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Notice of Appeal.

(Filed April 8, 1918.)

New Jersey Supreme Court

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WILLIAM J. HEILER, *Plaintiff,* *vs.* GOODMAN'S MOTOR EXPRESS VAN & STORAGE COMPANY, *Defendant.*	Action at Law. Notice of Appeal.

PLEASE TAKE NOTICE that the plaintiff appeals to the court of errors and appeals in the last resort in all causes from the whole of the judgment of non-suit rendered against the plaintiff and in favor of the defendant Goodman's Motor Express Van & Storage Company and entered in the above entitled cause, and from the order and direction made upon the trial thereof by the Honorable William H. Speer, Circuit Judge, directing a non-suit against the plaintiff and in favor of said above named defendant and from each and every part of said judgment and direction of non-suit.

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Dated, April 2, 1918.

To E. S. Holman, Esq.,
Attorney of Defendant Goodman's
Motor Express Van & Storage Co.

Yours &c.,

JOHN WINANS,
Attorney of Plaintiff.

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Summons issued and dated October 10, 1917.

Complaint.

(Filed October 23, 1917.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

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WILLIAM J. HEILER, *Plaintiff*, *vs.* SAMUEL GOODMAN, and in the alternative GOODMAN'S MOTOR EXPRESS VAN AND STORAGE COMPANY, *Defendants.*	Complaint.

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Plaintiff, who resides at No. 713 Willow avenue, Hoboken, New Jersey, says that:

1. At all times herein mentioned the defendant Goodman's Motor Express Van and Storage Company, herein referred to as the Corporation Defendant, was and is a corporation organized under the laws of New Jersey.

2. At all said times the defendants or one of them owned a certain motor vehicle, being the automobile moving van hereinafter mentioned.

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3. At all said times the defendant Samuel Goodman maintained, controlled and operated the certain automobile moving van or motor vehicle hereinafter mentioned.

4. At all said times the defendant corporation maintained, controlled and operated the certain automobile moving van or motor vehicle hereinafter mentioned.

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5. At all said times Broadway was and is a public highway in the city of Bayonne, New Jersey.

6. At all said times Twentieth street was and is a public highway and a prominent crossroad intersecting and crossing the said Broadway, at Bayonne.

7. At all said times the intersection of Broadway and Twentieth street, above referred to, was and is in the built-up portion of the city of Bayonne where the houses were and are on the average less than 100 feet apart.

8. On or about September 27, 1917, plaintiff was lawfully in and upon Broadway, immediately to the north of the intersection thereof with Twentieth Street, and was approaching said Twentieth Street and the intersection aforesaid upon the right hand or westerly side of the roadway of Broadway aforesaid.

9. At the time and place last aforesaid the plaintiff was riding upon a certain motorcycle proceeding southerly upon the westerly side of Broadway, approaching and about to pass Twentieth street, at Bayonne aforesaid.

10. At the time and place last aforesaid, the said automobile moving van of the defendants, or either of them, was proceeding along Broadway aforesaid at and approaching the intersection thereof with Twentieth street, and was then and there in charge and under the control of one or more of the servants, agents and employees of the defendants and each of them.

11. At the time and place last aforesaid, plaintiff owned and possessed the certain motorcycle upon which he was then riding.

12. At the time and place last aforesaid, wholly by reason of the negligence and the willful,

wanton and wrongful acts of the defendants and each of them, both individually and by and through their several servants, agents and employees then in and upon, in charge of and engaged in driving the said automobile moving van, the said automobile moving van was caused violently to strike, collide with, run against, over and upon the body and person of plaintiff, and to strike, collide with and run over the said motorcycle upon which plaintiff was then riding, throwing plaintiff and his said motorcycle violently to the ground and inflicting upon him and upon said motorcycle the injuries hereinafter mentioned.

13. Plaintiff's injuries, so sustained, comprised and comprise a fracture of his left leg above the knee, bruises, lacerations, contusions and other injuries in and upon his right leg and other parts of his head, body and limbs, internal injuries, severe shock and derangement of his nerves and nervous system, which injuries are and will be permanent, and his said motorcycle was broken and destroyed.

14. At and prior to the occurrence of the accident and injuries aforesaid the defendants and each of them, individually and by and through their several servants, agents and employees, were guilty of negligence and of willful, wanton and wrongful acts, in that the said defendants and each of them failed to provide a careful, competent and duly licensed driver or drivers for said automobile moving van, but on the contrary entrusted the management and operation thereof and caused and permitted the same to be driven along the public highways aforesaid or one of them, by careless, incompetent, unqualified and inattentive men, in that they and each of them

failed to make proper inspection of said automobile moving van and of the brakes, steering devices and other apparatus and equipment therein contained, in that they failed to keep the same in repair, in that the same was in ill repair, unrepaired and not equipped as required by the motor vehicle laws of this state, in that they and each of them failed to provide and use adequate and sufficient brakes, steering devices, bells, trumpets and other means and devices in common use and required by law for giving audible and visible signal or warning of the movement, approach and intended direction of said automobile moving van, or for stopping or regulating the speed and direction thereof, in that the same was driven in and upon the public highway aforesaid at a dangerous, reckless and unlawful rate of speed upon the wrong side of the road, wholly without regard to the rules of the road and the statutes of this state and the ordinances of the city of Bayonne in relation thereto and wholly without warning of its movement, approach, intended direction and change of direction, and in that the said vehicle was so controlled, operated and driven as to cause the same to run down the plaintiff causing the accident and injuries aforesaid.

15. Plaintiff is unable to state upon his own knowledge which of the two defendants was, at the time of the occurrence of said accident and injuries, in the actual possession and control of said automobile moving van for the reason, as he is informed and believes, that said automobile moving van was then being used in the business of the defendant corporation, was in charge of certain servants, agents and employees who were then working for it, that the defendant Samuel Good-

man is actively in charge of the business and operation of said defendant corporation and of said automobile moving van and is the one actively in charge of the servants, agents and employees aforesaid and from whom they receive orders and to whom they account for their time and activities in behalf of the business in which said automobile moving van is employed and in which work they are engaged.

16. At the time and place of said accident and injuries the particular servants, agents and employees of the defendants who were then in charge of said automobile moving van were acting within the scope of their employment by the defendants and each of them.

17. By reason of the accident and injuries aforesaid, plaintiff has forever since the occurrence thereof been obliged and hereafter for a long time will be obliged to give up his usual work and employment about which he theretofore earned large sums of money as wages, he was confined to his bed and indoors for a long time and will hereafter be so confined and he has been obliged to and will hereafter be obliged to pay out large sums of money and to incur heavy indebtedness for medical, surgical and nursing care and attendance, and for medicines and supplies, all to his damage in the sum of $5,000.

He demands as damages $5,000.

JOHN WINANS,
Plaintiff's Attorney,
75 Montgomery St.,
Jersey City, N. J.

Answer.

(Filed November 8, 1917.)

The defendants, Samuel Goodman and Goodman' Motor Express Van & Storage Company, of the City of Bayonne, County of Hudson and State of New Jersey, say that:

1. They admit the first paragraph.

2. They deny the second paragraph, and say that Goodman's Motor Express Van & Storage Company are the owners of several motor vehicles.

3. They deny the third paragraph.

4. They deny the fourth paragraph.

5. They admit the fifth paragraph.

6. They deny the sixth paragraph, and say that Twentieth Street was and is a public highway intersecting and crossing said Broadway, at Bayonne.

7. They admit the seventh paragraph.

8. They deny the eighth paragraph.

9. They have no knowledge or information concerning the ninth paragraph, and, therefore, deny same.

10. They deny the tenth paragraph.

11. They deny the eleventh paragraph.

12. They deny the twelfth paragraph.

13. They deny the thirteenth paragraph.

14. They deny the fourteenth paragraph.

15. They deny the fifteenth paragraph.

16. They deny the sixteenth paragraph.

17. They deny the seventeenth paragraph, and say that any injuries sustained by plaintiff were sustained through his own negligence in operating a motorcycle in a careless and negligent manner contrary to law and to the ordinances of the City of Bayonne in relation thereto, at an ex-

cessive and unlawful speed, and in attempting to pass another vehicle going in the same direction on the right side thereof.

E. S. HOLMAN,
Attorney for Defendants.

Reply.

(Filed October 26, 1917.)

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Plaintiff denies every allegation in the answer.

JOHN WINANS,
Plaintiff's Attorney.

Stipulation Endorsed on Answer and Filed Therewith.

(Filed November 8, 1917.)

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I hereby consent to the filing of the within answer as of time, reply on file to stand.

November 5, 1917.

JOHN WINANS,
Attorney for Plaintiff.

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Rule for Judgment.

(Filed March 9, 1916.)

NEW JERSEY SUPREME COURT.

WILLIAM J. HEILER, *Plaintiff,* *vs.* SAMUEL GOODMAN, and in the alternative GOODMAN'S MOTOR EXPRESS AND STORAGE COMPANY, *Defendants.*	Action at Law, Postea &c. Judgment of Non-suit.

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This action being regularly on for trial on the 4th day of March, 1918, before Judge William H. Speer at the Hudson County Circuit, the plaintiff submitted his evidence by which it appeared the plantiff was an alien enemy of the United States of America, whereupon upon motion of the attorney for the defendant, the trial Judge ordered a non-suit.

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Whereupon it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant recover its costs.

WM. H. SPEER,
Judge.

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Judgment Nisi.

(Entered March 9, 1918.)

NEW JERSEY SUPREME COURT.

SAMUEL GOODMAN, and in the alternative, GOODMAN'S MOTOR EXPRESS VAN & STORAGE COMPANY, PANY, *ads* WILLIAM J. HEILER.	Action at Law. On Postea.

10

It is ordered that judgment of non suit be and hereby is entered in favor of defendants and against the plaintiff with costs to be taxed nisi.

Entered March 9, 1918,

On motion of

E. S. HOLMAN, Atty.

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Judgment of Non-Suit.

(Entered March 9, 1918.)

NEW JERSEY SUPREME COURT.

WILLIAM J. HEILER, *vs.* SAMUEL GOODMAN, and in the alternative GOODMAN'S MOTOR EXPRESS VAN & STORAGE COMPANY.	**Action at Law. On Postea. Judgment of Non-Suit. E. S. Holman, Attorney.**

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Costs $—— Judgment entered this ninth day of March, A. D., nineteen hundred and eighteen, for the sum of———— dollars, in favor of the defendant and against the plaintiff.

WILLIAM S. GUMMERE,

C. J.

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Grounds of Appeal.

(Filed April 8, 1918.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM J. HEILER, *Plaintiff-Appellant,* *vs.* GOODMAN'S MOTOR EXPRESS VAN & STORAGE COMPANY, *Defendant-Respondent.*	Action at Law. On Appeal.

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The grounds upon which the plaintiff-appellant appeals are as follows:

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The honorable trial court directed judgment of non-suit against the plaintiff-appellant and in favor of the defendant-respondent Goodman's Motor Express Van & Storage Company;

2

The honorable trial judge made and signed a rule for judgment against the plaintiff-appellant and in favor of the defendant-respondent Goodman's Motor Express Van & Storage Company without adequate reason or cause or any reason or cause therefor;

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3

Judgment was granted and entered against the plaintiff-appellant and in favor of the defendant-respondent Goodman's Motor Express Van & Storage Company in the court below without any valid adjudication or any adjudication against the plaintiff-appellant;

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Grounds of Appeal.

4

The honorable trial judge failed properly to exercise his discretion, abused his discretion and acted contrary to law and the discretion reposing in him, in that he refused to grant relief upon the trial to the plaintiff-appellant when he was surprised by the defense of enemy alienage then first urged by the defendant-respondent and by evidence tending to support such defense;

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5

The honorable trial court refused to direct or permit a juror to stand aside or to declare a mistrial when moved by plaintiff-appellant upon the trial of this cause so to do;

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The plaintiff below was not permitted upon the trial to complete the presentation of evidence in support of his cause of action, or to finish the trial of the issues embodied in the pleadings in the said cause;

7

The defendant-respondent was permitted upon the trial to avail itself of a defense by reason of the alleged enemy alienage of the plaintiff-appellant without having pleaded any such defense and judgment was directed against plaintiff-appellant solely upon such defense not pleaded;

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8

The plaintiff-appellant was deprived of his property without due process of law, and he then and there being a person within the jurisdiction of this state, resident and actually domiciled therein, was denied the equal protection or any protection of the laws, by means of the trial and proceedings

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in this action in the court below and the judgment therein rendered and entered against him; in contravention of Article XIV of the Constitution of the United States of America;

9

The plaintiff-appellant was, by the trial and proceedings in the court below and the judgment therein entered, denied his natural and unalienable right of enjoying and defending life and liberty, acquiring, possessing and protecting property and of pursuing and obtaining safety and happiness, in contravention of Section 1 of Art. I of the Constitution of this state; and his right to a trial of this cause by a jury of his peers was denied him in contravention of Section 7 of Article I of the constitution of this state;

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Judgment was directed, rendered and entered against the plaintiff-appellant and in favor of the defendant-respondent Goodman's Motor Express Van & Storage Company in the court below without a trial by jury and without any adjudication or lawful adjudication of the merits of the cause of action disclosed by the pleadings in the said cause;

11

Judgment for the costs of the action was rendered against the plaintiff-appellant and in favor of the defendant-respondent Goodman's Motor Express Van & Storage Company in the court below without any sufficient adjudication and without any verdict, decision or other adjudication therein.

Dated, April 6, 1918.

JOHN WINANS,
Attorney of Plaintiff-Appellant.

Trial.

NEW JERSEY SUPREME COURT.

WILLIAM J. HEILER,
Plaintiff,

vs.

10 SAMUEL GOODMAN, and in the alternative GOODMAN'S MOTOR EXPRESS VAN & STORAGE COMPANY,
Defendants.

The trial of this cause was moved before the Honorable William H. Speer, Circuit Judge, and a jury, at the Hudson Circuit on the 5th day of March, 1918.

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APPEARANCES:

JOHN WINANS, ESQUIRE, Attorney and Counsel of Plaintiff,

RANDOLPH PERKINS, ESQUIRE, of Counsel with Defendants.

A jury was empanelled and sworn.

Mr. Winans opened the case to the jury for the plaintiff.

Mr. Perkins opened the case to the jury for
30 the defendants.

MR. PERKINS: In order to facilitate the case, your Honor, and abbreviate the case as much as possible, I will admit that the motor truck was the property of the defendant corporation and not of the defendant Mr. Goodman. The suit is brought against Mr. Goodman and the truck owner in the alternative. That will strike Mr. Goodman out of the case
40 altogether?

MR. WINANS: Yes.

THE COURT: All right.

MR. PERKINS: And we will admit that the motor truck was the property of the—

MR. WINANS: It is conceded that the motor van which participated in this collision and accident was at the time of the accident the property of Goodman's Motor Express Van and Storage Company, and in view of that fact the defendant Samuel Goodman is discharged. 10

THE COURT: All right.

MR. PERKINS: We will ask for a nonsuit as against him. I suppose that will be the proper way—not to discharge, but just nonsuit.

THE COURT: Yes, that is the way he is discharged, the only way he can be discharged that I know of. 20

There will be a nonsuit ordered as to Mr. Goodman.

WILLIAM J. HEILER, a witness produced in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WINANS: 30

Q. Is your name William J. Heiler? A. Yes, sir.

Q. Where do you reside, Mr. Heiler? A. 713 Willow Avenue, Hoboken.

Q. Did you live at that same place on September 27th last? A. Yes, sir.

Q. On September 27th, before the occurrence of this accident, as set forth in the complaint, what was your condition of health? A. Good.

Q. At that time where were you employed? A. 40

At Eighth Street and Broadway, the lunch wagon, Joseph O'Brien.

Q. Where was that lunch wagon located? A. Eighth Street and Broadway.

Q. Who was the proprietor of it? A. Joseph O'Brien.

Q. How much did you earn, what were your
10 wages at the lunch wagon? A. Eighteen dollars and meals.

Q. Eighteen dollars a week or a month? A. A week.

Q. What were your hours of work? A. Eleven at night until seven in the morning.

Q. You were the night man, in other words? A. Yes, sir.

Q. How did you go to and from your place of work from your home in Hoboken? A. Why, at
20 about two o'clock in the morning trouble started in the lunch wagon—

Q. No, no, how were you accustomed to go back and forth between your home and the place of work before this accident happened? A. By motorcycle.

