? A. No.

Q. You don't recall the doctor asking you to do any other things? A. No. I didn't say anything while I was there. From there I was taken to police headquarters.

Q. You were taken down to police headquarters? A. Yes.

30 Q. You appeared in the police court the next morning? A. I wasn't even out.

Q. I said— A. (Interposing.) Yes.

Mr. Seymour: I object to that in reference to any other trial.

The Court: I will allow it.

Q. And the next morning in police court were you charged with operating a motor vehicle while under the influence of intoxicating liquor?

40 A. Judge Stoddard just read off the Motor Vehicle Law, and I pleaded guilty.

Q. So you paid your penalty? A. Yes.

Frederick Ramsauer, cross

Q. Ramsauer, how long have you been working for Minahan Brothers? A. Six years.

Q. Did you drive that one truck all that one time? A. 99 times out of a hundred.

(At one o'clock p. m. the court takes a recess until two o'clock p. m.) 10

AFTER RECESS

FRED RAMSAUER resumes the stand.

Cross examination (continued) by Mr. Green:

Q. Mr. Ramsauer, I show you a certified copy of the registration application marked P-6, and ask you whether that covers the truck that was involved in this accident (handing paper to witness). A. Yes, that is the truck. 20

Q. When did you commence to work for Minahan Brothers? A. When did I start for them?

Q. Yes. A. July 5, 1925.

Q. And your employment continued until when? A. Until when?

Q. Yes. When did you stop working for them? A. Well, up to the time of the accident. 30

Q. Didn't you work for them after the accident? A. Yes, I worked for them a couple of days after the accident.

Q. When did you work for them after the accident? About how long afterwards? A. Oh, I think it was in the middle of June, or something like that.

Q. That is, toward the latter part of June? A. Something like that, yes. 40

Q. Where did you work for them then? A. Up on Springfield Avenue, Irvington.

Frederick Ramsauer, cross

Q. How long did that employment continue?
A. Oh, I judge about four or five days.

Q. What kind of work did you do? A. I done ordinary laborer.

10 Q. What did you do? Just quit work at that time, or did they discharge you? A. They didn't have any more to do.

Q. So you continued with them until they ran out of work? A. Yes.

Q. Some time in 1928 you moved to the home in Irvington? A. Yes.

Q. By the way, where was that home located?
A. 46 Montrose Terrace.

Q. Irvington? A. Yes.

20 Q. Where did you live prior thereto? A. 81 Linden Avenue.

Q. Newark? A. No, Irvington.

Q. When you moved, did you move yourself?
A. No, not all—part.

Q. And the part that you moved, did you use this particular truck? A. Yes, I did.

Q. That is, you transported at least part of your household furniture from the Linden Avenue address? A. Yes.

30 Q. To the other place? A. Yes, with their permission.

Q. Whom did you speak to about that? A. Mr. Alfred Minahan.

Q. Mr. Alfred Minahan? A. At that time.

Q. You told him you were going to do that, and he said it was all right? A. O. K.

40 Q. Now, during the time that you were employed did you also use the truck on other occasions for your personal use? A. Outside of a load of wood once in a while.

Q. And each of those occasions you would use the truck? A. I used to ask them for it.

Frederick Ramsauer, cross

Q. Was there a time when you used the truck without their permission? A. Only this last one.

Q. With regard to this last time when you moved the truck from Bernardsville to this section, when was it, do you know? A. I came down May 6th. I brought a load down—a load of top soil, to Leo Minahan's house, and I got back to Bernardsville that Thursday. It was around twelve o'clock, and then I got another load and brought it down to Alfred Minahan's house, and that was the last time I went to Bernardsville. 10

Q. Then you brought the truck up here? A. No, I took it to Maplewood.

Q. Where did you store the truck? A. In Maplewood. 20

Q. Where in Maplewood? A. Parker Road.

Q. Now, at that time did you have a conversation with the Minahans? A. Yes, I seen them at that time in Bernardsville.

Q. I mean you had a conversation about the storage of this truck? A. They told me to bring it up to Parker Road.

Q. Did they tell you to leave it at Parker Road or at your place? A. No, at that time they told me to leave it at Parker Road. 30

Q. Did you bring the truck to the Parker Road place? A. Yes, I did, after I got rid of the top soil.

Q. And you left the truck there? A. Yes, for two days.

Q. What did you do then? A. I went to Caldwell.

Q. Who told you to go there? A. Mr. Leo Minahan. 40

Frederick Ramsauer, cross

10 Q. What did he tell you to do? A. Why, he came up there that Saturday and paid me, and I asked him if I should leave the truck up in Caldwell, and he said it wasn't safe, so he asked me—he told me to either take it to Maplewood or down to my yard, if I had room in my yard to bring it down there.

Q. Did you tell him where you were going to take it? A. Yes, I told him I would take it down to my yard.

Q. What did he say? A. He didn't say anything.

Q. Did he say anything else to you about the use of this truck at that time? A. No.

20 Q. So from the Caldwell job you took the truck to your yard? A. Yes; that was on a Saturday.

Q. Saturday, what date, do you remember? A. Nine.

Q. And you put it there? A. I put it in the yard on the 9th.

Q. Did you leave it there Sunday? A. I left it there Sunday and Monday went back to Caldwell.

30 Q. And you took the truck back up there? A. Yes.

Q. And you worked in Caldwell until when? A. Monday night.

Q. From the time you first placed the truck in your yard until the occurrence of this accident did you talk to the Minahans, or did the Minahans talk to you about the use of that truck? A. No. It was two days after that day.

40 Q. What did he tell you then? A. We were working on the Public Service then.

Q. Where was that? A. In Orange.

Q. Did they tell you anything further about the storage of the truck? A. No.

Frederick Ramsauer, cross

Q. So then you went up to Orange? A. Yes.

Q. Each day that you were employed in Caldwell and Orange you would take the truck from the yard in the morning and bring it back in the night? A. Yes.

Q. Were you paid anything for the use of that yard by the Minahan Brothers? A. No, sir. 10

Q. Did you store the truck there for their convenience? A. I don't understand you.

Q. Did you store the truck in your yard for the convenience of the Minahan Brothers? A. Well, the way I did it, they told me to put it down in the yard or either up in Maplewood.

Q. But they didn't pay you anything? A. No.

Q. So you stored it there for their benefit. A. I don't know what you mean. 20

Q. Don't you know what I mean? A. No.

Q. I mean you stored the truck in your yard for the convenience of the Minahan Brothers. A. With their say, yes.

Q. And also for their convenience. Do you know what convenience means? A. No.

Q. For their benefit. A. Oh!

Q. Did you talk to them about this dirt in your yard? A. No.

Q. Did you have trouble putting the truck in your yard? A. Well, no. 30

Q. What? A. No.

Q. Talk up. A. No trouble.

Q. No trouble? A. No.

Q. There was a lot of dirt there? A. Quite a little.

Q. What did that dirt consist of? A. Broken up chassis, springs, axles.

Q. Glass? A. I don't know about glass. 40

Q. What? A. I don't know about glass.

Q. Sharp pieces of metal? A. Well, chassis is metal.

Frederick Ramsauer, cross

Q. That is what I mean. Were their jagged edges on the metal? A. Yes.

Q. Is that the nature of rubbish that might injure the tires? A. Cut them up if it goes through them.

10 Q. Was it possible to turn the truck around in the yard without removing the dirt? A. No, you couldn't turn it around anyhow. The truck was too big. I had to back it up.

Q. If the dirt wasn't there could you swing around? A. No.

Q. And with the dirt you couldn't swing around? A. You couldn't swing around anyhow.

20 Q. Do you recall testifying in the District Court on July 7, 1932, in an action of Mildred Nicholas against the Independence Indemnity Company, and saying this—this question—A. (Interposing.) Yes.

Q. "What did you clean up in the yard? Answer: I cleaned up to make room for the truck to swing around." Do you recall so testifying? A. I don't know.

The Court: Speak up.

30 Witness: I don't recall swinging around. I don't see how I could swing around if the yard isn't wide enough.

Q. I asked you if you gave that answer at the time? A. I don't remember.

Mr. Green: I will read it again.

Mr. Seymour: I object to the repetition.

40 The Court: Don't repeat it. He says he doesn't remember.

Frederick Ramsauer, cross

Q. Do you recall this question and your answer at the same time: "Did that (and I am referring to the rubbish and old parts of cars) interfere with the truck? Answer: Well, it blocked it up." Do you recall that? A. To a certain extent, yes.

10

Q. No. Do you recall giving that answer? A. Yes, about blocking it, yes.

Q. Do you recall this question and answer: "What kind of tires did the truck have? Answer: Pneumatic." Do you recall that? A. Yes.

Q. "Was it necessary to clean up the yard to keep the truck there safely? Answer: Either to clean up the yard or to cut the tires." Is that correct? A. Yes.

20

Q. "And this accident happened coming back from taking the rubbish away? Answer: Yes." That is correct? A. Yes.

Q. So that in order to prevent these tires, which were pneumatic tires, from being cut up, you removed that rubbish, is that correct? A. Yes.

Q. By the way, how large is that? A. I don't know. It is 20 feet at the most in the back yard there.

30

Q. 20 feet in width? A. Fence to fence.

Q. 20 feet in width? A. No, length, and about 25 feet wide.

Q. Where is house located? A. 46 Montrose Terrace.

Q. Is that in the middle of the block or on a corner? A. At the foot of the hill.

Q. It is on the corner? A. No, it is about the fourth house from the corner.

40

Q. How did you get into the yard? A. There is a driveway there.

Frederick Ramsauer, cross

- Q. You drive into the driveway head on to get into the yard, and then how would you get out of it after? A. Pull out.
- Q. What? A. You backed in and pulled out.
- Q. That is, you would back it in? A. Yes.
- 10 Q. Then you would go out forward? A. Yes.
- Q. How long was that alleyway—that driveway? A. The alleyway?
- Q. How long was it? A. About 80 foot.
- Q. How wide was it about? A. 25 foot.
- Q. That is, you had ample room there? A. Yes, to back in.
- Q. What? A. To back in there was ample room.
- Q. Was this an unusually large pile of rubbish? A lot of stuff? A. An accumulation of cars and stuff.
- 20 Q. Did it occupy about half the yard? A. No, I had it up against the fence, like.
- Q. But there was quite a large pile of it? A. Well, quite a little.
- Q. And it interfered with your getting the truck in and out? A. What do you mean interfered?
- 30 Q. Answer the question. A. What do you mean by interfere?
- Q. Will you please answer the question?
- (Question read by the stenographer as follows: "And it interefered with your getting the truck in and out?")
- Q. Did it? A. I cleaned it so I could get over closer to the fence with the truck.
- 40 Q. That is what I mean: You cleaned up the rubbish so you could get in and get closer to the fence? A. Yes.

