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Complaint.

(Filed July 16, 1934.)

New Jersey Supreme Court

HUDSON COUNTY CIRCUIT.

VIOLA E. WALTERS,
Plaintiff,

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,
Defendant.

Action at Law.
Complaint.

10

20

Plaintiff, Viola E. Walters, residing in the Town of West New York, County of Hudson and State of New Jersey, respectfully shows that:

1. At all times hereinafter mentioned, the defendant was and now is a corporation organized for the purpose of making life and accident insurance.

2. On or about December 30, 1924, the defendant insured the life of William B. Walters and made a policy of insurance in writing in the sum of Two Thousand (\$2,000.00) Dollars, insuring the person and life of William B. Walters, and made and constituted Viola E. Walters, the wife of the insured, the beneficiary of the said policy of insurance.

30

3. A provision of the said policy of insurance provides that: The accidental death benefit shall

40

Complaint.

be in the sum of Two Thousand (\$2,000.00) Dollars payable in addition to the face amount of insurance at the home office of the company, in the event of death by accident, as defined in the provision regarding accidental death benefits.

- 10 4. The said policy of insurance contained a provision which provided that the amount of the accidental death benefit shall be payable in addition to the face amount of insurance, immediately upon receipt of due proof that the death of the insured occurred during the continuance of the policy, while there was no default in the payment of premiums, as a result, directly and independently of all other causes, of bodily injuries effected solely through external, violent and accidental means, of
- 20 which, except in the case of drowning or internal injuries revealed by an autopsy, there is a visible contusion or wound on the exterior of the body, and that such death occur within sixty days of the accident; provided, however, that no accidental death benefit shall be payable if the death of the insured resulted from suicide, whether sane or insane, from having been engaged in aviation or submarine operations, or in military or naval service in time of war, or from a state of war, riot or insurrection, or directly or indirectly from
- 30 bodily or mental infirmity or disease in any form. The accidental death benefit is granted in consideration of the payment of an extra annual premium of Three and 04/100 (\$3.04) Dollars which is included in the amount of the premium stated, and which is payable at the same time and subject to the same provisions as to payment, as the regular premium of this policy.
- 40 5. On or about January 1st, 1929, the said William B. Walters, the insured, was shot by a bullet

Complaint.

from a lethal weapon in the hands of another person, and died as a direct result thereof on or about January 1st, 1929.

6. Due proof of the death of the insured, effected directly and solely as a result of bodily injuries through external, violent and accidental means, independently of all other causes, and during the continuance of the said policy, was made to the said defendant and/or its servants, agents and employees, and demand was made by the plaintiff, the said beneficiary, for the said sum of Two Thousand (\$2,000.00) Dollars, but the defendant has failed, neglected and refused to pay the said sum. 10

7. At the time of the death of the insured, there was no default in the payment of the premium, nor was the death of the insured the result of suicide, nor from having been engaged in aviation nor submarine operations, nor military nor naval service in time of war, nor from a state of war, riot or insurrection, nor directly or indirectly from bodily or mental infirmity or disease in any form. 20

8. Plaintiff, in all other particulars complied with, performed and observed the conditions, provisions, restrictions, prohibitions and stipulations of the said policy, and of the application thereof, on her part to be complied with, performed and observed according to the form and effect of the said policy and application. 30

9. As a direct result of the neglect, failure and refusal of the said defendant to pay the said accidental death benefit in the said sum of Two Thou- 40

Answer.

sand (\$2,000.00) Dollars, the plaintiff has been damaged in the sum of Two Thousand (\$2,000.00) Dollars.

Wherefore, plaintiff demands damages in the sum of Two Thousand (\$2,000.00) Dollars, together with interest and costs.

10

ADELMAN & ADELMAN,
Attorneys of Plaintiff.

Served on Ralph W. Hyatt for The Prudential Insurance Company of America on July 16, 1934.

Answer.

20

(Filed August 1, 1934.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

VIOLA E. WALTERS,
Plaintiff,

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,
Defendant.

30

Action at Law.
Answer.

The Prudential Insurance Company of America, defendant in the above-entitled cause, for answer to the complaint filed herein, says:

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1. It admits the allegations of paragraphs 1, 2, 3 and 4 of the complaint.

Answer.

2. It denies the allegations of paragraphs 5, 6 and 7 of the complaint.

3. It denies paragraphs 8 and 9.

First Separate Defense:

The death of the insured, William B. Walters, did not occur as the result, directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental means within the meaning of the said policy. 10

Second Separate Defense:

The death of the insured, William B. Walters, occurred as the result of an unlawful attack made by him upon one, Walter Scullion, and of acts of self-defense committed by the said Scullion and necessary to repel the said unlawful attack, which acts of self-defense resulted in the death of the insured. The death of the insured, therefore, did not occur as the result, directly and independently of all other causes, of bodily injuries effected solely through external, violent and accidental means within the meaning of the said policy. 20

Third Separate Defense:

The death of the insured, William B. Walters, occurred as the result of his own aggression in a fight with one, Walter Scullion, which fight had been caused and precipitated by the said insured, and in the course of which the said insured sustained wounds that resulted in his death. The death of the said insured, therefore, did not occur as the result, directly and independently of all other causes, of bodily injury, effected solely through external, violent and accidental means within the meaning of the said policy. 30 40

PERKINS, DREWEN & NUGENT,
Attorneys of Defendant.

Reply.

(Filed August 18, 1934.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

10

VIOLA E. WALTERS,
Plaintiff,

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,
Defendant.Action at Law.
Reply.

20

The plaintiff, replying to the defendant's answer, says:

1. It joins issue with the defendant in paragraphs 1, 2 and 3 of the answer.

Answer to First Separate Defense:

Plaintiff denies the answer by way of first separate defense and joins issue with the defendant thereon.

30

Answer to Second Separate Defense:

Plaintiff denies the answer by way of second separate defense and joins issue with the defendant thereon.

Answer to Third Separate Defense:

Plaintiff denies the answer by way of third separate defense and joins issue with the defendant thereon.

40

ADELMAN AND ADELMAN,
Attorneys of Plaintiff.

Postea.

(Filed August 2, 1935.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

VIOLA E. WALTERS,
Plaintiff,

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,
Defendant.

Action at Law.
Postea.

10

20

This case was tried before Judge Henry E. Ackerson, Jr., with a jury at the Hudson Circuit, on Thursday, June 27, 1935.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for the sum of Two Thousand Seven Hundred Eighty (\$2,780.00) Dollars.

Dated: July 30, 1935.

HENRY E. ACKERSON, JR.,
Judge.

30

Statement N. J. Supreme Court. Judgment entered Aug. 2, 1935.

Damages	\$2,780.00
Costs—Attorney	45.00
Disbursements	23.34
	\$2,848.34

40

FRED L. BLOODGOOD,
Clerk.

Judgment.

(Entered August 2nd, 1935.)

NEW JERSEY SUPREME COURT

10

VIOLA E. WALTERS,
Plaintiff,

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,
Defendant.

Action at Law.
Judgment.

20

This case was tried before Hon. Henry E. Ackerson, Jr., Judge, and a jury at the Hudson Circuit on June 27, 1935.

The jury rendered a general verdict in favor of the plaintiff and against the defendant and assessed damages in the sum of Two Thousand Seven Hundred Eighty (\$2,780.00) Dollars.

30

Whereupon it is adjudged that the plaintiff Viola E. Walters do recover of the said defendant The Prudential Insurance Company of America, a corporation of the State of New Jersey, the sum of Two Thousand Seven Hundred Eighty (\$2,780.00) Dollars damages together with her costs which have been taxed at the sum of Sixty-eight dollars and thirty-four cents making in the whole the sum of Two Thousand Eight Hundred Forty-eight dollars and thirty-four cents.

Damages \$2,780.00
Costs 68.34

\$2,848.34

40

Judgment entered and signed August 2nd, 1935.

THOMAS J. BROGAN,
Chief Justice.

Notice and Grounds of Appeal.

(Filed September 18, 1935.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

VIOLA E. WALTERS,
Plaintiff,

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,
Defendant.

Action at Law.

Notice of Appeal
and Grounds.

10

20

*To Adelman & Adelman, Esqs., Attorneys of
Plaintiff, or to Whom it May Concern:*

Sirs:

PLEASE TAKE NOTICE that the defendant in the
above-entitled cause appeals to the Court of
Errors and Appeals, in the last resort in all
causes, in New Jersey, from the whole of the judg-
ment entered in this cause on the following
grounds, to wit: 30

1. Because the Trial Court erred in denying
the motion for non-suit made by defendant's at-
torney at the close of the plaintiff's case.

2. Because the Trial Court erred in denying
the motion for a directed verdict made by defend-
ant's attorney at the close of the whole case.

3. Because the Trial Court erred in charging
the jury as follows: 40

Notice and Grounds of Appeal.

“Whether Scullion was justified in so doing is not the important question you have to decide here as the cause of action in this case.”

4. Because the Trial Court erred in charging the jury as follows:

10

“So you see you are not to decide whether Mr. Scullion was justified in killing Walters as bearing upon the question of his guilt or innocence of murder.”

5. Because the Trial Court erred in charging the jury as follows:

20

“If Mr. Walters on this eventful night deliberately faced a loaded revolver—if he deliberately faced a condition that would in any way convey to his mind under the circumstances that the natural and probable consequences of his conduct would be his death, can’t you see that he would then not be the victim of an accident but would be exposing himself voluntarily to his own death, and, therefore, under such circumstances—which I am giving to you purely by way of illustration of the point that I make with regard to whether or not his death was caused by accidental means—under such circumstances you might find that it was a natural consequence to flow from this conduct.”

30

6. Because the Trial Court erred in charging the jury as follows:

40

“Now, in this case, gentlemen, if the effect produced by the conduct of the insured, Walters, was such that the decedent could reasonably have foreseen it as the natural and

Notice and Grounds of Appeal.

probable consequence resulting from his own voluntary conduct; a probable result that he ought reasonably to have expected or anticipated in view of all the circumstances, then the insured's death was not due to an accident."

7. Because the Trial Court erred in charging the jury as follows:

"So you see we are not to decide whether or not Mr. Scullion was justified in killing Mr. Walters as bearing upon the question of his guilt or innocence of murder, although it is to be considered, of course, in the questions which I am presently to discuss with you."

Respectfully,

PERKINS, DREWEN & NUGENT,
Attorneys of The Prudential
Insurance Company of Amer-
ica, Defendant.

Service of a copy of the within Notice of Appeal and Grounds is hereby acknowledged this 14 day of September, 1935.

ADELMAN & ADELMAN,
Attorneys of Plaintiff,

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30

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Testimony.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

10

VIOLA E. WALTERS,
Plaintiff,

vs.

PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a corporation,
Defendant.

Jersey City, New Jersey,
June 27, 1935.

20

Before:

HON. HENRY E. ACKERSON, Jr., Judge,
and a jury.

Appearances:

ADELMAN & ADELMAN, Esqs.,
By A. HARRY ADELMAN, Esq.,
Attorney for Plaintiff.

30

PERKINS, DREWEN & NUGENT, Esqs.,
By JOHN DREWEN, Esq.,
Attorneys for the Defendant.

(A jury was impaneled and sworn.)

(Counsel for the plaintiff opened to the jury.)

(Counsel for the defendant opened to the jury.)

40

Mr. Adelman (interrupting the opening of Mr. Drewen): I object to the introduction in the open-

Opening of Case.

ing address of counsel of any statements which are evidential and which may be brought out later.

Mr. Drewen: I am telling the story of what occurred. I can't tell this man's mental state unless I tell all that he did.

The Court: What you expect to prove.

Mr. Drewen: Exactly.

10

(Mr. Drewen completed his opening address.)

Mr. Adelman: If the court please, notice of certain admissions was served upon the defendant and in response thereto reply to the demand was made. In order that the jury may understand what they were, I should like to read the questions and the responses before we proceed, if it meets with your Honor's approval.

The Court: I assume, however, by listening to the argument that the defendant is not going to insist upon anything except that this death was not due to accidental means.

20

Mr. Drewen: Then there is at present in my mind some question as to the giving of notice under the policy, but when we come to that I may admit it. At the moment I am saying to your Honor the only defense is with the qualification I have made, the question of accidental death. I have made every admission I could.

Mr. Adelman: That is the purpose, to get before the court and the jury notice was given of this accidental death. For that purpose I wanted to have this read because of the exceptions made by counsel for the defendant.

30

The Court: All right.

(The notice of admissions and the replies thereto were read to the jury; Mr. Adelman reading the demand and Mr. Drewen reading the responses.)

40

Arthur P. Haskins, for Plaintiff—Direct.

Mr. Adelman: I should like to have both these pleadings submitted to the jury when they leave.

The Court: Do you wish to offer these as exhibits?

Mr. Adelman: Yes, sir.

10 The Court: If there is no objection they may be marked.

(There being no objection noted, the papers above referred to were received and marked in evidence P-1 and P-2.)

Mr. Adelman: May I ask your Honor to permit me to step out of the orderly procession of witnesses and permit certain professional men, policemen and firemen to take the stand?

The Court: All right.

20

ARTHUR P. HASKINS, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination by Mr. Adelman:

Q. What is your occupation? A. Physician.

30 Q. Are you the county physician of Hudson County? A. One of them.

Q. Did you on or about January 1, 1929 or the day after, examine the body of William Walters? A. I did.

40 Q. Will you in your own language tell us just what you found? A. Autopsy was performed at Bosworth's Morgue on January 2, 1929. The body was that of a white male measuring five feet nine, estimated to weigh approximately 170 pounds, well built and muscular. I found over the knuckle of the—the third knuckle of the right hand

Arthur P. Haskins, for Plaintiff—Direct.

black and blue discoloration of the skin. We found situated a half an inch above the left nipple a circular shaped wound of the skin having a diameter of approximately one-third of an inch and having the appearance of a bullet wound of entrance. There were no other marks of recent violence on external examination of the body. On opening the body we found that the wound had penetrated—there was a penetration between the third and fourth ribs on the left side at a point corresponding to the external wound that I have previously mentioned. I found that the left lung had been perforated as also was the heart. The diaphragm, which is the muscle that separates the belly from the chest, had been perforated. The upper surface of the right lobe of the liver was furrowed and in the body, in the substance of the right lobe of the liver was found a leaden pistol bullet of apparent calibre .32.

There was extensive hemorrhage taking place in both the chest and the abdominal cavities. The other organs of the body were normal, such condition as to be consistent with continuance of life and health. Therefore, from all the facts observed I inferred death resulted from a bullet wound involving the chest and abdomen.

Q. Was this bullet wound the result of an external injury?

Mr. Drewen: I don't know how it could have been anything else.

Q. Was there a visible contusion on the outside of the body? A. Yes.

Q. Would you say that death occurred promptly? A. I would expect an injury involving the lung, a through and through bullet wound of the

Arthur P. Haskins, for Plaintiff—Cross.

heart, and an extensive furrowing of the liver would result in death in a short time.

Q. Could you, from the nature of the wound, reconstruct the manner in which the wound was received? A. Not other than it was a bullet wound.

10 Q. Could you, by following the course of the bullet, determine in your autopsy whether that wound was received while the man was struggling with another? A. Why, it would not be enough to indicate that he was struggling. He might not have been in contact with anybody and the wound could take that course. I would not be able to tell anything except the course of the bullet in the body.

20 Q. Were there any powder marks close to this wound? A. No.

Cross-examination by Mr. Drewen:

Q. Doctor, when you saw the body it was where? In the morgue, I assume? A. I personally saw it in the morgue.

Q. When you came to it the body was nude, wasn't it? A. Yes.

30 Q. If this body had been clothed in ordinary attire that one would wear during the winter months, that would prevent the accretion of powder marks on the externals, wouldn't it? A. It would.

Q. So that even at close range a pistol might have been fired, if he had been clothed fully, and still not show powder marks? A. Unless the clothing is extremely thin, like a shirt. Ordinary cloth clothing will obstruct powder marks.

40 Q. You said something on your direct examination about black and blue marks? A. Black and

*Arthur P. Haskins, for Plaintiff—Re-direct—
Cross.*

blue discoloration over the third knuckle of the right hand.

Q. Now, was the course of this bullet upward or downward? A. In order to properly explain that without confusion, I would like to make a preliminary remark.

10

Q. Just answer me in a general way. Supposing I help you. You say it entered near the nipple on which side? A. Left.

Q. That would be here, wouldn't it, on me? A. Yes.

Q. Where did you say you found the bullet located—with regard to me—in the corpse? A. In the substance of the right lobe of the liver.

Q. That would be here? A. It would, approximately in that level.

20

Q. So that the course of the bullet was laterally downward? A. In an erect body.

Q. In an erect body, that is right? A. That is what all my positions are based on.

Q. Upon the body's normal position? A. Anatomical position of the body, which is the body erect.

Re-direct examination by Mr. Adelman:

Q. This abrasion——

30

Mr. Drewen: Wait a minute.

Mr. Adelman: I beg your pardon.

Cross-examination by Mr. Drewen (continued):

Q. Now, you don't wish to be understood as attempting to tell us anything at all whether there was any struggling or what the circumstances were when this wound was inflicted? A. Not

40

*Arthur P. Haskins, for Plaintiff—Re-direct—
Re-cross.*

based on an autopsy, any information gotten in autopsies.

Re-direct examination by Mr. Adelman:

10 Q. This abrasion you spoke of, Doctor, do you know how that occurred, the abrasion to the knuckle? A. I don't.

Q. That might have occurred in the handling of the body? A. No. It was antemortem.

Q. It was before death?

Re-cross examination by Mr. Drewen:

20 Q. Do you have any record from which you may describe this body? I think you said it was well nourished, didn't you? A. Well built and muscular.

Q. Well built and muscular. About how tall was this body? A. About five feet nine.

Q. What was the weight of it? A. Estimated to weigh not less than one hundred and seventy pounds. That was the approximate weight estimated by inspection.

Q. Muscular and well built? A. Yes, sir.

By Mr. Adelman:

30 Q. When you say "muscular," Doctor, you merely refer to the common lay language as muscular? A. Well developed.

Q. Well built. You didn't mean that he was the type of muscular man such as a pugilist would be? A. I mean that he had a well-built, muscular development.

Q. Just a healthy man, is that it?

Mr. Drewen: This is counsel's witness.

40 The Court: Strike out the last question and the answer thereto, if any.

Henry Leber, for Plaintiff—Direct.

Q. Was he a well-built man and a healthy man?

A. He was.

Mr. Adelman: I offer a certified copy of transcript of the record of the death of Hudson County.

Mr. Drewen: That is objected to. It proves no more than has already been testified to. It is irrelevant, incompetent and immaterial. It is a mere transcript of death.

10

Mr. Adelman: This, if your Honor please, is a certified copy of the transcript of death.

The Court: It cannot be any more than accumulation in any event, so it may be marked.

20

(The transcript of death above referred to was received and marked in evidence P-3.)

HENRY LEBER, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination by Mr. Adelman:

30

Q. What is your occupation? A. Funeral director.

Q. Sir? A. Funeral director.

Q. Did you on or about January 1, 1929, take care of as mortician the body of William Walters?

A. I did.

Q. Will you tell us where you got the body and under what circumstances? A. We were notified by Mrs. Walters, wife of the deceased, to have the

40

Henry Leber, for Plaintiff—Direct.

body removed to our funeral home and laid out there and arrange for a funeral.

Q. Did you personally supervise that? A. Yes, sir.

Q. Did you see the body of the deceased? A. I did, sir.

10 Q. Do you remember what you saw about the body of the deceased or did you make a memorandum at that time? A. Why, slight memory I have of it.

Q. What, sir? A. I have a slight memory of it.

Q. You have a memory of it? A. Yes.

Q. Will you tell this court and jury just what you saw about the body at the time with relation to the area of the left breast? A. We just saw the wound there, that is all. As far as the interior is concerned, we don't know that. That was done by the county physician at the post mortem.

20 Q. Did you see a bullet wound on the body? A. Just a mark where the bullet had entered.

Q. Will you describe that mark? A. Just a round hole as the bullet went in.

Q. Tell us just where that round hole was with relation to me. A. I couldn't describe it. I imagine it was in the left side of the chest.

30 Q. Left side of the chest. About the region of the heart? A. In that neighborhood.

Q. How large a hole was that? A. I should say—I didn't measure that hole.

Q. Would you say it was— A. About a quarter of an inch.

Q. —about the size of a pencil? A. It looked about that size, yes.

Q. Did you bury the body? A. I did.

Mr. Drewen: No questions.

Albert Schneider, for Plaintiff—Direct.

ALBERT SCHNEIDER, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination by Mr. Adelman:

Q. What is your occupation? A. Captain of the Fire Department. 10

Q. Of what town? A. West New York.

Q. Do you remember the night of January 1, 1929? A. Yes, sir.

Q. Do you remember being called out on an alarm? A. Yes, sir.

Q. Did you go to the building at 410 Hudson Avenue, West New York? A. Yes, sir.

Q. Will you tell us what you found there? A. When we arrived there we went into the building. 20

Mr. Drewen: Speak louder, please.

The Witness: We went to an apartment in the rear of the building on the north side of the building. As we entered the door there was a man lying on the floor. I asked Fireman Brility to come in the building with me. I said, "Jack, you go examine the man, see if he is alive yet." So he examined the man. At the same time I was speaking to Mr.— 30

The Court: Never mind what you said or what they said. What did you find? What did you see?

The Witness: That is all I seen, a man lying there and the place was all upset and the window was broken on the right-hand side.

Q. Did you pick up the body? A. No, sir.

Q. Who was with you? A. Mr. Brility. 40

Albert Schneider, for Plaintiff—Direct.

Q. Were there any police officers there? A. The police officers came in and Brility and the cop took him out.

Q. Now, did you see this body on the floor reclining? A. Yes, sir.

10 Q. Do you know whether that body was the body of William Walters? A. That is what I found out afterwards.

Q. You found out later that the body was the body of William Walters? A. Yes.

Q. Now, was that body carried out? A. Yes, sir.

Q. By whom? A. Brility and Corvinus.

Q. Who is Brility? A. Fireman and Corvinus is the cop.

20 Q. Do you know where it was taken? A. Down to the hospital.

Q. Do you know that of your own knowledge? A. Yes, sir. They put him in the cop's car and they took him down in the cop's car.

Q. You left the scene of the accident? A. No. I stood there then.

Mr. Drewen: Scene of what?

Mr. Adelman: I will withdraw the "scene of the accident." You can say scene of the incident.

30

Q. Did you observe any marks on the clothing of the deceased? A. I just seen blood on the left-hand side.

Q. Did you open the shirt or clothing? A. No, sir.

Q. Did you see a hole through the clothing? A. No, sir.

Mr. Adelman: That is all.

40

Albert Schneider, for Plaintiff—Cross.

James Brility, for Plaintiff—Direct.

Cross-examination by Mr. Drewen:

Q. What floor was this apartment on in which you saw the body? A. First floor.

Q. How? A. First floor.

Q. That is the ground floor? A. The ground floor or first floor. 10

Q. The ground floor or first floor. What time of the morning did you arrive there about? A. The alarm came in two o'clock, so we arrived in there about one minute after two.

Q. You don't know whether the police had gotten there ahead of you or came there after you? A. Came after.

Q. When you got to this apartment did you go through any other rooms besides that where you saw the body? A. No, sir. 20

Q. In which room of the apartment was the body lying? A. The kitchen.

The Court: That was to the rear, I suppose?

The Witness: That is just as you come in.

JAMES BRILITY, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows: 30

Direct examination by Mr. Adelman:

Q. What is your occupation? A. Fireman, West New York Fire Department.

Q. In the Town of West New York? A. Yes, sir. Fireman, Town of West New York Fire Department. 40

James Brility, for Plaintiff—Direct.

Q. On the night, or rather, the morning of January 1, 1929, were you called out on an alarm? A. Yes, sir.

Q. To the building at 410 Hudson Avenue, West New York? A. Yes, sir.

10 Q. Will you tell us what you found when you arrived? A. When we arrived at that box there we was called into the apartment on the ground floor.

Q. What did you find? A. Why, we found a body laying there.

Q. I can't hear you? A. We found a body laying on the floor.

Q. What about that body? What was it? A. Why, a man looked to be dead to us.

20 Q. Did you recognize that body as the body of William Walters? A. I did after.

Q. Were you told that that was his body? A. Yes, sir.

Q. Did you observe on that body any injuries? A. No, we didn't.

Q. Did you see any blood on the clothing of the body? A. There was some blood.

Q. Where was it? A. I believe it was on the left side.

30 Q. Was there any hole in the clothing? A. I didn't take notice.

Q. Did you open any of the clothing of the deceased? A. No, sir.

Q. Did you assist in taking the body away? A. We did at once.

Q. Who did you assist? A. I assisted motorcycle policeman Corvinus.

Q. Where did you take the body? A. Took it out to a police car outside.

40 Q. Then where? A. Then the police took it down to the hospital.

James Brility, for Plaintiff—Cross.

Cross-examination by Mr. Drewen:

Q. Did you go into any other rooms beside the kitchen? A. Sir?

Q. Did you go into any other rooms beside the kitchen? A. No, sir.

Q. What was the condition of the kitchen when you went there? Was it orderly or disorderly? 10
A. I didn't take notice.

Q. You didn't take notice? A. No, sir.

Q. How long were you there altogether? A. Sir?

Q. How long were you in the place altogether?
A. Not very long, sir. We rushed the body right out.

Q. How long was that? A. Well, I couldn't say.

Mr. Drewen: Well, that is all. 20

Mr. Adelman: If your Honor please, I offer the original of the insurance policy in evidence. This is produced on notice to produce by the defendant.

The Court: Any objection?

Mr. Drewen: No objection.

(The insurance policy above referred to was received and marked in evidence P-4.)

Mr. Adelman (addressing the jury): I have here a photostatic copy of the same policy which his Honor now holds. I read to you from that policy provisions as to accidental death benefits. The amount of the accidental death benefits—you have heard the defendant admit the premiums were paid. You heard the defendant admit— 30

Mr. Drewen: I object to counsel summing up. 40

James Brility, for Plaintiff—Cross.

The Court: You can't do that.

Mr. Adelman: I want to lay the foundation for the very next question and answer that is going to be introduced. I should like to proceed, if I can, along that line.

The Court: Why not ask the question?

10

Mr. Adelman: Sir?

The Court: The quickest and best way is to ask the question.

Mr. Adelman: I show Mr. Drewen a letter, an original letter, under date of December 31, on the stationery of the Prudential Insurance Company of America. May I ask you if you have any objection to offering this letter in evidence?

20

Mr. Drewen: I object to it as immaterial. I admit the letter is authentic. I object to its relevancy.

Mr. Adelman: May I have it marked in evidence?

The Court: There is objection to it.

Mr. Drewen: I object. I say it is authentic, written by the gentleman who signed it. It has no bearing on this issue.

Mr. Adelman: I offer it for identification.

30

(The letter above referred to was received and marked for identification P-5.)

Mr. Adelman: I show you a letter dated from the law department of the Prudential Insurance Company of June 25th.

Mr. Drewen: Same objection.

Mr. Adelman: May I ask it be marked for identification?

(The letter above referred to was received and marked for identification P-6.)

40

Mr. Adelman: I offer for identification proofs of death on the forms of the Pru-

Viola E. Walters, Plaintiff—Direct.

dential Insurance Company entitled "Number 1, Claimant's statement; 2, physician's statement; 3, identification statement."

(The papers above referred to were received and marked for identification P-7, P-8 and P-9.)

10

VIOLA E. WALTERS, the plaintiff, called as a witness in her own behalf, being sworn, was examined and testified as follows:

Direct examination by Mr. Adelman:

Q. Will you tell the court and jury who Mr. Walters was? A. William Walters was my husband.

20

Q. Speak louder. A. William Walters was my husband.

Q. On the night of January 1, 1929, or rather the evening preceding that, did you and your husband go any place? A. Yes. We went over to Mr. and Mrs. Scullion's house.

Q. Will you speak louder so that number 12 can hear you? A. Yes. We went over to my sister and brother-in-law's house, Mr. and Mrs. Scullion.

30

Q. Who went with you? A. My son, William, junior.

Q. How old was he? A. Two and a half years.

Q. About what time did you go to the home of Mrs. Scullion? A. At nine o'clock in the evening.

Q. Who was Scullion? A. My brother-in-law.

Q. And his wife was your sister? A. My sister, Gladys.

Q. Tell us just what happened in your own language that night. A. Well, we went over to my sister and my brother—

40

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Q. Speak so I can hear you. A. We went over to my sister's for supper and to stay the next day to have dinner, my sister's birthday and my anniversary, and we were to celebrate New Year's. We got over there nine o'clock. We were drinking wine, having something to eat, and we were talking and fooling. Then around about half past eleven I went to take the baby and I wanted to put him to bed. Of course, I laid down with him. Of course, I was dozing off to sleep. Of course, I left my husband with Mr. and Mrs. Scullion out in the kitchen. They were talking. I fell asleep with the little fellow. I was dozing off to sleep. My husband just came in and decided to go home, which I said to him, "Well, Bill, what is the use of going home. You said you were going to stay for supper and tomorrow's dinner. After you promised Gladys and Walter——"

Q. Will you speak slowly and distinctly? It is very difficult to hear you. A. The baby was going to sleep. I was dozing off myself. My husband came in and wanted me to go home. I says, "Bill, you promised Gladys and Walter to stay for supper and tomorrow's dinner." He says, no, he had no intentions of staying, he wanted to sleep home in his own house. So he told me to get up and get the baby ready and go on home.

The Court: Who said this?

The Witness: My husband. So I got up and after coaxing a while he says no, he decided he is going to sleep in his own house and nobody else's; so I got up. I started to dress the baby. I started to try and coax him to stay. He said no, he had no intentions of staying. He wanted to go home and sleep in his own house. I stopped coaxing. I saw he wanted to go home, so I got

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dressed, dressed the baby; so with that he told me to wait outside in the hall; so I walked out. He shut the door after me. He told me to wait there. In the meantime I went over to my mother's with the baby. That was the end I seen of him.

Q. You took the baby out in the hall yourself, did you? A. Yes.

Q. You dressed the baby? A. Yes.

Q. At any time during the evening up to the time that you retired was there any argument between your husband and Mr. Scullion? A. No.

Q. Did your husband and you bring anything there that evening? A. Yes. My husband brought a gallon of wine, red wine.

Q. What kind of wine? A. Red wine.

Q. Was that what is commonly known as — A. It was called Italian red wine.

Q. Were you in this kitchen at the time when these men were talking together? A. No. In the first part of the evening I was, then I put the baby to sleep.

Q. Had you seen them drinking any of this wine? A. Yes, I did.

Q. Up to the time of your retirement I understand you heard no argument of any kind between these men? A. No, sir.

Q. What time did you go to bed? A. Well, about half past eleven.

Q. With relation to the kitchen how far away were you in bed? A. About three rooms from the kitchen; two rooms from the kitchen.

Q. Did this room that you were sleeping in open off the kitchen? A. No. That is the sitting room. First comes the kitchen, then the sitting room, then the bedroom.

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Q. Beyond that? A. Beyond that.

Q. So in order to get to the bedroom you had to go through the sitting room? A. Yes.

Q. About what time was it that your husband wanted you to go home? A. Well, I imagine around one o'clock. I imagine it was around one
10 o'clock.