Q. Did you own a motorcycle at that time? A. Yes, sir.

Q. What kind of motorcycle was it? A. New motorcycle, Excelsior model.

30 Q. What year's model? A. 1918.

Q. How much did you pay for that? A. Side car and everything four hundred and one dollars. I didn't have the side car on that night.

Q. How much of that was represented by the side car? A. Well, about three hundred and twenty-five dollars without the side car.

Q. The balance was the side car, was it. In what condition was this motorcycle before this accident happened that night? A. The motor-
40 cycle was in good condition.

Q. Out of repair in any respect? A. No.

Q. Are you familiar with Broadway in Bayonne? A. Yes, sir.

Q. I am referring now to the section of Broadway in the 20's? A. Yes, sir.

Q. Do you recall where you were about two o'clock in the morning of September 27th last? A. At two o'clock. I was at the lunch wagon. 10

Q. Where did you go from there? A. From there I went to police headquarters, 26th Street and Avenue C.

Q. How does Avenue C lie with reference to Broadway, is it east or west of Broadway? A. West of Broadway.

Q. Did you afterwards leave police headquarters? A. Yes.

Q. And started to go where? A. Down Broadway—down 26th Street towards Broadway and up Broadway—or down Broadway to Eighth. 20

Q. You went through 26th Street to Broadway, you say, and then down Broadway, and you were on your way to go where? A. Going back to work.

Q. Back to the lunch wagon? A. Yes.

Q. And as you left Broadway and 26th Street going south towards the lunch wagon did the numbers of the streets become smaller or larger as you went along? A. Smaller. 30

Q. Now do you recall anything that happened when you got to 22nd Street, where 22nd Street crosses Broadway? A. 22nd Street?

Q. Yes. A. Why, there was a ditch; we had to go the left side across the street.

Q. What was the position of that ditch with respect to 22nd Street; was it right in the roadway of 22nd Street? A. Right across Broadway.

Q. But in the line of 22nd Street, was it? A. Yes, sir. 40

Q. And it extended out from the westerly side of Broadway how far? A. Pretty near across the street.

Q. Did it leave a good wagon way, broad enough for an ordinary vehicle to go across? A. Yes, sir; just left enough room for a vehicle to go across.

Q. Not enough for two to pass? A. No.

10 Q. Was anybody else on this motorcycle with you at that time? A. Yes.

Q. Who? A. Mr. Richard Walsh.

Q. Is he in court? A. Yes.

Q. What part of the motorcycle did he occupy? A. The rear seat.

Q. Anything happen with relation to Walsh just as you got to 22nd Street? A. Before getting to 22nd Street Walsh's hat blew off.

Q. What if anything did he and you then do?

20 A. Stopped; Walsh ran back and picked it up.

Q. And got on the machine again, did he? A. Yes.

Q. And you proceeded? A. Yes.

Q. Now when did you first see another vehicle in that street around 22nd Street? A. At 22nd Street a moving van, while I was standing still, passed me, going across 22nd Street.

Q. That was going in which direction? A. Going south.

30 Q. That was a motor vehicle or horse drawn vehicle? A. Motor vehicle.

Q. How large a motor vehicle? A. Well, regular moving van.

Q. Big boxed in moving van, was it? A. Yes.

Q. Did you notice whether any name was painted on the side of that moving van? A. Yes.

Q. What was painted on it? A. "Goodman's Motor Express Van & Storage Company."

Q. Could you see the license number? A. I did

40 not see it.

Q. Did that motor van have a tail light? A. No, no tail light.

Q. Do you understand what that means? The tail light is the rear light at the rear of the motor vehicle. A. Yes.

Q. Had no such light? A. No such light.

Q. Did you notice that particularly? A. Yes.

Q. Did this motor vehicle proceed across this narrow place left by the ditch at 22nd Street? A. Yes. 10

Q. On which side of the road did it proceed after passing 22nd Street? A. After passing 22nd Street he kept on going on the left side of the street until he hit 20th Street.

Q. When you say on the left hand side of the street, how close to the curb on the left side of the street was this moving van between 22nd and 20th Streets? A. It was so close, so there was no room for me to get through. 20

Q. Did you go across this narrow place at 22nd Street alongside of the ditch? A. Yes, sir.

Q. Then what did you do with regard to proceeding further southward? A. I turned to my right and went south.

Q. Turned your what? A. To my—turned to my right.

Q. Where did that bring you, about what part of the road? A. Brings me right side of the street, about four or five feet from the curb. 30

Q. On the right side of the street? A. Yes.

Q. Then you proceeded along toward 20th Street, did you? A. Yes.

Q. As you approached 20th Street what, if anything, happened? A. Why, at 20th Street the front wheel of my motorcycle was up against the hind wheel of the motor van, about in that position, and at the same time the van swung around into 20th Street and I could not make the stop, so I steered my motorcycle towards the curb. 40

Q. One minute, Mr. Heiler, and I won't interrupt again. When you say your front wheel was up against the hind wheel of the motor van, what do you mean, it touched it? A. No; I mean in the same direction. The motor van was on this side and my motorcycle was on this side.

Q. On which side of the road was the motor
10 van then? A. On the left side.

Q. Which side were you on? A. On the right side.

Q. You mean then that the front of your machine overlapped the rear of the motor van, don't you? A. Yes.

Q. That was the case as you approached 20th Street? Did you look at this motor van to see whether any signal was given by any person driving or riding in the van? A. Yes, sir. No signal
20 at all.

Q. Was any hand put out? A. No, sir.

Q. Any horn, trumpet or signal blown? A. No.

Q. Did you look carefully? A. Yes.

Q. Tell me why you did look? Why did you look? A. On account of being on the other side of him.

Q. You realized your position of danger, didn't you? A. Yes.

Q. Just as you approached 22nd Street what, if
30 anything, did the motor van do, with regard to changing its direction? A. He kept on going on the left side all the way up.

Q. Yes. How far? A. For two blocks to 20th Street.

Q. Yes; then what did he do? A. Turned to his right into 20th Street.

Q. Well, did he make a broad swing or did he make a sharp turn? A. Well, he made a pretty sharp turn.

40 Q. What speed was he going as he made this

turn? A. Going the same speed as he was going before.

Q. Well, what was that speed? A. Well, around twelve miles an hour.

Q. You are familiar with speed of motor vehicles, are you? A. Yes.

Q. How long have you driven a motorcycle? A. Why, I have driven a motorcycle 1915. 10

Q. Ever since 1915? A. Well, not steady all the time, but I had one 1915.

Q. Have you a knowledge of how many miles per hour a vehicle is going if you are riding on it or looking at it as a traveler; can you judge? A. My own I had a speedometer.

Q. Yes, but can you judge the speed per hour of a motor vehicle by looking at it as it goes along the street? A. Oh, yes.

Q. Now, when this van turned into 20th Street, 20 which side of 20th Street did it turn in, the left or right side? A. Right side.

Q. The motor vehicle was pointing in what direction then? A. Going up 20th Street.

Q. That is east or west? A. West.

Q. How close to the right hand or north curb of 20th Street was the motor vehicle just as it made the turn at the corner? A. Well, it was pretty near up to the curb.

Q. How close to the curb? A. Two or three feet 30 away from the curb.

Q. Now when this motor van made this turn what did you do? A. Why, I steered my motorcycle toward the curb trying to avoid it and going the same direction as the moving van, but while getting half way around the corner the moving van hit—hit my machine, knocking Richard Walsh off the rear seat, and I grabbed hold of the moving van.

Q. What part of it? A. The mudguard of the 40 moving van.

Q. Which mudguard? A. The front mudguard of the van.

Q. On which side of the van? A. On the right side of the van; and held on with one hand to the mudguard and one hand to the motorcycle, and after the van carried me along for about fifteen feet I couldn't hold any more and my motorcycle
10 slid underneath the van and me with it, and the van went over me.

Q. What part of you did it go over? A. The hind wheel of the van.

Q. What part of you did the hind wheel of the van go over? A. Why, over my left leg.

Q. Knocked you down, then, did it? A. Yes.

Q. Feel any pain? A. Why, I have got pain yet.

Q. Did you at that time, did you suffer any pain
20 at that time? A. Oh, yes.

Q. Where did you feel pain, what parts of your body? A. Right at my leg.

Q. Any other part? A. I was all doubled up in a knot.

Q. Did you lose your senses? A. No, sir.

Q. Who picked you up? A. Walsh took the motorcycle off of me first off and then O'Connor and McGrath, the two police officers, picked me up and sent for the ambulance.

30 Q. Are those police officers in court? A. Yes, sir.

Q. When the ambulance came—I suppose it did come, did it? A. Yes.

Q. What was done with you then? A. I was taken to Bayonne Hospital.

Q. Who treated you there? A. Dr. Gordon.

Q. What did Dr. Gordon do to you while you were in the hospital? A. Why, fixed my leg, put it in splints and put a Buck's extension on it and
40 fixed all the wounds and everything.

Q. What wounds did you have on your body? A. Why, I had wounds on both legs, on my hand and one arm.

Q. Have those wounds largely disappeared at the present time? A. Yes.

Q. How about your leg; is that thoroughly healed at this time? A. No; my leg is one inch shorter than the right one. 10

Q. Which leg is it that was broken and which part of that leg? A. Above the knee—the left leg —the thigh.

Q. Which leg is now shorter than the other? A. The left leg.

Q. Before this accident were your legs both the same length? A. Yes.

Q. What inconvenience does it cause you having one leg shorter than the other? Make you limp? A. Yes. 20

Q. How long did you remain in the hospital? A. Seven weeks and one day, and then I couldn't walk; I was lying in bed all that while and I was taken home in an automobile and I had to stay in the house for three weeks before I could walk.

Q. Did you return to your employment after that? A. About a month after. I worked for a while and then I had to give it up.

Q. A month after what, Mr. Heiler? A. After Christmas, I returned to work. 30

Q. A month after Christmas? A. No, after Christmas.

Q. After Christmas, that was a month after what? A. After I came out of the hospital.

Q. Then you went to work somewhere, did you? Where did you go to work? A. At the same place, Eighth Street and Broadway.

Q. Get your same job back? A. Yes, sir.

Q. How long did you hold it? A. Couple of weeks. 40

Q. Why didn't you keep on? A. I couldn't stand it; I had to work twelve hours then and that was too much for me.

Q. Well, how did it affect you? A. Why, my leg—pained me while standing on it.

Q. Which leg do you refer to? A. The left leg.

Q. The one that was injured? A. Yes.

10 Q. Do the duties in the lunch wagon require you to keep on your feet a good deal of the time? A. Yes, sir; be on your feet for twelve hours.

Q. Do not sit down at all? A. No, sir.

Q. Walk up an down behind a counter and serve meals, do you? A. Yes.

Q. How much did you earn during the two weeks you were working there? A. Eighteen dollars a week and my meals.

Q. Have you earned anything else since this 20 accident happened? A. Why, I have only worked two or three days a week now, helping out in the lunch wagon.

Q. What lunch wagon is that? A. Greenville.

Q. Where? A. In Greenville, Greenville car barns.

Q. How much are you paid there? A. Three and a half dollars for twelve hours.

Q. Is that night work or day work? A. Well, two nights and one day.

30 Q. Are you able to do that work? A. Yes, sir.

Q. Your leg bothers you? A. Well, after twelve hours is up it is—I couldn't go any more.

Q. How many days a week do you work there? A. Three days a week.

Q. If you work three days a week why don't you work the other four days? A. That is too much for me; can't stand that much.

Q. Why can't you stand it? A. Because my leg bothers me.

40 Q. In what condition is your leg on a day after

you have put in twelve hours in a lunch wagon? A. After I have put in twelve hours I have to go home and go to bed right away because I can't stand on it any longer.

Q. Are you able to work the next day? A. After a good rest, yes.

Q. Are you able to work the next day after you put in a full day of twelve hours; can you work the next day? A. The following day—that is, yes, for one day I can do it, yes, but I couldn't do it steady. 10

Q. Well, after you have put in a day's work of twelve hours can you work the next day, the day following the day that you have worked? A. After a rest.

Q. How much rest? A. Well, about ten hours. I couldn't do that every day.

Q. Now, what condition was this motorcycle in after the rear wheel of the motor van had run over it? A. Why, everything was smashed but the motor; new frame, new wheels, everything has got to be put on. 20

Q. What did you do with the motorcycle? A. Why, the motorcycle was taken in the police van up to 26th Street police headquarters and left there for a month and then I got somebody to take it away out to Newark, to the place where I bought it, and it is out there. 30

Q. What place is that? A. Haverford Cycle Company.

Q. That is located where? A. At 945 Broad Street, I think.

Q. You directed them to do what with that machine? A. Get it fixed.

Q. Any directions with regard to selling it? A. What's that?

Q. Did you give them any directions with regard to selling it? 40

MR. PERKINS: I object.

A. Yes.

MR. PERKINS: I object.
MR. WINANS: Withdraw it.

Q. Have you tried to sell the motorcycle?

10 MR. PERKINS: I object.
THE COURT: I do not see how you can make that relevant.
MR. WINANS: I withdraw it.
THE COURT: An unaccepted offer is not evidence.

Q. How fast were you driving your motorcycle—
A. Same rate of speed.
Q. —just before the accident? A. At the same rate of speed as the motor van was going.
20 Q. That is about what? A. Twelve miles an hour.

CROSS EXAMINATION BY MR. PERKINS:

Q. Mr. Heiler, where was it that Mr. Walsh's hat blew off? A. At Twenty-second street.
Q. At the same place where this ditch was dug across Broadway? A. Well, between 23rd and 22nd.
30 Q. Well, how far from 22nd Street? A. Well, not far. About, not quite in the middle of the block.
Q. Then you stopped the motorcycle and he got off and got his hat? A. Yes.
Q. While your motorcycle was stopped the van came along and passed? A. Yes, sir.
Q. By the way, what kind of a night was this September night? A. Nice night.
Q. Pleasant night? A. Yes.
Q. Well, was this accident really on the 27th
40 or 28th of September? A. 27th.

Q. When you say two o'clock in the morning don't you mean the morning of the 28th? A. No, sir; it was the morning of the 27th.

Q. You had had some trouble down in the lunch wagon? A. Yes, sir.

Q. And that trouble caused you to go to the police headquarters? A. Yes, sir; one man got arrested and the officers told me to go up to police headquarters to complain. 10

Q. How many men were working in the lunch wagon at that time of the night? A. Two, myself and my helper.

Q. What time did you leave the lunch wagon to go to police headquarters? A. About 2:30.

Q. What time did you arrive at police headquarters? A. I arrived there about quarter to three, something like that.

Q. How many blocks is it? A. Eighteen, nineteen. 20

Q. So your idea is that you took about fifteen minutes to go nineteen— A. I couldn't tell you the exact time, because I didn't look at no watch or anything.

Q. How long did you remain in that police headquarters? A. Remained at police headquarters about seven minutes, eight minutes.

Q. Then what time did you start back? A. Started back around 2:50, something like that. 30

Q. Where did you pick up Mr. Walsh? A. Why, he was at the lunch wagon at the time the trouble started and he witnessed everything.

Q. Were you busy about that time in the morning at the lunch wagon? A. Well, not exactly.

Q. Was this a calm September morn or a blustery morning? A. It was a nice morning, nice and clear.

Q. The question is as to whether it was calm or blustery? A. It was calm. 40

Q. How far did Mr. Walsh's hat blow when it left his head? A. How far?

Q. Yes. A. Why, just a few feet away from where I stopped.

Q. His hat was blown off by reason of the speed of the motorcycle, wasn't it? A. I don't know.

Q. But you have just said it was a calm morn-
10 ing. (No answer.)

Q. How long did it take you to stop the car, that is, to stop the motorcycle just before Walsh went after his hat? A. Why, didn't take me long.

Q. In what distance did you stop it? A. Why, from here ahead to where you are standing.

Q. Let us see, that is eighteen feet? Is that your estimate of it? Please answer. How many feet do you estimate it to be? A. About eighteen or twenty feet, yes, sir.

20 Q. At what rate of speed was the motorcycle going when Walsh's hat blew off? A. Why, it wasn't going any faster than about twelve or fourteen miles an hour.

Q. How long a time did it take you to bring your cycle to a stop and Walsh get his hat and start the cycle again? A. How long it took? Why, about two minutes.

Q. Where was Walsh when the motor van passed your standing cycle? A. He was just going after
30 his hat.

Q. How long a time elapsed after the motor van passed you before you started your cycle again? A. Why, I was right behind the van.

Q. Please answer the question. How long a time elapsed between the time the motor van passed you and Walsh went and got his hat and you got on the motorcycle and went on? A. Why, didn't take half a minute.