Frederick Ramsauer, cross

Q. In other words, you cleaned up this rubbish for the benefit of keeping the truck there?

A. Well, I didn't know how long I was going to keep it there.

Q. If you didn't keep the truck there you would not clean up the rubbish? A. I couldn't.

10

Q. Listen, Ramsauer, here is what the Court, the jury, and I would like to find out: Did you remove that rubbish— A. (Interposing.) Yes.

Q. —so as to make it possible to store the truck there more conveniently? A. So I wouldn't cut my tires—that is what I removed it for.

Q. During the days that you were working on the Orange job and on the Caldwell job you took that truck in and out every day? A. Yes, sir.

20

Q. Now, did you work that entire week? A. No, sir.

Q. What part of the week did you work? A. Monday, Tuesday, and Wednesday. The rest of the week was raining.

Q. Were you paid a salary for that week? A. No, sir. I was working by the day that time.

Q. Did you get paid for Monday, Tuesday, and Wednesday? A. Yes, sir.

30

Q. And did you get paid for the balance of the week? A. No, sir.

Q. And the Sunday on the end of the week was the 17th? A. Yes, sir.

Q. Were you supposed to go to another job after that? A. No, sir.

Q. What? A. No, sir.

Q. What were you waiting for? I mean, what other job were you waiting for? A. I was waiting either for Bernardsville to pick up or another job—whatever they had.

40

Frederick Ramsauer, cross

Q. And then you started the following week again? A. Yes.

Q. During that period you were keeping the truck there for the Minahan Brothers? A. Yes.

10 Q. Did the Minahan Brothers have a regular place of storage for the truck in Newark when it wasn't on the job? A. Why, they moved from Houston Street up to Bernardsville.

Q. So that before the Bernardsville job there was a regular place in Newark to store that truck? A. Yes.

Q. Where was that? A. Houston Street.

Q. And you would drive the truck in there every day? A. That is when we were down there, yes.

20 Q. Is that a public garage? A. Yes.

Q. And they paid for storage of the truck at the public garage? A. Yes, sir.

Q. And at your place they didn't pay for storage? A. No.

Q. Were you receiving as part of your salary anything that they would ordinarily pay for storage? A. No, sir.

Q. They didn't pay anything at all for it? A. No, sir.

30 Q. While the truck was there did the Minahan Brothers make inquiry of you regarding the truck? A. Not that I can recall, no.

Q. Didn't they ask you where you stored the truck? A. No, sir.

Q. Did they come up to see where the truck was stored? A. No, sir.

Q. Did they try to find out whether the truck was stored in your yard or whether it was in the Maplewood place? A. No, sir.

40 Q. Did they make any inquiry whatever regarding the truck? A. The last I heard from

Frederick Ramsauer, cross

the Minahans was on the Tuesday night, or Monday night, he came to Orange—that was the last.

Q. Then you had no occasion to speak to them thereafter? A. No, sir.

Q. Did you see them following the accident? A. Yes, I seen them the same day of the accident—two hours after. 10

Q. Whom did you see? A. Both Leo and Alfred.

Q. Did you tell them what you had done? A. I told them what I had done.

Q. Did you tell them you removed the rubbish? A. I didn't mention rubbish or nothing—just told them I got into an accident.

Q. That is all? A. At that time I was in the cell at that time. 20

Q. You told them at that time you had been drinking? A. Yes, sir.

Q. You said you were in a cell at that time? A. Yes, sir.

Q. I thought you said you were in a cellar. A. No, cell.

Q. Did they ask you about what you were using the truck for? A. Not that day, no, sir.

Q. Ramsauer, are you sure that you didn't tell the Minahan brothers when you first put the truck there that you were going to clean out the rubbish so that you could properly store the truck there? A. No, sir. 30

Q. You said nothing to them about that at all? A. No, sir—made no remark about that.

Q. When Leo Minahan or Alfred Minahan told you about storing the truck at your place or in Maplewood, did they say to you in so many words that "You can't use the truck"? A. No, sir. 40

Frederick Ramsauer, cross

Q. They had confidence in you as a driver, didn't they? A. I worked for them long enough.

Q. You had never had any trouble before? A. No, sir.

10 Q. If you had told the Minahan brothers that you were going to remove that rubbish would they have refused permission for that purpose?

Mr. Seymour: I object to that.

A. I couldn't tell you.

The Court: Strike it out.

Q. Did you get any money from the Minahan brothers after the occurrence of this accident?

20 A. After the accident?

Q. Did you get any money from the Minahan brothers after the occurrence of this accident?

A. No, sir; outside of them five days I worked up in Irvington.

Q. You never went back with them on that Bernardsville job? A. No, sir. I didn't have no license; I couldn't go back there.

30 Q. Now, let me clear up one more point, Mr. Ramsauer. Under the instructions given to you by Mr. Leo Minahan could you have stored the truck either at Maplewood or in your yard? A. Well, I kept in it my yard—

Q. No. I mean could you have put it in either place under the instructions of Mr. Minahan?

A. I think I could.

40 Q. Under those instructions could you have stored the truck in your yard one day and at Maplewood another day, and so forth? A. That would be, maybe, an inconvenience for me—one day here and one day there.

Frederick Ramsauer, cross

Q. So that it was for the convenience of having the truck accessible to you— A. (Interposing.) Yes.

Q. —so that you could go to work for the Minahan brothers? A. Yes, sir.

Q. That you put the truck in your back yard. 10
A. Yes, sir.

Q. Why didn't they store that truck at the Houston Street garage when it was brought back from the Bernardsville job? A. Well, they gave it up before they went to Bernardsville.

Q. It was because they wanted to save the expense of that month's rent? A. It wasn't that.

Q. As a matter of fact, isn't that the reason assigned to you by the Minahans—that they wanted to save garage rent for the balance of May; that they didn't want to store the truck there until June 1st? A. Not that I know of, 20
no.

Q. Do you know this gentleman sitting alongside of me at the table, Mr. Schober (indicating)? A. Yes, I have seen him.

Q. Do you recall having a conversation with him in August, 1931? A. Yes.

Q. And in the course of that conversation didn't you tell him, "Previous to May 8th I never kept a truck at my yard over night, and had them here only to make repairs. I kept it here on May 8th because told to do so, and kept it the following days, because I wasn't told to do otherwise, and I knew Minahan didn't want to start storage in the middle of the month. The truck always kept at night at a garage at 109 Houston Street, Newark, when the trucks weren't out of town on a job"? A. I don't know anything about that. 30
40

Frederick Ramsauer, cross

Q. Will you say you didn't say that to him or that you don't recall? A. I don't recall saying that to him—not about rent. I ain't got nothing to do with rent.

10 Q. So you deny making that statement? A. I didn't say I deny it. I don't remember making it.

Q. You also used the truck for your personal use in moving the household furniture? A. Yes.

Cross examination by Mr. Seymour:

Q. Whose junk was that that was moved from that yard? A. From the cars that I wrecked.

20 Q. Was there any junk there belonging to the Minahan brothers? A. Well, not anything that I can recall.

Q. Was there some there belonging to your landlord? A. Well, it was pretty well mixed up, like brush and stuff like that. We threw that all on together.

30 Q. Before you moved that junk I understand that you backed your car in the yard and drove it up there in the interim of three or four days that you went to the Caldwell and Orange jobs, is that right? A. Yes.

Q. During those backings in and drivings in there was no injury to the tires, was there? A. Well, I tried to stay away as far as I could, you see.

Q. How wide was the driveway? A. It was on a 25 foot lot, see?

Q. But there was room enough with careful driving? A. You had to be very careful.

40 Q. Where was the junk? A. Up against the fence.

*Frederick Ramsauer, cross**Cross examination (continued) by Mr. Green:*

Q. You say you don't think there was any stuff of the Minahan Brothers there. Was some of their paraphernalia there? A. He just asked me was any of the Minahan's stuff there, and I told him I couldn't recall. There might have been, maybe, changing chains and something. 10

Q. Can you recall? Just jog up your memory a little bit. A. No, I can't.

Q. What about these chains? What kind of chains were they? A. Riding chains, what we put on the truck.

Q. They may have been there? A. I don't recall having any laying around.

Q. What else might have been there? A. Well, I told you chassis and radiators, and stuff —parts of bodies. 20

Q. No, I mean stuff belonging to Minahan Brothers. A. No. That is all I can recall.

Q. But it is probable that some of their stuff was there, too? A. Well, I don't recall. That is what I said. I can't recall.

Q. You recall everything else? A. Well, I can't recall that there was anything belonging to them. 30

Q. But it is possible that some of their stuff was also there? A. No, I can't recall that now.

By the Court:

Q. Did you do a business of breaking up second-hand cars? A. Well, I had a few cars of my own, see? And I would take one part and fix up another, and throw it on the side of the fence.

Q. Parts that you personally used? A. Yes. 40

Q. Trucks? A. No.

Frederick Ramsauer, redirect

Q. Pleasure cars? A. Pleasure cars.

Q. You didn't make a business of busting up cars? A. No.

Q. This rubbish—— A. (Interposing.) That just accumulated.

10 Q. From different cars that you had broken up that you used yourself? A. Yes.

Q. Did the landlord ask you to move this junk this morning? A. No, sir.

Q. Had you ever moved the junk out of there before? A. No, that was the first time.

Q. Did you have a garage or a shed for your own car? A. No, sir.

Q. Did you have a pleasure car at the time? A. Yes, sir.

20 Q. Where did you keep that? A. Right in the yard. I kept that in one corner.

Q. Was it because you had the truck in the yard that you moved this junk, or not? A. Well, I thought if I got the junk out of there it would save the tires, and I thought by the landlord letting me keep the truck there I was repaying him that way.

Q. The tires of what? A. Of the truck. They were pneumatics.

30 Q. Well, they were pneumatics on your pleasure cars? A. Well, I didn't have to come over that far with the pleasure car.

Redirect examination by Mr. Brown:

40 Q. Before on the cross examination you testified when you came down and made the left turn there you looked to the right, and then you said you didn't turn to the left. What did you mean by that? Did you mean you didn't look to the left when you came to this corner? A.