Q. Had you been asleep at that time? A. No.

Q. Did you hear everything that was going on? A. Yes.

Q. Could you have heard everything that was going on? A. It was only very small rooms.

Q. Did you hear conversations that were taking place in the kitchen? A. Yes.

Q. When your husband came to the bedroom and asked you to leave was he—tell us what his state was; what his condition was. A. He asked
20 me what was the idea of going to sleep. I says, "If you have intentions of staying I wanted to put the baby to sleep. I am going to lay down with him until he falls asleep." He says, "I am going to sleep in my own house." He says, "Now you don't have to." He says, "Get the baby dressed and get home." I says, "Bill, aren't you going to stay all night, and go home tomorrow?" He says, "No, he is going to sleep in his own
30 house."

Q. Did you dress the baby yourself? A. Yes.

Q. Did you carry the baby or walk it out into the hall? A. Yes. I carried it out.

Q. What? A. I carried the baby out.

Q. You heard counsel for the defendant in his opening to the jury say to the jury that the baby was thrown in the hall.

Mr. Drewen: I object to any characterization from this witness.

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The Court: Yes. Just bring out the facts. Don't refer to what was said to the jury.

Q. Was your baby thrown into the hall by your husband? A. No.

Q. Did you hear any discussion between your brother-in-law as to anything at all in the nature of anger? A. No. 10

Q. There was no angry discussion, no quarrel or fighting? A. No.

Q. When you left the building did you tell us what happened then? A. I went outside. I seen my brother Edward. I said, "Eddie, go in and take Bill home." I said, "He is in Mr. Scullion's house."

Q. Did you go home yourself or did your brother accompany you? A. No. I went over to my mother's. 20

Q. How far away from 410 Hudson Avenue did you live? A. I really didn't go home to my house. I went to my mother's. That is the next block, one block from 410.

Q. What street? A. 449 Hudson Avenue.

Q. 449. That is a block away? A. Yes.

Q. Tell us what happened when you got to your mother's house. A. When I got to my mother's house my mother says, "Where was you?" I says, "Over by Gladys, and Bill doesn't want to stay there, he wants to go home and I didn't want to go home with him." I says, "I expected to stay at Gladys'." I says, "I left Bill there. I am going to stay here for the night." In the meantime I heard fire engines running around. My mother says, "You better see what is the matter." We went outside. There the fire engines was in front of the 410, my sister's address. 30 40

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Q. Tell us what happened. A. My mother and I—I put the baby into bed; then I took a walk over to my sister's. In the meantime as we were walking over there my mother opened the door. She says, "Did you hear?" I says, "Hear what?" She says, "Bill is in the hospital and Walter is in jail."

10

Q. Is that the first you heard of this incident?

A. Yes. Then my sister Gladys told me I should go to North Hudson Hospital and see if he was there.

Q. Did you go there? A. No, I didn't. In the meantime the detective came to the house and told me my husband was dead.

Q. When did you next see your husband? A. The next day.

20

Q. Where? A. At Mr. Leber's.

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

Q. Fully undressed? A. No. I seen him when he was laid out.

Q. Just fully dressed? A. Yes. I asked Mr. Leber to take care of him.

Q. Thereafter did you file notice of proof of death with the insurance company? A. Yes.

Q. Did they pay you any benefit? A. They gave me a check of \$2,000.

30

Q. Did you request any further payment of any moneys? A. Yes, I did.

Q. What was the answer? A. That I would have to wait until after the trial of Mr. Scullion.

Q. Did they explain to you what trial?

Mr. Drewen: That is objected to. It is admitted here that a claim was made and that it was not paid. I object to anything having to do with trials.

40

Mr. Adelman: If your Honor please, in the admissions counsel for the defendant

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made an exception in which he denied timely notice. I am connecting up, if your Honor please, the notice.

Mr. Drewen: Withdraw the objection to save time.

Q. What did the company say to you? 10

Mr. Adelman (to the stenographer): Just repeat the question.

(The question was repeated by the stenographer: "Did they explain to you what trial?")

The Witness: To get the insurance money—

Q. Did they explain to you what trial at the time when they told you that you would have to wait until after a trial? A. After a trial, yes. 20

Q. Trial of whom? A. Trial of Mr. Scullion.

Mr. Drewen: We are talking about whom? "They" could not obviously say all this. Who said all this; whether it was written or in oral form.

Q. Who is "they"? A. I went up to the office on 38th Street in Union City, Dispatch Building.

Q. Whose office was it? Was it the office of the Prudential Insurance Company? A. Yes, it was. 30

Q. Who did you talk to there? A. There is a man with a wooden hand.

Q. What is his name? Is the man in charge of the office? A. Yes, he is. Saperstein is his name.

Q. Who is he? A. He is one of the men of the Prudential offices.

Q. Do you know whether he was the superintendent or manager of the office? A. Yes, he was. He was superintendent or the manager. 40

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Q. He was the man in charge of that office? A. Yes.

Q. He spoke to you? A. Yes.

Q. Did he know about this case? A. Yes, sir.

Q. Is that the man that gave you that check?

A. No, it was Mr. Cook.

10 Q. Where is Mr. Cook? A. Mr. Cook is dead.

Q. You did not receive anything from the insurance company except the initial check for two thousand dollars? A. Yes, sir; that is all.

Q. Did you thereafter make any claim to the insurance company? A. I went to the office myself on 38th Street, to one of the agents, Mr. Saperstein.

20 Q. Thereafter did you go to the home office of the company? A. No. Mr. Scullion went because I was sick at the time.

Q. He went to the home office? A. Yes.

Q. Did you receive any moneys as a result of his visit? A. No.

Q. Did you thereafter consult counsel? A. Yes.

Q. Who did you consult? A. Mr. Adelman.

Q. Thereafter did you sign or procure proofs of death and execute them? A. Yes.

Q. Who procured them for you?

30 Mr. Drewen: They are in evidence, if your Honor please.

The Court: No, they are not. They are marked for identification.

Mr. Drewen: I admitted them.

The Court: That is the only way they are marked.

Mr. Adelman: I just want to come down to them now.

40 Mr. Drewen: If you don't want my admission, all right.

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Q. Is this the paper you signed? Is this your signature? A. Yes, sir.

Mr. Adelman: I offer it now in evidence.

Mr. Drewen: No objection. The three, I presume?

Mr. Adelman: All right.

10

(The papers heretofore marked P-7, P-8 and P-9 for identification were received and marked P-7, P-8 and P-9 in evidence.)

The Court: That was on December, 1934, that you put those in?

The Witness: No.

Mr. Adelman: Yes, they are dated in 1934. That will be explained later, if your Honor please. I have connected that up by asking her whom she consulted. I will probably have to take the stand myself.

20

The Court: Why didn't you send them in before?

Q. Tell the court why. A. Why didn't I send them in before?

Mr. Adelman: Perhaps I can explain this to your Honor.

The Court: No. You are not the witness. I want to know from her.

30

Q. Tell the court why you didn't have these papers before and sign them. Do you know? A. No. I really don't know, only that I was in the hospital and I was sick at the time.

The Court: How long?

The Witness: I was in North Hudson Hospital for about three and a half months and two months in Jersey City Hospital.

40

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Q. Why?

Mr. DREWEN: That is objected to.

The Court: Oh, yes. You were sick, I suppose, that is the reason you were there.

The Witness: I fell off the roof.

10 Q. Fell or jumped? A. I had a broken leg.

Mr. DREWEN: He knows perfectly well he hasn't any right to make this statement.

Mr. ADELMAN: I withdraw it.

The Court: Yes, of course you withdraw it.

Mr. DREWEN: He is a very sporty man.

The Court: There is no time stated in the policy for filing proof of loss.

20 Mr. DREWEN: I didn't hear your Honor.

The Court: I have not read all this voluminous policy. Casually I find no time stated in it.

Mr. DREWEN: There isn't. It merely says due proof; no time limit. I don't make any important point as to the time these were filed at all.

The Court: Then don't let us develop it.

30 Mr. DREWEN: What I say about it is, it is the character or the nature of the proof so-called, that is of importance, if anything, on that point.

Mr. ADELMAN: The only reason this is brought out, if your Honor please, is to show—we have got to overcome the admission of the company in which they question as to whether the proofs were submitted timely. If counsel now admits these proofs were there——

40 The Court: That is just what he said.

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He raises no objection. I don't see very well how he could.

Mr. Drewen: I don't raise it at all.

The Court: The policy, as far as I have read it, makes no provision whether it must be filed within one year, two years or one hundred years.

10

Mr. Adelman: That is correct. Therefore, I don't think any proof under the question of that timely question is necessary. That is what I wanted to have her show.

The Court: It could be, therefore, said so far as the sufficiency of it, if it only had three words it would be sufficient unless they raised objection. I don't understand they raise objection to it. I imagine this question of notice is going to fall out.

20

Mr. Drewen: Timeliness of it is going to drop.

Mr. Adelman: They do raise the question of sufficiency.

The Court: He says now he does not.

Mr. Drewen: What I said, if your Honor please, we make no point of timeliness. He submits papers to us which he calls proof of an accidental death——

The Court: Don't you see, you misunderstand him. He does not say you did not endeavor to get proper proof to him. He does not object to the contents of it; but he does say it does not prove accidental death.

30

Mr. Drewen: Exactly.

The Court: So that narrows it down to one issue and that is whether this was an accidental death. Do you understand?

Mr. Adelman: Yes.

40

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The Court: He is not saying you did not give him timely and adequate notice of a death, all that you were required to do, except he says that it does not establish accidental death within the purview of this insurance policy.

10 Mr. Adelman: Under those circumstances it is not, as I understand it, necessary for us to go into the question of the proof except to show it was an accidental death, as I understand the rule.

The Court: You have that burden.

Mr. Adelman: I will undertake under those circumstances to meet it. I then require no further testimony from this witness.

20 Mr. Drewen: Mr. Adelman, I assume, knows his case and knows the policy. The policy requires two things be done. It must be accidental death; there must be due proof of an accidental death. Those proofs which he calls proofs of accidental death do not contain a syllable to show how this death occurred, whether it was accidental, suicide, or what. That is one thing he has got to prove and he knows that, the fact of the accidental death.

30 The Court: That is the thing I think is important here because in the absence of any objection from you calling for further proof, the proof would be sufficient. In other words, if you accept the proofs and make no objection to their sufficiency as proofs.

Mr. Drewen: As far as they go.

40 Mr. Adelman: That is the problem we are up against. This proof says this man met his death by gunshot wound.

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The Court: All right.

Mr. Adelman: And he died almost immediately of a bullet wound.

The Court: As I understand it, we are in this situation, that if you now offer some proof to show that this death was due to accident, why, that is all you have to do, because as I take it the proofs submitted were not specifically objected to—at least I have seen no evidence as yet that any of this has proven to the company it was accidental means; but they say the facts are it was not accidental. 10

Mr. Adelman: Will you admit this letter?

Mr. Drewen: I will admit that is a letter from Mr. Hyatt. I object to its admissibility. I admit its authenticity. 20

Mr. Adelman: I ask it be marked for identification.

(The letter above referred to was received and marked P-9 for identification.)

Mr. Adelman: If it can save time for your Honor, I would like you to just read this letter.

(Handing P-9 to the court.)

The Court: You have your papers here if you want to offer them in evidence. This letter has no pertinency whatever. 30

Mr. Adelman: Except to indicate, if your Honor please, they have no particular forms upon which such proof could be made.

The Court: Assuming all that to be so, what of it? It is up to you to furnish proofs, not for them.

Mr. Adelman: As I understand it, under the terms of the policy, the general provi- 40

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10 sions of the policy, such proofs must be made on forms of the company. Now, in that letter they said they have no special forms for submitting proof of accidental death; "I am, however, enclosing herewith a set of regular death claim proof papers." If we submitted our proof on any form other than the company's it would not be accepted.

The Court: Unless my eyes deceive me, you have here the proof. Why go into what was not sent you? Don't you see, that would have no evidential value whatever, because whatever was sent you you used. Now, if you filled in sufficient to comply with the requirements, all right.

20 Mr. Adelman: That is what I wanted to get before you, if you please, because it must be necessary for you to understand the underlying situation here. I am through with Mrs. Walters.

The Court: May I exchange this policy that is offered in evidence for a photostatic copy that I may probably read a little better?

30 *Cross-examination by Mr. Drewen:*

Q. About what time was it when you left and met your brother Edward Dillon on the street?

A. I guess about one o'clock.

Q. What time was it when your husband, you say, came into your bedroom and told you to get dressed and dress the baby? A. I imagine about eleven thirty.

Q. So that it was an hour and a half after that that you were on the way home and met Edward?

40

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A. No. It was right outside of the door I met my brother, outside of my sister's house.

Q. I say, it was an hour and a half after your husband came into the room and told you to go home that you met your brother Edward on the street? You say your husband came into the room at half past eleven and told you to dress your baby and go home with him and that it was one o'clock when you met Edward and told Edward to go back to Scullion's to bring your husband home, is that correct? A. No. 10

Q. Then what is correct? What time did your husband come in the room? A. I imagine it was half past eleven.

Q. All right. What time was it when you met Edward on the street and told Edward to go bring Bill home? A. Well, I imagine about a half an hour after. 20

Q. About twelve o'clock? A. Or a little after twelve.

Q. All right. Now, what was happening in the meantime in the Scullion home before you left there? A. Before I left there? Well, we were drinking; we were eating, we were fooling around.

Q. Did you hear any unpleasant words or any dispute between anybody? A. No.

Q. Would you know? Are you sure about that? A. Yes. 30

Q. Sure about that? A. I didn't hear any unpleasant words.

Q. You didn't hear any unpleasant words or disputes between Bill and Mr. Scullion's wife? A. No.

Q. Sure about that? A. Yes.

Q. All right. Why did you ask your brother Edward Dillon to go and bring Bill home? A. Because he wanted me to go home; so I told my 40

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brother I was going over to my mother's and he should go home with Bill to his house.

Q. Couldn't Bill go home himself? A. I told my brother to go home with him.

Q. Couldn't Bill go home himself? A. Because I told my brother to go with him.

10 Q. Couldn't Bill go home himself? A. I guess he could.

Q. Why did you ask your brother Edward Dillon to go home with him? A. I told him to go to my sister's house and go home with Bill.

Q. No special reason in the world why you did that? A. I seen they were drinking; he should take him home.

Q. Was he drunk? A. No; he wasn't drunk. He was drinking.

20 Q. Now, when you got to your mother's home you said to your mother you intended to stay there the night and wouldn't go home with Bill, is that right? A. No. I said I wasn't going to go home; I wanted to stay at my mother's.

Q. Why? A. Because I didn't feel like going home.

Q. Why not? A. Because I just wanted to stay there. I figured I wanted to stay there and sleep.

Q. Why? A. Because Bill was drinking.

30 Q. Well, the mere fact a man was drinking wouldn't make you refuse to go home with your husband, would it? A. He was staying in Scullion's house, so I figured I wanted to get my baby to bed, anyhow. He was tired and cross. The baby was tired and cross.

Q. That is the best reason you could give why you refused to go home with your husband and you wished to stay at your mother's house? A. Right.

40 Q. Is "right" your answer? A. Yes.

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Q. Mrs. Walters, I show you what purports to be a statement made by you to the police.

Mr. Adelman: I object.

Q. I ask whether that is your signature? A. Yes.

Q. That is your signature on the first sheet? 10

A. Yes.

Q. Is that your signature also on the second sheet? A. Yes.

Mr. Drewen: I ask it be marked for identification.

(The statement above referred to was received and marked for identification D-1 and D-2.)

20

Q. Do you know Lieutenant Michael Hanglely of the West New York Police Department?

Mr. Drewen (addressing person in the court room): Lieutenant, stand up, please.

(The person so addressed arose in the court room.)

The Witness: I have seen him.

Q. This statement that you say bears your signature was made by you to Lieutenant Hanglely, wasn't it? 30

Mr. Adelman: I object, if your Honor please, to the introduction or the questioning of this witness from any paper or statement made in the criminal action. This is an examination which was made in an altogether different circumstance.

The Court: I don't care if it was made in Heaven. It is just as good. 40

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Mr. Adelman: For the purpose counsel expects——

The Court: You can't put a witness on and not subject her to cross-examination.

Mr. Adelman: Sir?

10 The Court: You can't put the plaintiff herself on and not subject her to cross-examination.

Mr. Adelman: That is true, but——

The Court: If she made a statement or admission at some other time she is entitled to be confronted with it for the purpose of affecting her credibility.

20 Mr. Adelman: If only for the purpose of affecting the credibility, yes, but if counsel intends to introduce this statement as a whole into this case unquestionably there can be objection to it.

Mr. Drewen: Counsel knows better than to attempt any such thing.

The Court: Even so, an admission is perfectly good whether for the purpose of making proof of attacking credibility. This is an admission of a plaintiff and party, not a witness.

30 Mr. Drewen: I mean, I know better than to attempt to do it at this time. If I have to, I will do it by the officer who can authenticate it.

Q. Now, the statement that you made and signed in the presence of Lieutenant Michael Hangley was true, was it not? A. It is so long ago I just don't recall what it was now.

40 Q. But the statement that you made to Michael Hangley was true, whether you recall it now or not? When you made it it was true, wasn't it?

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You didn't tell the Lieutenant anything that was not true? A. No.

Q. What you told him was true? A. Yes.

Q. When you made this statement to him he put it upon the paper, of course, before you signed it, didn't he? A. Yes.

Q. When you signed it you read it? A. To tell you the truth I didn't read anything, I was so excited. 10

The Court: Did you read it?

The Witness: No.

Q. You didn't read it? I call your attention to the fact in Exhibit S-12, which bears your signature, you say: "I live at 100—9th Street, West New York, New Jersey." That was true then, wasn't it? A. Yes. 20

Q. "On December 31, 1928, my husband, who was a carpenter by trade, was not working. He stayed home all day and about nine thirty p. m. we went to my sister's home." That was true, wasn't it? A. About nine o'clock.

Q. About nine oclock. Otherwise that statement was true? A. Yes.

Q. "When we left to go to my sister's house I think my husband had been drinking as I smelled drink on his breath." That was true? A. He was drinking, yes. 30

Q. That was true, wasn't it? A. Yes.

Q. You told that to Lieutenant Hangle, didn't you? A. Yes.

Q. "He had a gallon of wine which he took from our house. After we got to the house my husband was fooling and joking for quite a while and he was drinking wine." That was true, wasn't it? A. Yes. 40

Viola E. Walters, Plaintiff—Cross.

Q. You told that to Lieutenant Hangley, right?

A. Yes.

Q. "Around twelve or a little after he started to get nasty and he started to abuse me." That was true, wasn't it? A. I don't remember that.

10 Q. You don't remember that? A. I remember him telling me to go home.

Q. Just let me ask you this: Did you tell that to Lieutenant Hangley? A. I guess I must have told him that.

Q. "I put the baby to bed and was trying to put the baby to sleep and my husband came in and told me to get dressed and come home." That was true, wasn't it? A. Yes.

Q. You told that to the Lieutenant? A. Yes.

20 Q. "I told him I understood we were going to stay all night and he got angry and said he wanted to sleep in his own room." That was true, wasn't it? A. Yes.

Q. You said that to the Lieutenant? A. Yes.

Q. "He pushed the baby and told me to dress him and come home." Is that right? A. He pushed me.

Q. He pushed you, you say; he didn't push the baby? A. No.

30 Q. "Then he went into the kitchen and got nasty with my sister and my sister asked him to stay and go to bed and have dinner with her." That was true, wasn't it? A. He was talking to my sister. My sister was coaxing him to stay.

Q. Did he get nasty with your sister? A. I wouldn't call it nasty.

Q. What happened that caused you to tell the Lieutenant that he got nasty with your sister? A. I guess in all the excitement.

40 Q. What did he do in the excitement that you describe as nasty? Do you remember what he called her? A. No. I really don't remember.

Viola E. Walters, Plaintiff—Cross.

Q. You don't remember. Anyway, your sister tried to make peace with him and invited him to stay and have dinner the next day, didn't she?
A. Yes.

Q. Then I read from your statement: "He started to curse at her and called her everything, a lot of vile names." Was that true? A. No. 10
He called her a dirty liar.

Q. Called her what? A. Called her a dirty liar; she should keep quiet.

The Court: Didn't you tell that to the Lieutenant, what is stated in the statement?

The Witness: Now——

The Court: Did you or didn't you?

The Witness: I guess I did.

Q. What else did Walters—Bill, say to your sister besides she was a dirty liar or damn liar, whichever way you mean it? A. That she should keep quiet; she should mind her own business; she should keep out of her sister's affairs. 20

Q. What did you mean by a lot of vile names that you say he called her? What were the vile names that you told the Lieutenant he called your sister? A. Now, I just can't recall.

Q. You do remember telling Lieutenant he did that, called your sister a lot of vile names? A. I said vile names. I don't really recall about a lot of names. 30

Q. Recall what? A. A lot of names.

Q. You said: "Vile names." Leave out the "lot." What vile names did he call your sister? A. He told her to keep her mouth shut; I was his wife and he was tired of the Dillons butting in, sticking up for one another.

Q. You don't mean to say you think they were vile names, do you? A. They were vile to me. 40

Viola E. Walters, Plaintiff—Cross.

Q. I read this, which you said: "Then I got frightened because I knew he was dangerous and always tried to strike me when he was drunk." Did you tell that to the Lieutenant? A. I don't ever remember it.

10 Q. You don't ever remember that? A. No.
Q. Was that true? A. Well, he never hit me.

Q. Was it true that you got frightened? A. Of course I got frightened. I went home.

Q. It was because you got frightened that you did go home, wasn't it? A. Sure, because I didn't want to stay at my sister's. I didn't feel like going home. I didn't know which way to go.

Q. It was because you got frightened, Mrs. Walters, that you went home, wasn't it? A. I was nervous more than anything else.

20 Q. Well, it was a frightened nervousness, wasn't it? You were nervous because you were scared of your husband because you knew he was dangerous, as you say, when he was drunk, is that correct? A. I don't know that he was dangerous when he was drunk.

Q. Isn't that what you told the Lieutenant? A. I suppose I did.

30 Q. I read on: "He was crazy while he was drinking." Did you tell that to the Lieutenant?
A. I suppose if it is there I must have said it.

Q. No. Don't you remember saying it? A. No, to tell you the truth, I don't remember saying it. I just didn't read it and I signed the paper.

Q. Was it true that in your own language you said your husband was crazy when he was in his drink? A. I really don't know what crazy is.

Q. What did you mean when you used that word to the Lieutenant? A. To tell you the truth I don't know myself.

Viola E. Walters, Plaintiff—Re-direct.

Q. "I had my coat and hat on and the baby dressed by that time and I ran out of the house. I ran out of the house. I met my brother Edward Dillon out on the street and asked him to go into the Scullion house and get Bill." Was that true?
A. Yes, sir.

Q. That was true? You told that to the Lieutenant, too, didn't you? A. I guess so. 10

Q. "I told him Bill was in there drunk and calling Gladys everything." You told him that?
A. I guess if it is down there I must have said it.

Q. Have you no recollection of telling him? A. No, to tell you the truth.

Q. Was it true? A. That he was drinking, yes.

Q. That he was calling Gladys everything? A. Not everything.

Q. Who is Gladys? A. My sister, Gladys. 20

Q. That is Mrs. Scullion? A. Yes.

Q. "He went in"—that is, Edward—"I went over to my mother's house at 449 Hudson Avenue. After a while my mother and I went back to Scullion's house and I heard what had happened." A. Yes.

Q. That is true, isn't it? A. Yes.

Q. Now, when you went back to Scullion's house and heard what had happened what time was it?
A. To tell you the truth I really didn't know the time. 30

Q. How long after you heard the fire engines?
A. Well, that I couldn't really say. I just don't recall it. It only sounded like a short while after.

Mr. Drewen: That is all.

Re-direct examination by Mr. Adelman:

Q. Do you know when this statement was taken, Mrs. Walters? A. No, I don't. 40

Viola E. Walters, Plaintiff—Re-direct.

Q. Was it taken the day of the shooting? A. I believe the night or the next morning.

Q. Either that night or the next morning? A. Either that night or the next morning.

Q. Was your husband ever drunk before? A. He drank.

10 Q. Was he ever drunk, so intoxicated that he didn't know what he was doing? A. No; not that I know of.

Q. Was it his habit to get drunk at any time? A. No.

Q. Had he ever before struck you or beaten you? A. No.

Q. Or your child? A. No.

Q. You made a statement here that he was crazy while he was drinking. Do you remember making that statement? A. To tell you the truth I can't recall.

20 Q. That was six years—more than six years ago that this statement was taken. Do you remember making that statement to the Lieutenant? A. I just don't remember. I just don't recall.

Q. Was it true when it was made then? A. No; it was not true.

Q. So that if you made this statement you were in error then? A. I guess so.

30 Q. Well, don't guess. Do you know? A. Well, I must have.

Q. Was it true that you got frightened because you knew he was dangerous and always tried to strike you when he was drunk? A. No. I don't ever remember saying that. In fact, he never struck me. I was nervous, I know.

Mr. Adelman: That is all.

Mr. Drewen: That is all.

Gladys Scullion, for Plaintiff—Direct.

GLADYS SCULLION, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination by Mr. Adelman:

Q. Did you know William Walters? A. Yes, sir.

10

Q. Did you know Viola Walters? A. Yes, sir.

Q. Tell this court and jury who they are. A. I am Mrs. Walters' sister.

Q. Speak louder, please. A. I am Mrs. Walters' sister, Mrs. Scullion. Mr. Walters was my brother-in-law.

Q. You are the wife of Walter Scullion who was the other man in this controversy? A. Yes.

Q. Were you present—will you tell this court and jury what happened on the night of December 31st, or New Year's eve of January 1, 1929, in your own language? A. I invited Mr. and Mrs. Walters over to my house with their little boy.

20

Q. Speak louder. A I invited Mr. and Mrs. Walters over to my house with their little boy, over to my house for a birthday celebration and her anniversary and the new year and I intended them to stay the next day so I would have dinner for them, and Mr. Walters walked in my house about nine o'clock at night with the jug of Italian wine and he was drinking and we were fooling and joking, carrying on, when Mr. Walters decided he wanted to go home to his own home. Mrs. Walters and her baby went back in the two rooms to lie down in the bedroom and Mr. Walters went in and told his wife that he wanted his wife and baby to go home to their own home. I asked Mr. Walters to stay, that he promised me he was going to stay and spend the night and he said no,

30

40

Gladys Scullion, for Plaintiff—Direct.

he wanted his wife to go home to her own home; so he got his wife and the baby out and he pushed his wife out in the hall with the baby; so I went out and brought the baby in and I said, "Come on, now, Bill, you promised me you are going to stay. Now, you are going to stay." I grabbed hold of
 10 his arm, and he said, "I am not going to stay and neither is my wife." He says, "I want you to keep out of my affairs." He says, "I am sick of you butting into my trouble," and he pushed me over to the gas range, grabbed me by my dress and tore it. My husband was sitting in the kitchen with the baby on his lap. I asked my husband to help me. I said, "Are you going to stand there and let Bill talk like that to me?" Then with
 20 that my brother, Eddie, walked in. My husband still sat on the chair with the baby. My brother, Eddie, walked in from the hall to the kitchen and he grabbed hold of Bill. He said, "Now, Bill, you have to go home." He says, "I am not going home. I was invited over here. I am going to stay." Then my husband said to him, "Well, you are going to go home." He says, "Are you putting me out?" He says, "No; I am asking you like a gentleman that you go."

Q. What was that? A. "I am asking you like
 30 a gentleman, I want you to go."

Mr. Drewen: Your husband said that?

The Witness: Yes.

Q. Go ahead. A. I don't quite remember.

Q. What happened after your husband told him to go like a gentleman? A. Well, he started to wrestle with my husband into the next room on the settee; punched my husband.

40

Mr. Drewen: I can't hear.

The Witness: Punched my husband and

Gladys Scullion, for Plaintiff—Direct.

my brother, Eddie, came in to get him away and they walked out into the kitchen and my brother, Eddie, was putting on my brother-in-law's coat, Mr. Walters', to get him to go home, when my husband told him—he came out of the next room—he says, "Come on now, Bill, go home." My brother was putting on his coat and he turned around and went at my husband and pushed him through the window. 10

The Court: Was the window closed?

The Witness: Yes, sir.

The Court: He broke the window out?

The Witness: Yes, your Honor.

Q. Just what happened? What did you do? A. I went over and tried to pull my husband in from the window. 20

Q. Who was helping you? A. My brother Eddie.

Q. Proceed. What happened after that? A. I asked my brother, Eddie, to go out and call the policeman.

Q. Then what happened? A. Then I heard a shot and I helped my husband get in from the window. My brother-in-law struggled across the kitchen to the dish closet and he fell on the floor. I washed his mouth off and tried to give him a drink of water. 30

The Court: Where did the pistol come from?

The Witness: My husband had it laying on the table in the next room which is the sitting room.

Q. Will you tell, if you know, how it came about that this pistol came into the story? A. Well, 40

Gladys Scullion, for Plaintiff—Direct.

my husband and Mr. Walters were going to celebrate the new year and about four months before this trouble I lost a little boy eight years old and I asked my husband and Mr. Walters not to shoot the gun off on account of the tenants in the house would talk and it wouldn't look right, so they decided they wouldn't. My husband walked in the
10 next room and put it on the table.

Q. Where did the gun come from? A. Well, my husband had it in the drawer.

Q. In the drawer? A. Yes, sir.

Q. How did it happen that the gun was brought out of the drawer? A. Well, we wanted to celebrate the new year.

Q. At about what time, if you know, did you see the gun for the first time? A. I don't remember.
20

Q. Was it early evening or after the late evening or when? A. Oh, I don't remember. I think around twelve o'clock at night I seen it laying on the table.

Q. Did you see your husband handling the gun before twelve o'clock? A. No, sir.

Q. When did you first see the gun? A. When it fell on the floor in the kitchen. In the kitchen when it fell out of my husband's hand.

Q. Did you see Mr. Walters push this child out in the hall? A. I don't remember.
30

Q. You just testified a moment go— A. Pushed her out.

Q. I understand you to say pushed the child out in the hall. Did he? A. No. I remember him pushing Mrs. Walters out in the hall.

Q. Walters, in his discussion with you, what did he do to you? A. He grabbed me by the house dress right over her by the breast and pushed me up against the gas range.

Q. Where did he push you? What part of your body? A. Like here (indicating).
40

Gladys Scullion, for Plaintiff—Direct.

Q. Did he cause your nose to bleed? A. Well, I think from the excitement my nose bled.

Q. What? A. I think from the excitement my nose bled.

Q. Were you struck in the face? A. Well, I remember getting slapped because I was giving him a lot of guff.

10

Q. What was the relationship between you and Walters and your sister and your husband? A. Wonderful. We never had an argument.