Q. Half a minute. How fast do you think this
40 van was traveling? A. About twelve miles an hour.

Q. That is a guess on your part, isn't it? A. Well, I wasn't going any faster—

Q. Please answer? A. According to my clock.

Q. How fast was it going when it passed your standing cycle? A. Well, he just was slowing up to go across 22nd Street.

Q. Please answer; how fast was he going? A. How fast? Well, about ten miles. 10

Q. Would you notice an automobile slacking up from twelve miles an hour to ten miles an hour? A. Well, he just was slackening up then.

Q. Please answer this question. Do you mean to say that you can recognize a difference in speed between ten miles an hour and twelve miles an hour of a van? A. Not exactly so close, but I can see when he slacks up.

Q. So that you say he did slacken up at 22nd Street? A. Yes, sir. 20

Q. Now, how fast was he going when he slacked up? A. When he slacked up, when he got to 22nd Street?

Q. Yes. A. He wasn't going more than seven or eight miles an hour going across.

Q. Now we have got this clear, that when this van passed 22nd Street and Broadway on the night of this accident he was going seven miles an hour? Is that right? A. Going across the 22nd Street. 30

Q. Please answer my question? A. Yes, sir.

Q. This thing is clear for the jury and the court that when the motor van passed 22nd Street on Broadway the night of the accident it was going seven miles an hour? A. Well, not exactly seven; I couldn't say for sure. About seven or eight miles, that is what I figured.

Q. You can distinguish between a vehicle going seven miles an hour and eight miles an hour? A. Well, I can pretty near tell. 40

Q. You think you can. You think that you can get that down so fine that you can tell the difference in the rate of speed of one mile an hour? A. No, I can't do that.

Q. Then the vehicle might have been going six miles an hour? A. Not as slow as that.

Q. Do you think you can distinguish between a
10 motor vehicle going six miles an hour and one going seven miles an hour? A. Oh, he wasn't going—

Q. Please answer the question. A. No, I couldn't tell that far, one mile, no.

Q. So that after he passed Twenty-second Street, the van passed 22nd Street, a half minute elapsed before you started with your motorcycle in the same direction; is that right? A. Yes, sir.

Q. You said that your motorcycle was going
20 about twelve or fourteen miles an hour when Walsh's hat blew off? A. Yes, sir.

Q. What is the shortest space that you can stop your cycle in when you are going twelve or fourteen miles an hour? A. Why, I have got two brakes on my machine and I can stop just right there.

Q. Tell us in feet, please? A. Within five or six feet.

Q. Now, we have got that plain, that when your
30 motorcycle is going twelve or fourteen miles an hour you can stop inside of five or six feet? A. Yes.

Q. You are sure about that? A. Well, I ain't exactly sure; I didn't measure it up or anything, but—

Q. You had two brakes on your cycle? A. Yes, sir.

Q. In what condition were they? A. Good condition.

40 Q. Both in perfect condition? A. Yes, sir.

Q. Well, the fact is that you can stop almost instantly when you are going twelve or fourteen miles an hour? A. Well, the motorcycle swings around then, though.

Q. What is the shortest distance in which you can safely stop when the motorcycle is going twelve or fourteen miles an hour? A. The safest distance? Well, about twenty feet, just as I said before. 10

Q. You said twenty feet to me? A. When Walsh's hat blew off.

Q. Now, listen. No, no. What is the shortest distance in which you can safely stop a motorcycle going—your motorcycle—going at the rate of twelve or fourteen miles an hour? A. Without swinging the motorcycle or anything; safely stop?

Q. The question is plain: What is the shortest distance in which you could stop your motorcycle when you are going twelve or fourteen miles an hour? A. Safely? About fifteen feet. 20

Q. Didn't you say five or seven feet? A. Yes, but the motorcycle swings around.

Q. Well, then, we got this clear then, that when you are going twelve miles an hour the shortest distance in which you can safely stop your motorcycle is fifteen or twenty feet? A. Yes, sir.

Q. Now, that is perfectly clear, isn't it? A. Yes. 30

Q. How long have you been riding a motorcycle? A. How long?

Q. Yes. A. Why, I have been riding a motorcycle for—1915, for about six months, and I have been riding a motorcycle here only—I only had this motorcycle one month.

Q. How many months altogether have you ridden a motorcycle? A. Seven or eight months.

Q. You pass through the busy streets, do you? A. Yes. 40

Q. Did you ever travel in New York with your car? A. Newark.

Q. And Newark? A. Yes.

Q. Where the streets are crowded? A. Yes, sir.

Q. Now, you say that the shortest space in which you could stop your car going at twelve miles an hour was fifteen or twenty feet? A. Yes, sir.

10

Q. You have a speedometer on your car? A. Yes, sir.

Q. What is the lowest rate of speed at which you can travel and still travel with a motorcycle? A. The slowest speed?

Q. Yes? A. Why, you can travel very slow, can travel two miles an hour.

Q. Without the side car attachment? A. Yes.

Q. When you passed the ditch at 22nd Street where was the moving van? A. Moving van, he was just ahead of me.

20

Q. You stated that it had a half a minute's start, didn't you? A. Yes, sir, but—

Q. Now what I want to know is, when you passed 22nd Street on Broadway where was the moing van? A. When I was at 22nd Street, why the moving van was about twenty-five feet away from me.

Q. Then your idea is that the moving van only moved about twenty-five feet in a half a minute? A. No, sir.

30

Q. Well, how far did the moving van move from the time Walsh got off to get his hat and you started your cycle? A. About thirty feet.

Q. Yes. So during that time, which you have stated was two minutes, it took Walsh to get off to get his hat, the moving van only went thirty feet? A. Not for two minutes.

Q. Well, please tell us how far the moving van got down Broadway beyond you in the half

40

minute that it took Walsh to get his hat and you start your cycle? A. Why, Walsh had his hat when the moving van passed me. I just after—just started the machine—he was at 22nd Street going across when I started the machine.

Q. But, Mr. Heilner, you have stated that a half a minute elapsed from the time the moving van passed you, your standing cycle, until you started the cycle, didn't you? A. Why, I had the cycle going all the time. The cycle was going. 10

Q. Will you please answer? Didn't you say that the moving van had—that a half minute elapsed between the time when the moving van passed your standing cycle and when you went on with the cycle; didn't you say that? A. Well, I couldn't tell exactly the time, but the moving van—

Q. Didn't you say it in your testimony here this morning? A. I didn't say not quite a half minute. 20

Q. How much time did it—that is what I want to find out? A. Well, I can't figure down to seconds like that.

Q. Well, what was the greatest distance the moving van got ahead of your cycle? A. Twenty-five or thirty feet.

Q. Now, you say the moving van was going at seven miles an hour when it passed 22nd Street; is that right? A. Yes, sir. 30

Q. And this accident happened two blocks south of that point, didn't it? A. Yes, sir.

Q. So that you must have been going faster than the moving van, weren't you? A. Why, while at 22nd Street the van picked up speed again.

Q. At 22nd? A. Yes; after going across.

Q. You said the van continued along on the easterly side of Broadway? A. Yes, sir.

Q. So close to the curb that you couldn't get between it and the curb? A. Yes, sir. 40

Q. Is that right? A. Yes.

Q. How wide is Broadway there? A. How wide?

Q. Yes. A. Well, about seventy feet.

Q. Yes; and then when you passed the ditch at 22nd Street you went over to the right hand side? A. Yes.

10 Q. So that we have the picture of the moving van going along on the left hand side of Broadway close to the curb? A. Yes, sir.

Q. You on the right hand side close to that curb? A. About five feet away from the curb.

Q. Then there was about fifty or sixty feet between you and the moving van as you both proceeded southerly along Broadway; is that right? A. Yes; it was lots of room.

Q. Well, I want to know—I want to know, be-
20 cause this is very important—if the moving van were going along the left hand curb, close to it, and you were going along within five feet of the right hand curb, and the street was seventy feet wide, there must have been at least fifty feet between you; is that right? A. Yes, sir.

Q. Now, how far did the moving van continue along the left hand curb? A. Until 20th Street.

Q. How many feet from the intersection of 20th Street did it start to turn? A. Right close at the
30 corner.

Q. How many feet, please, if you can tell us? A. I couldn't—I don't know.

Q. You at all times continued five feet from the right hand curb; is that so? A. Yes.

Q. Now what rate of speed were you going? A. About twelve or fourteen miles an hour.

Q. Now, have you got this clear, that after you passed the ditch at 22nd Street and were going within five feet of the right hand curb, you were
40 going twelve or fourteen miles an hour? A. Yes, sir.

Q. You went two blocks at that rate of speed? A. Not exactly two blocks; at 22nd Street I started to pick up speed, because at 22nd Street I was going slow, that is, just after starting the machine, and the moving van at the same time started to pick up speed after he left 22nd Street going across.

Q. Well, what was the highest rate of speed which you say you went while you were going from 22nd to 20th Street? A. The highest rate of speed? Fourteen miles, that is the highest. 10

Q. Well, when you started the moving van was twenty-five feet or twenty feet ahead of you, wasn't it? A. Yes, sir.

Q. And when you started to go twelve or fourteen miles an hour at the right hand curb the moving van was over at the left hand curb fifty or sixty feet away; is that right? A. Yes—this side. 20

Q. Listen. And you both proceeded at about the same rate of speed? A. Well, I was going a little faster than the moving van.

Q. Yes; you were going a little faster than the moving van? A. Yes, sir.

Q. You were in a hurry to get back to the lunch wagon, weren't you? A. Oh, no.

Q. Then we have a picture of the moving van on the left hand side of the street and you on the right hand side of the street, your front wheel even with its hind wheel, is that right, and you were traveling a little faster, is that right? A. Yes, sir. 30

Q. Were you watching this moving van all the time? A. Yes, sir.

Q. Then you saw it start to turn, didn't you? A. What's that?

Q. Then you saw it start to turn into 20th Street? A. Yes, I seen that. 40

Q. So when it started to leave the left hand curb at 20th Street you saw it start into 20th Street? A. Yes, sir.

Q. You saw it was going to make a swing in 20th Street? A. Yes, sir.

Q. You saw it was going to cut across your pathway, didn't you? A. Yes, sir.

10 Q. You saw all of that? A. Yes, sir.

Q. Why didn't you stop your car? A. I couldn't make that short stop, not unless the motorcycle turn around on me and the two of us getting thrown off.

Q. You saw it start to leave the left hand curb? A. Yes, sir.

Q. And you were on the right hand side. You saw it start to leave that curb; you were just even with that at that time? A. Yes, sir.

20 Q. You watched the moving van all the time from 22nd Street down to 20th Street? A. Yes.

Q. Down to the time you had the collision? A. Yes.

Q. How far were you from 20th Street when the moving van started to turn into 20th Street? A. How far was I from 20th Street?

Q. Yes. A. Why, just four or five feet.

Q. Now you were four or five feet from 20th Street when the moving van started to turn into 30 20th Street? A. No; when he was right in front of me.

Q. Please answer the question. It is perfectly plain you said the moving van was going down on the left hand side of the street fifty feet away from you? A. Yes.

Q. My question is, how far from 20th Street were you when that moving van started to turn into 20th Street? Don't you understand me? A. Yes, I understand, but I couldn't exactly say.

40 Q. Well, please tell us this, how far were you

from 20th Street when the moving van first started to turn? A. Why, he started to turn right at the corner. He didn't—

Q. Then he was at the northeast corner when he started to turn, wasn't he? A. Yes.

Q. You were at the northwest corner? A. Yes, sir.

Q. And you were four feet from 20th Street? A. Yes. 10

Q. Now have we got this perfectly clear, that— A. No; four feet from 20th Street.

Q. How far were you— A. When he start to turn I was at the end of his moving van; that is about ten feet.

Q. Maybe I am mistaken, but I thought you placed this moving van at the left hand side of Broadway? A. Yes, sir, he did.

Q. And I thought you placed your motorcycle at the right hand side? A. Yes. 20

Q. And that you said the street was about seventy feet wide? A. Well, I don't know if it is seventy or sixty.

Q. It is an ordinary city street? A. Yes, sir.

Q. Now what I want to know is this: if you watched the moving van during all its course, where was your motorcycle at the time the motor van first started to turn, where with reference to 20th Street? A. At the right hand side of the street. 30

Q. How far from 20th Street? A. Well, about ten, fifteen feet.

Q. Now, have we got it perfectly clear, that when you first saw the van beginning to turn your motorcycle was ten or fifteen feet from 20th Street? Is that clear? Is that the fact? A. Well, I told you I didn't measure it out.

Q. I didn't ask you that, Mr. Heiler. I am not trying to puzzle you, but I want to know the facts. 40

Is that reasonably clear that when you first saw the moving van starting to turn your motorcycle was at the right hand side of the street about twenty feet from 20th Street? A. Oh, no. I only said ten or fifteen even. Now you are making it twenty.

Q. It wasn't more than twenty, was it? A. No.

10 Q. Then it was less than twenty? A. It was fifteen. I didn't see that moving van turning at all, that is the way he want to turn right away.

Q. I am asking you a different question. When you first saw the moving van turn, leaving the left hand curb, you were then within fifteen feet of 20th Street? A. The length of the moving van.

Q. How long is that? Will you answer the question? A. About fifteen feet, yes, from 20th Street.

20 Q. Now the moving van after it began to turn, crossed Broadway, didn't it? A. Yes, sir.

Q. So that after leaving the left hand side of Broadway near the curb it had to go all the way across Broadway to get to the point where the accident happened? A. Yes, but all the time—

Q. I haven't asked that. I want to know if that is right. We will all get mixed up if you don't answer the questions. Am I right? A. Say that again.

30 Q. The moving van started to leave the left hand curb of Broadway and went all the way across Broadway before it got to the point of the accident? A. Now by the time the moving van—

Q. Will you answer the question? A. —was at 20th Street he wasn't away—he was at the center of the street then.

Q. This is the first time you have told us about this. You did not mention that in your direct examination, either. As I understood your direct

40 testimony was that that moving van at all times

kept so close to the left hand curb that you could not go where the law required you to go, to the left of it? A. Well—

Q. Is that right? A. Yes, he was—

MR. WINANS: I object to the characterization of counsel, where the law obliged him to go. The law does not oblige a person to go to the left side where there is room— 10

THE COURT: No; I will sustain the objection.

MR. PERKINS: Strike it out.

Q. Now, Mr. Heiler, did you on your direct testimony state that during the entire course of this moving van from 22nd Street to 20th Street it was close to the left hand curb? A. Not exactly until 20th Street was it close to the curb. Pretty near. He was at the left all the time, yes. 20

Q. You have told us repeatedly in your cross examination that it did not leave the left hand curb until it got right near 20th Street. That is true? A. Right near 20th Street, yes.

Q. What I want to know is, how far was the moving van from 20th Street when he left the left hand curb? A. How far?

Q. Yes. A. Six or seven feet.

Q. Now have we got it clear that the moving van proceeded along the left hand side of Broadway until it got to six or seven feet from 20th Street; is that right? A. Yes, sir. 30

Q. And where were you then? You were then fifteen feet from 20th Street on the right hand side of Broadway; is that right? A. Yes, sir; I was at the end of the moving van.

Q. Mr. Heilner, I think you are mistaken, or I am mistaken. Let us see if we can find out the position of this thing. When the moving van started to cross Broadway it was within six feet of 20th Street? A. Yes. 40

Q. You then were fifteen feet from 20th Street on the right hand side; is that right? A. About that; ten or fifteen.

Q. So that after you saw the moving van start to cross Broadway it had to pass up six feet to 20th Street and all the way across Broadway before you had the collision, didn't it? A. The col-
10 lision happened right at the corner.

Q. Will you answer that? Shall I ask it again? After you saw the moving van start in its course across Broadway it had six feet yet to move to 20th Street and then to cross all the way across Broadway before it reached the point of collision; is that right? A. Yes, that is right, but he didn't move six feet to 20th Street; he made a sharp turn right into 20th Street them six feet; he started to turn while he was six feet away from
20 20th Street.

Q. Mr. Heilner, as I understood, I think you placed it that he proceeded along the left hand side of Broadway until he got within six or seven feet of 20th Street; is that right? A. Yes.

Q. Now get this in your mind; think what I am saying. Then he started to turn? A. Then he started to turn, yes.

Q. So when he was at the left hand side of *20th Street* within six or seven feet of *Broadway*
30 he started to turn? A. Yes, sir.

Q. And were you then on the right hand side of Broadway fifteen feet from 20th Street; is that right? A. Well—

Q. Is that right? A. I don't know; I didn't measure it. It is about ten or fifteen feet. You measure the moving van and then you have got it. My front wheel of the motorcycle was up against the back wheel of the moving van, so measure it.