Frederick Ramsauer, redirect

Well, I couldn't miss looking left, because I was on the left-hand side driving the truck. I had to look around the corner.

Q. Which way did you look first? A. To the right first.

Q. And then you made the swing? A. And then I made the swing. 10

By the Court:

Q. Before you made the swing did you look to your left? A. I couldn't make the swing unless I looked left, you know, to come out of 16th Avenue.

Q. Did you look left? A. I did at the time, yes. I looked right first, then I swung around and turned left, see? 20

Q. Did you look to the left before you made the swing or after you made the swing? A. After I made the swing.

By Mr. Brown:

Q. Do you remember whether it was before you completed the swing or after? A. No. I came out of 16th Avenue.

Q. Show the car just at the point you estimate it was. 30

Mr. Green: If you Honor please, I don't like to object, but what is this? Redirect or rebuttal?

The Court: Redirect. This is his witness.

Q. Just clarify that, will you, Mr. Ramsauer? Show the Court at what point you first looked down to the left. 40

Stanley Mazcurkewecz, direct

The Court: Put an X where your car was when you first looked to the left.

10 A. I was out of 16th Avenue with the front part. The whole truck wasn't out. Then I looked right and then I looked left.

By the Court:

Q. After you looked left you swung farther to your left, didn't you? A. Yes.

Q. Did you see anything when you looked to the left? A. No, sir; not at the time.

20 Q. How many feet did you go from where you first looked to the left until you came in contact with the other car? A. I was near this cross—this line here (indicating)—pretty near straight.

Q. How many feet did you travel before you came in contact with the car from the point where you first looked to your left? A. I should judge about 20 or 25 feet.

Q. So that within a distance of 20 to 25 feet this other car showed up? A. Yes, sir.

(Defendants Minahan Brothers rest.)

30

STANLEY MAZCURKEWECZ sworn in behalf of defendant Ramsauer.

Direct examination by Mr. Brown:

Q. Mr. Mazcurkewecz, where do you live? A. 46 Montrose Terrace, Irvington.

Q. Do you own that house? A. Yes, sir.

Q. How long have you owned it? A. 14 years.

40 Q. You owned it on or about May 17, 1931? A. Yes, sir.

Stanley Mazcurkewecz, direct

Q. At that time did you have a tenant by the name of Ramsauer— A. (Interposing.) Yes, sir.

Q. —living there? A. Yes, sir.

Q. Was he keeping a truck in your yard? A. Yes, he kept it a couple of days there, yes.

10

Q. On May 17, did you accompany him in carrying away some of the junk that was in the yard? A. Yes, sir.

Q. Where did you go with him, Mr. Mazcurkewecz? A. I went down Wilson Avenue, Newark, dumps.

Q. And you left the junk there? A. Yes, we dumped it out and come home.

Q. What course did you travel coming back, generally? A. Wilson Avenue, through Broad Street, Washington Street, through to 16th Avenue, all the way up to—

20

Q. Did you go up Springfield Avenue? A. Yes, sir.

Q. Where were you sitting in the truck? A. On the right-hand side of the cab.

Q. When you were coming up 16th Avenue, approaching Eastern Parkway, at what speed do you judge the truck was traveling? A. Well, we didn't go more than 10 miles an hour, and we shut—slowed down to about 5 miles on the corner.

30

Q. Did you, when you approached the intersection of Eastern Parkway and 16th Avenue, observe the Chevrolet coach coming from your left? A. Yes, I seen it.

Q. How far from the corner were you at the time you first saw the Chevrolet coach? A. About 20 feet from the corner.

40

Stanley Mazurkewecz, direct

By the Court:

Q. On the corner of where? On 16th Avenue?
A. No. We was right on the corner, but the Chevy was on this corner here (indicating). We was right in the middle of 16th Avenue here (indicating).

10

By Mr. Brown:

Q. And then what did the driver of the truck that you were in do? A. Well, he shut the engine down—slowed it down, and then he looked, and he started turning, and he was right in the middle of the street of Park Avenue when that Chevrolet ran right into him.

20

Q. What part of the truck came in contact with the Chevrolet? A. The front wheel, on the back.

Q. Will you just mark an X on the spot? A. Right on here (indicating).

Q. What part of the Chevrolet ran into it?

A. The front part.

By the Court:

Q. Is that the back or the front of that wheel?
A. The back of it.

30

Mr. Brown: Do you want to interpolate in there, indicating the back of the left front wheel and the fender adjacent thereto?

By Mr. Brown:

Q. Did you immediately get out of the truck?

A. No. I was on the truck.

40

Q. What did the driver of the truck do? A. Well, after the accident, he jumped out to see what has happened, and he asked for the license.

Stanley Mazurkewecz, direct

I was still on the truck, and he backed up the truck again and went back again to ask for the license from the lady, and he asked if she was hurt. I didn't know what he was telling her, because I was on the truck, and I didn't hear him.

Q. So that you say he got off the truck and then got back on and backed the truck up? A. 10
Yes, sir.

Q. Where did he back the truck up to? A. Back on 16th Avenue again.

Q. Was that before or after the arrival of the police patrol? A. That was before the police patrol arrived.

Q. At what point did the police patrol arrive? A. On the corner of 16th Avenue.

Q. At what time? Was it before or after the driver had gotten out of the truck the second time? A. Well, after. 20

Q. When did you get off the truck? A. I got off after the police was there.

Q. Can you tell the Court and jury whether from your observation the driver of the truck was intoxicated at the time of the accident? A. He wasn't intoxicated.

Q. You were with him all the time during the entire trip? A. Yes, sir. 30

Q. Did you stop in the saloon with him? A. Yes, sir.

Q. How many drinks did he have? A. Two.

By the Court:

Q. How much were they a drink? A. They was only small glasses.

Q. How much did you pay for them? A. 25 cents. 40

Stanley Mazcurkewecz, direct

By Mr. Brown:

10 Q. Do you recall the progress of the truck down 16th Avenue in the direction of Eastern Parkway? Can you tell the Court and jury whether the truck was zigzagging down the street? A. No, it wasn't zigzagging—the truck.

Q. Will you describe to the jury the course that the truck took after it got here (indicating), at the intersection? A. When the truck got in here on the corner?

20 Q. Yes. A. It was driving down here (indicating). He slackened it, and he started to turn right in here on Park Avenue (indicating), and the Chevrolet came in here (indicating), and she didn't stop at all. When he got in the middle of the street, right on Park Avenue, that Chevrolet ran right into the back of the wheel, and then she smashed it.

Q. When the truck was making this turn, what was the distance between the curb and the truck when the truck was nearest to the curb? A. It was over 10 feet.

Q. Over 10 feet? A. Yes.

30 Q. Was that the front of the truck or the rear of the truck? A. The front.

Q. Do you know where the rear of the truck was at that time? A. It was on 16th Avenue.

Q. How far was it from the curb? A. That was about in the middle of the street.

Q. You saw both cars after the accident? A. Yes.

40 Q. Do you know what part of the Chevrolet was damaged? A. The hood, front, radiator, and the windshield. I don't know how much more.

Q. Do you know what part of the truck was damaged? A. The mudguard was bent and the running board.

Stanley Mazcurkewecz, cross

Q. Did you receive any compensation for keeping the truck in your yard? A. No.

Q. Did you ask Mr. Ramsauer to take the junk out of your back yard? A. No.

Mr. Green: I object to that, if the Court please. He should not lead his own witness. I don't see what that has to do with this case, anyhow. 10

The Court: I thought that is what you were here for, for the last two days.

Mr. Green: His phase of the defense.

Mr. Brown: Well, I will withdraw the question if there is any objection.

Cross examination by Mr. Seymour: 20

Q. Mr. Mazcurkewecz, did you help Mr. Ramsauer load the truck there? A. Yes, sir.

Cross examination by Mr. Green:

Q. Did you talk to anybody about this case before coming here today? A. No.

Q. You didn't talk to Ramsauer or his lawyer? A. No.

Q. Did you get a subpoena? A. No. 30

Q. What? A. No.

Q. You were on the right-hand side of the cab, the driver's cab? A. Yes.

Q. The cab sets up very high, doesn't it?

A. Not very high. It is about 6 foot or 8 foot.

Q. Sitting in the cab you can look over the top of the Chevrolet coach? A. Yes.

Q. And then you tell us that you could see the Chevrolet coach run into the left side of your truck? A. Yes. 40

Q. You could see that? A. Yes.

Stanley Mazurkewecz, cross

Q. And you never moved out of the truck until a police patrol got there? A. I got out of the truck before the police came. When they came in I got off the truck.

10 Q. Did you get out of the truck after it was backed up into 16th Avenue? A. Yes, sir.

Q. And before the police patrol got there? A. Yes, sir.

Q. Was that about the time that the police patrol got there? A. No.

Q. Were you taken to the police station, too? A. Yes.

Q. Were you drunk at the time? A. No.

20 Q. Did you have anything to drink at the time? A. I had two drinks, too, with Ramsauer. I had two drinks, too.

Q. After the accident happened you didn't get out of the truck? A. No. I was right on the truck.

By the Court:

Q. Did you have the same thing to drink that Mr. Ramsauer did? A. Yes, sir.

30 Q. He treated you and you treated him, is that it? A. That is right.

By Mr. Green:

Q. Then as the truck got to the corner he had slowed down to about 5 miles an hour? A. Yes.

Q. You heard him testify that he was going about 14 miles an hour? A. That truck is rated—

40 Q. Wait a minute. Did you hear Ramsauer testify today that he was going 14 miles an hour? A. Yes.

Case

Q. Despite that you say he was going 5 miles an hour? A. No, he didn't go 14 miles.

Q. I say you heard him testify he was going at 14 miles an hour, didn't you? A. Yes.

Q. And despite that you say he was only going 5 miles an hour? A. That is all he was going— 10
5 miles an hour on that corner.

Q. You didn't talk to anybody about this case until you got here? A. No.

Q. Did you get a subpoena? A. No.

Q. Who told you to come here? A. Ramsauer's wife came down to the house, and she had told me to come down here.

Q. Did you get a subpoena fee? A. No.

Q. You just came down here? A. That is all. 20

ALBERT SCHOBBER, sworn in behalf of plaintiffs in rebuttal.

(Testimony omitted.)

Mr. Seymour: If the Court please, I move for the direction of a verdict in favor of the defendants Minahan Brothers on the ground that when the defendant Ramsauer, the driver for Minahan Brothers, was driving this truck on this occasion he was not engaged in the business of the defendant, nor was he acting as the agent or servant of the defendants Minahan Brothers, nor engaged in the business of the defendant Minahan Brothers, nor was he acting within the scope of his employment; and that he had the automobile out on that occasion without the knowledge or permission of the defendants Minahan Brothers. That is the legal ground that I make. 30
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(Counsel argue.)