Q. Have you ever had any trouble before? A. Never.

Q. Were you very friendly? A. Yes.

Q. Did you help them from time to time in their distress? A. Yes, sir. I always did.

Q. You did live close together, didn't you? A. Yes.

20

Q. Your mother lived in that neighborhood, too? A. Yes, sir.

Q. Was your brother, Eddie, friendly, too? A. Very friendly.

Q. Had you ever seen Mr. Walters drunk before? A. I never seen him in that condition before.

Q. Did you ever see him drinking before? A. No, I never did.

Q. Did you ever see him in an excited state of mind before? A. No.

30

Q. Had he ever had any violent argument with your husband prior to that evening? A. Never.

Q. Was there an argument that evening? A. No, sir.

Q. With your husband and Mr. Walters? A. No, sir.

Q. Prior to the time when you requested your husband to interfere? A. Not a word.

40

Gladys Scullion, for Plaintiff—Direct.

Q. Just what did you ask your husband to do?

A. I asked him would he please help me. He was sitting on the chair with the baby in his lap.

Q. Yes. A. Then he didn't get up until I asked my brother.

10 Q. Then what did he do? A. He put the baby on the floor and came over and got my brother-in-law by the arm.

Q. He took Mr. Walters by the arm. What did he do when he took him by the arm? A. Wanted him to go home.

Q. Then what happened? A. Well then they started wrestling in and out from the kitchen into the dining room.

The Court: Were blows struck?

20 The Witness: Yes.

The Court: Who struck the first blow?

The Witness: My brother-in-law, Mr. Walters.

The Court: Then, go ahead. Tell us from then on what happened.

30 Q. You said a moment ago he was wrestling. Just what do you mean by wrestling? A. Well it looked to me as though it was wrestling when it first started. They were kind of pushing one another.

Q. Just tell us what was wrestling. A. Grabbing one another.

Q. Trying to push one another? A. Yes.

Q. Was your husband trying to push Walters? A. Yes, sir.

Q. Was Walters trying to push your husband? A. Yes, sir.

40 Q. Up to that time had there been any blows struck? A. Until they went into the next room and my brother-in-law hit my husband in the eye.

Gladys Scullion, for Plaintiff—Direct.

Q. Up until the time they went into the next room there was no blow struck? A. No.

The Court: How did they come into the next room?

The Witness: Pushed one another. My husband ran from the kitchen into the next room.

10

The Court: Your husband ran from the kitchen into the next room and Mr. Walters followed him?

The Witness: Yes.

The Court: What happened in there?

The Witness: Well, then my brother-in-law walked out to the kitchen. My husband was on the settee. Then my husband walked out in the kitchen—I mean, when Mr. Walters walked out in the kitchen then my husband came out.

20

The Court: Then what happened?

The Witness: That is, I think, when my brother, Eddie, was putting on his coat to get him to go home.

The Court: Then what happened?

The Witness: My husband walked out of the other room and told him he would have to go home. He wanted him to go home. He was putting him out and he turned around and jumped on my husband.

30

The Court: What do you mean by jumped on him?

The Witness: Knocked my brother aside. My brother was in back of Mr. Walters putting on his coat. In back of my brother was my husband.

The Court: Had your husband hit him up to that time?

40

Gladys Scullion, for Plaintiff—Direct.

The Witness: No, sir. He just came out and demanded——

The Court: I mean while he was putting on his coat.

The Witness: No, sir.

10 The Court: Then you say he jumped? Mr. Walters jumped out from behind your brother and what?

The Witness: Pushed him over.

The Court: Pushed who?

The Witness: Pushed my husband over towards the kitchen window.

The Court: How did he push him? Where did he take hold of him?

The Witness: By the shoulder.

20 The Court: By the shoulder?

The Witness: Yes, sir.

The Court: Was any blow struck then?

The Witness: No.

The Court: What did he do? Back him back towards the window?

The Witness: Yes.

The Court: When they got to the window the window was down, was it?

The Witness: Yes.

30 The Court: What did he do then, that is, Mr. Walters?

The Witness: They were pushing one another; then my husband got pushed out the kitchen window.

The Court: Did your husband hit Mr. Walters?

The Witness: No.

The Court: Did Mr. Walters hit him?

The Witness: Yes.

The Court: He did?

40 The Witness: Well, no.

Gladys Scullion, for Plaintiff—Direct.

The Court: Where?

The Witness: He didn't hit him then.
He pushed him through the window.

The Court: He did or did not hit him?

The Witness: He didn't.

The Court: What did he do?

The Witness: Pushed him through the
kitchen window. 10

The Court: Just forced him through?

The Witness: Yes.

The Court: What did it do? Break out
the window?

The Witness: Yes.

The Court: Then what did you do?

The Witness: Well, then he was holding
on the windowsill trying to get in.

The Court: Who was? 20

The Witness: My husband and I was
pulling on his legs so he wouldn't fall out.

The Court: Where was Mr. Walters and
what was he doing? Was he still pushing
him?

The Witness: Yes; he was still pushing
him.

The Court: How far did he get him out
of the window?

The Witness: Half way, his body was out
the window. 30

The Court: Then what happened?

The Witness: Then I heard the shot.

The Court: You were in back of Mr.
Walters?

The Witness: Yes.

The Court: Did you see your husband
have this pistol when he was pushed out
of the window?

The Witness: Yes, in his hand. 40

Gladys Scullion, for Plaintiff—Direct.

The Court: He had it in his hand. When was this that he first picked this pistol up so far as you saw?

The Witness: I didn't see him pick it up.

The Court: When was the first you saw the pistol?

10 The Witness: When he had it in his hand out of the window.

The Court: Out the window?

The Witness: Yes.

The Court: Had you seen his hands before that to see whether he had the pistol in his hands or not?

The Witness: No.

The Court: You had not seen it?

The Witness: No, sir.

20 The Court: Had not seen it in his hands?

The Witness: No, sir.

The Court: The pistol was on the table in the other room. Did you see your husband pick it up there?

The Witness: No, I did not. I was in the kitchen.

The Court: All right. Then you heard this pistol go off. Then what?

30 The Witness: Then I tried to pull my husband in from the window and my husband got in from the window. I stood in the kitchen and picked up the baby.

The Court: Mr. Walters, did he drop down on the floor?

The Witness: He struggled across the kitchen and dropped down.

40 Q. Now, Mrs. Scullion, that time when your husband was leaning out the window, in which hand was the pistol? A. I don't recall. I think it was in the—

Gladys Scullion, for Plaintiff—Direct.

Q. I can't hear you. A. I think it was in the left hand.

Q. In the left hand? A. Yes.

Q. You don't know that, though. Did you say you saw this pistol? A. Yes.

Q. Now, just where was it? Was he pointing it deliberately at Walters? A. No.

10

Q. How did he have it? A. I could see him trying to get in from the window.

Q. He had the pistol in his hand trying to get in this way (indicating)? A. Yes.

Q. With relation to how I am standing here how was Walters over your husband? A. Had him by the shoulders.

Q. By the shoulders leaning on him. Mrs. Scullion, will you tell us was he leaning over him towards the outside? A. No. He was inside. My husband's waist line was right at the window; his head was still in.

20

Q. Your husband was sort of resting on the windowsill? A. Yes.

Q. And supporting himself with his two hands? A. Yes.

Q. Walters over him? A. Yes.

Q. Then the pistol was outside? A. Yes.

Q. You stated Eddie Dillon was in the room in the kitchen at the time? A. Yes.

30

Q. What did he do? A. He tried to get my brother-in-law off my husband.

Q. At the living room? A. In the kitchen.

Q. In the kitchen; that was before they got into the living room. Were they then wrestling in the kitchen? A. No. My brother was trying to put on Bill Walters' coat.

Q. Now, wait a minute. I am talking before they got into the living room when this quarrel started. Where was Mr. Dillon at that time in the room? A. In the kitchen.

40

Gladys Scullion, for Plaintiff—Direct.

Mr. Drewen: In the kitchen.

Q. What was he doing? A. He tried to pull my brother-in-law off.

Q. At the time when they were—when the first wrestling, as you term it, commenced? A. Yes.

10 Q. When the Court asked you a moment ago if your husband ran into the living room did he run with Mr. Walters after him?

The Court: No. That is what she said.
The Court didn't say it.

Q. The Court asked you how he got in the living room. How did he get in there? A. Well, he walked quick and wanted to like get away.

20 Q. Was Mr. Walters holding him or running after him? A. Running after him.

The Court: When they got out in the kitchen, as I understand it, after they were in the living room, you didn't see the pistol?

The Witness: No.

The Court: You didn't see your husband strike Mr. Walters?

The Witness: No.

The Court: But you did see Mr. Walters strike him?

30 The Witness: Yes.

The Court: Did he strike him many times?

The Witness: No; just once.

The Court: Then he grabbed him and pushed him?

The Witness: Yes.

The Court: How far did he push him before he got him to the window?

40 The Witness: Well, the window has a very low window sill.

Gladys Scullion, for Plaintiff—Direct.

The Court: How far across the room, if any?

The Witness: About ten, fifteen feet.

The Court: Kept pushing him back?

The Witness: Yes.

The Court: Did your husband strike during that time? 10

The Witness: No; I don't remember seeing him.

The Court: Did you see the pistol in his hand during that time?

The Witness: No.

The Court: You saw the pistol in his hand while he was trying to prevent himself going out the window?

The Witness: Going out of the window, yes, sir. 20

The Court: Was it plainly visible then? No doubt you saw the pistol then?

The Witness: Yes, I could see it as I tried to help him in from the window.

The Court: What did your husband say, if anything, as he was in the window there?

The Witness: He didn't say a word.

The Court: What did Mr. Walters say?

The Witness: He didn't say a word either. 30

The Court: Recess now until tomorrow morning at ten o'clock.

(Recess to 10 a. m. June 28, 1935.)

(June 28, 1935, 10 a. m.)

Hearing resumed pursuant to adjournment.

Appearances the same. 40

Gladys Scullion, for Plaintiff—Direct.

GLADYS SCULLION, recalled.

Direct examination (continued) by Mr. Adelman:

Q. Did Mr. Walters say anything at the time that he had your husband out the window? A. Not a word.

10 Q. What, if anything, happened to your brother at that time? A. Well, when he was trying to pull Mr. Walters—

Q. Speak louder. A. When he tried to pull Walters, my brother-in-law, off my husband, my brother got kicked.

Q. Yes. Then what happened to him? A. Then I asked my brother to run out and get a policeman.

20 The Court: Asked what?

The Witness: Then I asked my brother to run out and get a policeman.

Q. Did he leave the room? A. Yes.

Q. When did you next see your brother? A. When he came in with the firemen.

Q. With the firemen. Was it then that you say—strike it out. What happened when the firemen came in? A. Well, my husband and I stood in the kitchen and the firemen came in and looked
30 over my brother-in-law and stood there.

Q. Did you and your husband try to help Mr. Walters after the shooting? A. Yes; we went over and we tried to pick him up.

Q. And what happened? A. He was helpless. He was so heavy we couldn't lift him up.

Q. Did you know at that time that he was dead? A. No. I didn't think he was.

Q. I refer you back to the time when you were
40 in the kitchen in the early part of the evening.

Gladys Scullion, for Plaintiff—Cross.

Did you see any gun exhibited or brought out at that time? A. No; I didn't see no gun at all.

Q. The first time you saw the gun was when?

A. When he was out the window.

Q. There has been some testimony as to whether or not Mr. Walters pushed the child or threw him out in the hall. What do you know about that?

10

A. I remember him pushing Mrs. Walters out in the hall.

Q. Pushing Mrs. Walters out? A. In the hall.

Q. Did he put his hand on the child that you remember? A. I don't think—he wasn't nasty about it when he pushed her out.

Cross-examination by Mr. Drewen:

Q. Mrs. Scullion, you have told us everything that occurred there that night, haven't you? A. Yes, sir.

20

Q. You haven't left anything out? A. Not that I remember.

Q. You are quite sure about that, is that right? A. Yes, sir.

Q. Was anybody's dress torn off her back that night? A. My dress was torn in the front.

Q. It was torn right off you, wasn't it? A. No, sir; just torn in the front.

Q. Who tore it? A. Mr. Walters, my brother-in-law.

30

Q. What was the condition of your dress at the time it was torn? A. Well, it was blood stains on it.

Q. It was very bloody, wasn't it? A. Yes.

Q. You haven't told us about that, Mrs. Scullion, have you? You didn't tell us about that in your direct examination. A. I did say my dress was tore and the nose bled.

40

Gladys Scullion, for Plaintiff—Cross.

Q. It was very bloody also, wasn't it? A. Yes, sir.

Q. Where did that blood come from? A. My nose.

Q. How was your nose caused to bleed? A. From the push against the gas range.

10 Q. When who was pushed? A. When I was pushed against the gas range.

Q. Who pushed you? A. Mr. Walters.

Q. What did your nose strike when you were pushed against the gas range that caused it to bleed? A. My back went up against the gas range.

Q. What else happened that caused your nose to bleed? A. The push I got in the face.

Q. Did you get a push in the face? A. Yes.

20 Q. Now, isn't it a fact that you were punched by strong blows three or four times in the nose by Mr. Walters? A. No. I just got pushed in the face.

Q. Isn't it a fact that you told the police that you were struck blows in the nose by Mr. Walters that caused your nose to bleed freely? A. Not that I remember.

Q. Well, do you say that you didn't tell the police that? A. Not that I remember.

30 Q. Might you have told the police that? A. Maybe.

Q. You may have told them that; and if you told them that—the police that, it was true, wasn't it? A. I don't know. I was so excited I may have said anything.

Q. You didn't intentionally lie to anybody about this thing, did you? A. I was so excited about my husband I don't know what I really said.

40 Q. I say you didn't intentionally lie to anybody about this thing? A. No, sir.

Gladys Scullion, for Plaintiff—Cross.

Q. And it is the fact that you bled freely from the nose and bled down on your dress? A. Yes, sir.

Q. And you were what you call pushed in the nose, is that right? A. Yes, sir.

Q. By Mr. Walters? A. Yes, sir.

Q. Now, you say also that your brother Eddie, 10
Eddie Dillon, was kicked that night? A. Yes, sir.

Q. By whom was he kicked? A. Mr. Walters.

Q. In what part of the body was Eddie kicked?
A. I figure about——

Q. Near the groin? A. Yes, sir.

Q. In the private parts of his body, is that right? A. Yes, sir.

Q. Then what happened to Eddie when he was kicked? A. He went down.

Q. Fell down to the floor and he was out, wasn't he? A. No. No. He just stooped to the floor. 20

Q. He bent over to the floor? A. Yes.

Q. In pain? A. Why, I imagine so.

Q. Now, then, what did Eddie do to anybody that caused him to get that kind of treatment? What had he done to Mr. Walters that caused Walters to do that? A. I don't think Mr. Walters was in such condition he knew what he was doing.

Mr. Drewen: That does not answer the question. I ask it be stricken out. 30

The Court: Strike it out.

Q. What did Eddie do that you could see, to Mr. Walters, that caused Mr. Walters to do that to him? A. He wanted him to get away, I guess.

Q. He wanted him to get away, you guess. You were there to see what was happening. He was only trying to make peace, wasn't he? A. Yes.

Q. Eddie was trying to make peace and he was kicked, right? A. Yes, sir. 40

Gladys Scullion, for Plaintiff—Cross.

Q. What had you been doing that caused you to get this blow in the nose and to have your dress torn? A. Well, I interfered with Mr. Walters and his wife.

Q. You tried to make peace? A. I tried to get him to stay.

10 Q. You wanted him to stay and enjoy your home and the company of your family, didn't you? A. Yes.

Q. That is what you got for it, correct? A. Yes.

Q. Now, you said yesterday, too, that your husband said to Walters that, "I am speaking to you like a gentleman." Do you remember that? A. Yes.

20 Q. Now, your husband did say to Walters, he said, "Bill, now I am talking to you like a gentleman and asking you to be quiet and go home," isn't that right? A. Yes.

Q. It was when your husband was the gentleman and trying to make peace with Walters that Walters struck him and knocked him down on the settee, isn't that right? A. Well, I remember—

The Court: Is that so?

The Witness: No. I think my husband demanded him out then.

The Court: What?

30 The Witness: My husband demanded him to go then.

Q. Your husband demanded him to go then? A. Yes.

Q. But when your husband said quietly to Bill, "Now, I am asking you like a gentleman" what did Bill Walters do about that? A. Well, he said, "Are you putting me out?"

40 Q. Yes. A. And my husband said, "Yes, I am putting you out. I want you to go right out of this house."

Gladys Scullion, for Plaintiff—Cross.

Q. Then what did Walters do? A. Struck him.

Q. And he knocked him down on the settee?

A. No. They wrestled from in the kitchen into the dining room.

Q. You told the court and jury yesterday Walters chased your husband into the dining room. A. I mean wrestled back and forth.

10

Q. You mean wrestled back and forth. I see. Now, was your husband's trousers torn that night? A. Yes. The pocket was torn.

Q. By whom? A. By Mr. Watlers.

Q. How did that happen? The pocket was actually torn right out of the trousers, wasn't it? Right? A. Yes.

Q. How did that happen? A. When he grabbed him.

Q. Grabbed him where? A. By the pocket.

20

Q. Isn't this what happened, Mrs. Scullion: Bill Walters, your brother-in-law, struck your husband a blow and knocked your husband down on the settee? Is that right? A. Yes.

Q. Your husband was lying there after the blow, right? A. Yes, sir.

Q. And Bill Walters put his hand down and grabbed your husband by the trousers and lifted him up again and knocked him down again. Isn't that right? A. I don't remember that.

30

Q. You don't remember how the trousers were torn? A. I just remember him grabbing him by the trousers. I don't remember him lifting him up and hitting him again.

Q. He grabbed him by the trousers to lift him off the settee after he had knocked him there? A. I don't remember that.

Q. Isn't that what you told the police also? A. I might have. I don't remember now.

Q. Now, this pair of trousers that had been torn and your dress that had been torn, you saved

40

Gladys Scullion, for Plaintiff—Cross.

those, didn't you, so as to show the police as evidence for your husband? Correct? A. Yes.

Q. Do you remember making a statement to Assistant Prosecutor Besson in this building in the presence of a court stenographer up in the Prosecutor's office?

10

Mr. Adelman: I object, if the court please. Anything that may have any part or parcel of a criminal proceeding has no place in this trial. This is a trial between two different parties.

The Court: We are not talking about any criminal proceeding. This is in regard to a statement.

20

Mr. Adelman: His question is, as I understand it, did she make a statement to the Assistant Prosecutor. Unquestionably it is laying the foundation for the introduction of a statement or else questioning from a statement.

The Court: Well, of course, they have a perfect right to do that.

30

Mr. Adelman: As I understand the rule, if your Honor please, it is that any proceeding in a criminal action where the entire record is one of record the component parts of that proceeding including statements made are part of the record but are not evidential in a civil proceeding.

The Court: You are misinformed as to the rule; but what you are driving at is: you have a right to attack the witness no matter whether he makes a statement in church or in jail.

40

Mr. Adelman: May I ask your Honor's indulgence just a moment? I just want to check the rule on that for a moment.

Gladys Scullion, for Plaintiff—Cross.

The Court: The result of any criminal investigation cannot be brought out, but there has never been any such rule as you state. If there is I will overrule it. In any event, I understand this was not while this witness was on the witness stand, Mr. Drewen, in any event?

10

Mr. Drewen: No.

Mr. Adelman: Do I understand this statement was the statement which was made to the Prosecutor after the killing occurred?

Mr. Drewen: Certainly.

Mr. Adelman: And sworn to and used by the prosecution in this case?

Mr. Drewen: I don't know what use Mr. Besson made of it.

20

Mr. Adelman: The original is here?

The Court: Nothing appears here that there was anything written or anything of the kind. This is just an oral statement.

Mr. Adelman: On the contrary, yesterday Mr. Drewen introduced a statement and asked this woman if it was her signature. She admitted it was. He then identified the statement from which he asked questions.

30

The Court: I don't know what he is asking about. You have a right to cross-examine upon the subject. Of course, if there is a written statement she has a right to see the written statement. If there is not and this is not while it was on the witness stand he has a right to ask her just as if she was out in the street.

(The question was repeated by the stenographer as follows: "Do you remember

40

Gladys Scullion, for Plaintiff—Cross.

making a statement to Assistant Prosecutor Besson in this building in the presence of a court stenographer up in the Prosecutor's office?") A. No; I don't remember.

10 Q. You don't remember that, when you produced a dress and your husband's trousers and showed them to him? A. Here in court?

Q. No. In the building, up in the Prosecutor's office in another room in this building, a private office up in this building? A. No.

Q. You don't remember that? A. No.

Q. When Mr. Dillon, your brother, was also present and Officer Corvinus and Officer Snyder? Do you remember that? A. No, sir, I don't remember.

20 Q. Now, then, you say that Mr. Walters was not nasty at all when he pushed his wife out in the hall? You said that, didn't you? A. Yes, sir.

Q. Didn't you tell the police, Mrs. Scullion, in a statement that you signed that he actually threw the baby out into the hall? A. Not that I remember him throwing the baby out.

30 The Court: Wake up and remember some things. Either yes or no. You certainly know what you said or did. Do you hear me?

The Witness: Yes, sir. That is six years ago. It is hard for me to remember.

Q. At any rate, whatever you told the police at that time was fresh in your memory and you told the truth, or intended to, didn't you? A. Yes.

40 Q. Now, I show you a statement purporting to be a statement made by you to Captain Harry Kurth. Do you remember that man there (indicating) ? A. Yes, sir.

Gladys Scullion, for Plaintiff—Cross.

Q. Do you remember him? A. Yes.

Q. That is Lieutenant Hanglely sitting next to him. Do you remember him? A. Yes.

Q. He was present when this statement was made? A. Yes, sir.

Q. You signed it? A. Yes, sir.

Q. Is that your signature to both of those sheets, Gladys Scullion? A. Yes, sir. That is my signature. 10

Q. On both sheets? A. Yes, sir.

Mr. Drewen: I ask it be marked for identification.

(The statement above referred to was marked D-3 for identification and D-3a for identification.)

Q. I show you D-3 for identification. It is true, is it not, that you said to the police there in this statement, "My husband did not drink anything until after Bill started to bring out this wine. Mr. Walters started to get ugly with his wife and while she was putting the baby to sleep in my bedroom he went in and took the baby away from her and threw the baby into the hall without any clothes." Didn't you tell that to the police? A. If that is my statement I must have said it. 20

Q. If you said it it was the truth, wasn't it? A. Yes. 30

Q. What? A. Yes, sir.

Q. You don't deny having told that to Captain Kurth and Lieutenant Hanglely, do you? A. No, sir.

The Court: Does that refresh your recollection, having seen that, that that was so?

The Witness: Now that it comes to me, it comes clear to me. I remember seeing my sister get pushed out. 40

Gladys Scullion, for Plaintiff—Cross.

The Court: No. We are not talking about the sister. We are talking about that statement.

10 Q. Does this statement refresh your recollection, the court wants to know, what actually happened that night? A. I guess that happened then.

Q. You guess that happened?

The Court: No. Now, don't guess about it. You are not asked to guess. Does that refresh your recollection, that statement that you then made was the fact? Is that right or not?

The Witness: Well, your Honor, I was so upset—

20 The Court: I don't care whether you were upset or not. All I want to know is whether this refreshes your recollection that that was the fact. Was it?

The Witness: Yes, sir.

Mr. Adelman: Do you understand what the court is asking you?

The Witness: Yes, sir.

Mr. Adelman: The Court—

30 The Court: Now, she says yes. She is in her right mind, and it is not your turn to talk.

Mr. Adelman: All right. Go ahead.

40 Q. You may read this with me, Mrs. Scullion. This is from the police statement that you made to Captain Kurth and Lieutenant Hangle? "He called his wife every vile and dirty name he could think of and said he would kill her before the night was over." Did you tell that to the police? A. No. I recall he said that to me.

Gladys Scullion, for Plaintiff—Cross.

Q. Oh, he said to you that he would kill you? You don't recall his having said that to his wife? When did he say to you that he would kill you?

A. Because I interfered with his wife—with him and his wife.

Q. By "interfered" do you mean that you simply wanted to make peace between him and his wife and to have them stay with your family over the holiday? A. Yes, sir. 10

The Court: Now, wait a minute. Mr. Walters said to you that he would kill you before the night was over?

The Witness: Yes; I guess so. It is the signed statement. I must have signed that.

The Court: No, no. Is that what happened? 20

The Witness: Yes, sir.

The Court: And that was said in the presence of your husband, was it?

The Witness: No. I don't think my husband was there.

Q. Don't you know your husband sat right there holding his little boy on his knee at the time this happened? Don't you remember that? A. Yes, I remember that.

Q. Yes. You looked towards your husband and saw your husband with your child on his knee and then you turned to your brother, Eddie Dillon, and asked Eddie to protect you? A. Yes, sir. 30

Q. "Then he chased his wife around the room and she ran out with the baby and told me she was going home." That happened, didn't it? A. Yes, sir.

Q. That is what you told the police. "Then he got ugly with me and called me vile names and 40

Gladys Scullion, for Plaintiff—Cross.

punched me and tore my clothes.” That happened, didn’t it? A. Yes, sir.

Q. Now, that is the time when you say he punched you in the nose and caused your nose to bleed? A. Yes, sir.

10 The Court: And your husband was there then, wasn’t he?

The Witness: Yes, sir; sitting in a chair.

Q. “By that time the froth was coming out of the side of his mouth and his eyes were rolling around his head.” Is that true? A. Yes, sir.

Q. “He threw me against the stove. He started to roll his sleeves up and I called to my husband to save me.” Is that true? A. Yes, sir.

20 Q. “My husband had the baby on his lap in the kitchen and he put the baby down and came to help me.” Is that true? A. Yes, sir.

Q. “He took Bill by the arm and just then my brother Edward came in. My husband said to Bill, ‘Come on, Bill, I am asking you like a gentleman, get out of my home,’ and Bill said, ‘No son-of-a-bee like you is going to put me out of here.’” Did that happen? A. Yes, sir.

30 Q. “My husband said, ‘I am not putting you out; I am asking you to go, it is three o’clock.’ Then Bill punched my husband and my husband ran into the sitting room where he fell on the settee.” Did that happen? A. Yes, sir.

Q. What is that? A. If it is there I said it.

Q. Not if it is here you said it. I want to know if that happened; whether it is or not you can say from a refreshed recollection from what I read that that happened? A. Yes, sir.

40 Q. “And Bill picked up the floor lamp and was going to hit my husband with it.” Did that happen? A. Yes, sir.

Gladys Scullion, for Plaintiff—Cross.

Q. What kind of a floor lamp was this that Bill picked up? What size? Give us some idea. A. It was a tall wooden lamp.

Q. It was a tall wooden lamp? A. Yes, sir.

Q. So called standing lamp with rather tall up-rights? A. Yes.

The Court: As high as a man?

10

The Witness: Yes, sir.

Q. What did he do? How far did he go towards picking it up? You say "Bill picked up the floor lamp and was going to hit my husband with it." Tell us what he did. A. Well, I don't remember that.

Q. Did you see him pick up the lamp? A. No. I don't remember it now.

Q. You just said a moment ago that is what happened. A. I don't remember him picking up the lamp.

20

Q. You don't remember him picking up the lamp? A. No.

Q. Why did you say he picked up the lamp and was going to hit my husband with it? A. I don't remember it now.

Q. But you remembered it a moment ago. You said, Mrs. Scullion, that is what happened when I asked you. A. I don't remember now.

30

The Court: Now, see her, Madam. We want the whole truth here.

The Witness: Yes, sir.

The Court: Just as it happened. Do you understand?

The Witness: Yes, sir.

The Court: And I want you to answer these questions freely. Did he pick up the floor lamp and you saw him pick it up and

40

Gladys Scullion, for Plaintiff—Cross.

attempt to hit your husband with it?
Did he?

The Witness: Well, your Honor, I don't remember that. If it is in the statement I said it.

10 The Court: You said a moment ago you did remember it. What is the truth? Do you remember it?

The Witness: I must have referred to another answer.

The Court: Did that happen that night?

The Witness: Your Honor, I don't remember.

20 Q. Now, you then said to the police, did you not, "He then punched my husband in the eye and my husband's eye bled." Do you remember that?
A. Yes, sir.

Q. That happened, didn't it? A. Yes, sir.

The Court: Now, just up until that time and taking in view everything you said did happen there—up until that time your husband had not done anything to Mr. Walters?

The Witness: No, sir.

30 The Court: He had not had a gun then?

The Witness: No, sir.

Q. You saw the blood trickling down the side of your husband's face, didn't you, after he got that blow on the eye from Walters? A. Yes.

Q. All your husband had been doing up to that time was trying to make peace, bring peace to that home, is that right? A. Yes.

40 Q. "Then my brother Bill"—no. "Then my brother pulled Bill off my husband and then my husband ran into the kitchen and Bill staggered

Gladys Scullion, for Plaintiff—Cross.

out after him." This happened, didn't it? A. Yes, sir.

Q. "He started to beat my husband and they struggled towards the window in the kitchen," is that right? A. Yes, sir.

Q. Bill then shoved my husband through the kitchen window. I heard the glass break. My husband was almost out of the window." Is that right? That happened, didn't it? A. Yes, sir. 10

Q. "And I heard a shot and saw a flame between my husband and Bill." Is that right? A. Yes, sir.

Q. "Then I—" that happened, didn't it? A. Yes, sir.

Q. "Then I pulled my husband in and I saw a gun on the floor." That happened, didn't it? A. Yes, sir. 20

Q. "Bill fell over on the wash tub and I helped him over to the dish closet and gave him a drink of water and wiped the foam off his mouth." That happened, didn't it? A. Yes, sir.

Q. "Then I ran out into the street. My husband came out and said, 'For God's sake, get an ambulance.'" That happened, did it? A. Yes, sir.

Q. "Before I ran out I saw a black gun." That was another gun that you threw out the window, didn't you? A. Yes. 30

Q. You didn't want the police to come and see that? That was an old junk gun you had around the house that the boy found in the dumps and brought home, is that right? A. Yes.

Q. Had nothing whatever to do with this case? A. No, sir.

Q. The gun you saw on the floor after the shot was fired was a little pearl handled gun, wasn't it? A. Yes, sir. 40

Gladys Scullion, for Plaintiff—Cross.

Q. Now, I want you to describe, Mrs. Scullion, in a little more detail, if you will, just what was happening when you say that your husband was almost out the window. I show you first a photograph and ask you whether or not that represents the kitchen of your home at that time? A. Yes, sir.

10 Q. That is a true representation of the kitchen of your home at that time, is that correct? A. Yes.

Q. And is that the window through which you say your husband was pushed? A. Yes, sir.

Q. That is the window. I ask it be marked for identification.

(The photograph above referred to was received and marked for identification D-4.)

20

Q. Now, I show you another photograph and ask you whether or not that is a true representation of the outside of the building, showing the outside of the kitchen, that you have just seen in the other photograph? A. Yes, sir.

Q. It is, is it? A. Yes, sir.

Mr. Drewen: I ask it to be marked for identification.

30

(Photograph above referred to was received and marked for identification D-5.)

Q. Now, this picture, D-5 for identification, shows the drop, doesn't it? A. Yes.

Q. From that outside window down the area-way? A. Yes, sir.

Q. What is the bottom of that pit or areaway made of? Is it sand, concrete or brick? A. Concrete.

40

Gladys Scullion, for Plaintiff—Cross.

Q. Do you know the height from that window sill there to the bottom of that areaway? A. I imagine about seventy-five feet.