Q. Please, Mr. Heilner, don't get into a con-
40 troversy about it. We are trying to get how this

thing happened. Where were you when you first saw the moving van starting across to Broadway? A. About ten or fifteen feet away from Broadway.

Q. From 20th Street? A. From 20th Street.

Q. So that while you were proceeding ten or fifteen feet to the point of collision the moving van must have crossed Broadway, didn't it? A. No. 10

Q. You say—where were you born, Mr. Heilner? A. What's that?

Q. Where were you born? A. Germany.

Q. When? A. August 16, 1895.

Q. Are you a naturalized American citizen? A. No, sir.

Q. So you were born in Germany? A. Yes, sir.

Q. You are not an American citizen? A. No, sir. 20

Q. How many feet did you travel after the collision with the van? A. How many feet?

Q. Yes. A. After I was hanging on to the van fifteen feet.

Q. After the collision with the van? A. The van carried me for fifteen feet after.

Q. What part of the mudguard did you collide with? A. Front part of the mudguard.

Q. Which part, which mudguard? A. The right, on the right hand side. 30

Q. The front part of it? A. Front part—front wheel.

Q. Well, how far from the front of the front mudguard did you strike? A. About at the end of the wheel.

Q. Which end of the wheel? A. The front wheel.

Q. The front or the back of the front wheel? A. The back of the front wheel.

Q. So that the collision took place with the 40

front of your front wheel on the mudguard at the rear of his right hand front wheel? A. Yes, sir.

Q. How near is the nearest you were then to the right hand curb? A. I was crowded into the curb then.

MR. PERKINS: I move that that be stricken out.

10 THE COURT: It will be. How near were you? Were you two feet, one foot, or twelve?

A. At 20th Street and Broadway?

Q. Yes. A. I was up against the curb then, about one foot away from the curb.

Q. When did you first go to the right hand curb? A. As soon as I start, I seen the moving van to turn.

Q. Where were you up to that time? A. Four
20 of five feet away from the curb.

Q. Why didn't you go to the left hand side of the moving van? A. When I was at the back of the moving van, there wasn't room enough to get through at the left hand side.

Q. Then you must have been over on the left hand side of the street, too? A. At 22nd Street, coming up I see there was no room to get through, because he was right up against the left hand curb.

Q. At any time while the moving van was
30 traveling from 22nd Street to 20th Street was there any time room enough for you to go to the left hand side? A. After—when I was on the other side, at the right hand side of the moving van, just before 20th Street, when he started to cross over, there was—that was too late for me; I couldn't go around there then.

Q. How far away was the moving van when you first saw it make a turn; wasn't it across the street from you? A. The moving van? He was
40 alongside of me when he start to make the turn.

Q. Mow many feet from you? A. About thirty-five feet.

Q. He was thirty-five feet away from you when he started to make a turn; and where were you then? A. I was at the right hand side.

Q. You saw that he was starting to make a turn, didn't you? A. Yes.

Q. Why didn't you put your brake on? A. I did. 10

Q. And you traveled fifteen feet after you put your brakes on? A. As soon as I put my brake on I—

Q. Please answer the question? A. There was not fifteen feet, otherwise the machine would have stopped.

Q. You told us you were fifteen feet from 20th Street, didn't you? A. Yes, sir.

Q. And the accident happened in 20th Street? A. Yes. 20

Q. So you traveled at least fifteen feet before you had the accident? A. Yes, but I had been going around the corner first before the accident happened.

Q. How many feet did your cycle travel after you saw the van moving across there? A. About ten feet.

Q. So we have got it clear that after you saw the moving van attempt to go on 20th Street your cycle moved ten feet further? A. Yes, around the corner. 30

Q. Please try and think of what I am asking you, Mr. Heilner; I want to know after you perceived the motor van attempting to go into 20th Street how far your motorcycle went before it collided with the van? A. Before it collided with the van it went about ten feet.

Q. So from the time you saw the moving van start to go into 20th Street until the time you struck you moved ten feet? A. Yes, but I— 40

Q. Is that right? A. Yes.

Q. How far did the moving van move toward 20th Street before you put your brake on? A. How far did it move? So soon as I seen him making the turn I put the brake on.

Q. So you were going at such a rate of speed that you could not stop in ten feet? A. Oh, no.

10 Q. Could you have stopped in less than ten feet? A. If—

Q. Please answer the question. At the rate of speed you were going when you first saw the moving van turn for 20th Street could you have stopped in ten feet? A. Yes, there was no ten feet when I collided with the moving van that way around the corner.

MR. PERKINS: I move that the surplus be stricken out.

20

A. Five feet in 20th Street.

MR. PERKINS: I move that the surplusage excepting the direct answer to the question be stricken out.

THE COURT: It will be.

Q. What I want to know is this, that after you saw the moving van start on its turn at 20th Street you traveled ten feet before you struck it, 30 didn't you? A. Yes.

Q. At what rate of speed were you going when you first saw it turn for 20th Street? A. About fourteen miles an hour.

Q. Fourteen. You said the moving van was going slower than you? A. He was going about twelve, yes.

Q. So that you were traveling faster than the moving van; is that right? A. Yes.

Q. Now, why didn't you put your brake on and 40 stop your car in that ten feet? A. I didn't have no ten feet to stop in.

Q. How many feet did you have to stop in when you first saw it start for 20th Street? (No answer.)

Q. Can you answer it, sir? A. About six feet.

Q. You stated on your direct examination that you realized you were in a position of danger. What did you mean by that? A. By going past a vehicle on the right hand side of the street while he was at the left. 10

Q. Then you made an effort to pass this vehicle on his right hand side, didn't you? A. Yes.

Q. You were going faster than he was? A. Little, yes.

Q. You were going at a rate of speed that you could not have stopped your cycle with the brake before the collision happened; is that right? A. I could have stopped, yes.

Q. Then why didn't you stop? A. Yes, but— 20

Q. Why didn't you stop? A. The rear end of the motorcycle turn around and throw the two of us off.

Q. That is the way the thing happened then? If the rear end of the motorcycle had not turned around there wouldn't have been any accident, would there? A. No, no.

MR. WINANS: I object. The witness didn't say it. It didn't turn around. He said he couldn't stop it because it would have turned around. 30

(Answer repeated by stenographer.)

MR. WINANS: He said it would have turned around. Ask the witness what he said.

MR. PERKINS: I don't have to ask the witness; I asked the stenographer.

Q. You saw this moving van going into 20th Street? A. Yes. 40

Q. You say you were going slowly on the right hand side of the street, on the right hand side of the van? A. Yes.

Q. Then when you saw it start to turn why didn't you stop your cycle? A. I couldn't stop this minute.

Q. Didn't have time to stop it, did you, without a collision? A. If I would have stopped—

Q. You didn't have time to stop it without a collision, did you? A. No.

Q. That is all.

RE-DIRECT EXAMINATION BY MR. WINANS:

Q. Mr. Heilner, in answer to a question relative to stopping did you say that the rear end of your cycle did swing around and throw you and Walsh off? A. No.

Q. What did you say in answer to that question? A. I said if I would have made that short stop the hind end of the motorcycle would have swung around and threw me and Walsh off.

MR. WINANS: If your Honor please, that is the way I heard, and I ask your Honor to permit the notes being corrected with what the witness has stated.

THE COURT: I don't know what was stated. I am taking the report as put down by the stenographer.

MR. WINANS: If your Honor please, the witness has stated that the word "would" was in there, and he was asked why he didn't stop, and he said the rear end would swing around and throw Walsh and him off, and it has been misunderstood, and I think the record ought to be corrected.

THE COURT: Why should I correct it? You cannot correct the record that way. I did

not hear it and the other side heard it differently from what you did. How can you correct what was a slip that way? If we always amended the record because the counsel who seems to have been injured by the question—

MR. WINANS: I take exception to your Honor's inference. It is not because there is any injury, it is because I heard the witness' answer and I called your attention instantly to the fact, and I told counsel what the answer was.

THE COURT: If there was no injury what is the point you make?

MR. WINANS: The point is you said the answer "which has injured counsel." The answer to the counsel does not injure, but the way it has been taken down does injure.

THE COURT: If it does—

MR. WINANS: The inference indicated by the answer involves an injury. There has been an amendment of what the witness said, and it seems to me the province of your Honor to correct an error in the record when it occurs, when your attention is promptly called to it.

THE COURT: Why should I believe you, Mr. Winans, rather than the—

MR. WINANS: The witness is under oath and he testifies what he said.

THE COURT: The jury all heard it. If what the witness said is what he said now they heard it.

MR. WINANS: There is a record to be made of this case possibly, and I like to have the record straight as I go along.

THE COURT: So do I. Why should I believe you rather than Mr. Perkins? I believe both.

MR. WINANS: The witness is under oath, and the only statement that I can insist upon that applies is the sworn statement of the witness, and he says he doesn't say what has been ascribed to him.

THE COURT: The jury will remember whether he did or not. I cannot say whether he did or not.

MR. WINANS: And will your Honor allow me an exception?

THE COURT: You may have anything that you want that will embalm on the record the proposition that you think that that thing ought to be changed.

MR. WINANS: Well, that is satisfactory.

THE COURT: I will make it so perfectly clear that you are entitled to it that I will write down now that I want you to have it, whatever it is. I do not want you to be injured by what I ruled, but when I do not remember a thing you nor anybody else will get me to say that I do and change all that according to your recollection when the other counsel has a different recollection, and as it was taken. I do not want to injure you nor him.

MR. WINANS: I understand a record may only be traversed by a direct statement under oath, on the application to have it corrected, and I promptly put myself in line with that rule.

THE COURT: All right. How am I going to remember it when I do not recall it?

MR. WINANS: I think the exception saves my rights.

THE COURT: I hope it does, I am sure.

MR. WINANS: Beg pardon?

THE COURT: I hope it does. If it does not it won't be my fault.

Q. Mr. Heiler, have you made a diagram of the place of this accident, showing the course followed by the two vehicles that participated in the collision? A. Yes.

Q. Have you that with you? A. Yes, sir.

Q. Let me see it, please?

(Witness produced three papers.) 10

Q. Referring now to the diagram which I will mark with the letter A—

MR. PERKINS: I object. Before he refers to it I would like to enter an objection.

MR. WINANS: I will let you see it.

MR. PERKINS: I do not think it can be used. I do not think you can produce a witness to make a diagram of his conception of how the thing happened. He is to testify to that. 20

MR. WINANS: I want to finish my question.

Q. Will you state what this paper shows?

MR. PERKINS: I object, first, on the ground that this is certainly not re-direct examination, and that it is not proper for him to attempt to elucidate on his re-direct examination by a diagram made by the witness himself. How could I cross-examine the diagram? He drew this diagram in his calmer moments. 30

THE COURT: The diagram is not in evidence. I think I will permit the question. He is asked what the diagram purported to show. The jury have not seen it and they won't see it unless it is authenticated as being accurate and correct and a proper representation of the scene it purports to represent.

(Question repeated by stenographer.) 40

A. This shows how the moving van on the left and the motorcycle on the right was going south on Broadway between 21st and 20th Street.

Q. Does it correctly show the location of Broadway and 20th Street, Bayonne, with regard to each other and the positions occupied by the motor van and your motorcycle shortly before this
10 accident occurred.

MR. PERKINS: I object. I would like to cross examine on it.

THE COURT: Well, he does not offer it yet and I will permit the question.

(Question repeated by stenographer.)

MR. PERKINS: I object to the question on the ground that it is leading.

THE COURT: I will permit the question.

(Question repeated by stenographer.)

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A. Yes.

Q. Who made that drawing? A. Why, I made that myself.

MR. WINANS: Now I offer it in evidence.

MR. PERKINS: I object and ask leave to cross examine.

RE-CROSS EXAMINATION BY MR. PERKIN:

30 Q. Mr. Heiler, is this paper drawn to any scale? A. No.

Q. Is the sidewalk drawn to any scale on the diagram? A. No.

Q. Is the moving van drawn to any scale? A. No.

Q. Is this street drawn to any scale; the motorcycle drawn to any scale? A. No.

Q. At what moment of time does this paper
40 purport to represent the location of the various things there? A. At what time?

Q. At what moment of time? A. Just before the collision.

Q. How much before the collision? A. About one minute—half a minute.

Q. Does it purport to show the situation at the time you were going fourteen miles an hour and the motor van going twelve miles an hour? A. Yes. 10

MR. PERKINS: Then I withdraw all objection to it.

(Paper marked Exhibit P-1.)

RE-DIRECT EXAMINATION BY MR. WINANS:

Q. I now show you a map which you have indicated with two I's 1, and ask you if you drew that also? A. Yes, sir. 20

Q. What does that show? A. That shows where the moving van is turning into 20th Street and myself at the same time making the turn for 20th Street to go in the same direction as the moving van, where the front part of the moving van hit the front part of my motorcycle, throwing Richard Walsh off the rear seat and me taking hold of the mudguard of the van.

MR. PERKINS: I object to that as an entirely improper answer and ought not to be on this record. It is an attempt to introduce into evidence a situation by direct evidence of the witness when he is merely describing a paper. 30

THE COURT: Well, I will strike out the answer, and if the paper were offered on that description I would strike the paper out. It is absolutely inadmissible under all the cases, everywhere decided, for a man to draw his 40

conception of moving things that are apt to come into collision, or in the act of coming into collision, and offering that in evidence before the jury. There is no such rule that permits such things to be admitted, and I will strike out the answer and if the paper is offered I will strike it out.

10 MR. WINANS: I want to ask one more question with regard to that paper.

Q. Does it show the intersection of Broadway and 20th Street and the courses followed by the motor van and the motorcycle up to the instant that the collision occurred?

MR. PERKINS: I object, on the ground that it is merely a matter of——

20 THE COURT: Oh, I sustain the objection. You cannot produce things and show the picturization of a man's testimony. That is never permissible.

MR. WINANS: Now I offer this paper in evidence.

MR. PERKINS: I object.

THE COURT: I will overrule it.

(Paper marked A-1, for identification.)

MR. PERKINS (referring to Exhibit P-1): I have got the picture in, but I am not going to let the verbiage in. I did not see this. This is quite a nice little statement. In practiced phraseology this gentleman wrote on this paper some testimony he would like to give. I do not object to the thing as far as it is a map, but so far as it says a lot of things that Mr. Heiler would like to have——

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THE COURT: The map was all that was offered.

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MR. WINANS: That is all that was offered. I will tear it off. I don't care anything about it Is that agreeable to you?

MR. PERKINS: Entirely.

MR. WINANS: I will tear it off this way and then I won't destroy the exhibit mark. Is that satisfactory? You want the jury to see this? 10

MR. PERKINS: Perfectly glad to have them look at it.

(Exhibit P-1 handed to the jury for inspection.)

BY MR. WINANS:

Q. Mr. Heiler, when you first saw this motor van beginning to pinch over twoard the right, did you know that it was the intention of the driver of that vehicle to turn into 20th Street? 20

MR. PERKINS: I object, because there is no evidence that it was pinched over to the right.

THE COURT: I will sustain the objection, as it contains an unwarranted assumption of fact.

Q. When you first saw this motor van begin to leave or depart from the left-hand curb on Broadway, did you know that it was the intention of the driver of the vehicle to turn into 20th Street? A. Not exactly right away, but as soon as he made the turn more I knew right away he was turning into 20th Street. 30

Q. How near to 20th Street had he got when you first ascertained that he was turning into 20th Street? A. He wasn't in 20th Street yet.

Q. How near was he to 20th Street? A. About fifteen feet. 40

Q. Now did your motorcycle, just before Walsh fell off, swing around rear end first? A. No

Q. Did it swing at all? A. No.

Q. Did you ever say that it did? A. No.

Q. That is all.

RE-CROSS EXAMINATION BY MR. PERKINS:

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Q. If you had applied the brake real hard it would have swung around, wouldn't it? A. Yes.

Q. So that it was possible for you to apply the brake harder than you did; is that right? A. Yes.

Q. If you had applied the brake harder than you did your motorcycle would have come to a quicker stop than it did? A. Yes.

Q. When this fifteen feet of intervening space between the van and 20th Street existed and you saw it was moving into 20th Street, and you immediately applied your brake hard, you would have stopped, wouldn't you? A. Yes, I would have stopped, but——

20

Q. (Interrupting.) One minute; and you would not have reached the point of collision, would you? A. Oh, yes.

Q. Oh, then you were going so fast—let me ask the question before you start to answer it—then you were going so fast that you would have covered the fifteen intervening feet? A. No.