Case

The Court: We can't conclude this case tonight, gentlemen, at its best, and I think I will adopt one of Mr. Green's suggestions, at least, and that is to adjourn.

(The jury returns into court.)

10

The Court (addressing the jury): It will be impossible for us to conclude this case this afternoon on account of the hour. Therefore, we will take a recess at this time until ten o'clock tomorrow morning, and you are excused until that time.

(Adjourned until tomorrow, Thursday, June 1, 1933, at ten o'clock a. m.)

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 THIRD DAY

Thursday, June 1, 1933.

(Continued pursaunt to adjournment.)

Present, counsel as before stated.

30

The Court: There was a motion made in this cause for a direction of a verdict against Leo Minahan and Alfred Minahan, individually, and as co-partners, trading as Minahan Brothers. This is a motion to direct a verdict in behalf of those two defendants. It seems to the Court that the question is whether Ramsauer was at the time he was driving the truck acting within the scope of his employment, among other things. Precisely this same set of facts has already been decided by the Supreme Court, as will appear in the decision of the Supreme Court, before Chief Justice Brogan and Justices Trenchard and Case, sitting in the case of *Nicholas v.*

40

Case

Independence Indemnity Company, 11 Misc. 344. In that case, rising out of the same accident, practically the same testimony was the basis of the contention of the plaintiff to hold the Minahan Brothers responsible in that case.

Ramsauer, the witness who testified in this case, the Court finds from reading the state of the case in the case wherein the Supreme Court filed its opinion, testified as follows, at page 33: "What was there in the yard to clean up? Rubbish? Answer: Rubbish and old parts of cars. Question: Did that interfere with the truck? Answer: Well, it blocked it up. Question: What kind of tires did the truck have? Answer: Pneumatic. Question: Pneumatic tires? Answer: Yes. Question: Was it necessary to clean up the yard to keep the truck safely? Answer: Either to clean up the yard or to cut the tires. Question: And this accident happened coming back from taking the rubbish away? Answer: Yes."

In the decision of the Supreme Court above referred to, the Supreme Court among other things says, "We think that such evidence did not show permission to use the truck on that occasion." This Court, therefore, feels inclined to follow that decision and hold that there is no evidence upon which these two defendants, the Minahan Brothers, can be held liable. Furthermore, assuming that Ramsauer's custody of the truck carried with it the implied authority to keep it safely and carrying that material from there, assuming that he had the implied authority to clear the yard to make a place for the truck, I cannot see that such authority would imply the further authority to use the truck for

Court's Charge

10 that purpose. Therefore, his authority to clear the yard, if there was such authority, could not in my opinion be stretched to include the authority to use the truck for that purpose. After all, the authority to clear the yard, if there was such authority, is at the most one implied from the authority to keep the truck, and that authority to clear the yard cannot be stretched further to include the authority to use the truck for that purpose. Therefore, the motion for the direction of a verdict as to Leo Minahan and Alfred Minahan, individually, and as co-partners, trading as Minahan Brothers, will prevail.

(Plaintiffs' counsel prays an exception to this ruling of the Court.)

20 (Exception noted as ground of appeal.)

The Court: Gentlemen of the jury, you now understand that the defendants Leo Minahan and Alfred Minahan are no longer parties to this suit from the Court's ruling. Therefore, the only remaining defendant is Fred Ramsauer.

(Mr. Brown sums up for defendant Ramsauer.)

(Mr. Green sums up for plaintiffs.)

30

The Court charges the jury as follows:

Court's Charge

SMITH, JOSEPH L., *J.*

Gentlemen of the Jury:

40 This is an action brought by Lydia A. Fox, a minor under fourteen years of age, by her next friends, her parents, Leonard J. and Lydia H.

Court's Charge

Fox. That is the first action. There is also an action brought by Leonard J. Fox, the father. That is the second action. Then there is an action by Lydia H. Fox, the mother. That is the third action. All are against Fred Ramsauer, the driver of the truck. The case against the Minahan Brothers is out. The purpose of the actions is to recover for personal injuries and damages claimed to have been sustained by the three plaintiffs as the result of a collision between the automobile in which the plaintiffs were riding as passengers, driven by Miss Nicholas, and the truck driven by the defendant, Ramsauer, on May 17, 1931, at the intersection of Eastern Parkway and 16th Avenue, Irvington, New Jersey.

10

20

If during the course of the trial the Court has made any rulings on the admission or the rejection of certain testimony or evidence, or on motions addressed to the Court, your determination of the facts is not to be influenced by such rulings, because the Court ruled on questions of law. The Court is the sole judge of the law. You gentlemen are the sole judges of the facts. You are to decide the credibility of the witnesses where there is any contradictory testimony, and in so doing you naturally take into consideration the interest and relationship of the litigants and those who may be called as witnesses in their behalf, their general demeanor and actions on the witness stand, and the impressions that they have created in your minds. You determine the facts from the evidence as you have heard it, and apply the rules as the Court gives them to you. You are not to take into consideration any statements by the Court or by counsel in reference to any of the testimony, which conflicts

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Court's Charge

with your own recollections and understanding of the facts, but you are to rely entirely on your own recollections as to what the testimony and the evidence are. Your recollections are what are to control you in your deliberations.

10 The plaintiffs at the time were riding in the automobile of Miss Nicholas, proceeding in a northerly direction on Eastern Parkway, which runs between Springfield Avenue and South Orange Avenue in Irvington. The truck, which was a bull dog Mack truck, was being driven by Ramsauer in a westerly direction on 16th Avenue, which runs into Eastern Parkway, but does not go through it. The truck was making a left-hand turn, turning into Eastern Parkway, when
20 the collision occurred.

I am not going to review any of the detailed facts for you. You gentlemen have to determine the facts from your own recollections, and they are just as fresh in your minds as they are in the Court's.

30 The mere happening of an accident does not spell out negligence. The burden of the proof is upon the plaintiffs to establish their cases by a fair preponderance of the evidence—that is, the evidence must weigh in their favor. In order for them to be entitled to your verdict, they must establish negligence on the part of the defendant.

40 Negligence is the failure to observe for the protection of another that degree of care, precaution, and vigilance which the circumstances justly demand; namely, reasonable care. Reasonable care is such care as a reasonable person exercises in view of all the circumstances presented to him—such care as an ordinarily prudent person would exercise under the conditions

Court's Charge

at the time he is called upon to act. Where by reason of such failure such other person suffers injuries or damages, the negligence must be the natural and proximate cause of the injury or damage.

Natural and proximate cause is that cause which naturally and probably led to and which might have been expected to produce the result; namely, the efficient cause.

In this case the negligence of Miss Nicholas is no part of your determination. Under the theory of this case it is contended by the plaintiffs that Ramsauer, in making a left turn, so to speak, cut the corner.

Our Motor Vehicle and Traffic Acts provide among other things that when one intends to turn to the left, the driver shall, in making the turn, pass immediately to the left of the center of the intersection, passing as closely as shall be practicable to the left of the center of the intersection. A motorist making a left-hand turn at an intersection is obliged to use great care and seek an opportune time to turn.

The fact that Ramsauer is alleged to have been intoxicated, if he was, does not in itself spell out liability. Driving a car while intoxicated is a violation of the Motor Vehicle Act, and as such is a circumstance to be considered in determining the question of negligence. Intoxication is shown as tending to prove negligence, but liability depends on negligence. Violations of the Traffic Act or Motor Vehicle Act are not in themselves controlling. They are not conclusive evidence of negligence, but they are evidence of negligence. They are circumstances in the case from which you may infer negligence. Consider them together with all the other facts and circumstances in the case.

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Court's Charge

10 If after considering this case you come to the conclusion that the defendant driver was not guilty of negligence or that his alleged negligence was not the proximate cause of the injuries and damages sustained by the plaintiffs, your verdict will be in favor of the defendant, no cause of action.

If you find that the defendant driver was guilty of negligence and that his negligence was the proximate cause of the injuries sustained by the plaintiffs, your verdict will be against the defendant, Ramsauer.

20 If you find that the plaintiffs are entitled to your verdict, then you come to the question of damages, which, of course, you cannot consider until you first settle the question of liability. There are in this case three plaintiffs, the child, bringing the action in the name of her parents as next friends, and the parents individually. If the defendant is liable, all the plaintiffs will be entitled to verdicts. If so entitled to your verdict the child will be entitled to compensation in money damages in so far as money can compensate her for her injuries which she has sustained and for the pain and suffering which she has undergone and for the effects upon her health and mind, according to their duration, degree, and permanency, taking into consideration the likelihood of her injuries being permanent.

30

As for the damages to Leonard J. Fox, the father, as such, he is entitled to compensation, if entitled to your verdict, for the loss of the services of the child up to the time she becomes emancipated, and for the expenses which he has incurred and may hereafter incur in the cure and treatment of the child.

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Aside from their claim as parents or next friends, the plaintiffs Leonard J. Fox and Lydia

Court's Charge

H. Fox, the mother and father, contend that they have received certain injuries, for which they would be entitled to compensation, if they are entitled to your verdict, in money damages, in so far as money can compensate them for their injuries and for their pain and suffering, and for the effect of such injuries upon their health, according to their duration, degree, and permanency. They would also be entitled to any money they have expended or may hereafter expend for the cure of such injuries, if there are any, and for the damages sustained by reason of the inability of the father in the past or in the future to attend to his usual occupation or business.

10

The plaintiff Leonard J. Fox, as the husband of the plaintiff Lydia H. Fox, will also be entitled to compensation, if entitled to your verdict, for the money which he may have spent or may hereafter spend for the cure and treatment of his wife, Lydia, and for the loss of her services, society, and consortium.

20

The Court has been requested to charge on behalf of the defendant Fred Ramsauer the following requests:

The first request the Court declines to charge.

The second request the Court charges: "Even if you find that the defendant, Fred Ramsauer, was intoxicated at the time of the accident, this is not of itself conclusive proof that the defendant, Fred Ramsauer, was negligent at the time of the accident; in order to find a verdict for the plaintiff you must further find that the defendant, Fred Ramsauer, was negligent and that such negligence was the proximate and sole cause of the accident."