Q. Seventy-five feet.

Mr. Drewen: Well, I will admit it is not that much. We will find it out.

The Court: Was this window on the first floor? 10

The Witness: Yes, sir.

The Court: How far above the ground?

The Witness: About seventy-five feet.

Mr. Drewen: There is a photograph marked for identification, if your Honor please, which shows the areaway. It will give you some idea of how it is built. There is a marked depression in it but I don't claim it is seventy-five feet. 20

The Court: Well, there is an areaway there. While it may be the first floor, it does not indicate that there is not quite a drop there.

Mr. Drewen: There is quite a drop, yes.

Q. Now, out of that window shown in photograph D-5 for Identification your husband was hanging, wasn't he, head first? A. No, sir.

Q. Feet first? A. His waist like was—(indicating). 30

Q. Yes; but was his head outside of the window or was he inside of the kitchen? A. His head was inside the kitchen.

Q. And his feet were outside of the window? A. No. He was hanging out more bodily.

Q. All right. Now, here is the window sill, you say (indicating)? A. Yes.

Q. Here is the areaway? A. Yes, sir.

Q. Here is the kitchen? A. Yes, sir. 40

Gladys Scullion, for Plaintiff—Cross.

Q. I mean standing in the kitchen was your husband hanging out of the window like this with his head out towards the areaway? A. No. I remember his body out like.

Q. But he was half way out and half way in? A. Yes, sir.

10 Q. But his head was out over the areaway? A. No, I think—why, the window was down and he was pushed out through the pane of glass.

Q. I know it, but which went out of the pane of glass first, his feet or his head? A. His body.

Q. But a body has a head on it? A. Yes, sir.

Q. Was it the head end of the body went out first or the feet end of the body? A. His body was getting pushed out. His head was like up against the—

20 Q. Up against the jamb, the window frame, is that what you mean? A. Yes.

Q. The glass was broken and he was being pushed out of the window and his head was up against the window frame out of which the glass had been broken? A. Yes.

Q. While your husband was that way, being pushed out, as you say, what was Bill doing? A. Pushing him.

30 Q. Pushing him. How was he pushing him? With his hands? A. With his hands.

Q. What part of your husband's body did Bill have his hands on while he was pushing him through the window? A. Here (indicating).

Q. The chest? A. Yes.

Q. Pushing for all he was worth? A. Yes.

Q. What was your husband doing at that time? A. Trying to get in.

Q. Trying to get in; struggling to get in? A. Yes.

40 Q. Was he saying anything? A. Not a word.

Gladys Scullion, for Plaintiff—Re-direct.

Q. Your husband? A. Not a word.

Q. Was Bill saying anything? A. Not a word.

Q. It was while that was happening that you say you heard the gun go off? A. Yes, sir.

Q. Nobody at any time that night in your presence had done any harm or wrong or said any unfriendly thing to Bill Walters, had they? A. No, sir. 10

Q. Neither his wife— A. No.

Q. —nor you— A. No, sir.

Q. —nor your husband—? A. No, sir.

Q. —nor Eddie Dillon? A. No, sir.

Re-direct examination by Mr. Adelman:

Q. This statement for identification, D-3, was made to the Captain of Police and the Lieutenant of Police the next day, wasn't it? A. Yes, sir. 20

Q. For what purpose was that statement made by you? A. Well, I was asked to give a statement.

Q. At the time you were asked to give the statement did they write it down? A. Yes, sir.

Q. What did they tell you when they wrote this statement down? Anything? A. They didn't tell me anything.

Q. Just asked you to make this voluntary statement? A. Yes, sir.

Q. At the time this was made was your husband arrested? A. Yes, sir. 30

Q. Was he in jail? A. Yes, sir.

Q. Were you told that this statement if made might save your husband from a charge for murder? A. No.

Q. Were you told that this statement was going to be used by the Prosecution or by the Prosecutor of Hudson County in connection with the trial of your husband? A. No, sir. 40

Gladys Scullion, for Plaintiff—Re-direct.

The Court: As I understand it, with the exception of the incident about the lamp which you say you don't remember, it is true, isn't it, what you said, what you stated there?

10 The Witness: Well, your Honor, I really don't remember.

The Court: Oh, well, now, come, come, Madam. You have told us all the way through except for the floor lamp which you say you don't remember everything that is stated down here was true, is that right?

The Witness: Yes, sir.

The Court: Well, that is what we want to know.

20 Q. Everything that you stated here is the truth of what actually occurred? A. Yes, sir.

Q. Then the statement that you made earlier yesterday afternoon that Mr. Walters pushed the baby out in the hall was not true, is that right? A. Not that I remember that part.

Q. Then that part of it in here about Mr. Walters pushing the baby is true or not? Which is the truth? A. I was referring to his wife getting pushed out in the hall.

30 Q. So that Will Walters pushed his wife into the hall, not the baby? A. Yes, sir.

Mr. Drewen: The witness has not said any such thing.

Mr. Adelman: Yesterday she testified—

Mr. Drewen: I know; but counsel is testifying now.

40 Q. You stated earlier today that these men wrestled in the kitchen and wrestled from the

Gladys Scullion, for Plaintiff—Re-direct.

kitchen into the living room and on the settee?

A. Yes.

Q. And in this statement you said "My husband ran into the kitchen"—that is not the part—I withdraw the question. When was your brother kicked? Was he kicked before your husband was out the window or after he was out the window or while he was out the window? A. While he was out the window. 10

Q. So that Mr. Walters did not kick your brother in the kitchen before he got to the window, is that right? A. Yes, sir.

Q. It was while he was holding Mr. Scullion out the window? A. Yes, sir.

Q. Will you just step down here and show me exactly how your husband was holding—Mr. Walters was holding your husband just with relation to where your brother was? 20

Mr. Drewen: At what time, please?

Q. At the time in the kitchen. A. My husband was out the window.

Q. No, in the kitchen. A. In the kitchen? Mr. Walters was pushing him like that (indicating). My brother was in back of him trying to pull him off.

Q. Then what happened? A. Then he went back like that (indicating). 30

Q. Was this in the kitchen? A. Yes.

Q. Then what happened? A. Then I asked him to go out and get a policeman.

Q. Well, now, you testified yesterday that when your brother was pulling Mr. Walters off your husband at the window it was then that your brother was kicked and fell to the floor? A. Yes, sir. 40

Gladys Scullion, for Plaintiff—Re-direct.

Q. A moment ago you say this occurred in the kitchen. Now, just where did it occur? A. It occurred in the kitchen.

Q. Was this window in the kitchen? A. Yes, sir.

10 Q. This window is not in the living room? A. No, sir; the kitchen.

Q. So that they did come back into the kitchen from the living room, is that right? A. Yes, sir.

Q. And this window is how far away from the wash tub? A. Oh, it is close to the wash tub. There isn't any space.

Q. Were they doing any fighting around this wash tub? A. No, sir.

20 Q. I show you photograph marked for identification D-4 and ask you if that is the window that your husband was pushed out of? A. Yes, sir.

Q. And there is a wash tub alongside of that window partly extending over into the window? A. Yes, sir.

Mr. Adelman: Are these in evidence, these photographs?

Mr. Drewen: No.

Mr. Adelman: May I offer them in evidence.

30 Mr. Drewen: Certainly.

(The photographs heretofore marked D-4 and D-5 for identification were received and marked in evidence P-9 and P-10.)

Q. Is this a photograph of the living room? A. Yes, sir.

Mr. Drewen: You may offer that. I have no objection.

40 (The photograph above referred to was received and marked in evidence P-11.)

Gladys Scullion, for Plaintiff—Re-direct.

Q. I show you photograph marked in evidence P-9 and ask you if that is the window out of which your husband was being pushed? A. Yes, sir.

Q. I show you photograph marked for evidence as P-10 and ask you if this is the scene from that very same window? A. Yes, sir.

Q. I show you photograph P-11 and ask you 10
if that is the living room? A. Yes, sir.

Q. Now, is this the doorway? A. From the kitchen.

Q. From the kitchen into the living room? A. Yes, sir.

Q. So that this photograph indicates a view from that doorway? A. Yes, sir.

Q. Now, this altercation occurred first in the kitchen as shown on P-9? A. Yes.

Q. They went from the kitchen where to? A. 20
Into the living room.

Q. As shown on photograph P-11 and fell on the settee? A. Yes, sir.

Q. Now, tell us what happened after they fell on that settee? A. Well, my brother—he walked out to the kitchen, Mr. Walters.

Q. He came out of the living room after they were on the settee and came back into the kitchen? A. Yes.

Q. What happened in the kitchen? A. Then my 30
brother was putting on his coat to get him home and he was in back of Mr. Walters.

Q. Where was your husband while he was putting on his coat? A. On the settee.

Q. On the settee? A. In the living room.

Q. Yes. When your brother was putting his coat on just where was he standing?

The Court: Just a moment, please.

(A short recess was taken.)

Gladys Scullion, for Plaintiff—Re-direct.

(After a short recess.)

Mr. Drewen: You were talking about the brother putting his coat on.

Re-direct examination (continued) by Mr. Adelman.

10

Q. Mr. Walters' coat, that is whom you refer to, is that correct? A. Yes, Mr. Walters.

Q. He was helping Mr. Walters on with his coat in the kitchen? A. Yes.

Q. Which way was Mr. Walters facing? A. Facing the door.

Q. Which door, the door to the living room or the door to the exit of the apartment? A. To the hall.

20

Q. Mr. Walters was facing that door to the hall? Did that require him to have his back to the living room? A. Yes, sir.

Q. Where was your brother then? A. In the back of my brother-in-law.

Q. Behind Mr. Walters. Where was your husband? A. In the living room.

Q. Then what happened? A. Well, then that is when my husband came out and demanded him to go.

30

Q. Did your husband walk into the kitchen? A. Yes, sir.

Q. What happened then when they were in the kitchen? A. Well, he pushed my brother aside.

Mr. Drewen: Who pushed?

The Witness: Mr. Walters pushed my brother aside and wrestled across the kitchen with my husband.

Mr. Drewen: I can't hear you.

40

The Witness: And pushed him through the window.

Gladys Scullion, for Plaintiff—Re-direct.

Q. And he pushed him out this window shown in Exhibit P-9? A. Yes.

The Court: Your husband didn't strike him or tried to strike him or say anything to him?

The Witness: No, sir. My husband thought he was going to go home.

10

Q. Well, did your husband say anything to him then? A. No; not a word.

Q. Across this window is there a cross bar? A. Yes, sir.

Q. That is where the upper sash lays on the lower sash, is that right? A. Yes, sir.

Q. Do you know how high this window is? A. From the floor?

Q. No, the glass, the sash? A. No, I don't.

20

Q. Would you say it is two and a half feet high? A. Yes, sir. It is very low on the ground, though.

Q. The window extends low on the ground. So that the sill itself is low from the floor; then from the floor goes a height of about two and a half feet to this cross bar, is that right? A. Yes.

Q. When Mr. Walters pushed your husband through this window did the seat of his body go out through the window? A. Yes, sir.

30

Q. And his shoulders and head. His head, you testified, was against this cross bar, is that right? A. Yes.

Q. So that the position is, the head was here and the body was out like that (indicating)? A. Yes.

Q. Holding on this way (indicating)? A. Yes.

Q. With two hands on the frame? A. On the window sill, yes, sir.

40

Gladys Scullion, for Plaintiff—Re-direct.

Q. In this right hand did he have anything that you saw? A. I remember seeing the gun.

Mr. Drewen: I can't hear that.

The Witness: I remember seeing the gun as he was out the window.

10 Q. When Mr. Walters pushed your husband out this window was there a wash tub in front of the window as indicated in this photograph? A. Yes, sir. It extends to the window.

The Court: Now, that is not in front of the window, it is to one side, is it not?

The Witness: No, sir.

Mr. Adelman: It extends into the window.

20 The Court: How could he be pushed out of the window in front of which a wash stand is?

The Witness: Well, it is a wide window.

The Court: What you mean is it is a wide window and that on the side where your husband was pushed out there was a sink?

The Witness: Yes.

The Court: There was nothing in front of the window through which he was pushed?

30 The Witness: No, sir.

Q. This wash tub extended over part of the way into the window? A. Yes.

Q. About how far into the window would you say it extended? A. I couldn't say.

40 Q. When your brother— What happened when they were at the window? What were you doing then? A. I was down like on my knees trying to pull my husband in by the legs.

Gladys Scullion, for Plaintiff—Re-direct.

Q. By the legs, holding him in? A. Yes.

Q. Where was your brother? A. In the back of my brother-in-law.

Q. Holding on to whom? Walters? A. Yes, sir.

Q. Trying to pull him off? A. Yes, sir.

Q. What did Mr. Walters do to your brother then? A. Then he kicked him.

10

Q. Put his foot back like that (indicating)? A. Yes; to push him off.

Q. And he kicked him in what part of the body?

A. In the stomach.

Q. Where?

Mr. Drewen: In the stomach she says.

Q. In the stomach. What did your brother do after he was kicked? A. He leaned over as though he was hurt.

20

Q. Did he fall down? A. Yes; he went right to the ground.

Q. Fell right on the floor? A. Well, he bent over like that (indicating).

Q. You say he went to the ground. Now, did he fall down completely or did he just bend over? A. He bent over.

Q. Well, he didn't fall, did he? Then what happened? What happened then? A. Then I asked him to go for the policeman and he got up and went out.

30

Q. So that he was not on the floor but he was bent over? A. Yes.

Q. Then he went for a policeman. How far out of that kitchen was he when the shot rang out?

Mr. Drewen: How can this witness tell how far he was? She might tell us how long before he had left.

The Court: Just what you saw.

40

Gladys Scullion, for Plaintiff—Re-direct.

The Witness: His body was out the window.

Q. No, no. How far had Eddie Dillon, your brother, gotten out of the room when the shot occurred after you sent him for a policeman? A. He was out in the hall.

Q. He was out of the room at the time? A. Yes.

The Court: Is Dillon here?

Mr. Adelman: Yes, he is here.

Mr. Drewen: Yes.

Juror Number Two: May I ask a question? How high was this window sill from the floor?

The Witness: Well, I judge about that high from the floor (indicating).

Juror Number Two: How high?

The Witness: I don't know how high, but about that high from the floor (indicating).

Juror Number Two: How wide was the window?

The Witness: Well, it was an ordinary window; kitchen window.

Juror Number Two: What do you mean by an ordinary window? How wide?

The Witness: Well, I don't know.

Juror Number Two: Just give us a little sample.

(The witness indicated.)

Juror Number Two: Two and one-half feet?

The Witness: Yes, about two and a half feet.

Q. Is it as wide as any of these windows in the court room? A. Little bit wider.

Gladys Scullion, for Plaintiff—Re-direct.

Q. Just a little wider than any one of them?

A. Yes.

Q. Were either of these men what you call intoxicated at that time, or had they just been drinking? A. Well, they had been drinking but Mr. Walters looked as though he was intoxicated.

Q. Had Mr. Walters been drinking before he came in, do you know? A. Yes. 10

Q. He had been drinking before he got to the house that night? A. Yes, sir.

Q. Was he intoxicated when he came into the house? A. No; but he had drink in him.

Q. Thereafter he drank more, is that right? A. Yes.

Q. Now, Mr. Drewen questioned you about this torn pocket and he asked you if Mr. Walters had struck your husband first and knocked him down on to the settee and then pulled him up by the pocket and struck him again. Your answer to that was "yes". Can you explain that? Will you just tell us that story again, please? What happened from the moment— 20

The Court: On the settee, at the time they were on the settee.

The Witness: He punched my husband— 30

Q. Did you see it as it—

The Court: Let her answer.

The Witness: He punched my husband in the eye and knocked him down on the settee.

Q. Speak a little louder, please. A. And then he went to go out to the kitchen—walked out to the kitchen. 40

Gladys Scullion, for Plaintiff—Re-direct.

Q. Well, now, he knocked your husband down to the settee. Mr. Drewen asked you a question did he lift your husband up by the pocket by his trousers and tear them and then strike your husband again. Your answer was "yes". Is that so? A. Well, he grabbed my husband by the pocket. I only saw him hit him once.

10 Q. What? A. I only saw him hit him once; punch him in the eye.

Q. That was before he knocked him on the settee? As the result of the blow on the eye your husband fell on the settee? A. Yes.

Q. Then what happened when he was on the settee? A. Then I remember my husband—Mr. Walters walking to the kitchen.

Q. Well, did he strike your husband again while he was on the settee? A. No.

20 Q. Did he pull him up by the trousers' pocket? A. He grabbed him by the pocket.

Q. What did he do when he grabbed him by the pocket? What did he do when he grabbed him by the pocket? Just grab him and hold him or what? A. Just grabbed him.

Q. How did it come about he got up from the settee and walked into the kitchen—Mr. Walters? A. I don't know. My brother tried to get him home.

30 Q. Your brother got them off each other at the settee, is that correct? A. Yes.

Q. Then Mr. Walters got up and went into the kitchen? A. Yes, sir.

Q. What did your husband do? A. Well, he came out of the living room into the kitchen and told—my husband told him to go home.

Q. Told who to go home? A. Mr. Walters. My husband told Mr. Walters.

40 Q. Your husband told Mr. Walters to go home.

Gladys Scullion, for Plaintiff—Re-direct.

Was your husband cut on the face at that time?

A. Well, his eye was swollen.

Q. His eye was swollen where he had been struck? A. Yes.

Q. Did you see Mr. Walters strike your husband in the kitchen before they wrestled into the living room? A. No, sir.

10

Q. You testified to that effect.

Mr. Drewen: If your Honor please, that is cross-examination in violent form of his own witness. He has been doing it a long time.

The Court: Yes.

Mr. Adelman: If your Honor please, I feel the witness did not understand the portent of the statement and the refreshing of the recollection that was made to her.

20

The Court: Hardly. I think she understood well enough exactly what she testified to when she was being examined concerning that statement. At least, she satisfied me.

Q. When did your husband ask Mr. Walters to leave like a gentleman? After they came out of the living room or before the altercation began? A. Before the fight.

30

Q. Before the fight. That was in the kitchen in the first instance. What happened after they came out of the living room while your brother was putting his coat on? A. Then he demanded him to go.

Q. How, and what language did he use? A. He told him to get the H—— out of the house and go home.

Q. You testified—strike it out. You made a statement to the police in which you said, “My

40

Gladys Scullion, for Plaintiff—Re-direct.

brother pulled Bill off my husband and then my husband ran into the kitchen and Bill staggered out after him." Just what did you mean by that statement?

10 Mr. Drewen: Well, that is objected to. The statement speaks for itself.

The Court: Sustain the objection. The statement speaks for itself.

Q. Did your husband run into the kitchen and Mr. Walters stagger out after him? A. No. Mr. Walters went first; then my husband came out after him.

20 Q. Well, if the statement says, "Then my brother pulled Bill off my husband and my husband ran into the kitchen and Bill staggered out after him," that statement then made is not true? A. Well, it must be true if it is there.

Q. Now, which is the truth? The statement or what you testified to now? A. That must be true.

Q. Disregard the statement. What is the truth?

30 The Court: No, no. Now I object. Let her answer. You are going too far now. Don't disregard the statement. Disregard everything else except the statement. Is that true?

The Witness: Yes, sir.

Q. In the position that Mr. Walters was in when they left the living room which you testified he was facing the door and the position that your brother was in behind Mr. Walters, where were you standing with relation to those two men? A. I was in the kitchen. I picked my baby up.

40 Q. Where were you standing in the kitchen? A. Near the bathroom door.

Gladys Scullion, for Plaintiff—Re-direct.

Q. Near the bathroom door; that is this door indicated in the photograph? A. Yes, sir.

Q. The door that is shown as an exit to the hall is not shown in this photograph, is it? A. No, sir.

Q. With relation to that door where you were standing, were you facing your husband? A. No, sir.

10

Q. Were you facing Walters and Dillon? A. Yes, sir.

Q. And where was your husband? A. In the living room.

Q. Facing the back of these men? A. Yes.

Q. You were off to an angle? A. Yes, sir.

Q. Did you see your husband have a gun in his hand? A. No, sir.

Q. Did you see a gun brought out at all that evening? A. No, sir.

20

Q. After the shooting occurred, there is some testimony about your throwing this gun out the window.

Mr. Dreden: No. I beg your pardon. There is no testimony about throwing this gun out the window.

The Court: No.

Q. Throwing a pearl handled gun out the window? A. I threw a black gun out the window.

30

Q. It was not this gun? This gun was there? A. Lying on the kitchen floor.

Q. How did you come to make this statement, Mrs. Scullion (exhibiting statement to the witness)? Who asked you to make it? A. No one asked me to make it.

Q. Well, now, you didn't—strike it out. How did you come to make it to Lieutenant Hangley and Captain Kurth?

40

Gladys Scullion, for Plaintiff—Re-direct.

Mr. Drewen: It makes no difference how the witness came to make it. She made it, she says, and she said it is true.

The Court: She has said it is true. If she had denied that then, of course, you might go into that. She says it is true. If she made it on her knees or on a scaffold would not make any difference.

Q. Was this delivered into the personal possession of Captain Kurth and Lieutenant Hangle,—this statement? A. Yes, sir.

Q. Did you ever see it after that? A. No, sir.

Q. Was it ever shown to you after that? A. No, sir.

Q. The first time you saw it was in this court?

20 A. Yes.

Q. After you signed it. Had you read it before you signed it? A. No.

Q. You didn't read it at all before you signed it? A. No.

Q. Was it read to you? A. I think it was read to me.

Q. Do you remember whether it was read to you?

30 Mr. Drewen: This is cross-examination, if your Honor please, of his own witness.

Mr. Adelman: As to a statement or admission which is alleged to be made, I believe I have a right to go into that.

The Court: The statement?

Mr. Drewen: She has already said she recalls it was read to her.

The Court: Even so, she says it is true except the matter of the lamp.

40 Mr. Adelman: She has made certain modifications on the statement.

Edward Michael Dillon, for Plaintiff—Direct.

The Court: In any event, you may answer the question. Was it read to you?

The Witness: Yes.

Q. What is it? A. Yes, sir.

Q. Were you arrested? A. No, sir.

Q. Did you see bodily injury effected on William Walters,—that is, physical injury? A. No. I just seen the blood stain on his shirt. 10

Q. Did you see a hole in his shirt? A. No.

Q. Did you examine the body? A. No, sir.

Q. You attended the funeral and saw him buried? A. Yes, sir.

EDWARD MICHAEL DILLON, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows: 20

Direct examination by Mr. Adelman:

Q. Do you know Viola Walters? A. Yes, I do.

Q. Who is she?

The Court: What is your name?

The Witness: Edward Michael Dillon.

Q. Who is she? A. My sister. 30

Mr. Drewen: Speak up, please, Mr. Dillon, so these men can hear you.

Q. Are you the brother of Gladys Scullion? A. Yes, I am.

Q. And brother-in-law of William Walters, deceased, and the brother-in-law of Walter Scullion? A. I am.

Q. Will you tell us what happened on that night of January 1, 1929? A. Well, if I remember 40

Edward Michael Dillon, for Plaintiff—Direct.

rightly, about one o'clock in the morning I was passing my sister——

10 Q. Speak slowly and louder. A. I was passing Mrs. Scullion's house and my sister, Mrs. Walters, called me over to go into Mrs. Scullion's house to get out her husband, Bill Walters. I went into the house. I heard some loud talking; so I entered the apartment and I saw Mr. Scullion and Mrs. Scullion and Mr. Walters in the kitchen; and Mr. Walters was talking to my sister in sort of a sarcastic way.

Mr. Drewen: What is that last?

20 The Witness: I heard him say to my sister, Mrs. Scullion, she is always butting into his affairs. I noticed that he struck her in the face causing her nose to bleed and my sister, Mrs. Scullion, asked her husband would he protect her. He had the baby on his lap. He didn't make any attempt to get up. She asked me, being I was her brother, would I protect her. I took him by the arm. I tried to lead him out of the apartment to go home and Mr. Scullion also did the same—took him by the other arm and asked him to go home like a gentleman. He pushed me aside, throwing me to one side.

30 Mr. Drewen: Who pushed you aside?

40 The Witness: Mr. Walters pushed me to one side and made a lunge for Mr. Scullion, forcing him into the dining room. I followed; tried to stop him; tried to pull Mr. Walters off Mr. Scullion. I noticed he struck him on the eye. I proceeded in getting him off Mr. Scullion. He started to walk out towards the kitchen. I picked up Mr. Walters' coat and started to put it on

Edward Michael Dillon, for Plaintiff—Direct.

him, when Mr. Scullion says, "Come on, now, Bill, you will have to get out." Bill says, "All right, I will go." He threw me one side again; made a lunge for Mr. Scullion, forced him to the opposite side of the kitchen; forced him into the window. Mrs. Scullion was holding her husband like that (indicating). I tried to force Mr. Walters off Mr. Scullion. Somehow or other he kicked me between the legs; forced me to fall to the floor. I couldn't stay on the floor, so I left the room and went out to get an officer. 10

Q. What happened when you went outside? A. When I left the apartment, out in the street, I couldn't find an officer; so I pulled the fire alarm; waited until the firemen came. When they came I told them I had some trouble I wanted—there was some trouble in my brother-in-law's house. So, we came in and I noticed Mr. Walters lying on the floor. Mr. Scullion was lying over him and my sister standing crying. The firemen came in and took his body out and Mr. Scullion and I stayed until some officers came and brought us up to the station house. 20

Q. When you came into the house how long after you arrived there did Mr. Walters strike Mrs. Scullion? A. I really can't remember. 30

Q. Well, an hour, a minute or second? A. It can't be over an hour.

Q. That they were discussing that? A. Oh, no; I won't say discussing that. About twenty minutes that I can remember.

Q. When you came into the house— A. The time there Mrs. Scullion was struck?

Q. That is what I am asking you. Was Mrs. Scullion then struck? A. No, no. Not when I came into the house. 40

Edward Michael Dillon, for Plaintiff—Direct.

Q. What happened when you came into the room? A. I heard Mr. Walters arguing with my sister, Mrs. Scullion.

Q. What was this argument? A. Something about Mrs. Scullion always interfering in his business.

10 Q. Then what happened? A. He pushed my sister—rather, he struck my sister in the face causing her nose to bleed.

Q. Did he tear her clothes? A. I exactly didn't see that.

Q. Where was your brother-in-law, Walter Scullion, at that time? A. He was sitting on the opposite side of the kitchen on the chair—kitchen chair—holding the baby, his son.

20 Q. Then what happened? Your sister was struck. A. She asked me to protect her. The husband put her baby on the floor. We both took Mr. Walters by the arm and tried to lead him out of the apartment.

Q. Then what did Walters do? A. Walters threw me to one side of the room and lunged toward Mr. Scullion, forcing him into the dining room.

Q. Did he strike Mr. Walters? A. No, no.

Q. He lunged for him? A. He lunged for him.

30 Q. Where did he grab him? If I can remember, I believe it is around the shoulders.

Q. And they began— A. —sort of wrestling.

Q. Then what happened? A. And then he forced Mr. Scullion down on the settee and struck him in the eye.

Q. When he was on the settee? A. Yes.

Q. What were you doing at that time? A. Trying to get Mr. Walters off him.

40 Q. How? A. Grabbing him by the arms and the back.

Edward Michael Dillon, for Plaintiff—Direct.

Q. Pulling him off? A. Yes, sure.

Q. After he struck Mr. Scullion in the eye on the settee what happened? A. Well, I got him to walk toward the kitchen.

Q. You got Walters off Scullion? A. Mr.—I got him to walk out in the kitchen. I picked up his coat and tried to persuade him to go home.

10

Q. During this time was anything said by Walters or by Scullion? A. Not that I remember.

Q. Neither one of them said a word? A. No. I don't remember.

Q. When you pulled Walters off Scullion did Walters grab his pocket? A. I believe he did.

Q. Did he hit Scullion after he grabbed the pocket? A. I don't remember.

Q. Did Walters pull Scullion up from the settee by means of this pocket? A. I wouldn't say that. I don't think he lifted him off by the pocket. I noticed he had him by the pocket. I heard the pocket rip, but Mr. Scullion was not forced off the settee.

20

Q. Had Mr. Scullion been hit after the pocket was torn? A. No.

Q. Walters got up and walked out into the kitchen with you, is that right? A. That is right.

Q. I show you photograph, Exhibit P-9, and ask you if that is the kitchen? A. That is the kitchen.

30

Q. I show you photograph P-11 and I ask you if that is the living room? A. That is the living room.

Q. I show you photograph P-10 and I ask you if that is the view of the yard out of the kitchen window? A. It is.

Q. When you came into the kitchen with Mr. Walters and Mr. Scullion, just where were you standing in that kitchen? A. Right here by the kitchen chair.

40

Edward Michael Dillon, for Plaintiff—Direct.

Q. By the kitchen chair. How far is that away from the entrance to the apartment? A. About two or three feet from the entrance to the apartment.

10 Q. That was right near the entrance door. Where was Mr. Scullion? A. Mr. Scullion was right in the back coming out of the dining room into the kitchen.

Q. Where was Mr. Walters facing? A. Facing the entrance to the apartment.

Q. Where were you facing? A. I was in back of Mr. Walters trying to put on his coat.

Q. Walters was facing the entrance to the apartment? A. Yes.

20 Q. What was said, if anything, at that time? Did Scullion say anything at that time to Mr. Walters? A. No, not that I remember.

Q. What happened next? A. I don't remember. I can't remember.

Q. What happened after you were putting the coat on Mr. Walters? A. I heard Mr. Scullion say, "Well, now, Bill, you will have to get out."

Q. He said, "You will have to get out?" A. He said, "You will have to get out."

30 Q. Then what happened? A. Bill said, "All right, I will get out." Then he tossed me aside and lunged at Mr. Scullion again.

Q. How did he toss you aside? A. Pushed me with his arm—sort of pushed me off with his arm.

Q. Then what happened? A. I seen him go at Mr. Scullion again.

Q. What did he do to Scullion then? A. Forced him across the kitchen—the whole length of the kitchen—and forced him out the window.

Q. Did he strike him? A. Not that I know.

Q. Did he punch him? A. No.

40 Q. Just jumped at him and pushed him? A. Pushed him.

Edward Michael Dillon, for Plaintiff—Direct.

Q. And they pushed against this window? A. That is right.

Q. Is that window low in that kitchen? A. Very low.

Q. You see a chair in this photograph. Was that chair at that point that night? A. I really don't remember.

10

Q. He pushed him, however, to that window? A. That is right.

Q. Did the glass break? A. Yes, it did.

Q. Will you show this Court and jury exactly how Mr. Scullion was out that window with Mr. Walters on him, by indication? A. Well, the back of his head was on the top sill of the window (indication).

Q. At the cross bar? A. At the cross bar, and his body was out as far as his knees. The window sill was directly under his knees.

20

Q. The window sill under his knees? A. The window sill under his knees.

Q. His body out? A. His body out and his head was on the middle section of the window.

Q. And the back was out? A. And the back was completely out.

Q. Where were his hands? A. His hands were on both sides of the window trying to hold himself in.

30

Q. Did you see a gun in his hand at that time? A. No, I didn't.

Q. Did you see a gun at all? A. I can't remember whether I saw the gun or not.

Q. You were there? A. Yes; I was there.

Q. Did you see a gun brought out in Mr. Scullion's hand at all when he was behind Mr. Walters? A. No.

Q. Could you have seen it? A. I don't think I could have.

40

Edward Michael Dillon, for Plaintiff—Direct.