30

Q. You could have stopped within less than ten feet, couldn't you? A. Not safely.

Q. Well, you didn't stop safely at all. You could have applied your brake so that your motorcycle would have stopped within ten feet? A. Yes.

Q. In that event you never would have reached the point of collision, would you? A. I would have been right on top——

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Q. Please answer the question. You never would have reached the point of collision, would you? A. No.

Q. Let us get this one thing clear about this map which I have so graciously permitted you to use. This map represents the situation at the time you were going fourteen miles an hour; is that right? A. Yes. 10

Q. And the motor van going twelve miles an hour? A. Yes, sir.

Q. Just show us on here with the lead pencil, mark where you saw these two vehicles collide? At what point on the map? Where did they strike each other? A. Right (indicating) on the corner.

Q. You have marked X at the place where they collided? A. Yes.

Q. Where on the map did you first start to turn your motor vehicle? (Witness indicates with an X.) 20

Q. Put 1 at the first X and 2 at the second X, will you, please? (Witness complies.)

Q. And the map represents the situation of the cars when the van began to turn? A. No, not when the van began to turn.

Q. How long a period anterior to the beginning of the van to turn? A. About twenty feet after that the van started to turn. 30

Q. So that we have that clear, that the van travelled twenty feet further than—just mark X-3 where the van began to turn. (Witness complies.)

Q. Now we have it, 1 indicates where the collision took place? A. Yes.

Q. 2 indicates where you began to turn, and 3 indicates where the van began to turn? A. Yes, sir. 40

Q. And you were going fourteen miles an hour and he was going twelve miles an hour? A. Yes, sir.

Q. All right. That is all.

RE-DIRECT EXAMINATION BY MR. WINANS:

10 Q. Indicate now, while you have the pencil in your hand, the course that was followed by the automobile up to the place of collision and the course that was followed by your motorcycle up to the time of collision, as indicated by these several X's that Mr. Perkins——

MR. PERKINS: I object to him changing the map. I admitted this map in, but I do not think he has a right to change the map and make such a map as your Honor ex-
20 cluded.

THE COURT: No, he cannot.

Q. You have indicated here at Mr. Perkins' request, the letter X-3, have you not, indicating the place where the van began to turn? A. Yes, sir.

Q. Now will you indicate the course it followed from that point X-3 to the point X-1 which Mr. Perkins had you place here as indicating the place of collision?

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MR. PERKINS: I object to him changing the map.

THE COURT: He cannot change the map. He can mark a place on it where something will be put, but he will not be permitted to change the map and draw pictures of his conception of the case. I am not going to be the first one to make a fool emendation in the
40 law.

Q. Make an X indicating the point of curve through which the automobile van passed after leaving the point X-3 and before it reached the point X-1?

MR. PERKINS: I would like to know where the witness indicates the point of curve.

THE COURT: I will let it go.

10

Q. Do you understand the question? A. Yes.

(Witness indicates.)

Q. It means the point through which the van swung around?

MR. PERKINS: That is not the point of curve; that is the arc.

A. The van swung around here (indicating).

20

MR. PERKINS: I object. The Court has already ruled you can mark the points, but you cannot make any curves or other diagrammatical expressions there.

A. What do you mean?

Q. Make an X indicating the point that the motor van passed through after the time it began to turn and before the collision occurred. Put a 4 on that. (Witness marks with X-4.)

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Q. That is all.

RE-CROSS EXAMINATION BY MR. PERKINS:

Q. Now, just one question, Mr. Heiler. Do you mean to say the events at ten minutes to three on that morning are all so clearly pictured in your mind that you can even now sit down and diagram and make points on the map of where things happened? A. Yes, sir; exactly.

40

Q. Just another question. This motor van was going at such a rate of speed that it was very easy to you to read on it, "Motor Express Van and Storage Company." Had no trouble reading that? A. Well——

Q. Well, strike out the question? A. I can't say that.

10 Q. Strike out the question.

MR. WINANS: That is all.

Q. If you were going faster than the motor van and your cycle is nearer the point of collision, how did you ever happen to collide with one another (indicating map)? You were going two miles an hour faster than that van and your cycle is nearer the point of collision, how did you ever

20 happen to collide? A. Well, when I was around the corner I was trying to go the same direction as the van to avoid anything.

Q. Just make one more mark and call it X-5. Show us where you could have stopped your motorcycle if you had put your brakes on tight. Witness indicates.)

Q. X-5 represents where you could have stopped your motorcycle if you had put your brakes on tight; is that right? A. Yes.

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RE-DIRECT EXAMINATION BY MR. WINANS:

Q. If you had put on your brakes tight and stopped at X-5 what would have become of you and Walsh?

MR. PERKINS: I object to the form of the question.

THE COURT: Yes; I think it would be even religious speculation.

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MR. WINANS: Does your Honor rule that out?

THE COURT: Certainly.

MR. WINANS: That is all.

RICHARD WALSH, a witness produced in behalf of the plaintiff, being duly sworn, testified as follows: 10

DIRECT EXAMINATION BY MR. WINANS:

Q. Where do you live? A. 19 East 10th Street, Bayonne.

Q. Do you remember the early morning of September 27th last? A. Yes, sir.

Q. Were you with Heiler? A. Yes.

Q. Just tell what happened when you were on Broadway in the neighborhood of 22nd Street? 20 A. I was on that lunch wagon at the time there was an argument. Mr. Heiler and I went up to police headquarters. We left the lunch wagon going up the right-hand side of Broadway to 26th Street, we turned into 26th Street from Broadway into Avenue C, to police headquarters. We left police headquarters and we came down to 26th Street——

Q. What time did you leave police headquarters, about? 30 A. That I couldn't tell you.

Q. Well, around what hour? A. Well, half past two, going on to three o'clock.

Q. Then when you left police headquarters what street did you go through? A. 26th Street, going east on 26th.

Q. Through what street? A. Through 26th.

Q. To what street did you go? A. Coming back towards Broadway. 40

Q. Did you get to Broadway? A. Yes.

Q. Then what did you do? A. Went down south on Broadway to 26th Street, or 22nd Street.

Q. Which side of Broadway did you ride on? A. South.

Q. What part of this motorcycle were you occupying? A. The rear seat.

10 Q. When you got to 22nd Street did you see anything of an obstruction? A. Yes.

Q. What was that? A. They were putting in a water valve there and the whole street was taken up—half of that—there was room enough for a moving van or an automobile or a wagon to pass through.

Q. On which side? A. On the south side.

Q. The south side of what? A. 22nd Street on

20 Broadway.

Q. Which side of Broadway did you get past? A. Which side?

Q. Could you go down the right side, the westerly side of Broadway? A. No, sir.

Q. Which side of Broadway did you have to go on? A. On the east side.

Q. How wide a track was there for vehicles on the east side of Broadway at 22nd Street? A. There was room enough for a moving van to pass

30 or a wagon, but we couldn't pass there with the dirt and these car tracks and the stones that was out there.

Q. Was there room for two vehicles to pass each other where that ditch was dug up? A. No, sir.

Q. Do you remember a circumstance about losing your hat? A. Yes, sir.

Q. Where did that happen? A. Between 22nd

40 and 23rd Streets.

Q. Well, did you recover your hat? A. Yes.

Q. See anything of a moving van about that time? A. It was in the front of us.

Q. When? A. On 22nd Street; that was coming back I lost my hat, that is, going up and coming back.

Q. What's that? A. I lost my hat twice; it blew off my head. 10

Q. I am talking about the time you were coming—just before you got to 22nd Street did you lose your hat there? A. Yes, sir.

Q. When the motor van was going across this narrowed place going south on Broadway at 22nd Street where was your motorcycle? A. We were in back of the moving van.

Q. How close to it? A. About six or seven feet. 20

Q. After you got past this narrow place at 22nd Street did you observe where the motor vehicle went? A. It went down and we—on the left-hand side.

Q. Who went on the left-hand side? A. The moving van.

Q. How close to the curb? A. Well, I judge about five or six feet.

Q. Where did the motorcycle go? A. On the south side. 30

Q. What do you mean by the south side? A. The right-hand side going down.

Q. The right-hand side there is the west side, isn't it? A. Yes.

Q. You were going south, weren't you? A. Yes.

Q. Pointed—— A. Yes, going back to the lunch wagon.

Q. Tell what happened as you approached 20th Street? A. We went down south of Broadway 40

until we came to 20th Street. The moving van made a sharp turn in 21st Street, striking into 20th Street, going west, and run into the motor cycle. I was knocked off on the sidewalk.

Q. Now you ran along a little before the accident and across 22nd Street just behind the motor van; did you see whether it had any red tail light burning? A. No, sir.

10

MR. PERKINS: I object to it as immaterial, whether it did or not.

THE COURT: I cannot imagine how it would be immaterial. The law requires there should be a tail light burning and if it was not burning it may be that it would have some effect upon how a man would act when he came up behind that or was in the general neighborhood.

20

MR. PERKINS: I think my objection is material.

A. He didn't have no front lights burning either.

MR. PERKINS: If the automobile was in perfectly plain sight and they were on the right-hand side of it, how would it make any difference as to whether it was burning or not, any more than if he had a license number. Suppose they didn't have any license number on it?

30

THE COURT: It would make all the difference in the world. It has been decided that the mere fact it does not have a license number on does not bear on the question of negligence; it has been also decided that the fact that it doesn't have a light does have a bearing on the question of negligence, so it makes all the difference in the world as to whether

40

you are trying to prove the absence of a light or the absence of a license number. The two things are totally different things. One is merely meant for identification purposes and the other is meant for warning. That is the difference that I see. I think that I will permit the question.

10

Q. Was the tail light burning on the motor van that night? A. No, sir. That is when the machine turned into 20th Street after I took the motorcycle off of Mr. Heiler, I seen that.

Q. When did the motor van turn into 20th Street? A. Well, he made a sharp turn from about 21st Street and cut us off.

MR. PERKINS: I object to the characterization and ask that it be stricken out.

20

THE COURT: I will sustain the objection. That is a conclusion.

Q. Well, when he made this turn did he go in front or behind the motorcycle? A. He went in the front.

Q. How fast was the motor van going as he was making that turn? A. Well, I judge about fifteen miles an hour.

Q. How fast was the cycle that you were riding on going at that time? A. About ten or twelve.

30

Q. Were you looking at the motor van as you ran alongside of it from 22nd Street down to 20th Street? Did you look at the van between 20th and 22nd Street? A. Yes.

Q. Was any signal given by putting out of a hand by the driver of the motor van? A. No; it didn't blow no horn either.

Q. Was any signal given that you could hear of any kind? A. No, sir.

40

Q. Where did these two vehicles come in contact with each other? A. 20th Street and Broadway.

Q. Which corner? Well, was it on the right or left side of Broadway? A. It was on the right.

Q. Was it on the near side or far side of 20th Street as you were going south? A. Near side.

10 Q. Well, that would be the northwest corner, wouldn't it? A. Well, I will say this corner. Here is 20th Street and this corner here (indicating).

Q. You going south would be the northwest corner, wouldn't it? A. Yes.

Q. What happened when that collision occurred? What happened to you first? A. Why, I got knocked off and then I went over and Mr. Heiler seen—I heard him hollering and seen the 20 motorcycle on top of him, and I pulled the motorcycle off of him and then I was kind of weak and I fell down, and Officer McGrath and O'Connor came to the assistance, and he hollered to Mr. Heiler, "Will I get the priest?" and he said, "Yes," and he run for the priest and the other officer run and called up for the ambulance.

Q. See the ambulance come? A. Yes.

Q. Took him away, did it? A. And took him away to the hospital.

30 Q. Did you notice Heiler's condition? A. Yes; he was all up in a knot.

Q. What is that? A. He was all up in a knot. I thought the pedal of the motorcycle was through him.

Q. What do you mean? A. He was all banged up; he had one leg up under his head. I didn't think he would live at all.

Q. Which leg was that? A. That I couldn't 40 tell you, the condition he was in. I was all shaken up inside.

Q. Was he groaning or making any noise? A. He hollered, and I went, and I—he was on 20th Street then where he got dragged with the machine, and I hollered to them two colored men out there—they were driving the motor van—I hollered, "Stop."

Q. Do you recognize the man that was driving the moving van? A. Well, no, that I couldn't recognize. There were two gentlemen. I knowed them well. 10

Q. These two men were on the van? A. I think the little fellow was running the machine, I ain't sure, but I seen the two of them at the corner. But two of them was on the machine, yes.

Q. What do you mean you saw at the corner? When with relation to the accident? A. After they came and tried to get witnesses. There was another automobile came down there afterwards. 20

Q. That may be stricken out. A. With a party in it.

THE COURT: All right; strike it out.

Q. Did you see them around the place of the accident at the time the accident happened or shortly after? A. Shortly afterwards I seen them going off on the moving van.

Q. That was just before the ambulance came? A. Sir? 30

Q. Just before you went away in the ambulance? A. Why, we waiting for the ambulance; Mr. Heiler laid in the street and they brought a blanket to Mr. Heiler and put it over him.

Q. You picked up the motorcycle, did you? A Took it off of Mr. Heiler.

Q. Did you see the condition he was in? A. Yes, sir.

Q. What was it? A. Well, he was in a pretty 40

bad condition; I didn't think he would live until we got to the hospital.

Q. I mean the condition of the motorcycle? A Oh, yes.

Q. You saw that? A. Pretty bad condition.

Q. Broken? A. Never will be fixed—well, the front wheel and the hind wheel and the spokes and handle bars.

10

Q. What about the wheels and the handle bars? A. They were all bented.

Q. How about the frame? A. The frame was bented too.

Q. How long did you remain in the hospital? A. Well, not long after they—I got my wounds dressed up and I couldn't go home, couldn't walk home.

20

Q. All right. That is all about that. Did you see Heiler there? A. Yes.

Q. How long did he stay there to your knowledge? A. For about seven weeks, I believe, seven or eight weeks.

Q. Go there and visit him occasionally? A. Yes.

Q. That is all.

(Interruption.)

30

Mr. Winans: This man's alienage seems to be a pertinent question, and hence if the other side——

(Interruption.)

Mr. Winans: Judge Kelly in Brooklyn decided that a friendly alien might maintain a suit and dictated a memorandum on the subject which I have. I understand that has already been superceded by other legal decisions. There is not any use of prolonging the agony.

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THE COURT: Are you going to raise that point?

MR. PERKINS: Yes.

THE COURT: While you are both here I want to say to you that we were discussing a moment ago about this question of the maps indicating fugitive facts for crystallization and picturization. The matter is perfectly settled in a leading case which I have gotten out here, *Rodick vs. Maine Central Railroad Company,* in 85 Atlantic Reporter, at page 43, where the Court uses this language, which I deemed myself to be applying when I made my observation on the subject. This referred to photographs, which, however, in this particular are in the same ruling as the diagram:

"Photographs, however, should show simply the conditions existing at the time. They should aid the jury in better applying the oral evidence to the particular location. In a case like the one under consideration, they should represent inanimate, not animate, objects; and when they go further than this and represent the parties in various claimed positions they may more properly be excluded than admitted, on the ground that they have passed beyond their legitimate functions and tend to emphasize unduly the claims or the evidence of one party or the other. It was on this ground that the photographs were excluded in *Babb vs. Paper Company,* where the Court says: 'To be admissible, photographs should simply show conditions existing at the time in question. But photographs taken to show more than this, with men in various assumed positions, and things in various assumed situations, in order to illustrate the claims and contentions of the parties, should not be admitted. An examination of the excluded photographs shows that they fall with-

in the latter class. They would serve merely to illustrate certain theories of the defendant as to how the accident happened. They were properly excluded as a matter of law.' "

Then follows a citation of a case fully supporting that case. There is no doubt about it.

MR. WINANS: That is good law.

10 THE COURT: What are you going to do?

MR. WINANS: I ask for the withdrawal of a juror.

MR. PERKINS: I think we ought to try the case.

MR. WINANS: It may not be possible to bring the action over again.

MR. PERKINS: I am trying this case for another attorney.

20 MR. WINANS: I plead absolute surprise. This is the most unheard of thing in the world. It was not legitimate cross examination to ask him where he was born, anyhow.

MR. PERKINS: Yes, it is.

THE COURT: If you ask for a non-suit I think I will grant the non-suit.

MR. PERKINS: I am going to ask for a non-suit.

THE COURT: I think you are entitled to it. The case may be commenced over again.