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The third request I will charge as modified: In order for the plaintiff to recover, you must

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Court's Charge

10 find, as a matter of fact, that the plaintiffs have established by a preponderance of the evidence, that the defendant, Fred Ramsauer, was negligent at the time of the accident, such negligence being the proximate and sole cause of the accident. Proof of unseemly conduct on the part of the defendant, Fred Ramsauer, after the accident, does not in itself establish such negligence as will entitle the plaintiff to recover.

The Court has also been given certain requests to charge on behalf of the plaintiffs. The first request the Court declines to charge, except as already charged. The second request the Court declines to charge as not being in issue.

20 The third request I will charge you as modified. If you find from the evidence that the negligence on the part of the drivers of both vehicles proximately caused the accident, the same is no bar to recovery by the plaintiffs and against the defendant, but you must return a verdict in favor of the plaintiffs.

30 The fourth request I will charge you. I charge you as a matter of law that the plaintiffs in this case were not guilty of any contributory negligence which contributed to the accident. If you find that the defendant driver was negligent and that his negligence was a proximate cause of this accident, then you must find in favor of the plaintiffs.

The fifth request I decline to charge, as not in issue. The sixth request I decline to charge, as there is no evidence to sustain it.

40 Request 6A I will charge. Article 14 of the Traffic Act of the State of New Jersey provides that the driver of a vehicle intending to make a left-hand turn shall approach the intersection in the lane for traffic to the right of and nearest

Court's Charge

to the center line of the highway. If you find that the defendant, Ramsauer, disregarded this provision of the Traffic Act, then such violation may be considered by you as a factor in determining the negligence of the operator of the truck.

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The seventh request I will decline to charge, excepting as already charged. The eighth request I decline to charge.

The ninth request I will charge you. If you find from the evidence that the defendant driver did not make observations to his left before attempting to make his left-hand turn into Eastern Parkway, and that his failure to make such observation proximately caused the accident, then plaintiffs are entitled to a verdict.

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The tenth request I will charge you. Section 4B of Article 9 of the Traffic Act of the State of New Jersey, provides that it shall be unlawful for the driver of a vehicle to exceed the speed of 15 miles an hour when approaching within 50 feet, and in traversing an intersection of highways, when the driver's view is obstructed. If you find that Ramsauer disregarded this provision of the act, such a violation shall be considered by you as a factor in determining whether or not he was negligent.

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The eleventh and twelfth requests I will decline to charge, except as already charged. The thirteenth to twentieth requests are out.

The twenty-first request I will charge you as modified. If you find that the plaintiffs are entitled to verdicts, you shall bring in three verdicts, one in favor of Mrs. Lydia H. Fox for the injuries received by her, her pain and suffering of body and of mind, and her future pain and suffering, for the injury to her scalp and head, for

40

Court's Charge

10 the permanent visible scars resulting therefrom, which may cause her humiliation, embarrassment, and discomfort of mind, for her nervousness and insomnia, for the concussion of the brain and subsequent headaches, also for the effect of these injuries on her future health. You shall bring in a verdict in favor of Mr. Leonard J. Fox for all the moneys expended by him for medicines, medical attention and other expenses incident upon his wife's injuries, his daughter's injuries, and his own injuries, for moneys he will expend in the future in an endeavor to cure his wife and daughter of their injuries, and for the loss of service and consortium of his wife, which he would have obtained from her if she had not been injured, and for his own personal injuries, and for the duodenal ulcer, if you find that the ulcer condition was in part caused by the accident. You will also bring in a verdict in favor of the infant plaintiff, Lydia A. Fox, for the pain and suffering this child sustained, for the cuts on her face, and for the injuries to her teeth and the consequent deformity of her teeth, for the injury to her head and face, and for the humiliation, embarrassment, consequent other deprivations which this infant may suffer as a result of these scars, for her nervousness, and for the future effect of all these injuries upon her future health.

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40 Before you retire, in order that there may be no misunderstanding, by order of the Court you are to find a verdict in favor of Leo Minahan and Alfred Minahan, individually, and as copartners, trading as Minahan Brothers. Under an order of the Court, the Court directs such a verdict.

I submit the case to you gentlemen now for your consideration.

(The jury retires.)

Exceptions

Plaintiff's counsel prays an exception to the Court's direction to the jury to bring in a verdict in favor of the defendants Minahans, individually, and as co-partners, trading as Minahan Brothers.

Exception noted as ground of appeal.

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Plaintiff's counsel prays an exception to the Court's charging defendant's requests Nos. 2 and 3.

Exception noted as ground of appeal.

Plaintiffs' counsel prays an exception to the Court's refusal to charge plaintiffs' first request to charge, reading as follows: "If you find from the evidence that the defendant, Ramsauer, operating the truck did not exercise proper caution in respect to speed and control in approaching the intersection of 16th Avenue and Eastern Parkway, that is to say, that he did not exercise such care as an ordinary, prudent person would exercise under like circumstances, and that the same was the proximate cause of the injuries received by the plaintiffs, who were free from contributory negligence, then your verdict shall be in favor of the plaintiffs and against the defendants."

20

Exception noted as ground of appeal.

30

Plaintiffs' counsel prays an exception to the Court's refusal to charge plaintiffs' second request to charge, reading as follows: "If you find from the evidence that Mr. and Mrs. Leonard J. Fox were passengers in the Nicholas automobile and had no control over same, then any negligence on the part of Mildred Nicholas cannot be imputed to the plaintiffs in this case."

Exception noted as ground of appeal.

40

Plaintiffs' counsel prays an exception to the

Exceptions

10 Court's refusal to charge plaintiffs' fifth request to charge, reading as follows: "The infant plaintiff, Lydia A. Fox, being a child under the age of five years at the time of the accident, was therefore in the eyes of the law not *sui juris* and therefore as a matter of law cannot be charged with any negligence whatsoever."

Exception noted as ground of appeal.

20 Plaintiffs' counsel prays an exception to the Court's refusal to charge plaintiffs' seventh request to charge, reading as follows: "Since the testimony is to the effect that Ramsauer was attempting to make a left-hand turn into Eastern Parkway, he was obliged, under the law, to use great care and seek an opportune time to make this turn, and if you find that Ramsauer did not use great care and seek an opportune time to make his left-hand turn, and that his failure to do so was the proximate cause of the accident, then you shall return a verdict in favor of the plaintiffs (*Senofsky v. Frecker*, 10 Misc. 505)."

Exception noted as ground of appeal.

30 Plaintiffs' counsel prays an exception to the Court's refusal to charge plaintiffs' eighth request to charge, reading as follows: "The fact that the defendant's truck collided with the automobile in which the plaintiffs were passengers while the defendant driver was attempting to make his left-hand turn is some evidence that the defendant driver did not use great care and did not seek an opportune time in making his turn (*Senofsky v. Frecker, supra*)."

Exception noted as ground of appeal.

40 Plaintiffs' counsel prays an exception to the Court's refusal to charge plaintiffs' eleventh request to charge, reading as follows: "If you find that Ramsauer was operating his truck while

Exceptions

intoxicated and that his incompetence to control the truck by virtue of his intoxication proximately caused this accident, then you shall return a verdict in favor of the plaintiffs.”

Exception noted as ground of appeal.

Plaintiffs' counsel prays an exception to the Court's refusal to charge plaintiffs' twelfth request to charge, reading as follows: "If you find that Ramsauer was driving under the influence of intoxicating liquors, and that this was a proximate cause of the accident, then your verdict shall be in favor of the plaintiffs.”

10

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that part of the Court's charge wherein the Court stated that violation of the Motor Vehicle Act is not conclusive evidence of negligence, but it is evidence of negligence, on the ground that such a violation is not evidence of negligence.

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Exception noted as ground of appeal.

Defendant's counsel prays an exception to that part of the Court's charge wherein the Court charged as a matter of law that the plaintiffs were not guilty of contributory negligence, since it was possible for the adult plaintiffs to be guilty of contributory negligence in this case.

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Exception noted as ground of appeal.

Defendant's counsel prays an exception to the Court's refusal to charge defendant's first request to charge, reading as follows: "In order for the plaintiffs to recover, it is necessary that they prove negligence on the part of the defendant and lack of negligence on their own part, and such proof must be by a preponderance of the evidence," on the ground that lack of negligence on the part of the adult plaintiffs is a material part of the case and may be proved by the defendant.

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Exception noted as ground of appeal.

131MAY.T.1934

New Jersey Court of Errors and Appeals

LYDIA A. FOX, by LEONARD J.
FOX and LYDIA H. FOX, next
friends, and LEONARD J. FOX
and LYDIA H. FOX,
Plaintiffs-Appellants,

against

LEO MINAHAN and ALFRED
MINAHAN, individually and co-
partners, trading as MINA-
HAN BROTHERS, and FRED
RAMSAUER,
Defendants-Respondents.

Action at Law

On Appeal from
Essex County
Circuit Court

BRIEF OF PLAINTIFFS-APPELLANTS

(Italics ours unless otherwise noted.)

Statement

This is an appeal by the plaintiffs in a negligence action instituted by them against the owners (defendants Minahan Brothers), and the operator (defendant Ramsauer) of a motor truck, in which the trial court (Circuit Court Judge JOSEPH L. SMITH), at the conclusion of the case, directed a verdict in favor of the defendants Minahan Brothers, and against the plaintiffs, and submitted the case to the jury

against the defendant Ramsauer, and the jury brought in verdicts in favor of the plaintiffs and against the defendant Ramsauer, aggregating \$5,000.00.

Plaintiffs - appellants prosecute this appeal from said judgment based on directed verdict in favor of said defendants-respondents, Minahan Brothers, owners of the truck involved in the accident.

Facts

The *undisputed* facts are as follows:

On May 17th, 1931, plaintiffs were passengers in an automobile which was involved in an accident with a seven-ton dump truck (C. p. 36, ll. 17-19) owned by defendants Minahan Brothers, and operated by defendant Ramsauer.

Ownership of the truck by said defendants Minahan Brothers is alleged in the First Count, paragraph 1 of the Complaint (C. p. 4), and is admitted in Answer to First Count, paragraph 1, of defendant's Answer (C. p. 13).

The automobile in which plaintiffs were riding was proceeding in a northerly direction in and along Eastern Parkway, and defendants' truck was being driven in a westerly direction in and along Sixteenth Avenue, in the Town of Irvington, Essex County, New Jersey.

Collision between the motor vehicles took place at the intersection of said Sixteenth Avenue and Eastern Parkway.

As a result, all of the plaintiffs were injured.