Q. Could Mr. Walters have seen that gun if it were there? A. I don't think so.

The Court: Did you see the gun picked up from any place?

The Witness: No, not me, your Honor. I didn't.

10

The Court: When is the first you saw the revolver?

The Witness: I saw the gun on the floor in the kitchen.

The Court: You didn't see it until after you had been—you ran out and came back?

The Witness: That is right, your Honor.

The Court: It was when you came back when you saw it?

20

The Witness: It was when I came back when I saw it.

The Court: You didn't see it at the time your brother-in-law was being pushed to the window?

The Witness: No, I didn't your Honor.

The Court: And you are sure of that?

The Witness: Yes, positive.

Q. Did you see Mr. Scullion point a gun to Mr. Walters? A. Not that I remember.

30

Q. Or show it to him? A. No.

Q. You say "you don't remember;" not that I remember." I want positive statements from you. I don't want statements that "I don't remember" unless you don't remember. Did you see Mr. Scullion exhibit or point a gun at Mr. Walters? A. I can't remember that. I really can't remember.

40

Q. Did you see the gun in Walters' hand—in Scullion's hand as he was out the window? A. No, sir.

Edward Michael Dillon, for Plaintiff—Direct.

Q. Was Walters laying completely over his body—over Scullion's body in the window? A. Yes; he was.

Q. So that you—if there was a gun, could you have seen it in any way? A. That is hard to say. I really couldn't say.

Q. Walters' body concealed the gun in Scullion's hand? A. That is right. 10

The Court: Did Scullion have a gun in his hand at the time when you were assisting Walters on with his coat?

The Witness: Well, I had my back turned to him, your Honor.

Q. What was the answer? A. Well, I had my back turned to him. 20

The Court: You turned around later, didn't you?

The Witness: Yes.

The Court: Did you see any gun in his hand then?

The Witness: Not that I remember, your Honor.

The Court: You certainly would remember it, wouldn't you, if you saw it?

The Witness: Yes, sure. 30

The Court: Well, did he or didn't he, because, after all, the statement is the result of memory. It must necessarily be so. All we want to know is what you remember now. If you did or didn't see a gun in his hand after you turned around when Walters started for him.

The Witness: Well, your Honor, it is six years ago. I just can't place it in my mind.

The Court: My dear sir, listen to me, will 40

Edward Michael Dillon, for Plaintiff—Direct.

you? If you so positively say that you did not see a gun at all until after you came back and found it on the floor, how can you now say you don't remember whether you say a gun in his hand or not prior to the time you went out?

10

The Witness: Well, I was sort of excited.

The Court: You are not excited now, are you?

The Witness: No. I was really excited at the time.

The Court: Just sit down and get yourself together. Come on. I want to know. Did you see a gun in his hand or did you not?

20

The Witness: I don't think I did, your Honor.

The Court: Does that mean that you did not?

The Witness: Most likely I did not.

The Court: Not most likely. You are under oath.

The Witness: I did not.

The Court: What?

The Witness: I did not.

30

Q. You didn't see the gun in his hand? A. No.

Q. Had you seen the gun when you came into the house? A. No, sir.

Q. When was the first time you saw this gun?

A. When I came in the apartment and Mr. Walters was lying on the floor. There was a gun lying alongside of him.

Q. The gun was alongside of the body? A. That is right.

Q. That is the first time you saw a gun? A. Yes.

40

Edward Michael Dillon, for Plaintiff—Cross.

The Court: Did you see Walters have a gun at any time?

The Witness: No, sir.

Q. Do you know whether this gun—do you know whose gun this was? A. I found out later on it belonged to Mr. Scullion.

10

Q. But you didn't know at that time whose gun it was, did you? A. No.

Cross-examination by Mr. Drewen:

Q. Mr. Drewen, about what time was it when you met your sister, Mrs. Scullion, on the street—Mrs. Walters on the street and she told you to go over to Scullion's and get Bill? A. I imagine it was about one to two o'clock in the morning.

20

Q. Where were you when she told you? A. I was directly across the street from the house.

Q. From whose house? A. Mrs. Scullion's house.

Q. Just standing there? A. No, I was on my way home.

Q. You met your sister. What did she say to you? A. She called me. She says, "Ed." I went over. She says, "Will you go inside and get Bill and bring him home?"

Q. What else did she say? A. "He is drinking."

30

Q. What else did she say? A. I don't know what else she said.

Q. Did she say he was fighting with Mrs. Scullion? A. Not that I remember.

Q. Then you went directly to your sister's house, didn't you? A. That is right.

Q. When you got in there you saw Bill Walters in the kitchen? A. That is right.

40

Edward Michael Dillon, for Plaintiff—Cross.

Q. Who was with him? A. Mrs. Scullion and Mr. Scullion.

Q. What was Mr. Scullion doing? A. Sitting down at the kitchen table.

Q. With a child on his knee? A. That is right.

10 Q. What was Mrs. Scullion doing? A. Talking to Mr. Walters.

Q. What was the conversation between Walters and Mrs. Scullion at that time? A. Mrs. Scullion wanted Mr. Walters to stay with her husband—they were talking over that—and Mr. Walters said that Mrs. Scullion was always interfering with this business.

Q. Did he call her any names? A. I don't remember.

20 Q. You don't remember that, either. Now, did you see Walters strike Mrs. Scullion at that time while you were in the kitchen? A. Well, he struck her. I saw that, yes.

Q. Where did he strike her? A. In the face.

Q. What was the result? Was there any blood? A. The nose bled.

Q. Did you see him grab her dress and tear the dress? A. Grabbed her by the waist and tore her dress.

30 Q. On your direct examination you said you didn't see that. You recall now you did see that? A. I saw that, yes.

Q. That is correct, is it? A. Yes.

Q. Now, at any time that night did you hear Bill Walters threaten to kill anybody? A. No, no. I don't remember that.

Q. You didn't? You are sure about that? A. Well, I am not sure. I can't be sure of all that happened.

40 Q. Do you recall making a statement to the police, to Captain Kurth and to Mr. Doherty, who was then a Prosecutor's man? A. Yes, sir.

Edward Michael Dillon, for Plaintiff—Cross.

Q. Do you remember that? A. Yes, I do remember.

Q. That was made immediately after this happening, wasn't it? A. Right.

Q. And, Mr. Dillon, I ask you whether or not that is your signature signed to those two sheets?

A. This is my signature, yes.

10

Q. Who was it that wrote that statement? Was it Captain Kurth? A. I really don't know.

Q. But one of the officers wrote it? A. One of the officers wrote it.

Q. As you stated it? A. That is right.

Q. After it was written by the policeman and all that, did you read it? A. Yes, sir.

Q. You did? A. Yes.

Q. Then you signed it? A. Yes.

Q. When you read it and signed it was the statement correctly and truly written by the policeman as you had made it to him? A. Yes; it was.

20

Q. Therefore, I ask you whether that statement would refresh your recollection as to what you told the police and as to what happened that night? A. Yes; it would.

The Court: Mark it for identification.

(The statement above referred to was received and marked D-4 for Identification.)

30

Q. Now, then, I read to you from that statement, D-4 for Identification, Mr. Dillon. "This statement is made—" and so forth. "Before I went in I met my sister, Viola." That is Mrs. Walters, is that right? A. That is right.

Q. "—outside and she asked me to go in Walter's house—" that is Walter Scullion, isn't it? A. Right.

40

Edward Michael Dillon, for Plaintiff—Cross.

Q. “—Walter’s house and get Bill, her husband, out as he was drunk and he was fighting with Mrs. Scullion.” A. That is right.

Q. “I went in the house and heard Bill swearing at my sister, Scullion’s wife.” Correct? A. Right.

10 Q. “He was calling her a big interfering bastard and said, ‘You are like all the rest—’” I won’t mention that word in the presence of your sister. (Exhibiting the statement to the witness) That is what he said? A. That is right.

Q. “He slapped at her and called her—” that dirty word there. Did he call her that? A. That is right.

Q. That was true, was it? A. That is right.

20 Q. “And everything else. He had a glass with wine or whiskey in his hand. He was very drunk and had little white froth coming from the corner of his mouth.” Was that true? A. Right.

Q. “Mr. Scullion was sitting in the kitchen with the baby in his arms. Mrs. Scullion was arguing and told Walters to get out of the house.” A. That is right.

Q. “Walters said—” did he use that language that is written there? A. That is right.

Q. He did use that? A. That is right.

30 Q. He used that to your sister and to her husband, did he? A. That is right.

Q. “Then Scullion put the baby down and said, ‘Come on, Bill, you will have to go home; it is three o’clock in the morning.’” A. That is right.

Q. “Then Bill said, ‘Oh, you are going to be like your —’” is that the way he characterized his wife? A. That is right.

40 Q. “Your (blank) wife.” “I can lick any (blank) in here.” Is that the word he used again that appears in this statement marked for identification? A. That is right.

Edward Michael Dillon, for Plaintiff—Cross.

Q. "Then he took off his coat and punched Walter and Walter ran away from him into the sitting room." Is that true? A. Right.

Q. Is that true? A. That is right.

Q. "Bill ran after him. I could hear Bill punching Walter." Could you? A. That is right.

Q. What did it sound like? A. Like he was hitting him awful hard. 10

Q. Like heavy blows? A. Yes.

Q. Bill Walters was a powerful man, wasn't he? A. He was.

Q. Powerful, muscular man? A. He was.

Q. Was he taller than Walter Scullion? A. Yes; much taller.

Q. "I could hear Bill punching Walter and heard Scullion holler for help." Is that true? A. That is right. 20

Q. "I went in and tried to pull Bill off Scullion. He was on the settee." A. Right.

Q. Is that correct? A. Yes.

Q. "The parlor lamp was upset. I saw Bill punch Scullion in the eye and Scullion's eye started to bleed." Is that true? A. Right.

Q. "Then I saw Scullion run into the kitchen and Bill ran after him and grabbed him and pushed him through the pane of glass near the gas stove." A. That is right. 30

Q. "Before they ran into the kitchen—" now, listen carefully. "—I heard Walters say to Scullion, 'I will kill you, you son-of-a-bitch.'" Did you hear that? A. That is right. Right. I heard it.

Q. You heard that. "And while they were struggling in the kitchen Bill was mumbling like a crazy man." Is that true? A. Right.

Q. "Then I picked up Scullion's baby and ran into the hall. When I got outside I heard what 40

Edward Michael Dillon, for Plaintiff—Cross.

I—I heard a shot. I tripped with the baby and fell.” Is that correct? A. Right.

Q. “Then I left the baby in the hall and ran out in the street and looked for a policeman.” A. Right.

Q. “And didn’t see any.” A. No.

10 Q. That is true? A. Right.

Q. “So I pulled the fire alarm.” A. That is right.

Q. “Then Walter Scullion and his wife came out and asked me to get an ambulance.” A. Right.

Q. “I told them I had pulled the fire alarm. When the firemen came I told them Bill had shot himself.” A. Right.

20 Q. “We went in the house and I said to—and I saw Scullion give Walters water.” Is that right? A. Right.

Q. When you told the police or the firemen Bill had shot himself, did you know whether that was true at the time? A. No, I didn’t.

Q. You were trying to save somebody and you said that? A. The excitement.

30 Q. Now, in this description of the pushing out of the window that you made the only thing that was saving Walters or Scullion from going out of the window was the grip that he had with his fingers on the side of the window frame and the back of his head—the pressure of his head against the cross bar at the center of the window? A. That is right.

Q. When he was in that situation Mrs. Scullion, Walter’s wife, was pulling on his legs to keep him in? A. That is right.

Q. And Bill, the strong man, you say, was pushing to get him out? A. Pushing him out, right.

40 Q. It was then that you ran out? A. That is right.

Edward Michael Dillon, for Plaintiff—Re-direct.

Q. Mrs. Scullion asked you to go out and get a policeman, did she? A. That is right.

Re-direct examination by Mr. Adelman:

Q. You testified a moment ago under direct examination that they were scuffling. This incident occurred in the kitchen first? A. That is right. 10

Q. And in your statement you say then he—referring to Walters—took off his coat and punched Walter and Walter ran away from him into the sitting room. Which is true?

Mr. Drewen: The witness just testified the statement is true since he refreshed his recollection.

The Court: Well, of course, I suppose he has a right to find out now which he may rely upon, if there is any difference. 20

Mr. Drewen: I will withdraw the objection.

The Witness: I remember now he did strike him before he left the kitchen.

Q. He struck him before he left the kitchen. Then Walter ran away from him into the sitting room? A. That is right.

Q. Bill ran after him? A. That is right. 30

Q. Did he actually break away from him completely and then run into the sitting room? A. Yes; I believe he did.

Q. "I could hear Bill punching Walter and heard Scullion holler for help." A. That is true.

Q. Who did he holler to? A. Hollered to me, most likely.

Q. What did he holler? A. He said, "Walter." He didn't exactly holler anything special. Just heard him moaning and groaning. 40

Edward Michael Dillon, for Plaintiff—Re-direct.

Q. To who? A. Nobody special.

Q. Who did you hear moaning and groaning?

A. Mr. Scullion.

Q. Then he didn't holler, did he? A. I don't remember. No, he didn't holler for any special person.

10 Q. "Then I saw Scullion run into the kitchen and Bill ran after him and grabbed him and pushed him through the pane of glass near the gas stove." A. That is right.

Q. Then you didn't help Walters on with his coat? A. Not that I remember now, no.

Q. Will you tell us just where was Walters facing at that time? A. Mr. Walters?

Q. Yes. A. I don't understand the question.

20 Q. Just where was Walters in the kitchen? A. After—chasing Mr. Scullion.

Q. He chased Mr. Scullion? A. Yes.

Q. Then your story under direct examination is erroneous, is that correct? A. It must be.

Q. And this story is the truth? A. The truth.

Q. Are you here under subpoena from the plaintiff? A. I am.

Q. Are you under subpoena from the defendant likewise? A. Yes, sir.

30 Mr. Drewen: He was subpoenaed by both sides, then.

Mr. Adelman: Yes. At least, I subpoenaed him.

Q. When you came into the house what was the condition of Walters? Was he intoxicated? A. He had been drinking.

Q. Was he drunk? A. I wouldn't say he was drunk.

40 Q. What would be your distinction between drinking and drunk? A. Well, in my estimation

Edward Michael Dillon, for Plaintiff—Re-direct.

when a man is drunk he doesn't know exactly what he is saying or doing. When he is drinking he talks sensible.

Q. Do you believe Mr. Walters was talking sensibly at that time? A. He was at that time.

Q. You stated before that his words were crazy, if I remember correctly.

10

Mr. Drewen: That is the other witness said that. Mrs. Scullion said his eyes were rolling.

Q. "Bill was mumbling like a crazy man," is what you stated in this statement. What was he mumbling? A. You couldn't understand it.

Q. Couldn't understand him at all? A. No.

Q. You stated he was frothing at the mouth. A. That is right.

20

Q. How did you come to be kicked by Mr. Walters? A. I was trying to pull him off Mr. Scullion.

Q. Where? A. By the window in the kitchen, trying to get him off Mr. Scullion.

Q. Were you arrested? A. I was.

Q. Held as a material witness? A. Right.

Q. When this statement was made by you to the police did you read it? A. I did.

Q. Yes. A. That is right.

30

Q. And signed it? A. And signed it.

Q. Had you ever seen Walters drunk before? A. Never.

Q. Or drinking before? A. Never.

Q. This is the first time you ever saw him in that condition? A. First time I saw him in that condition.

Q. What kind of a man was he as a rule?

Mr. Drewen: That is objected to. We are not trying the man on his conduct.

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Motion for a Non-Suit.

The Court: Character is not in question in this case.

Q. You testified that you heard somebody say, "I will kill you." Who was it? A. Mr. Walters to Mr. Scullion.

10 Q. When? A. I believe when they came out of the dining room into the kitchen.

Q. After or before? A. After the blow was struck on the eye.

Q. You pulled them apart? A. I pulled them apart. Mr. Scullion ran into the kitchen and Mr. Walters said, "I will kill you."

Mr. Adelman: That is all. Plaintiff rests.

20

Mr. Drewen: If your Honor please, the defendant moves for a non-suit at this time on the ground that the testimony without equivocation or dispute establishes now that the death of the insured was not, within the meaning of the contract, accidental. I respectfully call the Court's attention to the language in brief, which is to the effect that the death contemplated in the contract must be entirely the result of accidental means, and I refer to the decisions that hold that accidental means are not the means which result from a situation that is created by the insured himself and as a logical, natural or necessary consequence of which he comes to his death.

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If your Honor please, in this case without contradiction or dispute we show that into a peaceful family this man came.

40

Motion for a Non-Suit.

Whatever effect liquor may have had on his mind also comes within the purview of the language of the policy which says that the death must be accidental, entirely free from any disease or impairment of mind or body. We have, as I say, a picture here that shows this man came into a peaceable family where he met only those who evidently showed him only signs of affection and interest. First, his wife. He was hostile to his wife, reviled her, threatened to kill her. His wife's sister, she tried to make peace. She was struck violently in the face and caused to bleed and called upon her husband for help. We know what happened to the would-be peacemaker Dillon; and in the last, ultimate climax of the rampage upon which this insured had started, we find Scullion in a plight that involved for him either imminent death or grievous bodily harm. I respectfully submit to your Honor that under the law of our state a man who is under the reasonable apprehension either of death or of grievous bodily harm, if he reasonably believes that at the hands of another he is put in imminent peril of his life or grievous bodily harm, he has a right to take life to protect himself either against death or against grievous bodily harm. Here is the situation: the photograph shows a drop into a concrete pit from this window. Scullion had already been wounded. He was bleeding from the eye. He had been threatened with death, according to the undisputed testimony, by Walters, and Walters, in an apparent execution of that threat,

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Motion for a Non-Suit.

10 was pushing this man out of the window. Scullion did what is said to have been done. Either Scullion shot this man—they don't call Scullion to the stand although he is in court—either Scullion shot this man or the man shot himself. If it is suicide, it is without the terms of the policy. If he was shot by Scullion he was shot as the result of an episode of peril to others that Walters had created himself, and he was shot under circumstances that made it not only Scullion's right but his duty to shoot to protect not only himself but his wife and his children in his own home. Now, the cases are in that memorandum I think I gave to your Honor and I say, by and large, there is no proof
20 in the plaintiff's case that this death was accidental within the meaning of the policy.

The Court: Well, of course, Mr. Drewen, the element of self-defense is not in this case because I listened very attentively throughout the testimony.

Mr. Drewen: Mr. Walters was the aggressor.

30 The Court: Of course. I understand the plaintiff does not claim otherwise. So, therefore, the question whether you may take life or not is not in this case. The question presented here is whether or not the unlawful acts of Walters in the situation in which he placed himself were such as a reasonably prudent man would have foreseen would have resulted in his death—that is, in Walters' death. In other words, was the death the natural and the proximate result of the voluntary acts perpetrated by Mr. Walters? That is the whole
40

Motion for a Non-Suit.

situation. Of course, the cases are in conflict. I would like to hear you on that.

(Argument by counsel for the plaintiff.)

The Court: The question is whether the person who was insured under this insurance policy was placed in such a position in view of all the circumstances of the case that a reasonably prudent person placed there where he was and a person in his condition placed there where he was would have reasonably anticipated that death might be a proximate result of what he was then doing. If he did, then it was not an accident because he then voluntarily assumed the risk and put himself in the position where his beneficiary cannot now say that this was an accidental happening. 10 20

However, to save further argument on the question, I am at all times governed by the rule. It is not what the Court would weigh the testimony to reach a result or what the Court may think a result should be, if there are conflicting questions of fact or inferences from facts—and that is particularly applicable to the question of proximate cause—that the Court should leave the whole question to the jury, which is just exactly what I am going to do in this case. I will deny the motion and allow counsel an exception. 30

Mr. Drewen: I ask an exception.

Walter Scullion, for Defendant—Direct.

DEFENDANT'S CASE.

WALTER SCULLION, called as a witness on behalf of the defendant, being sworn, was examined and testified as follows:

10 *Direct examination by Mr. Drewen:*

Q. Where do you live, please? A. My present address is 5394 Hudson Boulevard, North Bergen.

The Court: By the way, you made reference a while ago to a thing I don't think you intended to. You said there were certain exceptions about unlawful act. Somebody said something about unlawful act. I don't find any provision in this policy.

20 Mr. Adelman: I say there is no exception in the policy as to any unlawful acts, because if there had been it would have been so stated in the policy.

Q. Mr. Scullion, you recall the night of December 31st—January 1st, 1928 and 29? A. Yes, sir.

Q. At that time you were living where? A. 410 Hudson Avenue, West New York.

30 Q. Were you living there with your wife and one little child? A. Yes, sir.

Q. How old was your child? A. Approximately three and a half years old.

Q. At that time did your brother-in-law, Bill Walters, come to your house? A. Yes, sir.

Q. What time in the evening did he arrive? A. About nine o'clock.

Q. With whom was he? His wife? A. With his wife and child.

40 Q. Now, what was his condition when he arrived there? A. Well, he had been drinking, but not to any excess.

Walter Scullion, for Defendant—Direct.

Q. Was his mood fairly pleasant? A. Yes, sir.

Q. Did it at any time during that evening or night change into a mood unpleasant? A. Only about one-thirty or two o'clock in the morning.

Q. What happened? What did he do then to indicate a change? A. Well, he became—he got into an argument with his wife.

10

Q. With his wife? A. Yes, sir.

Q. What about? A. He wanted her to go home to his own home instead of staying there, as he had previously arranged.

Q. Then what happened in that argument? A. Well, his wife disagreed with him and wanted to stay the night out.

Q. Did he do anything to her? A. No. He asked her to get up out of bed and get her clothes on.

20

Q. She had gone to bed, had she? A. Yes, sir.

Q. He wanted her to dress? A. That is right.

Q. And go out with him? A. That is right.

Q. All right. What else? Tell us what happened. Tell us what he did. A. Well, the argument got pretty warm between them.

Q. The argument got pretty warm between them. What did he say to his wife? A. Well, that was all he said. He wanted her to go home; insisted on her going.

30

Q. Were you there when the wife or the child or both were pushed out into the hall? A. Yes, sir. The child was pushed out.

Q. The child was pushed out? A. Yes.

Q. By whom? A. By Mr. Walters.

Q. What did he do that you describe as "pushed out the child?" A. Well, he picked the child up and shoved him out the door without any clothes on.

Q. How old was this child, by the way? A. Three and a half years.

40

Walter Scullion, for Defendant—Direct.

Q. Took this child from its bed without any clothes, opened the door and pushed the child out in the hall? A. Yes.

Q. Where was Mrs. Walters at that time? Was she present? A. She was getting her clothes on then when she saw he insisted on her going home.

10 Q. She did go home? She went home? A. She went out.

Q. She picked the child up and went home? A. Yes.

Q. By the way, who went out in the hall and got this child when he did that? A. My wife.

Q. And brought it in? A. Yes.

Q. When Mrs. Walters went, she went along with the child; he didn't go did he? A. No, sir.

20 Q. What happened after she had left and he was there alone with the rest of you and your family? A. My wife and Mr. Walters got into an argument.

Q. What was the argument about? A. Well, she called him down for his treatment of the child and his wife—her sister.

Q. What did he say to your wife? A. He told her he was sick of his "in-laws" butting into his affairs.

Q. Did he call her names? A. Yes.

30 Q. What did he call her? A. I can't recall what he called her at present.

Q. You can't recall what he called her at present? A. No.

Q. You stood there and heard it? A. Yes.

Q. What else happened beside his calling your wife names that you can recall? What did he do to your wife? A. He pushed her and tore her dress.

40 Q. What else did he do? A. Struck her in the face.

Walter Scullion, for Defendant—Direct.

Q. What was the result of that? A. Her nose started to bleed.

Q. Where were you when he was striking your wife in the nose and it bled? A. Sitting on the chair in the kitchen with my three and a half year old boy on my knee.

Q. Did your wife call upon anyone for help at that time? A. Yes. She called upon me. 10

Q. What did you do? A. I got up, set the child on the floor and grabbed Mr. Walters by the arm and tried to lead him out the door.

Q. Just a moment, Mr. Scullion. At that moment was Eddie Dillon there? A. He just came in.

Q. Was Eddie there at the time you sat the child on the chair and got up and tried to lead Walters to the door? A. Yes, sir.

Q. Now, when you got up to lead Walters to the door after your wife had called on you for protection what did you say to him? A. I said, "Come on, Bill, you will have to go home; it is getting late." 20

Q. You went to lead him out to the door? A. Yes, sir.

Q. What did he say to you? A. He said, "Are you putting me out?" I said, "I am asking you to go like a gentleman."

Q. Speak up loud. You said, "No, I am asking you to go like a gentleman." What did he say? A. He said, "I was asked over here. I will be damned if anybody will put me out." 30

Q. What did you say? A. I said, "It is getting late. I am living in an apartment house. You are making too much noise. You will have to go home." Again he asked me if I was putting him out. I said, "Yes." So he started to wrestle with me, broke away from me, grabbed for me, and I tried to shove him out of the door. He struck me 40

Walter Scullion, for Defendant—Direct.

a blow. I broke away from him and ran into the living room.

Q. Where did he strike you the blow? A. In the body.

Q. Did he strike you a blow at any time on the eye that night? A. When I was in on the settee in the living room.

Q. That was later. The first time he struck you a blow in the body? A. Yes.

Q. You got away from him and went into the living room? A. Yes.

Q. You went in on the settee? A. Fell down on the settee.

Q. What caused you to fall? A. He was right behind me.

Q. He was right behind you? A. Yes.

Q. He was chasing you? A. Yes.

Q. After he chased you to the settee, after punching you and you were on the settee, what happened? A. He struck me on the eye.

Q. Punched you in the eye. Did your eye bleed? A. Yes, sir.

Q. Go ahead. A. And grabbed me by the pocket of the pants and tore the trousers half off me.

Q. Tore the trousers half off you? A. Yes.

Q. Were you lying down when he grabbed the pocket of the trousers? A. I was sitting back in that position (indicating).

Q. What were you doing so far as the result of the blow? A. I was defending myself with my arms close together.

Q. Now, after he punched you in the eye and drew blood when you were on the settee and tore the trousers half off of you what occurred? A. I called to Eddie Dillon and he came in and grabbed him by the shoulders and pulled him off me.

Walter Scullion, for Defendant—Direct.

Q. Did Eddie succeed in pulling him off you?

A. Yes, sir.

Q. After Eddie got him off you, you and he and Eddie were still then in the living room, in the room where the settee is? A. He and Ed went into the kitchen.

Q. Left you in the living room alone? A. Yes, 10
sir.

Q. Then what did you do? A. I got up off the settee and picked up a .32 revolver I had on the living room table.

Q. Now, then, Eddie and Walters are in the kitchen as far as you know? A. Right.

Q. You went then into the living room where you were—or, rather, it was in the living room where you were and picked up a revolver off the table? It was a .32? A. Yes. 20

Q. You had intended to use that revolver that night celebrating, hadn't you? A. Right.

Q. And you had not used it? A. No.

Q. The revolver was lying there where you put it? A. Yes.

Q. When had you put the revolver out on the table in the living room? A. I should say ten o'clock at night.

Q. Where had you gotten it from before putting it there? A. From the inner room. From the chifforobe in the inner room. 30

Q. Where you kept it? A. Yes.

Q. When you took the revolver off the table in the living room where did you go with it? A. Into the kitchen.

Q. Where Walters was? A. Yes, sir.

Q. What did you do after you got into the kitchen? A. I told Bill Walters to get out and go home.

Q. What did you do? What did you do with the gun? A. I held the gun in my right hand. 40

Walter Scullion, for Defendant—Direct.

Q. Like this? (indicating). A. No. Like this (indicating).

Q. Where was Bill when you said that? A. Eddie Dillon was putting his overcoat on.

Q. Was Bill in front of you when you said this with the gun? A. His back was turned.

10 Q. When you told him to go home did he turn around? A. Not until he broke away from Eddie Dillon and grabbed me.

Q. What was it you said to him as his back was turned? You are standing there with a gun and you said to him what? What were your words at that time after you armed yourself with the gun? A. "Get out of here; and get out of here quick."

Q. Why did you get the gun? What was your purpose when you armed yourself with the gun? 20 A. To scare him out of the apartment.

Q. To scare him out of the apartment?

The Court: Just a minute. Now, at that time was he, Walters, looking at you and the gun in your hand when you told him to get out?

The Witness: His back was turned to me, your Honor. My brother-in-law was helping him on with his coat.

30 Q. I was just coming to that. You say he didn't turn around until after you ordered him out of the house? A. That is right.

Q. But he did turn around after you told him to get out of there? A. That is right.

Q. When he turned around did he face you? A. Yes; he leaped upon me.

Q. He faced you? As he faced you and leaped upon you you were standing still with the gun in front of you? A. Well, when he started to leap I 40 raised my arms.

Walter Scullion, for Defendant—Direct.

Q. You raised your arms. Did you still have the gun in your hand? A. Right.

Q. You still had the gun in your hand. So that when he leaped upon you, you with the gun in your hand, what next happened? A. He wrestled me across the kitchen and pushed me through a pain of glass.

10

The Court: Now, how far did he push you? What distance across? You say across the kitchen.

The Witness: I would say eight feet, your Honor.

Q. Eight feet. You tried to prevent being pushed through the window? A. That is right.

Q. You went through the glass, did you? A. That is right.

20

Q. What caused you to go through the glass? A. Him pushing me.

Q. Bill Walters pushing you? A. That is right.

Q. Now, step down, please, Mr. Scullion, just a moment. Mr. Scullion, I am you and you are Walters. How were your hands? You put my hands the way yours were with the gun. You put my hands as yours were. I am Scullion. A. I like that (indicating).

Q. In your right hand or the left was the gun? Which? A. Right.

30

Q. Where my pencil is? A. Right.

Q. I am Scullion and I am in this situation. You are Walters. What are you doing? A. Grabbing.

Q. What doing? Driving you back? A. Driving me back.

Q. With power? A. Plenty of power.

Q. Back toward the window? A. Back toward the window.

40

Walter Scullion, for Defendant—Direct.

Q. I go through the glass; I still have the gun in my hand. Now, can you tell the court and jury, Mr. Scullion, if you know, what prevented you from going right through the window and down the areaway? A. My hand had hold of the sash on the sides.

10 Q. Was there any other thing preventing your body going through? A. A sill behind me.

Q. What about something obstructing the progress of your head through the window? A. My head was completely out the window.

Q. Your head was clear? Your head was completely out the window? A. Yes.

Q. And nothing but the grabbing of your fingers on the sash and what hold you had with your knees on the windowsill, correct? A. That is right.

20 Q. Now, at the same time that you were grabbing did you hold on to your gun? A. That is right.

Q. So that you really had the grip of only one hand, had you? A. No. I had two hands. The gun only took up two fingers.

Q. The gun took up two fingers and with the other fingers you gripped? A. That is right.

Q. Holding the gun? A. That is right.

30 Q. How far was your head out of the window? Was your body on a level out or was it on an angle? You see, it must have been on an angle because you still had your fingers on the sash? A. No. It was—I sat right out of the window in a straight line.