30 MR. PERKINS: There is no objection to commencing over again, as far as I am concerned. I can send my bill in, but I am trying this case for Mr. Holman, and he has absolutely no faith in the virtue of the plaintiff's case, and I think I ought to take advantage of everything that I can legitimately.

THE COURT: I will grant the motion then.

40 MR. WINANS: I think I will except to the non-suit too. I am also trying the case for somebody else.

Colloquy.

THE COURT: All right; you may have the exception entered. The exceptions are granted of course. It is upon the ground of the alienage of the plaintiff.

MR. WINANS: I understand.

THE COURT: Of course you understand it is not the mere fact of alienage, but the fact of enemy alienage I am granting it on. 10

MR. WINANS: Of course.

Non-suit granted, to which plaintiff excepts.

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NEW JERSEY

Court of Errors and Appeals.

WILLIAM J. HEILER,
Plaintiff-Appellant,

vs.

GOODMAN'S MOTOR EXPRESS VAN & STORAGE CO.
Defendant-Respondent.

On October 10th, 1917, plaintiff brought suit against defendant to recover damages for injuries received in an accident which occurred in the city of Bayonne on September 27th, 1917 (complaint, p. 3, line 16).

The case came on for trial before Judge Speer in Hudson Circuit on March 4th, 1918 (postea, p. 9, l. 18).

During the cross-examination, it developed that the plaintiff was an alien enemy, having been born in Germany, August 16th, 1895, and never having been naturalized in this country (p. 49, line 10, et seq.).

Shortly after this evidence was adduced it became apparent that the defendant intended to take advantage of the disability of plaintiff. Plaintiff's attorney then stated, "There is not any use of prolonging the agony." Thereupon the Court said to defendant's attorney, "If you ask for a non-suit, I think I will grant a non-suit." Later the Court granted the motion, to which an exception was taken by the plaintiff.

By reading page 68 of the case it becomes clear

that the plaintiff did not insist on his motion to withdraw a juror and that there was no ruling thereon.

The only question therefore is whether the Trial Court erred in granting the non-suit.

It will be observed that the suit was instituted and that the cause of action arose subsequent to the declaration of war between the United States and Germany.

The plaintiff does not contend in his brief that he is entitled to have the case tried while his country and ours are at war. He contends that he has a right to institute suit and hold the action in Court in suspension, and have the case heard and determined after a treaty of peace has been effected. It would seem clear that if he has a right to maintain his action at all, he would have a right to have it heard and determined.

The argument (brief, p. 32, l. 15) is that the non-suit is confiscatory and if permitted to stand, would impose upon the appellant the burden of paying costs, and might, if the war be prolonged, effectually destroy his cause of action, "since it is not improbable that the war may outlast the running of the Statute of Limitation."

This argument is based on a false notion of the effect of the disability of the plaintiff.

> "A foreign or international war suspends the operation of the Statute of Limitations between the citizens of the countries at war so long as the war lasts" (25 Cyc., 285).

The harm that plaintiff imagines has come to him by reason of the judgment of non-suit is entirely imaginary.

The only question in this case is whether it was the duty of the Trial Judge to permit the case to hang in the courts until the end of hostilities, or in view of the fact that the cause of action arose, and the suit was started, after the institution of war, to dismiss the case, leaving to the plaintiff the right to institute his action anew upon the coming of peace.

The case of Cetefonte vs. Camden Coke Co. (78 N. J. L., p. 662) (opinion in this Court) holds that a foreigner, not being an alien enemy, can maintain an action if not otherwise specially disabled by law. Citing 2 Cyc., 107.

In a foot-note to 2 Cyc., 107, we find the following: "Alien enemies, however, are not within the rule." Citing a number of cases.

It may be therefore very properly inferred that this Court approves the proposition that alien enemies may not maintain suits in our courts.

Alien enemy is defined in 2 Am. & Eng. Ency., of L. page 86, as "One who owes allegiance to the adverse belligerent," and on page 87, it says, "An alien enemy is not permitted to prosecute suits in Court, and if the plaintiff, at the commencement of a suit is an alien enemy, it is a cause for abatement; but the right of action is merely suspended, and revives on the cessation of hostilities." Citing many authorities.

The right of an alien enemy to sue a friendly citizen in the courts of the latter's country is suspended during the war, but, while an alien enemy may not sue, suit may be brought against him. (40 Cyc., p. 328.) Citing cases.

There is ample authority for the Court to sustain the judgment of non-suit, and by so doing the rights of the plaintiff will not be infringed.

The interesting brief of the plaintiff contains a great deal of matter that is really aside from the question involved.

Since the outbreak of the war with Germany, many tomes have been written on the question whether we have or have not a quarrel with the German people, and of our sincere friendship for that people. How can that effect the disability of the plaintiff?

I respectfully submit that the non-suit should stand.

RANDOLPH PERKINS,
Attorney for Defendant-Respondent.

New Jersey Court of Errors and Appeals.

WILLIAM J. HEILER, *Plaintiff-Appellant,* *vs.* GOODMAN'S MOTOR EXPRESS VAN & STORAGE COMPANY, *Defendant-Respondent.*	On Appeal. Action at Law.

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BRIEF OF PLAINTIFF-APPELLANT.

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This appeal is taken from a judgment of non-suit entered in the Supreme Court upon a direction made by the Circuit Court Judge at the trial. The sole ground of non-suit, as stated by the trial judge at page 69 of the State of the Case, is the fact that the plaintiff was an unnaturalized native of Germany.

The Grounds of Appeal, as set forth at pp. 11 et seq. of the Case, bring before this honorable court for review the propriety of the Rule for Judgment (Case, p. 9); the refusal of the trial judge to direct the withdrawal of a juror and declare a mistrial, when moved so to do by the plaintiff's attorney (Case, p. 68, line 10); the fact that the defendant-respondent was permitted to avail itself in the court below of a plea of enemy alienage, without having pleaded the same

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as a defense (see Answer, Case, pp. 7, 8); and the entry of the Judgment of Non-suit itself (Case, p. 10), with the consequent denial to plaintiff of his day in court and his right to a trial of the issues raised *by the pleadings* in the action by a jury of his peers (Case, pp. 11-13).

Facts.

10 The action is to recover damages for personal injuries sustained by plaintiff-appellant on September 27, 1917, when an automobile moving van belonging to the defendant-respondent (see concession of defendants' counsel, Case, pp. 14-15) came into collision with a motorcycle owned and driven by plaintiff-appellant, in the roadway of Broadway, at Bayonne. Two defendants were sued in the alternative under the provisions of the new Practice Act; and in the complaint, at para-
20 graph 15 (Case, p. 5), it was set forth that the plaintiff was unable to state which defendant was in the actual possession and control of the moving van at the time of the accident. A non-suit in favor of the former defendant Samuel Goodman was granted by consent at the beginning of the trial, which thereupon proceeded against the one remaining defendant, the respondent above named.

The motion for a non-suit in respondent's behalf, which is the basis of the appeal, was made
30 and granted before the completion of plaintiff's case in chief and while the direct testimony of his second witness was in progress; the only witness whose testimony was completed being the plaintiff himself.

The non-suit was not moved nor granted upon any ground of defect of testimony in substantiation of plaintiff's case, nor because of any facts appearing which tended to show contributory negligence as a matter of law. Sufficient evidence of
40 plaintiff's injuries resulting from the accident was

already before the court, although no medical testimony had yet been offered. Plaintiff-appellant did not rest his case.

The sole ground upon which the motion was made was the alleged enemy alienage of the plaintiff (Case, p. 66, line 30; p. 67). That this was the only matter considered by the court in that connection and the sole ground upon which the non-suit was ordered is evident from the following colloquy between court and counsel: 10

"MR. WINANS: This man's alienage seems to be a pertinent question, and hence if the other side—"

(Interruption.)

"MR. WINANS: Judge Kelly in Brooklyn decided that a friendly alien might maintain a suit and dictated a memorandum on the subject, which I have. I understand that has already been superseded by other legal decisions. There is not any use of prolonging the agony. 20

"THE COURT: Are you going to raise that point?

"MR. PERKINS: Yes" (Case, pp. 66, 67).

* * * * * * *

"THE COURT: What are you going to do?

"MR. WINANS: *I ask for the withdrawal of a juror.*

"MR. PERKINS: *I think we ought to try the case.*

"MR. WINANS: It may not be possible to bring the action over again.

"MR. PERKINS: I am trying this case for another attorney. 30

"MR. WINANS: I plead absolute surprise. This is the most unheard of thing in the world. It was not legitimate cross examination to ask him where he was born, anyhow.

"MR. PERKINS: Yes, it is.

"THE COURT: If you ask for a non-suit I think I will grant the non-suit.

"MR. PERKINS: I am going to ask for a non-suit.

"THE COURT: I think you are entitled to it. 40 The case may be commenced over again.

"MR. PERKINS: There is no objection to commencing over again, as far as I am concerned. I can send my bill in, but I am trying this case for Mr. Holman, and he has absolutely no faith in the virtue of the plaintiff's case, and I think I ought to take advantage of everything that I can legitimately.

"THE COURT: I will grant the motion then.

"MR. WINANS: I think I will *except to the non-suit, too.* I am also trying the case for somebody else" (Case, p. 68).

10

It may be said, with fairness and reason, that plaintiff's exception, noted at this point, applied equally to the refusal to declare a mistrial as to the granting of the non-suit. The motion to withdraw a juror was not passed upon except in connection with the ordering of the non-suit, and as the ruling of the court was a determination upon both motions, so the exception to that ruling applied to all that was embodied in that ruling. The use, by counsel, of the word *"too"* in taking the exception indicates the same plurality of intendment. That the trial judge entertained the same view is indicated by the use of the plural *"exceptions"* in the statement of the court, which follows:

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"THE COURT: All right; you may have the exception entered. *The exceptions* are granted, of course. It is upon the ground of the alienage of the plaintiff.

"MR. WINANS: I understand.

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"THE COURT: Of course you understand it is not the mere fact of alienage, but the fact of enemy alienage I am granting it on.

"MR. WINANS: Of course.

"Non-suit granted, to which plaintiff excepts" (Case, p. 69).

40

I.

The learned trial judge erred in granting a non-suit.

The granting of the non-suit, with its consequences, forms the basis of plaintiff-appellant's first, second, third, sixth, eighth, ninth, tenth and eleventh grounds of appeal.

The only reason for the non-suit was the fact that the plaintiff-appellant was born in Germany, an event over which he had no control, and the effect of which he had largely mitigated by his removal to this country. That he was not naturalized is only a matter of negation, and that he was not an American citizen merely a conclusion. These facts nowhere appear in the pleadings, and are brought out at one point in the testimony only, during the cross-examination of plaintiff by defendant-respondent's counsel, Mr. Perkins. This appears at page 41 of the printed case, as follows: "CROSS EXAMINATION BY MR. PERKINS:

* * * * * * *

"Q. You say—where were you born, Mr. Heiler? A. What's that?

"Q. Where were you born? A. Germany.

"Q. When? A. August 16, 1895.

"Q. Are you a naturalized American citizen? A. No, sir.

"Q. So you were born in Germany? A. Yes, sir.

"Q. You are not an American citizen? A. No, sir."

(Case, p. 41, lines 10-20.)

Elsewhere, the record is silent.

Plaintiff's nominal enemy alienage would not suffice to bar his suit, unless it were coupled with one or more of the further and concurrent circumstances:

(A) that he resided or was actually present in an enemy country;

(B) that the maintenance of the suit would be in violation or evasion of the provisions of the Act of Congress known as the "Trading with the Enemy Act", approved October 6, 1917; or

(C) that the moneys or other benefits likely to result from the action would probably or even possibly furnish aid, comfort or assistance to the public enemy.

None of these conditions appears, or is even suggested as existing. On the contrary, the plaintiff-appellant, as is clearly deducible from the record, is one of that very class of innocent nationals of the enemy countries, in behalf of whom, in common with all who are oppressed, or are subject to oppression, by the common enemy of humanity, our benevolent purposes in entering the war were rightfully enlisted.

Since the status of the plaintiff-appellant as a friendly denizen of our own country, notwithstanding the accident of his German nativity, must necessarily be a determining factor upon this appeal, it seems important to refer to those parts of the record which tend to negative any of those conditions which alone could render further prosecution of his action contrary to the public interests. The *public interests* are referred to as the criterion, since the defendant has no *private interest* entitled to consideration in opposition to the maintenance of a just cause of action against it upon allegations and appropriate proof of personal injuries to plaintiff resulting from defendant's negligence.

(A)

Heiler was a resident of this State on October 10, 1917, when the summons was issued (Case, p. 2), and then resided at No. 713 Willow Avenue, Hoboken (see Complaint, at p. 2 of the Case). That his residence was in Hoboken at and prior to

the time of the accident, September 27, 1917, is evident from his testimony at page 16 that he had been accustomed to ride back and forth between his home in Hoboken and his place of work in Bayonne, on a motorcycle (Case, p. 16, lines 1-4 and 20-25). His residence in Hoboken continued at the time of the trial, March 5, 1918 (p. 15).

He owned a motorcycle (p. 16, line 24) and operated it himself in the public highways of this State (Case, pp. 16, 18 and 60). The fact that the witness Walsh occupied the rear seat is a further indication that Heiler drove the vehicle. The conclusion that he was the holder of a license issued under the authority of this State authorizing such use and operation is unavoidable. The right he thus gained as the licensee of the State carried with it as an inevitable concomitant the right to use the orderly processes of the courts to redress injuries sustained in the exercise of these privileges accorded to him by the State's license. That his use of his motorcycle upon the public highways was not surreptitious is indicated by the fact that he drove up to and away from the Bayonne Police Headquarters shortly before the accident (pp. 17, 27, 59), and that he was picked up from the wreck of his motorcycle by two policemen of the Bayonne force immediately afterward (pp. 22, 64).

(B)

The only provision contained in the "Trading with the Enemy Act", above cited, against the prosecution of suits in our courts is directed against enemies, as very clearly defined in that Act, as follows:

> "Sec. 2. That the word 'enemy' as used herein shall be deemed to mean for the purposes of such trading and of this act:
>
> "(a) Any individual, partnership or other body of individuals, of any nationality, resi-

dent within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside of the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

10 It may, and probably will, be contended by the defendant-respondent that residence, as used in the Trading with the Enemy Act means domicile or place of birth, and that plaintiff-appellant, notwithstanding the facts adduced from the record under subdivision (A) above, is still a resident of the German Empire. The contrary view is clearly expressed by the Appellate Division of the New York Supreme Court, First Department, in the recent case of *Ober vs. Metropolitan Opera Co.,*
20 N. Y. Law Journal, Apr. 9, 1918, in which Mr. Justice Shearn, in the unanimous opinion of that court, holds as follows:

"The Trading with the Enemy Act was drafted in the light of the common law as announced by the greatest authorities in this country and in England, and its purpose was in part to carry out the public policy of preventing aid to the enemy. If it had been intended to base the test of right to sue upon nationality instead of residence
30 in the enemy territory, such a change in the policy of the law would have been indicated by appropriate words. Such a construction would be in part subversive of the purpose of the act, for it would permit suits to be maintained by persons whose legal residence or domicile was in this country, but who were residents and doing business in Germany. This would clearly tend to strengthen enemy credit and increase enemy resources. Further, such a construction would be directly contrary to the de-
40 cision of *Princess Thurn and Taxis v. Moffitt,*

(1915, 1 Ch., 58), for there, of course, the legal residence and domicile of the plaintiff was in Austria-Hungary with her husband, although her residence, as the term is ordinarily used, was in England. Finally, such a construction, would be entirely out of harmony with the entire line of decisions above referred to, all of which make residence, in the sense of sojourn or presence, within the enemy territory the basis of exclusion from the right to prosecute an action in our courts." 10

Ober v. Metropolitan Opera Co., supra.

It is not in evidence, nor is it contended, that Heiler was engaged in any business or activities falling within the prohibitions of the Trading with the Enemy Act, but on the contrary it is in evidence that he was employed in the very peaceful and salutary occupation of supplying food to the people of our own country and locality. He was the night waiter in a lunch 20 wagon at Bayonne (case, pp. 15, 16) a locality in which night workers in the munitions and other shops abound and require just the kind of service which Heiler was engaged in rendering.

That he was not recreant in his compliance with the legal and proper restrictions applying to the registration of and surveillance over alien denizens is apparent from the fact that he was permitted to reside on Willow Avenue, Hoboken (case, pp. 2 and 15) within a few hundred feet 30 of the vast docks taken over by the government and used for war purposes, and to attend to his daily (or nightly) work in Bayonne (pp. 16, 59), a locality given over to war activities and naturally proscribed to alien suspects. His voluntary presence at Police Headquarters in Bayonne on the night of the accident, as a complaining witness (pp. 17, 27, 59), is proof of his innocuous intentions and character, and when the policemen picked him up immediately after he sustain- 40

ed the injuries for which he sued, they sent him, not to a detention camp, but to a hospital for treatment (pp. 22, 64).