At the end of the plaintiffs' case, counsel for defendants Minahan Brothers, owners of said truck, moved for a nonsuit, which motion was denied (C. pp. 24, 25).

All the defendants then presented their defenses and produced as witnesses the defendants and one Stanley Mazcurkewecz. The latter was riding in the truck with Ramsauer (C. p. 75). Defendants Minahan Brothers were a contracting firm in business for about six years with offices at Newark, New Jersey (C. p. 25, l. 38).

Defendant Ramsauer worked for said defendants Minahan Brothers for about six years as the operator of the truck in question. Minahan Brothers had confidence in him and they entrusted him with the care of the truck involved in the accident (C. p. 31, ll. 38-43; p. 33, ll. 7-11). The defendant Ramsauer resided at 46 Montrose Terrace, Irvington, New Jersey, where he was a tenant of said witness, Stanley Mazcurkewecz, and there was a yard in connection with the said premises (C. p. 74 bottom, p. 75 top).

The defendant Ramsauer brought the truck from Bernardsville, New Jersey, where defendants Minahan Brothers stored it on the lot where they were working (C. p. 32, ll. 25-35).

The Bernardsville job was shut down temporarily and there was no definite date when truck was to go back there (C. p. 35, ll. 35-40) and until Bernardsville job was resumed truck was to be stored in Ramsauer's yard (C. p. 36, ll. 1-10).

On Saturday, May 9th, Ramsauer took truck to his yard and kept it there (C. p. 27, ll. 36-39) until Monday, when he took it to other jobs and was instructed by defendants Minahan Brothers to return it to his (Ramsauer's) yard on Wednesday (C. p. 28, ll. 32-42). The truck did not work or go out the balance of that week (C. p. 29, ll. 5-7; C. p. 35, ll. 31, 32) because it was raining (C. p. 63, ll. 24-26). The truck

finished the job at Caldwell, it could not be left there because there was no one to watch it and defendants Minahan Brothers informed their driver, the defendant Ramsauer, that they would like to put it down in his yard or in one of the other drivers' yards. They did not have any garage or space of their own to put truck in the vicinity, so they instructed him to store it in his or another driver's yard (C. p. 28, ll. 10-20; p. 33, ll. 39-41; p. 60, ll. 5-15).

Before the Bernardsville job defendants Minahan Brothers stored the truck in a public garage at Newark and paid storage for same (C. p. 66, ll. 8-22).

Defendants Minahan Brothers did not pay storage to Ramsauer for keeping the truck in his yard (C. p. 36, ll. 11-12; p. 60, ll. 10-11, 18; p. 66, ll. 23-29).

The truck was kept in Ramsauer's yard for the convenience of the firm (C. p. 36, ll. 13-15; p. 66, ll. 6-7; p. 69, ll. 1-10).

Ramsauer could not store the truck in other driver's yard because on previous occasion neighbors objected (C. p. 34, ll. 17-30).

There was quite a little dirt in Ramsauer's yard, "an accumulation of cars and stuff," consisting of broken up chassis, radiators, parts of bodies, springs, axles, jagged edges on the metal which might injure the tires (C. p. 61, ll. 36 to bottom; p. 62, ll. 1-8; p. 64, ll. 20-21; p. 71, ll. 18-21).

It was necessary to clean up the yard and remove the rubbish, otherwise the tires would be cut (C. p. 63, ll. 17-20, 24-27; p. 65, ll. 16-17; p. 72, ll. 22-29).

The dirt blocked the truck to a certain extent (C. p. 63, ll. 1-10). Ramsauer cleaned up the

rubbish so he could get in and get closer to the fence (C. p. 64, ll. 40-42).

The defendants Minahan Brothers wanted the truck kept in a safe place and wanted Ramsauer to exercise care and supervision over it while it was there for the convenience of the firm (C. p. 36, ll. 28-35).

Defendants Minahan Brothers wanted the truck stored in a place where there wouldn't be any glass or nails to puncture the tires (C. p. 36, ll. 37-39).

It was a valuable truck (C. p. 36, l. 20) and was worth about \$1,500.00 (C. p. 36, ll. 25-27). The truck had 6 pneumatic tires (six wheeled truck), which cost about \$90.00 each, value of which was about \$500.00 (C. p. 36, ll. 35-42; p. 37, ll. 1-8; p. 63, ll. 14-16). Defendant Ramsauer cleaned up the yard on May 17th, 1931, and took the load of rubbish to the dumps and used the truck in so doing, and while returning from the dumps the accident in question occurred (C. p. 63, ll. 21-23).

The landlord did not ask Ramsauer to remove the junk (C. p. 62, ll. 12, 13).

The defendants Minahan Brothers did not tell Ramsauer he could not use the truck (C. p. 67, ll. 37-42). In this posture of proofs, the defendants Minahan Brothers moved for a direction of a verdict in their favor, "on the ground that when the defendant Ramsauer, the driver for Minahan Brothers, was driving this truck on this occasion he was not engaged in the business of the defendant, nor was he acting as the agent or servant of the defendants Minahan Brothers, nor engaged in the business of the defendant Minahan Brothers, nor was he acting within the scope of his employment; and that he had the

automobile out on that occasion without the knowledge or permission of the defendants Minahan Brothers'' (C. p. 81 bottom).

The trial court granted the motion of defendants Minahan Brothers and directed the jury to bring in a verdict in their favor, on the ground that Ramsauer was not acting within the scope of his employment at the time of the happening of the accident (C. pp. 82, 83 and 84). Plaintiffs' counsel prayed an exception to the ruling of this Court, and the exception was noted as ground of appeal (C. p. 84, ll. 18-20).

The case was submitted to the jury as to the defendant Ramsauer, and the jury brought in verdicts in favor of the plaintiffs aggregating \$5,000.

Judgments were entered accordingly (C. pp. 21 and 22).

The foregoing facts are undisputed and is the testimony of all the defendants as the same appears in the State of Case. As plaintiffs' testimony and case has no bearing on the ruling of the court as defendants Minahan Brothers founded their motion for direction solely on question whether defendant Ramsauer was acting within the scope of his employment at time of happening of accident (C. p. 81, bottom), from which appeal is taken, and as same would only encumber State of Case and add unnecessary expense, same was omitted.

Plaintiffs alleged the following grounds of appeal (C. pp. 1 and 2):

1. The Circuit Court erred in directing a verdict in favor of defendants Leo Minahan and Alfred Minahan, individually and co-partners, trading as Minahan Brothers, and against the plaintiffs.

2. The Circuit Court erred in entering a judgment in favor of the defendants Leo Minahan and Alfred Minahan, individually and co-partners, trading as Minahan Brothers, without the rendition of a verdict by the jury.

POINT I

The Circuit Court erred in directing a verdict in favor of the defendants Leo Minahan and Alfred Minahan, individually and co-partners, trading as Minahan Brothers, and against the plaintiffs.

It is well established, that upon a motion for a direction of a verdict, the truth of the plaintiffs' evidence and of every inference of fact which can be legitimately drawn therefrom is admitted. In passing on a motion to nonsuit, and afterwards to direct a verdict the court cannot weigh the evidence but must take as true all evidence which supports the view of the party against whom the motions are made. *Fox v. Great Atlantic & Pacific Tea Company*, 84 N. J. L. 726 (E. & A. 1913); *Fagan v. Central Railroad Company of New Jersey*, 94 N. J. L. 454 (E. & A. 1920); *Andre v. Mertens*, 88 N. J. L. 626; *Ward v. Erie Railroad*, 89 N. J. L. 525; *Courtney v. Public Service Railway Company*, 97 N. J. L. 564.

As the court said in *Fagan v. Central Railroad Company of New Jersey*, *supra*, on page 457:

“* * * in passing upon a motion for the direction of a verdict, the court cannot

weigh the evidence but must take as true all evidence which supports the view of the party against whom the motion is made, and must give him the benefit of all legitimate inferences which may be drawn therefrom. *Andre v. Mertens*, 88 N. J. L. 626."

Proof of ownership, without more, of an automobile which was being driven upon a public highway, raises a presumption of fact that the automobile was in the possession of the owner, if not personally, then through his servant, the driver. Such proof likewise raises a presumption that the driver was acting within the scope of his employment. *Answer admitted ownership* (C. p. 13, ll. 37-39). *Mahan v. Walker*, 97 N. J. L. 304 (E. & A. 1922); *Tischler v. Steinholtz*, 99 N. J. L. 149 (E. & A. 1923).

There is, perhaps, no rule of law better settled than that a master is ordinarily liable to answer in a civil suit for the tortious act of his servant if the act be done in the course of employment in his master's service. Whether so done or not must depend upon the facts of each particular case. *Aycrigg v. New York & Erie Railroad Company*, 30 N. J. L. 460; *Doran v. Thomsen*, 74 N. J. L. 445; *Klitch v. Betts*, 89 N. J. L. 348 (E. & A. 1916); *McCann v. Consolidated Traction Co.*, 59 N. J. L. 481 (E. & A. 1896). In the case of *Klitch v. Betts, supra*, a dentist was held responsible for the negligent act of his assistant in extracting a tooth. The assistant had orders that he was to work for the dentist from 9:00 a. m. to 6.00 p. m. On a certain evening at 8:00 p. m., and without the knowledge of the defendant, the assistant extracted a tooth from the plaintiff's mouth. The master was there held liable. The court said on page 351:

“The general rule is a very clear one, that the master is liable for any act of his servant done within the scope of his employment, and if a servant is acting in the execution of his master’s orders, and by his negligence causes injury to a third party, the master will be responsible, although the servant’s act was not necessary for the proper performance of his duty to his master or was even contrary to his master’s orders. *McCann v. Consolidated Traction Co.*, 59 N. J. L. 481, 487.

“The application of the rule *respondeat superior* does not depend upon the obedience of the servant to his master’s orders, nor upon the legality of the servant’s conduct; where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the acts done may be the very reverse of that which the servant was actually directed to do. *Driscoll v. Carlin*, 50 N. J. L. 28, 30.”

We have, in the case at bar, the situation of a truck on a public highway, owned by the defendants. Presumably it is being driven by their agent and in the course of his employment. In order for the defendants to overcome this presumption they must present proof that the driver was not acting in the course of his employment at the time of the accident. When this proof is offered a jury question arises and it is the province of the jury to say whether the defendants have overcome the presumption which existed. *It is improper for the court to take this question from the jury and direct a verdict when there is any evidence which is contradictory or which is reasonably subject to contradictory interpretation. Tischler v. Steinholtz, supra; Mahan v. Walker, supra; Crowell v. Padolsky*, 98 N. J. L.