Q. But your head was out? A. Yes; that is right.

40 Q. How long were you—withdraw that. While you were in that position, Mr. Scullion, what was Walters doing? A. He still had me by the shoulders.

Walter Scullion, for Defendant—Direct.

Q. He still had you by the shoulders pushing you? A. Pushing me.

Q. With the same amount of power as before? A. That is right.

Q. That was plenty, you say, is that right? A. Yes; that is right.

Q. Now, will you step down here once more? 10
Let us say this is the window sash, the arms of this chair. You still had your gun in your right hand? A. That is right.

Q. You were holding on like this with the gun in the right hand with your head out through the window. Now, tell us just before the shot was fired what Walters was doing to you? You put your hand on me and do it to me. A. Like that (indicating).

Q. Pushing you out like that. You were holding on to the window? A. With my feet out straight. 20

Q. Your wife pulling them in. What did you say at that time, Mr. Scullion? A. Nothing.

Q. Call for help? A. No.

Q. Say, "Let me up; let me up?" A. No. I didn't say anything.

Q. That was what was happening at the time the shot was fired; your head out the windowsill; Walters had his hands as you have your hands on my shoulders, pushing? What were you doing the moment the shot was fired? A. Struggling to get back in the window, on the sash, my finger contracted on the gun. 30

Q. You struggled to get back on the sash like that; trying to pull yourself back; your finger went on the trigger and you pulled it? A. Yes.

Q. And that was the first time you had any relief from Walters' pressure? A. Yes.

Q. How high up on the window sash did you have your two hands at the time the gun went off? 40

Walter Scullion, for Defendant—Direct.

About on a level with the arms of these chairs?

A. No. About even with my head.

Q. About even with your head? A. That is right.

Q. Just as I am now, right? A. That is the relative position, yes, sir.

10 Q. At that moment just about even with your head as my hands are even with my head now? A. That is right.

Q. Just at that moment Walters, you say, was leaning over you pushing you out with his hands pressing on your shoulders and chest? A. Right.

Q. Well, Mr. Scullion, can you explain how it was that the bullet entered the nipple of the left breast if that was the position of the two bodies?

20 Mr. Adelman: I object to that, if your Honor pleases. That calls for a conclusion on the part of the witness.

Mr. Drewen: He can say whether he can explain it or not.

The Court: If he can explain it that is what we want to know.

The Witness: I don't understand whether I can explain that or not.

30 Q. Can't you tell? The gun was in your right hand? A. That is right.

Q. The nearest side of Scullion that was to your right hand—of Walters that was to your right hand was his left side? A. That is right.

Q. So that his left nipple would be nearest to your right hand? A. That is right.

40 Q. Now, how far was his left breast, as you recall it, from your right hand at the moment the shot was fired? Was he leaning right over on you? A. I would say a space of three or four inches in between.

Walter Scullion, for Defendant—Direct.

Q. Three or four inches and you were going out the window slowly? A. That is right.

Q. All the time, weren't you? A. Yes.

Q. Your grip weakening on the window, correct? A. Right.

Q. Finally the shot was fired? A. That is right.

10

Q. Now, all of the time from the moment that you ordered Walters out of the house while Dillon was helping him on with his coat and he turned around you were in his presence, in his immediate presence, with this revolver in your right hand? A. That is right.

Q. Now, isn't it a fact, Mr. Scullion, that before he made a lunge at you in the kitchen and right after you ordered him to go, you having the revolver in your hand, he said he would go out? A. That is right.

20

Q. His first response to your showing the gun was a willingness to go? A. That is right.

Q. Let us get that very carefully. When he turned around and saw you, or, rather, you stood in his presence in front of him with the gun in your hand he said, "All right, I will go?" A. No. He said that when his back was turned.

Q. What did he say when his back was turned? A. He said, "All right, I will go home."

Q. He said, "All right, I will go home?" A. That is right.

30

Q. Then what did you do? You turned? A. I turned my back to him and walked toward the tubs.

Q. Then he made a lunge after you? A. That is right.

Q. And he got in front of you? A. That is right.

Q. You had the gun in your right hand, and you, with the gun in your right hand, were being

40

Walter Scullion, for Defendant—Direct.

pushed by him right back through the window?

A. That is right.

Q. Correct? A. Right.

Q. If that gun had not been fired was there anything to save you from going out through the window and down to the areaway? A. Unless
10 my wife and brother-in-law could have got him off me.

Q. Your brother-in-law ran out to get a policeman. Was there anything beside your wife's efforts of pulling your weight through the window against Walters' pressure to stop you from going out through the window and down in the areaway? A. No.

Q. There was not? A. No.

Q. From the moment that he made a lunge at you and pushed you over the eight feet of kitchen floor toward the window you and he were face to face? A. That is right.
20

Q. You had to be face to face all the time he was trying to push you through the window? A. That is right.

The Court: Well, when was the first time that he faced you when you had the revolver exposed in your right hand? When was that?

30 The Witness: That was just a few seconds after I came out of the living room. I told him to go home. He answered, "All right, I will go."

The Court: I know, but at that time was he looking at you and the gun?

The Witness: No. His back was turned at that time.

40 The Court: All right. Just at what time did he first face the gun so that if he had looked he could have seen it?

Walter Scullion, for Defendant—Direct.

The Witness: He turned around and made a lunge for me. I turned to meet him and that is the time that the gun was in my right hand and we were face to face.

The Court: That was before he started to push you?

The Witness: That was when he started to push me. 10

The Court: He was not right alongside of you at the time he started—he had to come at you in order to push you?

The Witness: He was breaking with my brother-in-law when I turned around to meet him.

The Court: Then during the time that you were being pushed across the room with the gun in your right hand like this (indicating) if he had looked he could have seen the gun? 20

The Witness: That is right.

Q. Did you hear him threaten——

The Court: Did he say anything about the gun?

The Witness: No, your Honor, he didn't.

The Court: Did you say anything about it? 30

The Witness: No.

The Court: Did you say anything to him, such as "If you come any further I will shoot" or anything of that kind?

The Witness: No, sir.

Q. Now, you made a statement, too, to the police, didn't you? A. Right.

Q. Do you remember? I think you made it to Captain Kurth in the presence of Micheal Hangley, is that right? A. That is right. 40

Walter Scullion, for Defendant—Direct.

Q. Now, at the time you made the statement to the police you stated to them the truth of what occurred? A. That is right.

Q. By the way, that is your handwriting, isn't it, to those three pages of statement, Walter Scullion, Walter Scullion and Walter Scullion? A. Yes, sir.

Q. Now, would a reference to that statement refresh your recollection as to this particular incident with regard to your use of the gun? A. I believe it would.

Q. Now, I read to you——

Mr. Drewen: I ask that this be marked for identification.

(The statement above referred to was received and marked Exhibit D-5 for identification.)

Q. I read to you from Exhibit D-5 for identification the following: "I pointed the gun——" "I ran into the kitchen and Bill ran after me." That was after you had the gun, wasn't it? A. Yes.

Q. After you had the gun you ran in the kitchen still trying to get away from him. He ran after you, that is correct, isn't it? A. Yes.

Q. "I pointed the gun at him to scare him." Is that true? A. That is right.

Q. Now, if you pointed the gun at him when he was facing you—didn't you do that? A. No. His back was turned.

Q. You pointed the gun at him as his back was turned? You say you did that? A. Yes.

Q. You said to scare him. "He said, 'All right, I will get out,' and as he said that I turned away and he then made a jump for me." Is that right? A. That is right.

Walter Scullion, for Defendant—Direct.

Q. "He was frothing at the mouth. He grabbed me and wrestled me to the kitchen window and pushed me backward through the window." So that all the time from the instant that he turned after you had pointed the gun at him—from the instant that he turned around after you pointed the gun at him until it was fired, he was in the immediate presence of the gun in your hand, wasn't he? A. Yes. 10

Q. And faced with it? A. Yes, sir.

Q. With the gun in your hand? A. Right.

Q. Is that right? A. Right.

Q. I don't know whether I asked you whether or not you heard him threaten to kill anybody in the house that night? A. I didn't hear that.

Q. Did you hear Walters threaten to kill anyone that night while in your house? A. Yes. 20

Q. Whom did he threaten to kill? A. He threatened to kill my wife.

Q. What part of the evening was it when that happened? Was that after his own wife had gone home? A. Yes.

Q. What did he say to your wife? What were the words in which that threat was conveyed? A. I can't recall at this late date.

Q. You say you don't recall. Referring again to Exhibit D-5—you don't recall the language he had used to your wife—you told the police what he used to your wife, didn't you? A. That is right. 30

Q. Would that refresh your recollection? A. Yes, it would.

Q. He called your wife a prostitute, didn't he? A. That is right.

Q. And a rotten bitch? A. That is right.

Q. While you stood by listening? A. That is right. 40

Walter Scullion, for Defendant—Cross.

Q. Now, then, don't you remember that he threatened also to kill you when he was tearing the trousers from you? Would this refresh your recollection? A. Yes.

10 Q. "Then he made a lunge for me. He started to beat me. I broke away from him. I ran into the next room, the sitting room, and he ran after me and threw me on the settee and hit me in the eye and tore my clothes. He said, 'I will kill you, you son-of-a-bitch'." A. That is right.

Q. He said that to you? A. That is right.

Q. "Eddie Dillon grabbed him and tried to pull him off me and he turned—and I got up. There was a little pearl handled revolver on the sitting room table and I grabbed it and ran out in the kitchen." Is that right? A. That is right.

20 Q. "I intended to shoot it off when the whistles blew—" never mind.

Mr. Drewen: That is all.

Cross-examination by Mr. Adelman:

Q. Were you arrested in this case, Mr. Scullion? A. Yes, sir.

Q. Charged with what? A. Murder.

Q. What happened to you?

30 Mr. Drewen: We will admit the Judge directed a verdict of acquittal.

Q. At the time of this arrest did you make statements to the police and Prosecutor's office? A. That is right.

Q. And is this the statement that was for the police? A. That is right.

40 Q. At that time you knew you were being charged with murder, didn't you? A. That is right.

Walter Scullion, for Defendant—Cross.

Q. Are there any statements in this written paper called D-5 for Identification which were made by you for the purpose of preparing a defense at the criminal trial? A. No, sir; that was the truth.

Q. At the time when Walters came into your house what was his condition? A. I answered that before. I said that he had been drinking but not to excess. 10

Q. What? A. He had been drinking but not to excess.

Q. Was he drunk when he came into your house? A. No.

Q. Did he continue drinking after he got there? A. Yes.

Q. To excess? A. Well, moderately, I would say, all night. 20

Q. Did he bring this Italian wine with him? A. Yes.

Q. Did you drink any of it? A. No.

Q. In the course of his drinking did he become abusive? A. Not until the specified time when he had the argument with his wife.

Q. What were you talking about all this time between the time he arrived there and the incident occurred? A. The usual thing you talk about in a family gathering, baseball, weather and so on. 30

Q. No arguments of any kind? A. None at all.

Q. No discussions? A. No.

Q. Had you ever had any trouble with Walters before this night?

Mr. Drewen: Objected to.

The Court: What difference does it make? You are not trying a homicide case.

Mr. Adelman: I will withdraw the question. 40

Walter Scullion, for Defendant—Cross.

Q. You were very friendly with Walters, weren't you? A. That is right.

Q. Had you ever seen him drunk before? No.

Q. What precipitated this quarrel in your house? A. Argument with his wife.

10 Q. What was the argument? Were you in the room? A. I was close by. I could hear what was going on.

Q. Were you in the room? A. I don't recall whether I was just in that particular room or not.

20 Q. What was the quarrel with the wife? What was said? Tell us what happened? A. Well, he told his wife he wanted to go home in his own home; he didn't want to stay there for the night. He had previously arranged to come there that night and stay for the New Year's dinner the next day but he had changed his mind for some reason or other and wanted to go back home at that time, which was one thirty or two o'clock in the morning. She didn't agree with the idea and they were having quite a discussion about it. He finally picked up the child and threw him out the door and she got dressed; dressed the boy after my wife had pulled him in from the hall and went over to her mother's.

30 Q. Were you in court when your wife testified? A. Yes.

Q. Did you hear your wife testify he pushed the child in the hall? A. Well, pushed or threw.

Q. Which is it, pushed or threw? A. I don't know whether I can define the difference between pushed and threw. The boy was not injured, so he couldn't have been thrown bodily into the hall.

Q. You said he threw the child into the hall. Did he pick him up bodily? A. I will change it to "pushed him out."

40 Q. What do you want to change it to? A. He forced him out the door.

Walter Scullion, for Defendant—Cross.

Q. He pushed him out, is that it? A. That is right.

Q. Was the child dressed or undressed? A. In his night clothes.

Q. What happened then? A. Why, my wife called him down for the treatment of his child and his wife.

10

Q. What did he say or do? A. He said that he was sick of her interfering in his business and that he was sick of his in-laws interfering in his business, anyway.

Q. Was he speaking in a coherent manner or befuddled? A. I don't know.

Q. Would you say that he was drunk at the time? A. He was drunk, yes.

Q. At the time when this occurred. Where was your wife in the kitchen at the time? A. In the kitchen.

20

Q. And he was there too? A. That is right.

Q. Where were you? A. In the kitchen.

Q. Where were you in the kitchen? A. Sitting on a chair with my three and a half year old boy on my knee.

Q. What did your wife do after this incident, after he got into a quarrel with her? Did she brush him aside to get away from him? A. No. She called him down.

30

Q. What did he do in response to that? A. Well, he pushed her aside, tore her dress and struck her in the face.

Q. What did he strike her with? A. With his hand.

Q. Fist or open hand? A. I couldn't say.

Q. What did you do? A. I got up off the chair and grabbed him by the arm and tried to lead him out the door.

40

Walter Scullion, for Defendant—Cross.

Q. Was there anybody else in the kitchen at that time? A. Eddie Dillon had just come in at that time.

Q. Did he help you try to get him out the door? A. Yes.

10 Q. How did you try to get him out? A. By the arms.

Q. One on each side? A. That is right; tried to force him out.

Q. Was he struggling against you? A. That is right.

Q. What did he do to you? A. Well, he turned on me and struck me and I broke away from him and went into the living room.

Q. What did Dillon do at that time? A. Nothing—I don't know.

20 Q. When he broke away from you and he struck you just where did he strike you? A. On the body.

Q. In the body? A. Right.

Q. You turned around and went away from him? A. That is right.

Q. Had he let go of you completely? A. No. I broke away from him.

Q. Did he still have hold of you? A. No.

30 Q. You heard your wife testify, and Mr. Dillon testify, that there was some wrestling. Now, did he break away from you or did he wrestle? A. I was clear of him and went into the living room.

Q. In the living room what happened? A. Well, he was right close behind me; threw me down on the settee; struck me in the eye and tore my trousers.

40 Q. Just when in the evening did this gun come into the—make its appearance? A. Ten o'clock in the evening I placed the gun on the living room table.

Walter Scullion, for Defendant—Cross.

- Q. Where? A. On the living room table.
- Q. Was that gun loaded at the time you placed it there? A. No, sir.
- Q. Was it unloaded? A. Right.
- Q. How do you know? A. Well, I never loaded it.
- Q. Well, when you put it away—strike it out. 10
Did you examine it to see if it was loaded or unloaded? A. Yes.
- Q. At the time you brought it out? A. No.
- Q. When was the last time prior to this shooting that you examined the gun? A. I would say a week or ten days.
- Q. Was it unloaded after you last handled it?
A. That is right.
- Q. Did you have any cartridges for it? A. Yes.
- Q. Where were they? A. On the living room 20
table.
- Q. Who put them there? A. I did.
- Q. When? A. At ten o'clock at night.
- Q. When you brought the gun out? A. That is right.
- Q. Did you place any of the cartridges in the revolver chambers? A. No.
- Q. Did Walters? A. No.
- Q. Did Walters or you handle that gun after it was placed on the table? A. No. 30
- Q. Were you always with Walters at all times that evening? A. No.
- Q. Do you know whether he handled it or not? A. Not to my knowledge.
- Q. What was the purpose of having the gun there? A. We were going to celebrate the advent of the New Year.
- Q. When was that? A. Twelve o'clock.
- Q. Did you celebrate the new year? A. No. We 40
abandoned the idea.

Walter Scullion, for Defendant—Cross.

Q. Did you shoot the gun or discharge it at all between the time you brought it out and the time of this shooting? A. No.

Q. Did Walters handle that gun after you first brought it out? A. Not to my knowledge.

Q. Or discharge it? A. Not to my knowledge.

10 Q. Were there any bullets in the gun besides the bullet that did the killing? A. No.

Q. Only one shell? A. The police would know more about that than I would.

Q. Did you see the gun after the shooting? A. No.

Q. Did you examine it after it? A. No.

Q. You testified that you were sitting on the settee with your back straight up and Mr. Walters was tumbling you on the settee, is that correct?

20 A. That is right.

Q. You were reclining? A. No.

Q. Leaning over? A. No.

Q. Just came in and struck you? A. That is right.

Q. In the eye. And who was with him? A. Just him alone.

Q. Was Dillon with him? A. No. Dillon was in the kitchen.

Q. Did Dillon come in and pull him off you?

30 A. Yes.

Q. Did he jump on you on the settee? A. No.

Q. Just leaned over and hit you. How did your trousers come to be torn? A. He grabbed them with his hand.

Q. What? A. While I was on the settee.

Q. After he struck you in the eye or before? A. After he struck me.

40 Q. What did he do when he had his hands on your trousers? What did he do with them, or what did he do when he had his hands on your

Walter Scullion, for Defendant—Cross.

pocket trying to lift you up? A. Pulled the pocket and tore the trousers.

Q. He didn't try to lift you up, did he? A. I don't know what his idea was.

Q. Did he strike you after that? A. No.

Q. Just one blow on the settee? A. That is right.

Q. Then what happened? A. Well, Edward Dillon pulled him off me and he got him out into the kitchen.

Q. Then what did you do? A. I picked up the .32 revolved and went out after him.

Q. Into the kitchen? A. Right.

Q. You passed through. I show you photograph P-9 and ask you where in the kitchen Walters was when you came out of the living room? A. I would say right here (indicating).

Q. Indicating in front of the gas range? A. No. On the side, across the kitchen here.

Q. To the left of the gas range? A. That is right.

Q. Was that point that you indicated near the exit—entrance and exit door to the apartment going into the hall? A. Yes.

Q. How many feet away? A. About three feet.

Q. What was he doing there? A. Edward Dillon was helping him on with his overcoat.

Q. Facing which way? Which way was Walters facing? A. I don't know. I can't recall right now.

Q. Which way was Walters facing at the time when you came out of that living room into the kitchen? Was he facing you? A. Yes, he was facing me.

Q. Who was between you and Walters? A. No one.

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Walter Scullion, for Defendant—Cross.

Q. You testified, as I believe, on your direct examination, that Dillon was between you and Walters.

Mr. Drewen: There is no such testimony.

The Court: He didn't say so; not this witness.

10

Mr. Adelman: If your Honor please, I believe that he did when telling his story.

Mr. Drewen: He said that Dillon was putting his coat on. If anybody was between him and Dillon he didn't say.

Q. Was Dillon putting on his coat facing you?

A. Yes, sir.

Q. Did Walters look at you at all? A. I couldn't say.

20

Q. Did Walters make any statement to you or any remark? A. He said, "Yes, all right, I will go home."

Q. In response to what? A. My orders to go home.

Q. Did you directly point this pistol at Walters at that time or any other time, aim it at him? A. I pointed it at him.

Q. Did he see you point it at him? A. I couldn't say.

30

Q. Was he looking at you when you pointed it at him? A. I don't believe I was looking at him.

Mr. Drewen: What is that?

The Witness: I don't believe I was looking at him.

Q. Well, you pointed it. Didn't you know where you were pointing it to? A. Yes.

Q. Where were you pointing it? A. At him.

40

Q. Well, did you know that you were pointing it at him? A. Yes.

Walter Scullion, for Defendant—Cross.

Q. Did you intend to point it at him? A. Yes.

Q. Dillon was helping him on with his coat, you testified. A. Right.

Q. You told him to get out then, didn't you?
A. Yes, sir.

Q. He brushed Dillon aside and jumped on you?
A. Yes, sir. 10

Q. Now, just where was the gun at the time he jumped on you? A. In my right hand.

Q. Where was your right hand? A. When he jumped on me I turned; put my arms up to protect myself.

Q. Before he jumped at you where was the right arm? Was it down, hanging down behind you? A. Down like this (indicating).

Q. And he jumped at you? A. That is right.

Q. What happened then? A. He grabbed me 20
by the shoulder; pushed me across the room.

Q. He pushed you across this room. I want you to look at this photograph. Tell me how many windows there are there. A. Two.

Q. There is a double window? A. Right.

Q. It is not quite clear on this photograph that there are two windows.

Mr. Drewen: I think you can distinguish it. 30

Q. Which window did he push you out, the one on the right in which the wash tub is in front of, or the one to the left? A. The one to the right.

Q. Where the wash tub is? A. That is right.

Q. Where you were hanging out, at that point you had to be leaning out at an angle? A. No, not necessarily.

Q. How big is that distance between the wash tub and the sill? A. In what way do you mean? 40

Walter Scullion, for Defendant—Cross.

Q. Horizontally. From the edge of the wash tub to the sill how much space was there intervening? A. It is very close.

Q. Yet through that close space he pushed you out this window? A. That is right.

Q. Backwards? A. Backwards.

10 Q. Through the window to the extreme right? A. That is right.

Q. Now, just where did you hang on to this window? To the window sill? A. No, to the sash.

Q. To the frame on the side? A. That is right.

Q. Where was your head? A. Right out in the shaft.

Q. You heard your wife and Mr. Dillon testify your head was against that frame, the cross bar. Are they correct or are you correct? A. I am
20 correct.

Q. Did you say to Walters at any time when you pointed this gun at him if he didn't get out you would kill him? A. No.

Q. Did you say to him at any time if he didn't leave you alone you would kill him? A. No.

Q. Did you threaten him at all with the gun? A. No.

The Court: You mean with words?

30 Mr. Adelman: With words and by actions.

Q. Did you threaten him by any actions?

Mr. Drewen: I object to action. That calls for a conclusion. If a man points a gun at a man that does its own talking.

The Court: Sustain the objection. It evidently did.

40 Q. You were quite excited that night, weren't you, when this quarrel was going on? A. I didn't get that.

*Walter Scullion, for Defendant—Re-direct—
Re-cross.*

Q. You were very much excited? A. Yes.

Q. So was Mr. Walters, wasn't he? A. Yes.

Q. Is it likely you could have forgotten just what happened there in the excitement? A. I doubt it very much.

Q. In your statement to the police the next day—you made several statements to the police and the Prosecutor, didn't you? A. Only one, I believe. 10

Q. Did you discuss this previously—strike it out. Were you taken into custody immediately? A. Yes, within a few minutes after the shooting.

Q. Did you have counsel represent you at the time any of these statements were made? A. No.

Re-direct examination by Mr. Drewen: 20

Q. Mr. Scullion, just one question: What is the drop from outside of that kitchen window down to the pit of the areaway? A. I would say fourteen feet.

Q. Fourteen feet. Thank you. That is all.

Re-cross-examination by Mr. Adelman:

Q. This window sill in the kitchen was how high from the floor? A. I would say about eighteen inches. 30

Q. So that if you were being pushed across this room the window sill would catch you right at the knee, is that correct, or slightly below the knee? A. The knee, or slightly below.

Q. If you were pushed back this would trip you, is that right? A. Right.

Q. Is that why you went through the glass? A. Well, it was the line of least resistance.

Q. Is that why you went through the glass? A. Yes, sir. 40

Walter Scullion, for Defendant—Re-cross.

Q. That you were being pushed out this window? A. That is right.

Q. And there was no other place for you to go? A. That is right.

By Mr. Drewen:

10 Q. Is this table upon which you say the gun had been lying since ten o'clock shown in P-11? Is that the living room table there? A. That is right.

Q. Is that the table on which the gun was lying? A. That is right. This hall lamp turned over.

Q. Where is the settee in that room on which you were lying when you were struck? A. Right here.

20 Q. Both the settee and the table are shown in the room? A. That is right.

Juror Number Two: Can I ask one question, if it is in order?

The Court: Yes.

Juror Number Two: Had you been drinking that night?

The Witness: Very much.

Juror Number Two: All of you?

30 Mr. Drewen: Had who been drinking? Had he been drinking that night?

The Witness: Yes.

Juror Number Two: All of you?

The Witness: Yes.

Q. Were you in your senses? Were you intoxicated yourself? A. No. I had quite a few drinks but not so far gone that I lost my senses.

Q. But not so far gone that you had lost your senses, is that what you say? A. That is right.

40

Motion for a Direction of a Verdict.

Q. So that you were in possession of your normal faculties? A. That is right.

Q. There was quite some excitement there?

Mr. Drewen: That has already been asked and answered.

The Court: Sustain the objection.

Mr. Adelman: I just want to lead up to another point—just a moment.

10

The Court: Don't lead up; get there.

Q. Were you excited that night?

Mr. Drewen: He has already asked that question; the witness has already testified.

The Court: Yes. He has told us that and admitted it and he says that the other party was also excited.

20

Q. How many drinks had you had? A. I couldn't say.

Q. Did you have as much as Walters or more? A. I couldn't say that, either. I don't know what the man had before he seen me.

Q. In your house did he have as many as you or did you match drinks? A. I would say we were about even.

Q. He came into the house in what condition? A. With drink on him.

30

Mr. Drewen: If your Honor please, I rest my case and ask for a direction of a verdict in favor of the defendant on the ground that in the present posture of the proofs it is evident that the decedent insured had every reason under normal standards of responsibility to apprehend the result of his conduct which actually occurred. A gun was pointed at him face to face. He was

40

Motion for a Direction of a Verdict.

10 faced with a man, who in his right hand held like this, had a gun. Having already threatened to kill this man, he pushed the man through a window that was fourteen feet above the concrete bottomed areaway and pushed him until a fall through the window was imminent and until the only thing that could save the man from going through the window was the disabling of the assailant. It seems to me there is nothing from which it is possible or reasonable to draw any inference that the assailant, insured, was not bound to anticipate as a reasonable consequence of what he was doing the consequence that actually did befall him.

20 And, also, I urge for the record the other ground that there is no evidence here that there was any proof of accidental death submitted to the defendant.

 The Court: Are you urging this latter reason as a reason for a direction?

 Mr. Drewen: I urge them both.

30 In addition to the grounds for direction I stated at the close of the whole case, I want to urge those that I urged on my motion for a nonsuit.

 The Court: Well, they are the same.

40 Mr. Adelman: I might call your Honor's attention, it was counsel's intention on rebuttal to take the stand. In regard to this letter from the insurance company, under the Guarraia case I hold it is a waiver and I believe it to be. (Referring to Exhibits P-5 and P-6 for identification and P-9, being a letter from Mr. Hyatt of the Prudential Insurance Company heretofore referred to.)

Motion for a Direction of a Verdict.

The Court: Is that in evidence?

Mr. Adelman: I wanted—inasmuch as we identified that I anticipated coming in on rebuttal.

The Court: Of course, Mr. Drewen rather anticipated and gave you no opportunity, much, for rebuttal. If you wish to do it, you may. Probably Mr. Drewen will admit the letter was sent. I don't know. 10

Mr. Drewen: I admit they were sent. I say they have no materiality to the issue.

Mr. Adelman: If they are admitted I would like to offer them in evidence.

Mr. Drewen: I object on the ground they are immaterial and irrelevant. By the way, what is the posture of the case? Is it opened or closed? 20

Mr. Adelman: You made a motion.

The Court: You started to move without his being asked whether he had any rebuttal.

Mr. Adelman: Under *Guarraia vs. Metropolitan Life*, 90 N. J. L., I should like to call your Honor's attention to the facts in that case. It was a Court of Errors and Appeals case.

"The plaintiff failed to show any proof of death. There was no formal proof of it, but the plaintiff relied on a letter of the insurance company declining to pay the policy because it had been procured in fraud or misrepresentation, and claimed that this was a waiver of the proof of death. This is attacked on the authority of an unreported opinion of a Justice of this court which is quoted in the brief. We do not know the facts in that case and cannot tell whether 30
40

Motion for a Direction of a Verdict.

10 it covers the present situation, but are inclined to say that under the terms of this policy such a letter may be considered a waiver. The policy fixes no time in which the proofs of death are to be submitted, so that they could be presented within any reasonable time; and, consequently, when some three months after the death, the lawyer wrote to the company asking whether the claim was going to be paid and the company said: 'No, we don't propose to pay because the policy was procured in fraud;' it should not be held necessary for the claimant thereafter to put in proof which would be entirely nugatory."

20 The Court: There is no doubt about the soundness of that proposition. I don't understand Mr. Drewen would argue against it. P-9 for identification I don't think is evidential.

Mr. Drewen: The ground for direction of verdict relating to proofs is withdrawn.

The Court: However, I think that these letters should be marked in evidence.

30 (The letters heretofore marked P-5 and P-6 for identification were received and marked in evidence P-5 and P-6.)

The Court: It is only to give a basis if anyone looks over Mr. Drewen's record—he will have a basis for withdrawing his objection. It will have no point with the jury.

40 I assume that your motion now is that I direct a verdict for the defendant on the ground that it now appears as a court question that the death in this case was not due to accidental means?

Motion for a Direction of a Verdict.

Mr. Drewen: And that there is no conflict in the testimony.

I add to the motion for directed verdict the language of the policy which reads:

“No accidental death benefits shall be payable if the death of the insured results directly or indirectly from bodily or mental infirmity or disease in any form;” 10

my point being that even if the death, aside from all other features in the case, is said to be attributable to the insured's state of mind caused from liquor, nevertheless it cannot within the terms of the policy be regarded as accidental, and on this feature of the case there is no conflict in the proof.

The Court: You wish that to be added to the other reasons for direction? 20

Mr. Drewen: Yes.

The Court: Well, I think I shall have to deny your motion in view of the testimony that was produced on the part of the plaintiff and I will allow you an exception.

Mr. Drewen: I ask an exception.

(Recess until 2 p. m.)

(After recess 2 p. m.)

(Counsel summed up to the jury.) 30

Mr. Drewen (interrupting the summation of counsel for the plaintiff): I object to counsel making a statement of that sort. Your Honor has ruled. Your Honor rules on your own judicial responsibility. They had the place in this trial that was given to them and no other.

The Court: I didn't hear what he said, so I cannot rule. 40

Charge.

10 Mr. Drewen: I will state to your Honor what he said. He said that these statements, the very statements with which the witnesses refreshed their memory and the statements which they admitted are true—he said they had no place in this trial; he doesn't know how they got here.

The Court: Well, of course, he can't say that because they have a very material place in the trial.

Mr. Drewen (again interrupting the summation of counsel for the plaintiff): If your Honor please, just a moment. That is a deliberate violation of the rules of law.

20 The Court: That is a deliberate appeal to the passion and prejudice and sympathy of the jury. That has no place, as you well know, in this case whether she has any children or not. It is a cold cut proposition, that is all.

Mr. Adelman: I beg your Honor's pardon.

Charge.