C.

No possible benefit to the German or Austro-Hungarian government from the prosecution of this action, or from any recovery by the plaintiff therein can possibly be conjured up, and the burden at least rests on the respondent to show such probability. It is not only improbable, but, upon the record wholly without foundation in fact.

The right of the plaintiff-appellant to his life, safety and property is guaranteed to him by the Government of the United States by treaty.

Article XXIII of the Treaty of July 11, 1799, between the United States and Kingdom of Prussia (merged into the German Empire) provides as follows:

> "Article XXIII. If War should arise between the two Contracting Parties, the merchants of either country then residing in the other, shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects, without molestation or hindrance; and all Women and children, scholars of every faculty, cultivators of the Earth, artisans, manufacturers and fishermen, unarmed and inhabitating unfortified towns, villages, or places, and in general, all others, whose occupations are for the common subsistance and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt, or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power by the events of War, they may happen to fall; but if anything is neces-

sary to be taken from them, for the use of such armed force, the same shall be paid for, at a reasonable price."

Article XXIII (inter alia) of the Treaty of July 11, 1799, as quoted above, was expressly revived and re-affirmed by the Treaty of Commerce and Navigation between the United States and Prussia, concluded May 1, 1828. Article XII of the Treaty lastly above referred to contains this express revivor of Article XXIII of the earlier Treaty, above quoted:

"Article XII. The twelfth article of the treaty of Amity and Commerce, concluded between the parties in 1785, and the articles *from the thirteenth to the twenty-fourth,* inclusive, of that which was concluded at Berlin in 1799, with the exception of the last paragraph in the nineteenth article, relating to the treaties with Great Britain, are hereby revived with the same force and virtue as if they made part of the context of the present treaty; it being, however, understood, that the stipulations contained in the articles thus revived shall be always considered as in no manner affecting the treaties or conventions concluded by either party with other Powers during the interval between the expiration of the said Treaty of 1799 and the commencement of the operation of the present treaty."

That these treaty provisions were not merely casual or accidental, but evinced the deliberate intent of the contracting parties, is evident from the preamble and portions of the text of the above-recited Treaty of 1828, from which quotation may be made:

"The United States of America and his majesty the King of Prussia, equally animated with the desire of maintaining the relations of good understanding, which have hitherto so happily subsisted between their respective States, of extending, also, and consolidating the commercial intercourse be-

tween them, and convinced that this object cannot better be accomplished than by adopting the system of an entire freedom of navigation, and a perfect reciprocity, based upon principles of equity equally beneficial to both countries, and applicable *in time of peace, as well as in time of war,* have in consequence, agreed to enter into negotiations for the conclusion of a treaty of navigation and commerce &c., &c."

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ARTICLE I.

" * * * The inhabitants of their respective States shall mutually have liberty to enter the ports, places and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing."

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ARTICLE XV.

"The present treaty shall continue in force for twelve years, counting from the day of the exchange of the ratifications; and if, twelve months before the expiration of that period, neither of the High Contracting Parties shall have announced, by an official notification, to the other, its intention to arrest the operation of said treaty, it shall remain binding for one year beyond that time, and so on, until the expiration of the twelve months which will follow a similar notification, whatever the time at which it may take place."

30

No action tending to annul any of the provisions of the Treaty of 1828 has been taken by either of the contracting parties, except that on July 1, 1916, the United States gave due notice of the abrogation of Article X thereof in accord-

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ance with provisions in the Act of Congress approved March 4, 1915 (38 Stat. L., 1164). The abrogated article relates to the maintenance by one party of consuls and other officials within the territories of the other.

The concluding portion of Article XXIV of the treaty of 1799, which reads as follows:

> "And it is declared, that neither the pretense, that War dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding Article; (Article XXIII, above quoted) but on the contrary that the state of War, is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the Law of nature and nations."

shows it to have been a convention adopted for the very purpose of governing the respective nations and their peoples during the existence of a state of war between them.

That our government, regardless of the provocation, is too proud to relegate its solemn treaty pledges to the category of a "scrap of paper" is only emphasized by the following letter recently received from the State Department:

(State
Department
Insignia)

"Department of State,
"Washington,
"April 19, 1918.

"Mr. John Winans,
"206 Broadway,
"New York City.

"Sir:

"The department is in receipt of your letter of April 15, 1918, requesting a copy of the Treaty between the United States and Prussia, relative to the status of the citizens and subjects of the respective countries within

the jurisdiction of the other country after the outbreak of war, and inquiring whether this Government regards this Treaty as being now on force.

"In reply the Department encloses for your information a copy of the Treaty of 1828 between the United States and Prussia, which was regarded as in force at the date of the commencement of a state of war between the United States and the German Empire, together with the Articles of the Treaties of 1785 and 1799, revived thereby.

"Your attention is called to *Article 23 of the last mentioned Treaty,* which is presumably the provision to which you refer, and *which the Department regards as in force* at the present time.

"I am, Sir,

"Your obedient servant,

"For the Secretary of State:

"ALVEY A. ADEE,

"Second Assistant Secretary."

(Counsel is responsible for the italicizing of certain clauses in the letter above quoted.)

Questions affecting the recognition of foreign nations and determining the status and rights of their nationals pertain rather to the political than to the judicial department of the government. This is never so true and so apparent as during the continuance of a state of war.

The president, in his address to Congress on April 2, 1917, in which he set forth in some detail the grievances suffered by our country and advised the declaration of a state of war by that body, in no uncertain words declared the policy of the United States toward persons standing in the position of the plaintiff William J. Heiler. In this address, which has become a classic among state documents, the President declares as follows:

"It is a war against all nations. American ships have been sunk, American lives

taken, in ways which it has stirred us very deeply to learn of, but the ships and people of other neutral and friendly nations have been sunk and overwhelmed in the waters in the same way. There has been no discrimination. The challenge is to all mankind. Each nation must decide for itself how it will meet it. The choice we make for ourselves must be made with a moderation of counsel and a temperateness of judgment befitting our character and our motives as a nation. We must put excited feeling away. Our motive will not be revenge or the victorious assertion of the physical might of the nation, but only the vindication of right, of human right, of which we are only a single champion."

* * * * * * * *

"With a profound sense of the solemn and even tragical character of the step I am taking and of the grave responsibilities which it involves, but in unhesitating obedience to what I deem my constitutional duty, I advise that the Congress declare the recent course of the Imperial *German Government* to be in fact nothing less than war against the government and people of the United States; that it formally accept the status of belligerent which has thus been thrust upon it; and that it take immediate steps not only to put the country in a more thorough state of defense but also to exert all its power and employ all its resources to bring the *Government* of the German Empire to terms and end the war."

(It will be noted that the President's denunciation of the unlawful and oppressive acts complained of is against the Imperial German Government, and not against its people.)

"Our object now, as then, is to vindicate the *principles of peace and justice* in the life of the world as against selfish and autocratic power and to set up amongst the really free and self-governed peoples of the world such a concert of purpose and of action as will

henceforth ensure the observance of those principles.

* * * * * * * *

"*We have no quarrel with the German people.* We have no feeling towards them but one of sympathy and friendship. It was not upon their impulse that their government acted in entering this war.

* * * * * * * *

"The world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty. We have no selfish ends to serve. We desire no conquest, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make. We are but one of the champions of the rights of mankind. We shall be satisfied when those rights have been made as secure as the faith and the freedom of nations can make them.

"Just because we fight without rancour and without selfish object, seeking nothing for ourselves but what we shall wish to share with all free peoples, we shall, I feel confident, conduct our operations as belligerents without passion and ourselves observe with proud punctilio the principles of right and of fair play we profess to be fighting for.

" * * * We are, let me say again, *the sincere friends of the German people,* and shall desire nothing so much as the early re-establishment of intimate relations of mutual advantage between us,—however hard it may be for them, for the time being, to believe that this is spoken from our hearts. We have borne with their present government through all these bitter months because of that friendship,—exercising a patience and forbearance which would otherwise have been impossible. *We shall, happily, still have an opportunity to prove that friendship in our daily attitude and actions towards the millions of men and women of German birth and native sympathy who live amongst us and share our life,* and we shall be proud to prove it towards all who are in fact loyal to their neighbours and to

the Government in the hour of test. They are, most of them, as true and loyal Americans as if they had never known any other fealty or allegiance. They will be prompt to stand with us in rebuking and restraining the few who may be of a different mind and purpose."

Section 4067 of the United States Revised Statutes provides that in the event of war between the United States and any foreign government, all natives of the enemy country who shall be within the United States and not actually naturalized shall be liable to be apprehended, restrained and transported, and expressly authorizes the President, by proclamation or otherwise, to direct the conduct to be observed on the part of the United States toward such aliens and to establish such other regulations as he may find to be necessary.

The President immediately upon the declaration of war issued his proclamation of April 6, 1917, in which he laid down with great particularity, under twelve numbered subdivisions, the regulations which he deemed proper and which he thereby established, relating to the status and conduct of such nominal enemy aliens as might be found within the United States.

There is not in this proclamation nor in any of the recorded utterances of the President, nor in any official act of the government, any proscription of the right of a friendly German subject residing in this country and observing the regulations imposed by the government for such as he, to maintain an action in our courts.

Additional regulations numbered respectively from 13 to 20 were laid down by the President in his proclamation of November 16, 1917, which while regulating the liberty of action of enemy aliens within our country with reference to ap-approaching munitions works, arsenals and other

works, yet make no mention of the peaceable and law-abiding pursuits of those aliens.

Again, in his address delivered at a joint session of Congress on December 4, 1917, the President reiterated the benevolent purpose actuating the United States in this war and indicated the same spirit of benevolence and fairness toward well-disposed nationals of the enemy countries, but imposed no additional disabilities upon them. It was in this address of December 4, 1917, that the declaration of war against the Austro-Hungarian government was urged, a declaration which followed by resolution of Congress three days later.

Even at common law, which grew up and became potent at times when less benevolent purposes actuated governments in their participation in war than is the case at present, the right of well-disposed subjects of enemy countries to maintain suits in the British courts was recognized unless it affirmatively appeared either that the right sought to be enforced grew out of actual hostilities or that the proceeds of the litigation would go to enhance the resources of the enemy government or of persons residing within its territorial jurisdiction or control.

The authorities on this subject are so exhaustively collated by Mr. Justice Shearn in the case of *Ober v. Metropolitan Opera Company* (supra), that counsel feels that he cannot do better than to refer at some length to this decision, more particularly as it has not yet appeared in the official series of Appellate Division Reports.

> "Shearn, J.—This appeal involves the right of a resident subject of a country engaged in war against our own country to maintain an action in our courts. We have recently decided in *Rothbarth et al v. Herzfeld* (179 App. Div., 865 aff'd March 19, 1918, — N. Y., —), following an unbroken line of

authorities, that a non-resident alien enemy may not prosecute an action in our courts during the war. That decision was based upon grounds of public policy which forbids the doing of acts that will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities through additions to the credit, money or goods, or other resources available to individuals in the enemy state, and upon the ground that permission to prosecute under such circumstances would violate the provisions of the 'Trading with the Enemy Act,' approved October 6, 1917. A radically different situation, however, is presented in the case of one who resides not in the enemy country, but in our own country. In the case of a resident the right to maintain an action in our courts is clearly established both in principle, and by authoritative decisions. The leading case in this country is *Clarke v. Morey* (10 Johns., 69). It was there held, as the head note correctly states, that '*aliens* resident in the United States at the time of war breaking out between their own country and the United States, or who come to reside in the United States after the breaking out of such war, under an express or implied permission, may sue and be sued as in time of peace; and it is not necessary for that purpose that such aliens should have letters of safe conduct or actual license to remain in the United States, but a license and protection will be implied from their being suffered to remain without being ordered out of the United States by the Executive.'

"Chief Justice Kent delivered the opinion of the court and said:

" 'The disability is confined to these two cases: 1. Where the right sued for was acquired in actual hostility. * * * 2. Where the plaintiff, being an alien enemy, was resident in the enemy's country. * * * It was considered in the Common Pleas at Westminster as a settled point (Heath, J., and Rooke, J., in *Sparenburgh v. Bannatyne,* 1 Bos. & Pull., 163), that an alien enemy under the king's protection, even if he were a

prisoner of war, might sue and be sued. This point had long before received a very solemn decision in the case of *Wells v. Williams* (1 Ld. Raym., 282; 1 Lutw., 34 S. C., 1 Salk, 46). It was there decided that if the plaintiff came to England before the war and continued to reside there by the license and under the protection of the king, he might maintain an action upon his personal contract; and that if even he came to England after the breaking out of the war, and continued there under the same protection, he might sue upon his bond or contract, and that the distinction was between such an alien enemy and one *commorant* in his own country. The plea in that case averred that the plaintiff was not only born in France, under the allegiance of the French king, then being an enemy, but that he came to England without any safe conduct, and the plea was held bad on demurrer. It was considered that if the plaintiff came to England in time of peace, and remained there quietly, it amounted to a license, and that if he came over in time of war, and continued without disturbance, a license would be intended. * * * In the case before us we are to take it for granted (for the suit was commenced before the present war) that the plaintiff came to reside here before the war, and no letters of safe conduct were therefore requisite nor any license from the president. The license is implied by law and the usage of nations; if he came here since the war, a license is also implied, and the protection continues until the Executive shall think proper to order the plaintiff out of the United States. * * * Until such order, the law grants permission to the alien to remain, though his sovereign be at war with us. A lawful residence implies protection and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy no less than to justice and humanity.

" 'The right to sue in such a case rests on still broader ground than that of a mere municipal provision, for it has been frequently held that the law of nations is part of the

common law. By the law of nations an alien who comes to reside in a foreign country is entitled, so long as he conducts himself peaceably, to continue to reside there under the public protection, and it requires the express will of the sovereign power to order him away.'

"Lord Reading, C. J., in the Court of Appeal, in the recent case of *Porter v. Freudenberg* (1915, 1 K. B., 857), elaborately and most convincingly reviewed the authorities and considered the subject from every point of view. It was therein decided that the test of a person being an alien enemy is not his nationality, but is the place where he resides and carries on business. Lord Reading said:

" 'Trading with a British subject or the subject of a neutral state carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy state, and therefore for the purpose of the enforcement of civil rights they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality but the place of carrying on the business (*Wells v. Williams* (1), *McConnell v. Hector,* per Lord Alvanley, C. J., (2), *Jansen v. Dreifontein Consolidated Mines* (3), per Lord Lindley). When considering the enforcement of civil rights a person may be treated as the subject of an enemy state, notwithstanding that he is in fact a subject of the British Crown or of a neutral state. Conversely, a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy state. As Lord Lindley said in *Jansen v. Dreifontien Consolidated Mines* (3): "When considering questions arising with an alien enemy it is not the nationality of a person but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts. Again the subject of a state at war with this country, but who is carrying on business here or in a foreign neu-

tral country is not treated as an alien enemy; the validity of his contracts does not depend on his nationality nor even on what is his real domicile, but on the place or places in which he carries on his business or businesses." * * * In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long since been and are at the present day treated in reference to civil rights as if they were British subjects and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's courts. Alien enemies have no civil rights or privileges unless they are here under the protection and by permission of the Crown (Blackstone, 21st ed., vol. 1, chap. 10, p. 372). * * *

"'In Walford's treaties on the Law Respecting parties to Actions (published 1842) there is a chapter in vol. 1, p. 647, dealing with disabilities of civil origin which well repays close and diligent study. When treating of alien enemies the learned author (at p. 650) thus states the law: "Alien enemies are distinguishable according as they are under the king's special protection or not. If an alien enemy came here under a safe conduct or is commorant here by the king's license and under his protection, he seems to stand in the same position as to the right of maintaining actions in our courts as an alien friend, a right of suing being an incidental right to protection"—that is, he is no longer under the disability attaching to an alien enemy.'