552 (E. & A. 1923); *Missell v. Hayes*, 86 N. J. L. 348 (E. & A. 1914); *Conway v. Pickering*, 111 N. J. L. 15 (E. & A. 1933).

In the case of *Conway v. Pickering*, *supra*, the court says on page 16:

“The ownership of personal property (and of course this includes an automobile) carried with it a presumption that it is within the control and operation of the owner or his servant, and to overcome this presumption the evidence must be ‘clear, convincing and uncontradicted’ that such control did not exist. Such is the doctrine in this court as laid down in numerous cases. *Missell v. Hayes*, 86 N. J. L. 348; *Mahan v. Walker*, 97 *id.* 304; *Tischler v. Steinholtz*, 99 *id.* 149.”

A very succinct meaning of the doctrine of *respondeat superior* is set forth in 39 *Corpus Juris*, on page 1283, paragraph 1472, where the learned editor says:

“* * * An act is within the scope of the servant’s employment, where necessary to accomplish the purpose of his employment, and intended for that purpose, *although in excess of the powers actually conferred on the servant by the master. So long as the servant has done some act in furtherance of the master’s business he will be regarded as acting within the scope of his employment, although he may have exceeded his authority.*”

And on page 1284 it is further stated:

“Where it is doubtful whether a servant in injuring a third person was acting within the scope of his authority, it has been said that the doubt will be resolved against

the master because he set the servant in motion, at least to the extent of requiring the question to be submitted to a jury for determination.”

Several cases hold that an employee is acting within the implied or apparent scope of his authority when he is doing any act which is either *beneficial* to the master or *in protection of the master's property*, as here. *DePue v. Salmon Company*, 92 N. J. L. 550 (E. & A. 1919); *West Jersey & Seashore Railroad Company v. Welsh*, 62 N. J. L. 655 (E. & A. 1899); *Dierkes v. Hauxhurst Land Company*, 80 N. J. L. 369 (E. & A. 1911); *Adams Express Company v. Lansburgh*, 262 Fed. 232 (Court of Appeals, District of Columbia 1920).

In the case of *West Jersey & Seashore Railroad Company v. Welsh*, *supra*, the facts were that a brakeman in the employ of a railroad company, and one of a crew in charge of a freight train used unnecessary force in ejecting a trespasser from the train. The court held the defendant railroad company liable, saying on page 659:

“* * * That implied authority in a servant would be inferred to do all those things that were necessary for the protection of the property entrusted to him, or for fulfilling the duty which he has to perform.”

In the case of *Dierkes v. Hauxhurst Land Company*, *supra*, a defendant owned property and left a caretaker in charge thereof. He had never given the caretaker any authority to expel trespassers. The plaintiff trespassed upon the land and the caretaker set his own two dogs after

her. She was frightened, fell over a rocky bluff, and was injured. There was a nonsuit at the trial court, on the ground that the caretaker was not acting within the scope of his employment. This was reversed on appeal and the court held that although the caretaker did not have any express authority to do what he had done that he was, nevertheless, engaged in protecting his employer's property. The act was said to have been done in the course of his employment, for that reason. The judgment of the trial court was reversed.

The defendants Minahan Brothers entrusted their truck to Ramsauer and in fact made him the caretaker thereof. They gave him implied authority to do what was reasonably necessary for the protection of their property. *West Jersey & Seashore Railroad Company v. Welsh, supra*. Ramsauer testified that he removed the rubbish so that he would not cut the tires on the truck (C. p. 65). This was certainly an act done for the benefit of his employer, and for the protection of the employer's property. There was no instruction given to Ramsauer that he was not to use the truck (C. p. 67). Under cross examination Ramsauer admitted that some of the rubbish which he removed on the date of the accident may have belonged to the Minahan Brothers. He spoke in particular that there may have been some riding chains lying around in the yard (C. p. 71). The same employee testified that it was in his discretion whether he was to keep the truck in his back yard or whether he should keep it in someone's yard in Maplewood, and that he could have stored it in his yard one day, and in Maplewood another

day, if he saw fit. It was for his convenience so that he might better work for the Minahan Brothers that he was storing the truck in his yard (pp. 68 and 69, also C. pp. 33, 34 and 35). It was within his authority to change the storage place of the truck if he deemed it advisable to do so. There can be no question but that an accident which might have happened when he was en route to store the truck would be held to have occurred within the scope of his employment. There seems little difference between this supposititious set of facts and the case at bar. Under the facts which actually existed, he was doing something to make it more convenient and more safe for the truck to be kept where his employers gave him orders to keep it. He was not only doing something for their benefit, but was doing something for the protection of their property. It can certainly not be said that this rubbish was removed for the benefit of the landlord. The rubbish had accumulated for a long period of time, and no one had seen fit to remove it before this truck owned by Minahan Brothers was to be stored in the yard. The landlord himself definitely says that he did not ask to have the junk removed (C. p. 79). Mr. Leo Minahan testified that the truck was valuable, and that he wanted Ramsauer to exercise care and supervision over it, that he wanted this done for the convenience of the firm, *and that he wanted the truck stored in a place where there wouldn't be any glass or nails to puncture the tires* (C. p. 36).

This testimony is followed by that of Ramsauer, where he definitely says in answer to question as to why he removed the rubbish: "So I wouldn't cut my tires—that is what I removed it for" (C. p. 65).

We respectfully submit that the decision of the Supreme Court in the case of *Nicholas v. Independence Indemnity Company*, 11 N. J. Misc. 344, is in no way dispositive of the question of agency presented in the case at bar. The case cited was merely a suit upon an insurance policy, and was appealed from a District Court. The question in that case was whether or not the driver was covered under the narrow terms of an insurance contract. The Supreme Court in deciding the issue did not have the advantage of an exhaustive record, and did not have before it the testimony of the owners as we have in the case at bar. The testimony before the court in the *Nicholas* case was at best very meager, and the court did not have the opportunity to examine the true relationship existing between the employer and employee, and naturally could not consider those fine points upon which the doctrine of *respondet superior* is founded. In the present case, all of the testimony taken together most certainly gave rise to such an inference of agency that the jury should have been allowed to pass upon it.

The recent case of *Meicke v. Silk City News Company, et al.*, 106 N. J. L. 513 (E. & A., 1930), decided the propriety of the trial court's charge to the jury, in which a certain test of agency was laid down. The question in that case was whether a truck driver was at the time of the accident engaged in the work of the defendant. There was a very close question as to which of the two defendants he was actually working for at the time of the accident. The trial court allowed the case to go to the jury with the following charge:

“The only way that a person not the driver of the car can be made liable is that

the driver of the car was in a legal sense an agent or servant of that defendant. That does not necessarily mean that there must exist a written contract of employment between the two or that anything need be evidenced by any formality, such as a written contract. But the relationship of master and servant is not necessarily created by any written document. It may be created by circumstances as they exist. The test as to whether there is a relationship of master and servant is that the driver, the so-called servant, was at the time of the accident engaged in something for the master. * * *

“So the question for your determination is whether the evidence has disclosed by a fair preponderance of the evidence that the driver was, technically speaking, a servant of the news company, that is, whether he was doing something for the news company, and that at its request or by its acquiescence or by its permission. If he was, then, of course, the news company would be liable for the acts of their so-called servant.”

The court on appeal gave its approval to the charge set forth above. Applying the test of the cited case, it most certainly appears that the testimony in the case at bar gave rise to such an inference that the jury would have been justified in finding that Ramsauer was doing something for the Minahan Brothers at the time of the accident in question.

The case of *Adams Express Company v. Lansburgh, supra*, is a very able opinion by the Court of Appeals of the District of Columbia. The express company employed a helper to ride on the truck with the driver. The driver in order to make deliveries locked the truck and placed the key under the seat. The helper had been ex-

pressly forbidden to drive or operate machines of the express company. Such instructions were given him personally, signs and notices were posted, and the rule books forbade the driving or operating of machines by helpers. At the request of a third party, the helper started the truck and through his negligence caused considerable damage. This was without the knowledge and against the specific instructions of the employer. The employer was nevertheless held liable. The court in deciding the case summarizes the law on the question, and implies that it is impossible to precisely define the meaning of "scope of employment." The court, on page 233, cites for approval several cases which hold that an employee is acting within the scope of his employment, that his act is done in the "furtherance of the employer's interest," and in the "protection of employer's property."

Applying the test of the *Adams Express Company v. Lansburgh* case, *supra*, it certainly was "reasonably necessary" in the light of the circumstances for Ramsauer to clean up his back yard to enable him to manipulate his truck with facility and also to protect the tires of same.

It was the natural and ordinary act for any truck driver to do under the circumstances. It was beneficial to Minahan Brothers (*Depue v. Salmon Co.*, *supra*). It was in furtherance of the business of Minahan Brothers (*Adams Express Co. v. Lansburgh*, *supra*). It was necessary to preserve and protect the truck from injury (*Dierkes v. Hauxhurst Land Co.*, *supra*; *West Jersey & Seashore Railroad Co. v. Welsh*, *supra*).

When Minahan Brothers entrusted their truck to Ramsauer, they in effect made him the care-

taker thereof, and therefore he had the authority, either expressed or implied, to preserve it from injury. Certainly, if the tires on the Minahan Brothers truck were damaged, because of the condition of the back yard, and it was necessary for Ramsauer to change those tires in order to operate the truck on his employer's business, and if in the course of changing the tires Ramsauer negligently inflicted injury upon the plaintiffs in this case, then it would be clearly held that these injuries occasioned to the plaintiffs happened within the scope of Ramsauer's employment. It logically follows that where Ramsauer was not repairing a damage to his truck, but was attempting to do something to prevent injury to that truck, that likewise in such case, which is precisely the case at bar, that Ramsauer was acting within the scope of his employment.

In *Baker v. Allen and Arnink Auto Renting Co.*, 231 N. Y. 8, the Court of Appeals cited with approval the following extract from *Jones v. Weigand*, 134 App. Div. 644:

“The master is liable only for acts done by the servant in the course of his employment as such, but mere disregard of instructions or deviation from the line of his duty does not relieve the master of responsibility. Wrongful acts are usually in violation of orders or in deviation from the strict line of duty. The test is whether the act was done while the servant was doing his master's work, *no matter how irregularly, or with what disregard of instructions.* If the servant for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable; but to constitute an abandonment of the service the

servant must be serving his own or some other person's purposes wholly independent of his master's business."