30 The Court thereupon charged the jury as follows:

The Court: Gentlemen of the jury:

I think that it is quite essential that you take with you to the jury room a very clear understanding of what this action is about. It is not an action to determine whether or not Mr. Scullion, who has been on the stand here, was guilty of murder. We are not trying a homicide case. It is true that Mr. Scullion killed his brother-in-law,
40 William Walters, but whether he was justified in

Charge.

so doing is not the important question that we have to decide here as the cause of action in this case. The death of Walters has brought this case into this Court, but it is here because of a contract made between Mr. Walters and the Prudential Insurance Company, because the complaint in this case charges that the Prudential Insurance Company of America issued an insurance policy to William Walters insuring him generally in the case of death to the extent of two thousand dollars; but giving double indemnity liability in the event that death occurred by accidental means.

10

And, so, generally speaking, without reading in detail at this moment the details of the provisions of the policy directly involved in this case, it is sufficient to direct your attention to the fact that the action is brought by Viola E. Walters as the beneficiary named in this insurance policy issued by the Prudential Insurance Company of America to William Walters, and she, Viola E. Walters, appears here as plaintiff claiming from the Prudential Insurance Company of America the sum of \$2,000, being the double indemnity specified in the policy, plus interest thereon from the date of Mr. Walters' death, which occurred on January 1, 1929, down to the present day.

20

So you see, we are not to decide whether or not Mr. Scullion was justified in killing Mr. Walters as bearing upon the question of his guilt or innocence of murder, although it is to be considered, of course, in the questions which I am presently to discuss with you. I say this because I don't want you to go out of the jury box with the impression that you have to find out whether Mr. Scullion was guilty or not guilty of murder. That is all that I have addressed my remarks to so far.

30

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Charge.

Now, this insurance policy and the provisions thereof upon which this action is based reads as follows:

“The amount of accidental death benefits specified on the first page hereof——”

10 and that is the sum of two thousand dollars——
“shall be payable in addition to the face
amount of insurance immediately upon receipt of due proof that the death of the insured occurred during the continuance of this policy while there was no default in the payment of premium, as a result directly and independently of all other causes of bodily injuries affected solely through
20 external, violent and accidental means of which, except in case of drowning or of internal injuries revealed by an autopsy, there is a visible contusion or wound on the exterior of the body and that such death occurred within sixty days of the accident; provided, however, that no accidental death benefit shall be payable if the death of the insured resulted from suicide, whether sane or insane; from having been engaged in
30 aviation or submarine operations or in military or naval service in time of war or from a state of war, riot or insurrection or directly or indirectly from bodily or mental infirmity or disease in any form.”

So, gentlemen, the question presented is whether the death of Mr. Walters was a result directly and independently of all other causes of bodily injury effected solely through external, violent and accidental means within the terms of the
40 policy which I have just quoted to you.

Charge.

The plaintiff has the burden of proving by a fair preponderance of the evidence that the insured's—that is, Mr. Walters'—death was the result of violent, external and accidental means within the provisions of the policy which I have just read to you; and this burden rests upon the plaintiff throughout the entire case.

10

It is true that if a *prima facie* case is made out it is the duty of the defendant to submit evidence to offset the plaintiff's case, and where there is new matter pleaded by the defendant it is his duty to go forward with the new matter; but the burden of proof to establish that death resulted from accidental means within the express terms of the policy as I have read them to you remains with the plaintiff.

The issue in this case is, did the plaintiff's decedent meet his death by accidental means as limited in the policy in question? Now, I bring that up on this burden of proof because a very recent case of *Kresse v. Metropolitan Life Insurance Company*, 111 New Jersey Law, 447, lays down the rules very clearly. Now, what is meant by accidental means? Now, you would have little difficulty in deciding that in the event of a person walking down the street, dropping dead on the sidewalk, found to have been killed by a bullet from a revolver shot by some person unknown to the deceased—that that was an accidental death, and no one would claim it to be otherwise; but, you see, gentlemen, in this case you have an entirely different situation presented because here there was evidently an altercation preceding the death of Mr. Walters, to say the least. So you have involved here the conduct of Mr. Walters in conjunction with the conduct of his brother-in-law, Mr. Scullion, to consider to determine whether or

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Charge.

not the death here resulted from accidental means; and, therefore, you have to go a little further and know exactly what is meant by accidental means. Now, fortunately our Court of Errors and Appeals in a recent case has said: "A chance hap-
 10 pening, commonly called an accident, may occur otherwise than by accidental means." The distinction is drawn out in *United States Mutual Accident Association vs. Barry*, referring to a case in the United States Supreme Court, where it was said that if a result is such as follows from ordinary means employed in a not unusual or unexpected way it cannot be called a result effected by acci-
 20 dental means; but if in the act which precedes the injury something unforeseen, unexpected and unusual occurs which produces the injury, then the injury has resulted through accidental means.

Now, the word "accidental" is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequences of means used are the consequences which ordinarily follow from their use; the result which will be reasonably anticipated from their use and which ought to be expected. The probable consequences of the use of given means is the consequence which is more likely to follow from their
 30 use than it is to fail to follow. The effect which is the natural and probable consequence of an act or course of action is not accidental nor is it produced by accidental means. It is either the result of actual design or it fails under the maxim that every man must be held to attend the natural and probable consequences of his deeds.

Now, in this case, gentlemen, if the effect produced by the conduct of the insured, Walters, was such that the decedent could reasonably have
 40 foreseen it as the natural and probable conse-

Charge.

quence resulting from his own voluntary conduct; a probable result that he ought reasonably to have expected or anticipated in view of all the circumstances, then the insured's death was not due to an accident.

Now, you see, gentlemen, in applying these definitions to determine whether or not the death of Mr. Walters was the result of accident or followed from accidental means, you have to have an exact agreement here as to just what occurred on this night in question. You must agree upon the circumstances and the inferences that may be drawn logically therefrom. Now, you can very well see—by way of explanation—that if Mr. Walters on this eventful night deliberately faced a loaded revolver—if he deliberately faced a condition that would in any way convey to his mind under the circumstances that the natural and probable consequences of his conduct would be his death, can't you see that he would then not be the victim of an accident, but he would be exposing himself voluntarily to his own death, and, therefore, under such circumstances—which I am giving to you purely by way of illustration of the point that I make with regard to whether or not his death was caused by accidental means—under such circumstances you might find that it was a natural consequence to flow from this conduct.

Now, gentlemen, remembering, as I have said, that the plaintiff must satisfy you by the greater weight of the evidence here that the death of this decedent, Mr. Walters, brought him within the provisions of this policy that I have read to you, if you find that the plaintiff has failed to bear that burden of proof, your verdict should be for the defendant and against the plaintiff, a verdict of no cause of action.

Charge.

On the other hand, if you find that the plaintiff has borne that burden of proof your verdict should be for the plaintiff and against the defendant.

10 Now, if your verdict is for the plaintiff and against the defendant, it will be very easy to determine what the amount is. The plaintiff would be entitled to the principal of the policy, two thousand dollars, plus interest thereon from the date of the death of Mr. Walters at six percent. I figure that that would be approximately six years and six months and would make the interest come to approximately \$780, which added to the \$2,000 would give a total of \$2,780. I am not vouching for the accuracy of these figures. How-
20 ever you will be governed by what you may figure the interest to be.

On the other hand, if you find that the defendant is to have the verdict, it would be expressed by saying "we find in favor of the defendant and against the plaintiff, a verdict of no cause of action."

Now, before you retire I wish to comment upon a situation which arose during the course of the trial. The attorney for the defendant moved the court for a nonsuit and then for a direction of a
30 verdict in favor of this defendant, which motions were denied by the court. I am commenting upon this because I sometimes feel jurors get the idea the court feels the verdict should be for or against a certain person by reason of the court's denial of motions that may be made. Now, in denying these motions the court was not conveying to you the idea that the court felt that your verdict should be for the plaintiff and against the defendant any more than you are to take from anything the
40 court has said that the court feels your verdict

Charge.

should be for the defendant and against the plaintiff. The court is not concerned with that. That is peculiarly your duty to decide who shall have the verdict; and in deciding these motions the court was deciding that this was a case where there were conflicting questions of fact and inferences that would have to be decided by you before the law could be applied. Now, it is only where there is no dispute that the court can apply the law and therefore direct a verdict. So, the court has—where questions of fact are involved—the duty of leaving to you the decisions on the questions of fact, but you are to take the rules of law that the court gives you and apply them to the facts as you find them and let that leave you where it will. If you do that and do it conscientiously and according to the oath each one of you has taken here, your verdict will be a right one no matter for which side it may be rendered; and it follows from what I just now said that you are not to allow passion, prejudice or sympathy to enter into the rendition of your verdict. These parties stand before you equally in the eyes of the law and it is only through the presentation of evidence and the decision of questions of fact and inferences and the application of the law to the result found from the facts that justice can be obtained. And, so, when you take this case and go to the jury room you are not to be influenced by the court's denial of the motions here. That occurs every day and verdicts are rendered one way or another regardless of how the court rules upon the questions of motion. When you come back from the jury room if you find for the plaintiff and against the defendant render your verdict by saying, "We find for the plaintiff and against the defendant—" and assess the damages at so

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Charge.

much money, including the principal of the policy plus the interest, as I have indicated, at six per cent.

On the other hand, if your verdict is for the defendant it will be expressed simply by saying, "We find for the defendant and against the plaintiff, a verdict of no cause of action."

An officer may be sworn; you may now retire.

Mr. Drewen: I except to that portion of the court's charge wherein the court said, "whether Scullion was justified in so doing is not the important question you have to decide here as the cause of action in this case."

I also except to that portion of the court's charge where the court said, "So, you see, you are not to decide whether Mr. Scullion was justified in killing Walters as bearing upon the question of his guilt or innocence of murder."

The Court: What could be wrong about that? I was trying to help you, saying this was not a murder case.

Mr. Drewen: I tell you frankly, Judge, my exception is not referred to murder. My exception is based on the question of justification. It is not a question of whether Mr. Scullion was justified in killing Walters. My theory was and is in the extremity which was created according to the evidence, the man himself being face to face with death, whether or not he would not be justified, and if he was justified in that situation that is created, that would take it out of the realm of accident, according to my theory.

The Court: Of course, we are not discussing that in that part of the charge yet.

Mr. Drewen: I am quoting what your Honor actually said, that is all.

I except to that portion of the court's charge wherein the court said, "You have the conduct of

Charge.

Walters in conjunction with the conduct of his brother-in-law to consider in determining whether or not the death resulted from—" withdraw that exception.

I except to that portion of the court's charge wherein the court said if the effect of the conduct of the insured would be that he could reasonably have seen the result of his conduct; that ought to have reasonably conveyed an anticipation of the result from all the circumstances, then the insured's death was not due to an accident. My reason for that is that I thought it was constricting it too closely to the question of Walters' own apprehension entirely apart from justification on Scullion's part in these circumstances.

10

The Court: I thought I said it was merely an example.

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Mr. Drewen: You did say that. You said I am giving you this as an illustration.

Mr. Drewen: I except to that portion of the courts charge wherein the court said "If he, Walters, faced a loaded revolver; if he deliberately faced a condition that would convey to his mind under the circumstances that the natural and probable consequences of his conduct would be his death, can't you see he would then not be the victim of an accident, but he would be exposing himself voluntarily to his own death." There I except for the same reasons. It is confining it to his own mental deliberateness in looking into a revolver entirely apart from justification on the side of Scullion.

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That is all I have to say.

The Court (addressing the jury): At the outset of my charge I drew your attention to the fact that this was not a homicide case in the sense you were deciding whether or not Mr. Scullion were

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Charge.

10 guilty of murder. I may have said that whether or not he was justified in killing Mr. Walters was not the important question to be decided. Well, of course, that enters into the balance of my charge, but at that particular time I intended to qualify it and thought I did qualify it by merely saying that this was not a charge of murder that we were deciding; so that you are not concerned with the justification so far as the murder case would be concerned.

20 Now, throughout my charge—if there has been any misapprehension about it—I might say that, of course, the question of justification enters into this question of whether or not under all the circumstances of the case this death was an accidental death. I did not mean to exclude from your consideration thereby the matter that I alluded to. I was directing your attention to the fact that this case was not based upon a charge of murder so that we were deciding whether a murder had been committed because justification is probably a defense in a case of murder.

30 Later on in the charge I referred to a situation which I gave you to explain a point that I had previously made, and referred to the apprehensions which Walters may have had. I did not mean to confine you only to a consideration of Mr. Walters' apprehensions at that particular time disassociated from the conduct and the justification that might have been found in Mr. Scullion's situation. I was merely using that language in conjunction with this illustration that I had given you. I did not mean to restrict it.

(The jury thereupon retired.)

Exhibit P-1.**Demand for Admissions.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY CIRCUIT.

10

VIOLA E. WALTERS,
Plaintiff,

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,
Defendant.

Action at Law.

Notice of Demand
for Admissions.

20

*To the Defendant, The Prudential Insurance Com-
pany of America, a corporation:*

PLEASE TAKE NOTICE that the plaintiff demands
of you, within five days after service of this notice
upon you, written admissions to the following:

1. That the defendant issued Policy No. 4897977. 30
2. That Viola E. Walters is the beneficiary
named therein.
3. That the said policy contained the following
clause that the amount of the accidental death
benefit shall be payable in addition to the face
amount of insurance immediately upon receipt of
due proof that the death of the insured occurred
during the continuance of the policy, while there 40

Exhibit P-1.

10 was no default in the payment of premiums, as a result, directly and independently of all other causes, of bodily injuries effected solely through external, violent and accidental means, of which, except in the case of drowning or internal injuries revealed by an autopsy, there is a visible contusion or wound on the exterior of the body, and that such death occur within sixty days of the accident; provided, however, that no accidental death benefit shall be payable if the death of the insured resulted from suicide, whether sane or insane, from having been engaged in aviation or submarine operations, or in military or naval service in time of war, or from a state of war, riot or insurrection, or directly or indirectly from bodily or mental infirmity or disease in any form.

20 4. That premium due on said policy, from its date, to the time of death of insured was fully paid.

5. That the insured, William B. Walters, died on January 1st, 1929.

6. That the defendant was notified of the death of the insured, William B. Walters.

30 7. That proper proofs of death of the insured, William B. Walters, was made to the defendant at, or about, a short time after the death occurred.

8. That the defendant paid to the beneficiary named in the said Policy No. 4897977, to wit, Viola E. Walters, the sum of Two Thousand (\$2,000.00) Dollars.

40 9. That Viola E. Walters, the beneficiary, made demand for the additional sum of Two Thousand

Exhibit P-1.

(\$2,000.00) Dollars, as provided for in the clause concerning accidental death, as set forth in the policy.

10. That the defendant rejected the claim of the beneficiary, Viola E. Walters, and refused to pay the additional accidental death benefit.

10

11. That proper proof of death by accidental means was made by the beneficiary to the defendant.

12. That the defendant rejected the claim of the plaintiff on such proof shown in No. 11 herein.

Dated, June 10, 1935.

ADELMAN & ADELMAN,
Attorneys of Plaintiff.

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Exhibit P-2.**Admissions.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

VIOLA E. WALTERS,
Plaintiff,

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,

20

Defendant.

Action at Law.

Reply to Demand
for Admissions.

*To Adelman & Adelman, Attorneys of Plaintiff,
768 Bergenline Avenue, Union City, N. J.:*

You are hereby notified that in response to the demand for admissions heretofore made by you upon the defendant in this action, the defendant states:

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1. It admits the issuance of the policy in suit (#4897977).

2. It admits that one Viola E. Walters is named in the said policy as beneficiary.

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3. It denies that the said policy contains a clause identical to that set forth in the third paragraph of the said demand for admissions and refers plaintiff to the complaint and answer filed in

Exhibit P-2.

this action, wherein the accidental death benefit clause contained in the policy in suit is pleaded and admitted.

4. It admits for the purpose of this action that premiums on the policy in suit were fully paid.

5. It admits that the insured died January 1, 1929.

6. It admits that it was notified of the death of the insured, reserving, however, any admission as to the timeliness of such notice and reserving also any admission as to notice of the nature, character or circumstances of the death of the insured.

7. In answer to the 7th demand for admissions, defendant admits nothing as to the propriety of any proofs of death submitted nor as to the time of the filing of any proof of death.

8. It admits payment to the beneficiary named in said policy of the ordinary death benefit of \$2,000.00.

9. It admits demand was made upon it for accidental death benefit, reserving, however, any and all admission as to the form of such demand; and it denies that such demand was made "as provided for in the clause concerning accidental death, as set forth in the policy."

10. It admits that it has not paid any additional accidental death benefit under the policy in suit.

11. It denies that proper proof of death by accidental means was made by the beneficiary to the defendant.

Exhibit P-4.

12. As to the 12th admission, the defendant denies that any such proof as mentioned or described in the 11th demand was submitted to it and it denies therefore that it rejected any claim of the plaintiff based upon such proof.

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PERKINS, DREWEN & NUGENT,
Attorneys of Defendant.

Dated, June 24th, 1935.

Service of a copy of the within reply is hereby acknowledged this 25 day of June, 1935.

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ADELMAN & ADELMAN,
Attorneys of Plaintiff.

Exhibit P-4.

Insurance Policy.

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(Photostats of Insurance Policy—3 Parts.)

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THE PRUDENTIAL

INSURANCE COMPANY OF AMERICA

IN CONSIDERATION of the Application for this Policy, which is hereby made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby insures the person herein designated as the Insured, for the amounts named herein, payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

THE INSURED WILLIAM B. WALTERS

FACE AMOUNT OF INSURANCE ---TWO THOUSAND--- Dollars,
payable immediately upon receipt of due proof of the death of the Insured during the continuance of this Policy, at the Home Office of the Company, in Newark, New Jersey.

ACCIDENTAL DEATH BENEFIT ---TWO THOUSAND--- Dollars,
payable in addition to the Face Amount of Insurance, at the Home Office of the Company, in event of death by accident as defined in the clause headed "Provisions as to Accidental Death Benefit," on the second page hereof, subject to the provisions therein set forth.

PAYABLE TO VIOLA E. WALTERS, Beneficiary, Wife of the Insured.

If there be no Beneficiary living at the death of the Insured the amount of insurance payable shall be paid to the executors, administrators or assigns of the Insured, unless otherwise provided in the Policy. The right to change the Beneficiary has --- been reserved by the Insured.

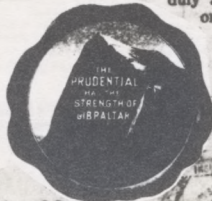
TOTAL AND PERMANENT DISABILITY BENEFITS.

MONTHLY INCOME TEN DOLLARS PER MONTH FOR EACH \$1000 of the Face Amount of Insurance, payable at the Home Office of the Company to the Insured in event of total and permanent disability before age 60, subject to the provisions as to Total and Permanent Disability contained in the Policy.

WAIVER OF PREMIUMS in event of Total and Permanent Disability as hereinafter provided.

ANNUAL PREMIUM ✓ ---Fifty-five and 42/100--- Dollars,
payable on the delivery of this Policy, the receipt of which premium is hereby acknowledged, and a like amount payable thereafter at the Home Office of the Company, or as provided under the heading "General Provisions" on the second page hereof, in exchange for the Company's receipt on or before the following due dates, the thirtieth day of December
in every year during the continuance of this Policy,
until twenty full years' premiums shall have been paid, or until the prior death of the Insured.

IN WITNESS WHEREOF, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this thirtieth day of December,
one thousand nine hundred and twenty-four.



Eward W. Ruffels
President.

William J. Hamilton
Secretary.

Age 22

Twenty-Payment Life Policy—Annual Dividends. Premiums Payable for Twenty Years, Insurance Payable at Death.
Accidental Death Benefit. Total and Permanent Disability Provision:
Waiver of Premiums, Monthly Installments Without Deduction from Insurance.

no 11215-55-B

FOUNDED BY JOHN F. DRYDEN
PIONEER OF INDUSTRIAL INSURANCE IN AMERICA

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GENERAL PROVISIONS.

Payment of Premiums.—This Policy is based upon the payment of premiums annually in advance, but if premiums be made payable quarterly or semi-annually, any unpaid premiums required to complete payment for the current insurance year in which death occurs shall be considered an indebtedness to the Company on account of this Policy. Premiums are payable at the Home Office of the Company, but may be paid to an agent of the Company on or before the date when due, in exchange for official receipts signed by the President or the Secretary and countersigned by an authorized agent of the Company. If any premium payment of any premium shall not maintain the Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

Grace in Payment of Premiums.—In the payment of any premium under this Policy, except the first, a grace of thirty-one days without interest will be allowed, during which time the Policy will remain in force, but if the Policy shall become a claim by death within the grace period the unpaid premiums for the then current policy year shall be deducted from the amount of insurance payable.

Change of Beneficiary.—If the right to change the Beneficiary has been reserved the Insured may at any time while this Policy is in force, by written notice to the Company at its Home Office, change the Beneficiary or Beneficiaries under this Policy, such change to be subject to the rights of any previous assignee and to become effective only when a provision to that effect is endorsed on or attached to the Policy by the Company, whereupon all rights of the former Beneficiary or Beneficiaries shall cease.

Assignments.—Any assignment of this Policy must be in writing, and the Company shall not be deemed to have knowledge of such assignment unless the original or a duplicate thereof is filed at the Home Office of the Company. The Company will not assume any responsibility for the validity of an assignment.

Suicide.—If within one year from the date hereof the Insured shall die by suicide—whether sane or insane—the liability of the Company shall not exceed the amount of the premiums paid on this Policy.

Incontestability.—This Policy shall be incontestable after one year from its date, except for non-payment of premium, but if the age of the Insured be mistaken the amount or amounts payable under this Policy shall be such as the premium would have purchased at the correct age.

Indebtedness.—Any indebtedness to the Company on account of this Policy will be deducted in any payment or payments or in any settlement under the Policy.

Reinstatement.—If this Policy be lapsed for non-payment of premium it will be reinstated at any time after the date of lapse upon written application and payment of arrears of premiums with interest at the rate of five per cent. per annum, together with the reinstatement of all indebtedness, provided such indebtedness is not greater than the loan value of this Policy at the time of application for such reinstatement, and provided evidence of the insurability of the Insured satisfactory to the Company be furnished.

Modifications, etc.—No condition, provision or privilege of this Policy can be waived or modified in any case except by an endorsement hereon signed by the President, one of the Vice Presidents, the Secretary, one of the Assistant Secretaries, the Actuary, the Associate Actuary or one of the Assistant Actuaries. No modification or change shall be made in this Policy except such as is in accordance with the laws of the State in which the same is issued. No Agent has power in Company by making any promise, or by making or receiving any representation or information.

Basis of Reserve and Computations.—The reserve upon this Policy for which funds are to be held, exclusive of any reserve on account of Disability Insurance and Accidental Death Benefit, shall be computed upon the American Experience Table of Mortality with three and one-half per cent. interest per annum by the net level premium method. All computations in accordance with the terms of this Policy involving net premiums or reserve values based on a mortality table and interest shall be made upon the basis here stated.

Entire Contract Contained in This Policy.—This Policy together with the Application, a copy of which is attached hereto, contains and constitutes the entire contract between the parties hereto, and all statements made by the Insured shall in the absence of fraud be deemed representations and not warranties, and no statement or declaration of the Insured or the Policy or be used as a defense to a claim thereunder unless it is contained in the Application for the Policy and unless a copy of such Application be endorsed upon or attached to the Policy when issued.

DIVIDEND PROVISIONS.

Annual Dividends.—Annually, during its continuance in force, the proportion of the divisible surplus accruing upon this Policy shall be ascertained and apportioned by the Board of Directors and credited to this Policy at the end of the policy year as a dividend. Such dividend shall be (1) paid in cash or (2) applied to the reduction of the premium then due, if any; or upon written request of the Insured it may be (3) applied to the purchase of a paid-up addition to the Policy or (4) left to accumulate to the credit of the Policy with interest compounded annually at the rate of three and one-half per cent. plus such additional interest as the Company may declare on such funds and payable at maturity of the Policy or withdrawable in cash on any anniversary of the Policy. Such paid-up addition may be surrendered at any time for its full reserve at the time of such surrender. The Company reserves the right to defer the payment of any cash surrender value for a period not exceeding ninety days after application for such cash surrender value. If the Insured shall select no other dividend option the dividend shall be paid in cash.

Post Mortem Dividend.—If this Policy be continued in force and it shall become a claim by the death of the Insured after one year from its date, such annual dividend, according to the dividend scale current at the date of death, as would have been payable if the Insured had been living on the anniversary date of the Policy next succeeding the date of the death of the Insured shall be paid in addition to the amount of insurance then payable.

(Notice to Policyholder.)—Owing to the low rate of premium at which policies of this nature are issued, the surplus accruing thereon will probably not be sufficient to enable the Company to credit any dividend to this Policy before the end of the second policy year from its date.)

PROVISIONS AS TO ACCIDENTAL DEATH BENEFIT.

The amount of Accidental Death Benefit specified on the first page hereof shall be payable in addition to the Face Amount of Insurance immediately upon receipt of due proof that the death of the Insured occurred during the continuance of this Policy while there was no default in the payment of premium, as a result, directly and independently of all other causes, of bodily injuries, effected solely through external, violent and accidental means, of which, except in case of drowning or accident, provided, however, that no Accidental Death Benefit shall be payable if the death of the Insured resulted from suicide—whether sane or insane; or from having been engaged in aviation or submarine operations or in military or naval service in time of war; or from a state of war, riot or insurrection; or directly or indirectly from bodily or mental infirmity or disease in any form.

The Accidental Death Benefit is granted in consideration of the payment of an extra ———— annual premium of \$ 3.04 ————, which is included in the amount of the premium stated on the first page hereof and which is payable at the same time and subject to the same provisions as to payment as the regular premium under this Policy.

PROVISIONS AS TO TOTAL AND PERMANENT DISABILITY:

WAIVER OF PREMIUMS, MONTHLY INCOME TO THE INSURED.

Disability Before Age 60: Waiver of Premiums—Monthly Income to the Insured.—If the Insured shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime, and if such disability shall occur at any time after the payment of the first premium on this Policy, while this Policy is in full force and effect and the Insured is less than sixty years of age, and before any non-forfeiture provision shall become operative, the Company, upon receipt of due proof of such disability, will grant the following benefits:

(1) **Waiver of Premiums.**—The Company will waive the payment of any premium or premiums the due date of which, as specified on the first page hereof, shall occur after receipt by the Company of said proof of such disability.

(2) **Monthly Income to the Insured.**—The Company will, in addition to waiving premiums, pay to the Insured the Monthly Income specified on the first page hereof under the heading "Total and Permanent Disability Benefits." The first monthly payment shall be made immediately upon receipt by the Company of due proof of such disability and subsequent payments shall be made on the first day of each month thereafter. Interest due on any indebtedness under this Policy may be deducted from such monthly income payments.

Such waiver of premiums and such monthly payment shall be additional to all other benefits and obligations under this Policy and the Policy shall be continued in force and the amount of insurance, less any indebtedness, shall become due and payable at death or maturity in the same manner as if the Insured had actually continued to pay the premiums.

Disability After Age 60: Waiver of Premiums with Reduction of the Face Amount of Insurance.—If such total and permanent disability shall occur after the Insured is sixty years of age, while this Policy is in full force and effect and before any non-forfeiture provision shall become operative, the Company, upon receipt of due proof of such disability, will waive the payment of any premium or premiums the due date of which, as specified on the first page hereof, shall occur after receipt by the Company of such due proof, but the Face Amount of Insurance under this Policy shall be reduced by the amount of each premium so waived, and any loan and non-forfeiture values shall thereafter be based upon the Face Amount of Insurance thus reduced.

Recognized Disabilities.—Without prejudice to any other cause of disability, the Company will recognize the entire and irrevocable loss of the sight of both eyes, or loss by severance of both hands above the wrists, or of both feet above the ankles, or of one hand and one foot, as total and permanent disability under this Policy.

Proof of Continuance of Disability.—Notwithstanding the acceptance by the Company of proof of total and permanent disability, the Insured, upon demand by the Company from time to time, but not often than once a year after such disability has continued for two full years, for the purpose of verifying that such disability is actual and not temporary, shall furnish due proof that he (or she) actually continues in the state of disability defined above; provided, however, that such demand shall not be made in the case of the "Recognized Disabilities" specified above, other than the loss of the sight of both eyes. In case of failure to furnish such proof, no further premiums shall be waived and no further monthly payments shall be made on account of such disability, but any insurance then remaining under this Policy shall be continued in force subject to the payment by the Insured of any premium or premiums, based on such insurance, the due date of which premium or premiums, as specified on the first page hereof, shall occur thereafter.

Extra Premium for Total and Permanent Disability Benefits.—The Total and Permanent Disability Benefits are granted in consideration of the payment of an extra ———— annual premium of \$ 2.12 ————, which is included in the amount of the premium stated on the first page hereof and which is payable at the same time and subject to the same provisions as to payment as the regular premium under this Policy, provided, however, that in no event shall said extra premium be payable on or after the anniversary of the Policy next succeeding the date when the Insured attains sixty years of age.

LOAN PROVISIONS.

If this Policy be continued in force, the Insured may borrow from the Company, without the consent of the Beneficiary, if any, named herein, with interest at the rate of six per cent. per annum, payable at the end of each policy year, on the sole security of this Policy, an amount up to the limit of the Cash Surrender Value to the Company as security. Failure to repay any such indebtedness or to pay interest shall not avoid the Policy unless the total indebtedness thereon to the Company shall equal or exceed the loan value at the time of such failure, nor until one month after notice to that effect shall have been mailed by the Company to the last known address of the Insured, of the person to whom the loan was made, and of the assignee of record at the Home Office of the Company, if any. The Company reserves the right to defer any loan, other than to pay premiums on policies in the Company, for a period not exceeding ninety days after application for such loan.

(Note.—At any time during the continuance of this Policy a statement of any outstanding indebtedness on account of the Policy will be furnished on request.)

NON-FORFEITURE PROVISIONS.

Non-forfeiture Values at End of First and Second Policy Years.—If this Policy after being in force one full year or two full years from its date shall lapse for non-payment of premium, the Company will continue in force the insurance under the Policy, exclusive of Disability and Accidental Death Benefits, for a period of sixty days or of one hundred and twenty days, respectively, from the due date of such premium, as specified on the first page hereof, as indicated in the following table; provided, however, that if the death of the Insured shall occur during the period of continued insurance herein defined, there shall be deducted from the amount payable by the Company any premium, exclusive of the extra premiums for Disability and Accidental Death Benefits, that would have become due on this Policy during such period of continued insurance.

Cash Surrender Value.—If this Policy be legally surrendered to the Company within three months after the end of the third year from its date or of any year thereafter, and if all premiums, required by the terms of the Policy, to the end of that year, have been paid in full, the Company will pay therefor the sum indicated in the following table, less any indebtedness to the Company on account of this Policy. The Company reserves the right to defer the payment of any Cash Surrender Value for a period not exceeding ninety days after application for such Cash Surrender Value.