"The decision in *Porter v. Freudenberg* was followed by *Shaffenius v. Goldberg* (1916 1 K. B., 284), in which the court upheld the right to sue in the case of one born in Germany, resident and carrying on business in England, unnaturalized, registered as an enemy alien and actually interned within the realm as a civilian prisoner of war. It appeared of course that the internment was not due to any misconduct. So, too, it was held in the case of *Princess Thurn and Taxis v. Moffitt* (1915, 1 Ch., 58) that an alien enemy's

wife resident in the United Kingdom and duly registered under the Aliens Restriction Act could maintain an action in the courts of England for the purpose of asserting her individual rights, notwithstanding the fact that her husband 'is an alien enemy as being a subject of Austria-Hungary or that he is abroad and probably engaged in fighting against this country.' The court said: 'The law applicable to the circumstances is, in my opinion, correctly stated in Hall's International Law (6th ed., p. 388) as follows: "When persons are allowed to remain, either for a specified time after the commencement of war, or during good behavior, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country."'

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* * * * * * * *

"It therefore appears that the plaintiff is not an enemy alien within the President's proclamation, but that if she were she would be entitled under that proclamation to maintain a suit here so long as she was guilty of no misbehavior during her residence; that the plaintiff is not an alien enemy within the terms of the Trading with the Enemy Act; that she is here virtually under the license of the President and is therefore entitled, so long as she conducts herself properly, to continue to reside here, under the public protection, and that, as Chancellor Kent said, 'a lawful residence implies a capacity to sue and be sued.'"

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All concur.

In the suit of *Keppelman vs. Keppelman*, the Court of Chancery of New Jersey held in construing the act of Congress, known as the "Trading with the Enemy Act", (approved Oct. 6, 1917, ch. 106, 40 Stat. 411) as follows:

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"I cannot, however, resist expressing my

firm conviction that the act of Congress must be construed in the light of two purposes: (1) To prevent absolutely any act which would result in a detriment to the United States in the progress of the war; and (2) not to permit or compel any act which would result in any injury to an individual alien enemy, which act would in no wise benefit the United States in the progress of the war".

This suit was upon a bill in Chancery filed by
10 the trustees under the will of Adolphus Keppelman for a construction of the will to the extent of determining how much should ultimately be paid to the respective beneficiaries, of whom three were subjects and residents of the German Empire. Prior to the declaration of war, these beneficiaries, enemy aliens, executed powers of attorney to the defendants Schulz & Ruckgaber, citizens of the United States, authorizing the latter to execute releases and refunding bonds in the names of,
20 and to receive the funds accruing for and in behalf of the enemy alien beneficiaries. These attorneys in fact, as well as A. Mitchell Palmer, custodian of alien property, were made parties to the bill, and the determination was upon a motion by the latter to strike out a portion of the complainant's bill, the effect of which, the court declares would have been to exclude from the suit the enemy aliens. It also appears that the attorneys in fact represent in the cause the interests of the enemy alien
30 beneficiaries under the will. The Vice Chancellor, in passing upon motion, finds that it involves the determination "whether or not under it" (the Trading with the Enemy Act) "the trustees should pay direct to the alien property custodian, or should pay to the holders of the powers of attorney"; and says further:

"Laying aside all questions of technique, inasmuch as the money cannot be distributed
40 until after final decree and as the rights of

the alien property custodian and of the United States cannot be detrimentally affected until final decree and as unquestionably the trustees (under the will) are entitled to protection to the fullest extent that this court can give them, it seems to me that to determine this important question at this time, upon this motion, would not only be premature, but most unwise from the standpoint of policy. I think the case is one in which the rule permitting the court to carry over a motion of this kind until final hearing ought to be applied, and such is the order that I will advise." 10

Keppelman v. Keppelman, 103 Atl. 27 (N. J. Chancery Feb. 2, 1918).

The right to liberty and personal security implies the right to redress a deprivation or infringement of that right by appropriate proceedings at law.

The force of this conclusion seems irresistible. 20

With the exception of the case of *Keppelman v. Keppelman,* lastly above cited, the question of the right of a German subject or his representative to maintain a suit in our courts has not come directly in question. The doctrine is nevertheless well established that the right to hold property in this state implies the right to maintain a suit in our courts in respect of that property.

In the case of *Martin v. Brown,* 7 N. J. L. 305, (November Term 1799) it is held: 30

"An alien whose rights are guaranteed to him by treaty and who is thereby made competent to hold real estate, is competent to maintain an action for its recovery."

It may be noted that at the time the case of *Martin v. Brown* was decided an alien could not hold real property in New Jersey, except a house for his own habitation.

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In the case of *Coxe v. Gulick,* 10 N. J. L. 328, it was held as follows:

> "Alienism will not be inferred simply from the facts that a person was on the 3d day of July, 1776, a subject of Great Britain; and in the year 1877 withdrew from this state and took refuge with the British army and died in England and never took upon himself the oath of allegiance to this state or the United States, but elected to continue a subject of Great Britain."

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These cases indicate the extreme reluctance which our courts have shown toward the plea of enemy alienage, and it may be said that if the right to own property implies the right to maintain an action for its recovery, so with greater force does the infliction of personal injuries upon a peaceable denizen of our state carry with it the right to the redress which the law affords for similar injuries occurring to our own citizens.

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The same question was before the United States District Court, in *Dudik v. Lehigh Valley Railroad Company* (decided March, 1918; not yet reported). In the opinion in this case by Mayer, D. J., it is held:

> "In anticipation of the question which was reserved in this case, I have made a fairly exhaustive examination of the authorities, and I may briefly state the conclusions at which I have arrived. * * * Beginning with a very notable decision by Chancellor Kent in this State, and ending with a decision of Lord Reading, Lord Chief Justice of England, the concurrence of authority is that the right of a plaintiff who is the subject of an alien enemy to sue and get admission of that suit by the courts, depends not upon the citizenship of the plaintiff but upon his residence, provided always that there is nothing which appears to the Court to indicate that the proceeds of his suit, if he gains a recovery, will in any manner be transmitted or be

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likely to be transmitted to the alien enemy or to any person in the territory of an alien enemy.

"The more enlightened view, beginning as far back as I have indicated, is that men shall have the fair protection of the courts if they reside here, and there is no reason, beyond their alien citizenship, to suggest that the proceeds of a judgment might be used in aid or comfort of the enemy.

"In addition to this there is a certain amount of practical construction to be gleaned from the proclamation of the President, referring to the citizens of Austria who are resident here, and without being able at the moment to quote the exact language, the substance was that they should be permitted, so long as they obeyed our laws, to pursue their lawful vocations under the protection of our government. * * *

"The doctrine of our courts I think is that where a man pursues a lawful vocation which subjects him to danger, we shall not deny to him the opportunity of seeking redress in our courts,—It would be from the American standpoint, I think, a backward step for us to deny courts of justice to law-abiding men who are engaged in occupations such as the plaintiff was engaged in, or in any other proper and lawful vocation.

"The evidence in the case shows here that the man has lived here for seventeen years: he came here when he was a minor, and has worked here, and there is no suggestion that he is concerned with anything excepting the pursuit of a lawful calling whereby he can support himself and his family—and being satisfied that that is the law now prevailing in this country, I deny the motion, with an exception to the defendant."

Dudlik v. Lehigh Valley Raidroad Co., U. S. Dist. Ct., So. Dist. of N. Y. (March 1918).

In the case of *Posselt v. D'Espard*, 100 Atl. 893, it was held:

"The modern trend is to discourage interference with property rights, whether of friends or enemies, in time of war, except so far as may be necessary to effectively accomplish the objects of the war.

"To shut the door of the court in the face of an alien enemy resident here would be a distinct violation of not only the spirit but the letter of this proclamation.

"By the Hague Convention it was forbidden 'to declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile parties.'

"See 36 U. S. Stat. at large, pt. 2, 227."

In *Schulz v. Raimes & Co.* 100 Misc. (N. Y.) 697, affirming 99 Misc. 626, it was held:

"The disability of alien enemies is not a prohibition against dealings with all of the enemy nationality, but is a prohibition against those who reside and do business in the enemy country."

II.

Defendant, by its continued participation in the trial, waived any possible right to relief by non-suit, stay or otherwise.

The whole matter of plaintiff's alienage was before the court when he testified, at p. 41 of the case, that he was born in Germany and had never been naturalized. This testimony has been quoted at an earlier part of this brief. The counsel for defendant-respondent might immediately have moved for any relief which he considered his client entitled to, but on the contrary he elected to proceed with the trial, and at p. 68, line 12, of the record he stated:

"Mr. Perkin: I think we ought to try the case."

After the full and frank admission of his alienage by the plaintiff while under oath, the defendant's counsel proceeded with his further cross-examination to the extent of five printed pages in the record (Case pp. 41-46); and thereafter on three different occasions, examined the defendant on re-cross (Case, pp. 50, 51; pp. 54-56; and pp. 57-59); interposed numerous objections and comments during the re-direct examination of plaintiff, and participated at least to the same extent in the direct examination of plaintiff's witness Walsh (Case, pp. 62, 63). Defendant's motion was made with evident reluctance after his counsel had elected that the trial proceed (Case, p. 68, line 12), when his hand was forced by plaintiff's motion to withdraw a juror (p. 68, line 10).

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III.

Defendant, not having pleaded enemy alienage, was not entitled to avail itself of such defense upon the trial.

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This point involves the subject matter of appellant's seventh ground of appeal.

The cases are uniform upon the proposition that a defense of want of capacity to sue must be made by demurrer in a proper case, or by a plea in abatement. Under the new Practice Act, abolishing demurrers, like relief should be obtained by a motion, upon notice, to strike out the complaint; but this only where the facts showing plaintiff's disability appear upon the complaint.

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The only alternative is by means of an answer, in the nature of the old plea in abatement.

> "Wherever a plaintiff is incapacitated from suing by reason of his alienage, the defendant should raise the objection by a plea in abatement. He cannot avail himself of such a defense to a suit unless pleaded."

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Burnside v. Matthews, 54 N. Y. 78;
Dumenko v. Swift Co., 32 Ont. L. 87; 7 Ont. W. N. 155;
Martin v. Woods, 9 Mass. 377;
Educational Society v. Varney, 54 N. H., 376;
Lee v. Salinas, 15 Tex. 495;
Shivers v. Wilson, 5 Harr. & J. (Md.) 130; 9 Am. Dec., 497;
10 *McNair v. Toler,* 21 Minn., 175;
Rateau v. Bernard, 3 Blatchf., 244; 20 Fed. Cas. No. 11,579;
The Bee, 1 Ware, 366; 3 Fed. Cas. No. 1,219;
Comyns Digest, 428;
Burk v. Brown, 2 Atk. 397;

"A plea of alien enemy must aver that plaintiff is an enemy, or adhering to the enemy, but need not aver that he resides in
20 the enemy's country."

Russel v. Skipworth, 6 Binn (Pa.) 241.

"A defense of alien enemy is deemed waived unless specifically pleaded".

McNair v. Toler, 21 Minn. 175;
Burnside v. Matthews, 54 N. Y. 78.

"A defense of alien enemy may be pleaded in bar or in abatement."

30 *Hutchinson v. Brock,* 11 Mass. 119;
Jackson v. Decker, 11 Johns. 418;
Bell v. Chapman, 10 Johns. 183.

"The plea of alienage ought to contain a direct averment that the person is an alien and that he was born out of the allegiance of the state and within the allegiance of a foreign state."

Coxe v. Gulick, 5 Hal. 328; 10 N. J. L. 328.

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IV.

Plaintiff's motion to have a juror withdrawn was in effect a tender of a stay of plaintiff's cause of action, which would have afforded defendant plenary relief.

The laws of this state and nation are in harmony with the provisions of international law and those of the various treaties to which the United States is now a party, with respect of the rights of the nationals of enemy countries. 10

Even where sequestration of the property of alien enemies is permitted or directed by law, provision is made for compensation at a later period or at the termination of the war. It is a canon of modern civilized warfare that the property of non-combatant enemies is not subject to confiscation without reparation. 20

The cause of action of the plaintiff Heiler is such a property right as is entitled to the protection of the laws. The utmost disability which could have attached to him, even if he had been an actual resident of Germany, would have been a postponement of the enjoyment of this property right until the termination of the war; at which time, if not before, he would have been entitled to due compensation for this deprivation. Such compensation at the very least would involve his reinstatement in the enjoyment and prosecution of his cause of action. 30

In the final analysis, this temporary disability, with the ultimate reinstatement of his rights as a litigant, would amount only to an ordinary stay of proceedings; and such stay, lasting not later than the cessation of the war, is the ultimate relief to which the respondent can plausibly lay claim. 40

As a matter of fact, plaintiff's motion to with-

draw a juror was a tender of precisely such a stay of proceedings. If defendant had availed itself of this tender it would have received not only the full measure of its rights but also something in excess thereof. It must be borne in mind that Heiler was not an alien resident in a foreign country, and therefore as has been said under Point I, he was entitled to prosecute his action in the ordinary way without stay and without limitation, except it appeared that the proceeds of the suit might in some way enhance the resources of an enemy country. No such fact appears of record nor is suggested in this case.

A non-suit, such as was granted in this case, is confiscatory. If permitted to stand it would impose upon appellant the burden of paying costs as a condition precedent to the further lawful prosecution of his cause. It might even, if the war be considerably prolonged, effectually destroy his cause of action, since it is not improbable that the war may outlast the running of the Statute of Limitations. If this non-suit should be sustained, it is inevitable that, based on this precedent, other non-suits would be granted successively, as often as appellant might pay the costs of prior suits and bring new ones, until a definite quietus was put upon his rights by the Statute of Limitations. If it be urged that he is under a disability and so within the exception of that statute, a course pregnant with danger would be presented to this court. In such a view, the Statute of Limitations would no longer be a "Statute of repose," but rather one of unrest, for during and for a measurable period after the war, the time limit upon actions would apply only to those of our own citizens and the nationals of friendly governments, while an unreasonable and preposterous immunity would attach to enemy nationals or all kinds, who at most may ask something approaching equality, and certainly not a preference under the law.

If the narrower view be taken, under Article XXIII of the Treaty of July 11, 1799 (quoted above), that the appellant's right to remain in this country was limited to nine months immediately following the declaration of war, it may be said that the resolution of Congress declaring a state of war was passed and became operative on April 6, 1917, on which day the President's proclamation to the same effect was issued.

This suppositious limitation of nine months would therefore expire on January 6, 1918; but the accident occurred on September 27, 1917, and the summons was issued on October 10, 1917. If such contention could be maintained at all, it would not go to the question of plaintiff-appellant's right to redress the injuries received by him in September nor to his right to commence the action in October, 1917, but only to his right to continue the prosecution of his suit after the lapse of the nine months' period on January 6, 1918.

Assuming the fullest possible effect of such a contention, it would seem to follow that the greatest relief that could be afforded to the respondent would be a stay of plaintiff-appellant's suit, taking effect not earlier than January 6, 1918, and terminating at the cessation of the war.

Even under this very forced construction, plaintiff's motion for the withdrawal of a juror was a tender to the defendant-respondent of the fullest measure of its rights.

V.

The learned trial judge erred in the exercise of his discretion in denying plaintiff's motion to declare a mistrial.

The injection into the procedings of the fact of plaintiff's enemy alienage during his cross examination by defendant's counsel involved a gratuitous injury to his standing before Court and jury. It naturally and necessarily prejudiced him in the eyes of the jury to have the disclosure made during the trial of his cause that he had been born in Germany and had not been naturalized.

The young man was born on August 16, 1895, and was therefore but a few months past his majority when the outbreak of war rendered his naturalization impossible. It was during this precise period of a few months before the declaration of war that the Imperial German Embassy was making its greatest efforts to induce its nationals to procure American naturalization for ulterior uses in Mexico. That Heiler was immune to these influences rather enhances than detracts from his loyalty to our own country; yet the obloquy attaching in these war times to a German subject immediately attached to him and an atmosphere hostile to his interests was created in the court room. He might have waived this injury and proceeded with the trial had not the non-suit been moved, but once the matter became of such engrossing importance as to occupy the attention of Court and counsel in the presence of the jury the plaintiff was entitled as a matter of right to have a mistrial declared, to the end that his cause might be again tried under less prejudicial conditions. It would seem that the trial judge in the exercise of his discretion should have recognized this disadvantage of the plaintiff as well as his right to have the same remedied by a continuance of the cause.

The motion to withdraw a juror was made in connection with defendant's motion for a non-suit and both motions were disposed of by the Court at the same time, the exception taken by plaintiff's counsel applying as has been urged at a previous part of this brief both to the granting of the non-suit and to the denial of a motion for a mistrial. See portion of this brief immediately preceding Point I.

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CONCLUSION.

The judgment of non-suit should be reversed and a new trial directed.

Respectfully submitted,

JOHN WINANS,

Attorney of and of Counsel with

Plaintiff-Appellant.

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