Of course, the only question before the court in this appeal is whether or not the trial court should have allowed the jury to decide whether or not Ramsauer was acting within the course of his employment. Under the cases heretofore cited, it seems clear that the question of agency must be left for the jury to decide, so long as the testimony is in any way contradictory, or if there is any contradictory inference that can be drawn from the testimony.

In fact, we contend that on the undisputed testimony of the defendants, there was a clear case of Ramsauer acting within the scope of his employment, and we intended to so request the jury to find, if the case had been permitted to go to the jury, as against Minahan Brothers also.

However, in the most adverse view, and if we assume for the purpose of argument, that there was a conflict in the testimony between Leo M. Minahan and Ramsauer, even then the question, in view thereof, should have been submitted to the jury.

The very language of the trial court in passing upon the motion for a direction of a verdict (C. p. 82, *et seq.*) indicates that the decision was based upon the weighing of the testimony. Such action is improper, for if there is any testimony to be weighed and the balance found for one side or the other, then it is for the jury to so weigh the testimony.

We respectfully submit that the basis of this appeal is the refusal of the trial court to allow the jury to exercise its rightful province in passing upon the contradictory testimony in the case.

POINT II

The plaintiffs-appellants respectfully repeat herein their arguments and citations as set forth in Point I.

Summary

Plaintiffs-appellants respectfully submit that the Circuit Court erred in granting the motion for a direction of the verdict in favor of Leo Minahan and Alfred Minahan, individually and co-partners, trading as Minahan Brothers, and against the plaintiffs.

Conclusion

It seems to us, and we respectfully submit, that in case this Honorable Court reverses the judgment of the trial court in directing a verdict in favor of the defendants Minahan Brothers, that on the proofs the facts of agency are undisputed and jury has already assessed damages in the sum of \$5,000, that the Circuit Court should be directed to enter judgment against the defendants Minahan Brothers also, instead of just ordering a trial *de novo* as against said defendants, unless, of course, this Honorable Court is of the opinion that there is a question of agency, and therefore this issue should be determined by a jury.

Respectfully submitted,

GREEN & GREEN,
Attorneys for Plaintiffs-Appellants.

HARRY GREEN,
Of Counsel and on Brief;
and ALBERT E. SCHOBEL,
on Brief.

131 MAY. T. 1934

New Jersey Court of Errors and Appeals

LYDIA A. FOX, by LEONARD J. FOX
and LYDIA H. FOX, next friends,
and LEONARD J. FOX and LYDIA H.
FOX,

Plaintiffs-Appellants,

v.

LEO MINAHAN and ALFRED MINAHAN,
individually and co-partners trad-
ing as MINAHAN BROTHERS, and
FRED RAMSAUER,

Defendants-Respondents.

Action at Law

On Appeal from
Essex County
Circuit Court

BRIEF OF DEFENDANTS-RESPONDENTS LEO MINAHAN AND ALFRED MINAHAN

Statement

This is an appeal by the plaintiffs in a negligence action instituted by them against the owners (defendants Minahan Brothers), and the operator (defendant Ramsauer) of a motor truck, in which the trial Court (Circuit Court Judge JOSEPH L. SMITH), at the conclusion of the trial, directed a verdict in favor of the defendants Minahan Brothers and against the plaintiffs, and submitted the case to the jury as to the defendant Ramsauer.

Plaintiffs have appealed from the direction of the verdict, and the grounds of appeal are that the Court erred in making such a direction.

In the State of the Case all of the plaintiffs' evidence has been omitted, and the defendants Minahan Brothers have filed objections to this omission and call attention to the provisions of Section 27 of the Practice Act of 1912, which provides as follows:

No judgment shall be reversed or a new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of the party.

The objections filed also set out that the testimony of Leo Minahan on cross examination (p. 38, l. 21), was incorrectly printed as follows:

Q. Are you sure about that? A. I am not sure about it, no. I said he had used the truck as far as I know on two or three occasions without permission.

The answer should read:

A. I am not sure about it, no. I said he had used the truck as far as I know on two or three occasions with our permission.

Plaintiffs' attorneys have agreed to correct the State of the Case as to this misprint of testimony.

Facts

The defendant Ramsauer was a truck driver for the defendants Minahan Brothers, who had

been doing some work with the truck at Bernardsville (Case, p. 27, l. 10). The Bernardsville job had shut down and the truck was brought to Caldwell to do some work there, and to Orange to do some work there. From May 9th to May 11th it worked in Caldwell, and May 11th and May 12th it worked at Orange. On Saturday, May 9th, the truck was at the Caldwell job, and, there being nobody to watch the truck, Leo Minahan told Ramsauer to take the truck to his yard or one of the other drivers' yards as he had no garage to put it in. Ramsauer did so and on Monday morning, the 11th, brought it back to the Caldwell job, where it stayed until Monday night, and then brought it to the Orange job, where it stayed until Wednesday night. The truck was not employed in any work on Thursday, Friday, Saturday and Sunday following. Sunday following was May 17th, the day of the accident (see Case, pp. 28 and 29). On page 33, line 40, Leo Minahan says on cross examination, "I told him he could store it there (in the back of the yard) or he could store it at the other driver's house." On page 39, line 40, he again says, "I told him he could store the truck in his yard or he could put it in the other driver's yard."

Ramsauer, the driver, says on page 60, line 5, "Why he (Leo Minahan) came up there that Saturday and paid me, and I asked him if I should leave the truck up in Caldwell, and he said it was not safe, so he asked me—he told me to either take it to Maplewood or down to my yard, if I had room in my yard to bring it down there." On page 68, line 30, he says that under the instructions given to him by Minahan he could have stored the truck either at Maple-

wood or in his yard, and that he kept it in his yard for convenience to him; and on page 69, line 8, he says "so that he could go to work for the Minahan Brothers."

On Sunday, May 17th, the day of the accident, Ramsauer cleaned up his landlord's yard, and on page 72, line 20, he says, "I thought if I got the junk out of there it would save the tires, and I thought by the landlord letting me keep the truck there I was repaying him that way." There was plenty of room to back the car in the driveway of the yard and drive it out (p. 70, l. 35). On page 67, line 30, Ramsauer says that he did not tell the Minahan Brothers that he was going to clean out the rubbish so that the truck could properly be stored in his yard. The removal of the dirt did not give him room to turn the truck around but did give him more room to back it in and out (p. 62, l. 10), but while the dirt was there he had no trouble in putting the truck in the yard (p. 61, l. 30). He says that he did not take the rubbish to the dumps at the direction of Minahan Brothers or either one of them (p. 45, l. 10).

The Minahan Brothers did not know anything about the rubbish, and on page 35, line 5, Leo Minahan states that "if I had known the rubbish had to be removed I would not have put the truck there." On page 37 the same witness testifies that he knew nothing of the condition of the yard, and on page 35 says that the truck was being stored in Ramsauer's yard temporarily (p. 35, l. 40).

Law

In the case of *Nicholas v. Independence Indemnity Company*, 11 Misc., page 344, which was

a suit against an insurance company based on a judgment obtained by Mildred Nicholas against Fred Ramsauer for personal injuries and for property damages as a result of the accident sued on in this case, and which, of course, was based upon the same testimony, the Supreme Court decided:

“Party injured by operation of assured’s automobile without his permission has no right of action against assured’s insurance carrier.”

On page 346 of the opinion the Supreme Court says:

“That testimony, as well as the testimony taken in the present trial, fails to show that Ramsauer had permission.

“On the contrary we think it shows that he had not. After a certain contracting job had been finished Ramsauer was told by his employer Minahan Brothers, the owners of the truck, to take it to his home and keep it in the yard until another job was ready. He took it out at the time of the accident for his own purpose of removing rubbish from his yard. Ramsauer at the original trial testified specifically that he did not have permission to use the truck; that the yard was a ‘big yard’ and had no garage thereon. At the present trial he testified that he was directed to keep the truck on the premises; that there was some rubbish in the yard and in order to take care of the truck, he used the truck in carrying off some of the rubbish, and it was on this trip that the accident happened. We think that such evidence did not show permission to use the truck on that occasion.”

The evidence quoted above under the statement of facts is the same as was considered in

the *Nicholas* case. The Minahans told Ramsauer to store the truck in his yard and did not give him permission to use it on the day of the accident, and on page 59, line 1, Ramsauer says that on the day of the accident he had the truck out without the permission of the Minahans.

In *Patterson v. Surplless*, 107 N. J. Law 305, the Court of Errors and Appeals held:

“Where, in an action brought against the owner of an automobile, to recover for personal injuries, received in the operation of the car by another person, it appeared from uncontradicted evidence that the car was not being used by him, or for him, at the time of the accident, the presumption that the owner was presumed to have the car under his control and operation was overthrown, and the question of the owner’s liability becomes a question of law to be dealt with by the court.”

In *Okin v. Essex Sales Company*, 103 N. J. Law 217, the Supreme Court held:

“Proof of the defendant corporation’s ownership of a motorcycle driven on a public highway, raises a presumption of fact that such motorcycle was in the possession of the defendant through its servant or agent, the driver, and that such driver was acting within the scope of his employment. But both or either of these presumptions may be overcome by uncontradicted proof to the contrary; and if so overcome by uncontradicted proof that the motorcycle was not being used by the owner’s servant or agent within the scope of his employment, then a motion for a direction of a verdict for the defendant owner will be granted.”

And in *Hoffman v. Lasseff*, 110 N. J. Law 122, the Court of Errors and Appeals held:

“Held, that the uncontradicted testimony in this case overcame the presumption that the operator of appellant’s car was acting as the agent or servant of appellant, and required the direction of a verdict in favor of appellant.”

It is clear that the uncontradicted evidence in the case at bar showed that the Minahans instructed their driver Ramsauer to take the truck to his yard and keep it there or store it there temporarily; that they did not give permission to Ramsauer to take the car out on the day of the accident; that they did not tell him to clean up the yard; that he could back the car in and out of the driveway without injury to it and that he removed the rubbish for his own convenience and to repay his landlord for allowing him to store the car there.

It is respectfully submitted that the Circuit Court was right in granting a motion for the direction of a verdict in favor of the defendants Leo Minahan and Alfred Minahan, individually and co-partners trading as Minahan Brothers.

Respectfully submitted,

SEYMOUR & SEYMOUR,
*Attorneys for Defendants-Respondents
Leo Minahan and Alfred Minahan,
individually and co-partners trad-
ing as Minahan Brothers.*

ARTHUR B. SEYMOUR,
Of Counsel.

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