Paid-up Life Policy.—If this Policy, after being in force three full years from its date, shall lapse or become forfeited for the non-payment of any premium on the date when due, as specified on the first page hereof, and if the Policy be not surrendered for its Cash Value, the Company upon the legal surrender of this Policy within three months after the date of such lapse, shall issue a non-participating Paid-up Life Policy dated on the date to which premiums have been paid, and as specified in the following table; provided, however, that if there be any indebtedness to the Company on account of this Policy the amount of such Paid-up Life Policy will be reduced by the proportion that the total indebtedness bears to the then tabular Cash Surrender Value of this Policy. Such Paid-up Life Policy shall not provide for Disability or Accidental Death Benefits.

1. The first step in the process of the investigation is the identification of the subject. This is done by the investigator who is assigned to the case. The investigator will then proceed to the next step, which is the collection of information. This is done by the investigator who is assigned to the case. The investigator will then proceed to the next step, which is the analysis of the information. This is done by the investigator who is assigned to the case. The investigator will then proceed to the next step, which is the reporting of the results. This is done by the investigator who is assigned to the case.

2. The second step in the process of the investigation is the collection of information. This is done by the investigator who is assigned to the case. The investigator will then proceed to the next step, which is the analysis of the information. This is done by the investigator who is assigned to the case. The investigator will then proceed to the next step, which is the reporting of the results. This is done by the investigator who is assigned to the case.

3. The third step in the process of the investigation is the analysis of the information. This is done by the investigator who is assigned to the case. The investigator will then proceed to the next step, which is the reporting of the results. This is done by the investigator who is assigned to the case.

4. The fourth step in the process of the investigation is the reporting of the results. This is done by the investigator who is assigned to the case.

5. The fifth step in the process of the investigation is the reporting of the results. This is done by the investigator who is assigned to the case.

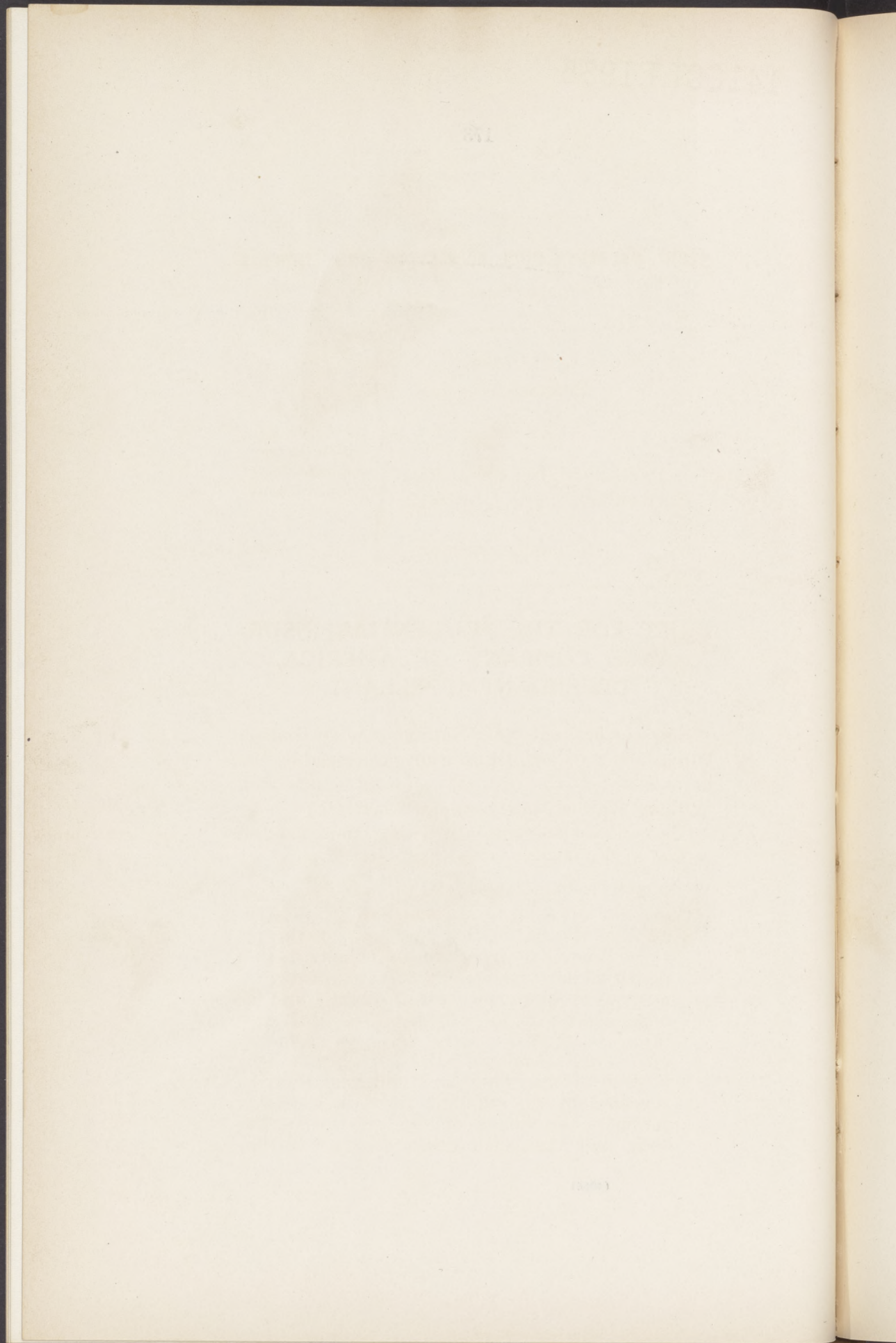
6. The sixth step in the process of the investigation is the reporting of the results. This is done by the investigator who is assigned to the case.

7. The seventh step in the process of the investigation is the reporting of the results. This is done by the investigator who is assigned to the case.

8. The eighth step in the process of the investigation is the reporting of the results. This is done by the investigator who is assigned to the case.

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2 What is your address?
3 Do you have a telephone?
4 Are you married?
5 Do you have children?
6 Do you have a car?
7a Are you employed?
7b If so, what is your occupation?
8 What is your religion?
9 What is your political party?
10 What is your favorite color?
11 What is your favorite food?
12 What is your favorite sport?
13 To what do you belong?
14 What is your favorite book?
15 What is your favorite movie?
16 What is your favorite TV show?
17 What is your favorite music?
18 What is your favorite hobby?
19 What is your favorite animal?
20 What is your favorite plant?

1. What is your name?
2. Do you live in the city?
3. What other information do you have?
4. Are you a member of any organization?
5. When was your last visit?
6. What quantity of goods did you purchase?
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141 OCT. T. 1935

New Jersey Court of Errors and Appeals

OCTOBER TERM, A. D. 1935.

VIOLA E. WALTERS,
Plaintiff-Appellee,

vs.

THE PRUDENTIAL INSURANCE COM-
PANY OF AMERICA, a corpora-
tion,
Defendant-Appellant.

Action at Law.

On Appeal from
New Jersey
Supreme Court,
Hudson County.

BRIEF FOR THE PRUDENTIAL INSUR- ANCE COMPANY OF AMERICA, DEFENDANT-APPELLANT.

Suit was brought in the Supreme Court, Hudson Circuit, on a policy of life insurance issued by the defendant on the life of plaintiff's husband, William Walters, in the sum of \$2,000.00.

The policy also contained a provision that the sum of \$2,000.00—

“shall be payable in addition to the face amount of insurance, immediately upon receipt of due proof that the death of the insured occurred during the continuance of this policy while there was no default in the payment of premium, as a result directly and independently of all other causes of bodily injuries effected solely through external, violent and accidental means, of which, except in case of drowning or of internal injuries revealed by an autopsy, there is a visible contusion or wound on the exterior of the body and that such death occurred within

sixty days of the accident; provided, however, that no accidental death benefit shall be payable if the death of the insured resulted from suicide, whether sane or insane; from having been engaged in aviation or submarine operations or in military or naval service in time of war, or from a state of war, riot or insurrection, *or directly or indirectly from bodily or mental infirmity or disease in any form.*"
(prop. of St. P. & M. Co.)

The normal death benefit under the policy was paid. The suit was to collect the additional sum of \$2,000.00 as for a death within the accidental death provision of the policy.

The jury returned a verdict in favor of the plaintiff for the amount in suit, and from the judgment entered thereon this appeal is taken.

The defense interposed was that the death of insured was not the "result directly and independently of all other causes of bodily injuries effected *solely through external, violent and accidental means.*"

While in the act of committing an unlawful, unprovoked and deadly assault insured was shot and killed by the victim of his attack.

There was no dispute or conflict in the testimony as to any material fact or circumstance attending insured's death.

These undisputed facts are as follows:

The insured with his wife and infant child were invited to spend the night of December 31st, 1928, at the home of Walter Scullion in the Town of West New York, and to have New Year's dinner with the Scullion family. The wives of the two men were sisters.

Pursuant to this invitation insured and his family arrived at the Scullion home at about 9:30 in the evening. The two couples appeared to have been in every way congenial and well disposed

That insured was the aggressor throughout was undisputed; and it was so recognized by the Trial Court. (p.120, 1.26-30)

toward each other, and for some hours their evening together was peaceful and pleasant. It was understood by all that both families were to spend the night and to take dinner together, the following day.

At about 11:30 insured's wife retired for the night, having first put her infant child to bed. Insured and the Scullions remained up, conversing about things in general; and all continued serene until about 1 o'clock in the morning when insured (having in the meantime drunk some wine which he had brought with him), without provocation or apparent cause, exhibited a violent and truculent rage against everyone in the Scullion home. He had suddenly determined that neither he nor his family would remain any longer, and that they must leave at once. He went to the bedroom and awoke his wife and child. Against the wife's pleadings and remonstrances, and her reminding him that he had already agreed to stay, he compelled her to leave the bedroom with the child, and before the child could be dressed for outdoors, insured "pushed" or "threw" both of them into the hall outside the Scullion apartment (Case, p. 52, l. 3; p. 73, ll. 20 to 30; p. 123, ll. 30 to 40). By the witness Scullion this happening is described as follows: "She (insured's wife) did not agree with the idea and they were having quite a discussion about it. He finally picked up the child and threw him out the door, and she got dressed; dressed the boy after my wife had pulled him in from the hall and went over to her mother's" (Case, p. 140, l. 25).

Having thus driven his wife and child out into the night, insured was alone with the Scullion family. And thereupon the Scullions sought to cure his ugliness with their kindness. They pleaded with him, they emphasized and reiterated the spirit of their invitation to him and his family.

Regardless of the bad turn things had taken, the Scullions desperately tried to restore him to the mood of peace (Case, p. 46, l. 20; p. 47, ll. 1 to 10; p. 51, ll. 25 to 40; p. 52, l. 10; p. 67, l. 35; p. 68, l. 20; p. 125, ll. 20 to 30). But the way of the peacemakers was hopeless. Soft words seemed only to increase the wrath they sought to allay. In return for Mrs. Scullion's overtures for peace, and her patient kindness toward him, insured denounced her in loud and mounting language. He called her a "dirty liar" (Case, p. 47, l. 10); a "prostitute," and a "rotten bitch" (Case, p. 137, l. 35); and most of the language used by insured in the denunciation of his host's wife one would shrink from quoting, even in a court of justice (Case, p. 112).

But insured did not spend his fury in words, however violent. He was a powerful and muscular man (Case, p. 18, l. 20; p. 113, l. 15); "much taller than Walter Scullion" (Case, *ibid.*). And at this juncture insured turned stark brute. He prepared himself for an assault on Mrs. Scullion by rolling up his sleeves (Case, p. 76, l. 18). He struck her a blow in the face so violent that the blood flowed freely, and he tore her dress, and pushed her against the gas range (Case, p. 65, l. 30; p. 67; p. 110, ll. 20 to 30; p. 100, l. 20). Scullion sat in the immediate presence of this assault upon his wife, holding his three-year-old child upon his knee. The wife appealed to her husband for protection, "I called my husband to save me" (Case, p. 52, l. 17; p. 76, l. 18). But Scullion did no more than set his child down and resume calm remonstrances for peace. He took insured by the arm, and "like a gentleman" asked him "to go home" (Case, p. 52, l. 28). Insured's response to Scullion was, "No son-of-a-bitch like you is going to put me out of here" (Case, p. 76, l. 23). Scullion's wife stood by, disheveled and bleeding.

A few minutes earlier insured had threatened to kill her (Case, p. 75, l. 3, etc.).

At just about the time Mrs. Scullion called upon her husband for protection, her brother, Edward Dillon, entered the apartment. His coming there was the result of his meeting insured's wife while on her way from the apartment, and of her asking him to go over and bring insured home. When she left the apartment she was frightened (Case, p. 48, ll. 12, 27).

When Scullion "like a gentleman" asked insured to leave, the latter leaped at Scullion, who fled from the attack as far as he could, in his own home (Case, p. 57, l. 12; p. 115, ll. 30-40; p. 62, l. 20; p. 126, l. 1). Insured pursued him, and pounded him with heavy, violent blows continuing to do so after Scullion had fallen under them upon a settee or sofa (Case, p. 52, l. 40; p. 102, ll. 30-40; p. 78, l. 20; p. 93, ll. 1-30). He did not stop until he was actually "pulled off of Scullion" by Dillon (Case, p. 126, l. 40). Dillon could hear insured punching Scullion "like he was hitting him awful hard, heavy blows and Scullion hollered for help" (Case, p. 113, ll. 8-20). In the assault on Scullion while he lay on the settee insured caused the blood to flow from Scullion's eye, and while he was beating him shouted: "I will kill you, you son-of-a-bitch" (Case, p. 113, l. 33; p. 118, l. 8, p. 138, l. 12). And when he was pulled away from Scullion insured picked up the floor lamp to hit Scullion with it (Case, p. 76, l. 38).

So, at this stage Scullion and his wife had both been violently assaulted, both were bleeding and both had been threatened with death. *And up to this moment not a hostile, not even a defensive, word or gesture had been offered to their assailant.* But obviously the imminence of tragedy was increasing; Walters did not stop his beating of Scullion until he was actually pulled away from

his victim by Dillon, and in being pulled away he tore Scullion's trousers "half off" him (Case, p. 126, l. 28).

But when he had been pulled from Scullion where did insured go? He returned to the kitchen where Mrs. Scullion still was, bleeding and frightened, and whom insured had just threatened to kill. What was Scullion to do? Immediately upon his being freed from insured's beating, he took from the table in the room to which he had retreated, a revolver that had been placed there earlier in the evening for intended use in welcoming the New Year, but which because of the recent death of a child and at the request of his wife Scullion did not use. With this revolver in his hand Scullion went into the kitchen where insured was. All gentle suasion having failed he hoped by the display of the gun to scare insured out of the apartment. He was not to be scared. When Scullion got to the kitchen Dillon was putting on insured's coat, coaxing him out. Insured's back was turned to Scullion. Scullion pointed the gun and said "get out of here, and get out of here quick." Insured turned face to face with Scullion, leaped upon him, grabbed both of his arms and drove him back across the kitchen floor toward a window that gave upon an areaway, fourteen feet above the concrete bottom of the areaway pit (Case, p. 80, l. 40; p. 149, l. 24; p. 127, ll. 40 to 129, etc.). He drove Scullion through the window. Scullion's entire body above the knees was outside. The height of the window sill above the kitchen floor was just about even with Scullion's knees. Scullion was going out under the great pressure and weight of insured's body upon him. The only grip he had was that of his fingers on the sash of each side of the window frame. He was still holding the gun in one hand. Steadily and surely he was going out, *backwards and head*

downward into the pit below. Still pushing "for all he was worth" (Case, p. 82, l. 35); and with the weight of his body leaning downward upon that of Scullion, insured continued his relentless assault (Case, p. 114, ll. 25 to 40; p. 129, l. 35; p. 133, ll. 1 to 10; p. 134; p. 148, l. 15). Mrs. Scullion was down on her knees "trying to pull my husband in by the legs" (Case, p. 90, l. 40). But it was a losing struggle. Dillon, her brother, who had been trying to pull insured off once more, was violently kicked in the groin by insured while the latter struggled to dispatch his victim at the window; and Dillon was doubled up with pain on the floor (Case, p. 67, ll. 1 to 25; p. 91, l. 30; p. 101, l. 15). In her desperation Mrs. Scullion sent her brother out to look for a policeman. This left her alone in the struggle for her husband's rescue, against the impossible odds of insured's power and strength.

And not until only seconds remained between Scullion and his death, or grievous bodily injury at least, did Scullion fire the pistol he held in his hand, and not until he fired it was he free from the deadly grip of insured, carrying out his threat to kill.

From the wound thus inflicted insured died.

As to the condition of insured the witnesses repeatedly say that he was not drunk. He was drinking but not drunk (Case, p. 42, l. 18). Dillon, "wouldn't say he was drunk" (Case, p. 116, l. 38). Insured's speech was "sensible at the time" (Case, p. 117, l. 8). Scullion said that insured "had been drinking but not to any excess" (Case, p. 122, l. 42; p. 139, l. 10).

But the state of insured's mind from liquor or otherwise is of no moment, in view of the provision in the accidental death benefit clause:

"No accidental death benefit shall be payable if the death of the insured results directly or indirectly from bodily or mental infirmity or disease in any form."

(*rep. of Ch. P-4, misale*)

POINT ONE.

The Trial Court erred in denying the motion to non-suit, and again in denying the motion for directed verdict.

In the first place, we submit that the facts in this case are so clear, so single in their import, that they are a conclusive commentary in themselves. They show without dispute or doubt that as a victim of insured's unlawful, unprovoked and heinous assault, Scullion had full reason to apprehend the imminence of his own death, or of grievous bodily injury, at least. In *State vs. Jones*, 71 N. J. L. 546, this Court, speaking through the Chief Justice, of the case then before it, said:

“The case which was before them (the jury) did not present for their determination the question of the right of a man to take life under circumstances where it was seemingly, but not actually, necessary to do so to preserve his own life, or to save himself from grave bodily harm. If the story told by the defendant was true, *the necessity of doing what he did for his own protection was absolutely beyond question, and it was with this story that the trial judge was dealing * * *, not with a mere abstraction.*”

The same certainly exists here.

Seemingly the trial court, for some reason, had the idea that it must not answer the problem before it with any principle or precept out of the criminal law, that the issue was one of *civil* liability, based on alleged accidental death, under a policy of insurance. Yes, but the death in question befell insured as the immediate result of criminal enterprise perpetrated by him. *It was vital to determine how far insured's own criminal acts had legally subjected him to the lawfully defensive violence of his victim.*

The wrongs that insured had himself done to Scullion, the state of peril to Scullion that insured had wilfully and unlawfully created, either did or did not justify Scullion in the taking of insured's life. This is not a case of misventure. The actors were under no misconception. Both acted knowingly and with intent. *And if insured's conduct did justify the taking of his life by Scullion, the result, in the facts adduced, simply cannot be accidental.* If it did not justify the taking of insured's life, then we must seek other tests. By so much does the question of accident turn upon the question of justification, or the want of it, according to the principles of our criminal law, and there is no avoiding it.

Upon our motion for directed verdict the trial court expressly declined even to consider justification. The same attitude is manifested in the charge. Upon being confronted with exceptions to the charge bearing on the point, (as we hereafter show) the Court undertook to amend the situation by additional instructions. But these were plainly not effectual, and in the meantime error highly prejudicial to the defendant had been done.

In *State vs. Mount*, 73 N. J. L. 582, this Court held that the right of self-defense arises from circumstances that justify a reasonable apprehension of grave bodily harm, and that the existence of actual peril is not requisite to the right.

In *State vs. Jones*, 71 N. J. L. 543, this Court approved the doctrine that the right to take life in self-defense rests upon necessity; and if such necessity was reasonably apparent as the only means of preventing one's own destruction or of escaping grievous bodily harm, the right to take life ensued.

To the same effect is the holding of this Court in *Brown vs. State*, 62 N. J. L. 668.

In *State vs. Bonafiglio*, 67 N. J. L. 239, Chief Justice Gummere speaking for this Court said on page 245:

“The limitation that the bodily harm which is threatened must be so serious as to cause a reasonable apprehension that his own life is in immediate danger, has no existence in New Jersey. Here a man may protect himself, *even to the extent of taking the life of his adversary, when that act is, or reasonably appears to be, necessary in order to preserve his own life or to protect himself from serious bodily harm.*”

All tendency to restrict our doctrine of self-defense as thus expounded has been resisted by our Courts. In *State vs. Firth*, 103 N. J. L. 275, the Trial Court pronounced the doctrine thus:

“The only time you or I or any citizen can use a gun or a knife or other weapon in self-defense is when we are backed up against a wall and it seems to us necessary to protect our life; that is the only time we may use a gun or knife or other weapon in self-defense, and, if we do so otherwise, we are responsible for the outcome of our act.”

This is of course a clearly erroneous narrowing of the right to take life in self-defense under our law, and of it the Supreme Court in the *Firth* case, *supra*, said:

“Whether the Trial Judge rightly or wrongly stated what, in law, constitutes self defense is inconsequential, since it could not prejudicially affect the defendant’s defense on the merits of the case. We take occasion to say, however, that we do not approve the declared conception of the Trial Judge, as expressed by him, as to what must appear to constitute a good plea of self defense.”

In *State vs. Len*, 108 N. J. L. 439, the rule was expressed by Mr. Justice Parker, speaking for

the Supreme Court, that one may in self-defense exert such force as may be *adequate to his protection under the existing circumstances*, not only where his conduct is actually necessary to his protection, but where he reasonably believes it to be necessary to that end.

The doctrine of the *Bonafiglio* case, *supra*, was reiterated by this Court in *State vs. Mellillo*, 77 N. J. L. 505.

It is not necessary that an assailant be himself armed with a deadly weapon in order to give the right of self-defense to the one assailed. Our decisions are instinct with the doctrine that the force adequate to the lawful exercise of the right of self-defense must be judged in the light of the general circumstance of peril, the situation created by the assailant under all conditions prevailing at the time and place of the assault. It is obvious that any contrary precept of self-defense would in many instances violate the principles of natural justice that underlie the right.

“In order to justify killing in self-defense, it is not true that there must have been used against the slayer what is commonly understood to be of itself a deadly weapon. It is sufficient if he was confronted with *such means of force as to induce a reasonable apprehension that he was in danger of loss of life or great bodily harm.*” (30 *Corpus Juris*, p. 65, Sec. 236.)

But Walter Scullion and his wife, in the perilous extremity to which the crime of insured had brought them, were vested by our law, not only with the right of self-defense, but with the specific right to take life under the terms of Section 110 of our Crimes Act. This statute provides:

“Any person who shall kill another * * * in his or her own defense, or in the defense of his or her husband, wife, * * * or who

shall kill any person attempting to commit * * * murder, * * * shall be guiltless and totally acquitted and discharged."

This is an enlargement upon the right of self-defense. The distinction between the two is important. Self-defense is based upon necessity, real or apparent, and certain obligations are placed upon the one who seeks to justify the killing, before such justification is established; but one acting under the authority of the statute is justified in taking the life of his assailant, even when other and less radical means would render the attempt abortive. His right to kill is absolute. In the ordinary case of self-defense the question to be determined is whether there was an apparent necessity for the killing, while in the case of killing within the purview of the statute apparent necessity is not an element, and the only question for determination is whether there was an attempt to commit the felony.

State v. Bonafiglio, supra, 67 N. J. L. 239.

We respectfully submit that under the facts in this case either Walter Scullion or his wife or both were vested with the right to kill insured, as a defense of the husband, and also as a means of suppressing an attempt to commit murder.

Of this statute Chief Justice GUMMERE in the *Bonafiglio* case, *supra*, says:

"Our statute (Crimes Act, par. 110, Pamph. L. 1898, p. 825) declares that 'any person who shall kill another by misadventure * * * or who shall kill any person attempting to commit arson, burglary, murder, rape, robbery or sodomy shall be guiltless and totally acquitted and discharged.' Nor does this enactment inject a new feature into the law of homicide; it is merely declaratory of the com-

mon law. Hawkins, in his treatise on the Pleas of the Crown, thus states the rule of the common law upon this subject: 'The killing of a wrong-doer may be justified in many cases; as where a man kills one who assaults him in the highway to rob or murder him; or the owner of a house, or any of his servants or lodgers, etc., kills one who attempts to burn it, or to commit in it murder, robbery or other felony; or a woman kills one who attempts to ravish her.' 1 Hawk. P.C., ch. 28, p. 21. So, too, Hale declares that, 'at common law, if a thief assaulted a man to rob him, and he had killed the thief in the assault, it had been *se defendendo*; but yet he had forfeited his goods as some have thought' (11 Co. Rep. 82b), though other books be to the contrary. But now, by the Statute of 24 Hen. VIII., c. 5, 'if any person attempts robbery of any person in or near any common highway, cartway, horseway or footway, or in their mansion-house, or do attempt to break any mansion-house in the nighttime, and shall happen to be slain by any person or persons &c. (though a lodger or servant), they shall, upon their trial, be acquitted and discharged in like manner as if he had been acquitted of the death of such person.' Hale P.C. 487."

The burden of proof was on the plaintiff to show that death had occurred solely by accidental means. *Kresse v. Metropolitan Life Ins. Co.*, 111 N. J. L. 474. Plaintiff not only did not discharge that burden but showed on the contrary that death was due directly to the criminal wrong-doing of insured himself.

Among the cases we find there is none in which the facts so indisputably show, as here, that the death of insured was the immediate result of an unprovoked, wanton, criminal assault committed by him. The decisions, almost without exception, deal with some degree of mutuality in the combat; though it is clearly established, even in such cases,

that where insured was the aggressor in an encounter that reasonably presents the prospect that it will be deadly, and death ensued to him, it is not to be regarded as accidental.

Such cases, of course, do not come so clearly within unmistakable and dispositive principles of criminal law as does the case at bar. The present case is not one of mere aggression. Rather it is one of rampage and pursuit, of running amuck. But we cite such cases to show that upon facts far less conclusive than those presented here the death of the aggressor is held, none the less, to be non-accidental.

In the case of *Fabian v. Prudential Insurance Co. of America*, 249 N. Y. Supp. 1, it appears that the insured had shot his wife. A police officer came upon the premises. The officer asked admission, and not being admitted, he broke open the door. When he got near the door of the bedroom he saw the woman lying on the floor with the insured beside her holding a pistol in his hand with his arm extended. The officer fearing and believing it was the insured's intention to shoot him, immediately fired his own pistol three times at the man. One of the shots hit the insured in the head, from which he died. Suit was instituted on the life insurance policy in question which provided that if death was "effected solely through external, violent and accidental means * * * directly and independently of all other causes", the defendant would pay in addition to the face amount of insurance an accidental death benefit of Fifteen Hundred Dollars. The Court held that the "insured's death from his own vicious and criminal acts is not the result of 'accidental means' within the insurance policy. Death of an insured shot by policeman after insured committed murder held not 'accident' within accidental death benefit provision of life policy".

In the case of *Manno v. Metropolitan Life Ins. Co.*, 249 N. Y. Supp. 471, it appears that the police officer was engaged in making an arrest, and one of the officers in protection to himself shot the insured. The Court held, one wrongfully attacking another under circumstances leading to a reasonable belief counter-attack might take his life, is not killed by "accidental means". The Court said:

"The Courts of other states and Federal Courts have held that where one acts as an aggressor in an attack under circumstances which would render a homicide likely as a result of his own misconduct, death was not accidental within the meaning of similar clauses of life insurance policies. *Meister v. General Accident Corporation*, 92 Or. 96; *Price v. Occidental Life Insurance Co.*, 169 Cal. 800; *Potter v. Travers Insurance Co.*, 173 Cal. 1; *Prudential Casualty Co. v. Curry*, 10 Ala. 642. Where one was the aggressor and struck another injuring his own hand while striking and dying from blood poisoning as a result, he was not killed by accidental means. *Fidelity & Casualty Co. of N. Y. v. Stacey's Executors (C. C. A.)* 143 Fed. Rep. 271. Those judicially executed for crime do not die accidentally. *Diamond v. N. Y. Life Insurance Co.*, 42 Fed. Rep. 910; *Burt v. Union Central Life Ins. Co.*, 187 U. S. 362. Where the aggressor was not wrongful and from it death could not reasonably be contemplated, it is said to be accidental. *Lovelace v. Travers Protective Association of America*, 126 Mo. 104. In *McKeon v. National Casualty Co.*, 216 Mo. App. 507, the facts were similar to those at bar, but there the decedent might not have known that those who tried to arrest him were police officers and might have supposed himself unlawfully attacked and retaliated by shooting as a result of which he was killed by an exchange of shots. I gather from the foregoing that one who wrongfully attacks under circumstances where one ought reasonably to believe that a counter-attack might take his life, is not killed by accidental means."

In the case of *Raven Halls, Inc. v. U. S. Fidelity & Guaranty Co.*, 254 N. Y. Supp. 589, death resulted from being stabbed by an employee at a bathing resort when decedent unjustifiably assaulted him while intoxicated, was held not to be accidental within liability policy.

The Court said:

“Death was not accidentally suffered, within liability policy, indemnifying assured against loss from all claims for bodily injuries by any person other than employee of assured by reason of and during operation of assured’s business, because stabbing resulting in decedent’s death, occurred when decedent made unprovoked assault on assured’s employee while decedent was intoxicated, and death was direct result of assault committed by decedent on assured’s employee.”

In the case of *Piotrowski v. Prudential*, 252 N. Y. Supp. 313, the death of the insured resulted from being shot by police officers attempting to effect arrest of insured fleeing. It was held that death did not result from “accident” within the policy providing for double indemnity in case of accidental death.

In the case of *Cory v. Woodman Accident Co.*, 164 N. E. 159, the Supreme Court of Illinois held that:

“Death of insured as a result of shooting by smaller and weaker youth when insured continued to advance upon and grabbed him by the neck after being told to stand or be shot, was not ‘due to accidental cause’ within accidental policy.”

In the case of *Mello v. John Hancock Mutual Life Ins. Co.*, 183 N. E. 255, the Supreme Court of Massachusetts held:

“Death of insured shot by coast guard in violating National Prohibition Act held not

sustained by 'accidental means' within policy providing for accidental death benefit whenever insured sustained bodily injuries solely through accidental means resulting in death."

The Court further said:

"As respects recovery for insured's death by accidental means, insured is presumed to have known that he might be killed when violating National Prohibition Act."

In the case of *Gray v. Western State Life Insurance Co.* (District Court of Appeals of California), 298 Cal. 512, the policy provided:

"Upon receipt of due proof * * * that the death of the insured occurred * * * as a result directly and independently of all other causes of bodily injury effected solely through external, violent and accidental means * * *, the Company will pay double the face amount of the policy * * *."

The Court said:

"In an action on double insurance clause of life policy, evidence supported the findings in substance that insured *assaulted another without provocation* and that latter, in protecting himself, struck insured causing him to fall and sustain a fractured skull."

The Trial Court found in favor of the defendant, and the Appellate Court sustained its action.

For a discussion and review of the cases in this line see Cooley's Briefs on Insurance, Vol. 6, page 5249.

See also:

Talliaferro vs. Travelers Protective Assn., 80 Fed. 368;
Prudential Casualty Co. vs. Curry, 10 Ala. App. 642 (1914);
Dozier vs. Fidelity and Casualty Co., 46 Fed. 446;

Case of Fidelity & Casualty Co., N. Y.
143, Fed. 271 (5 L. R. A. New Ser.
657);

Hutton vs. States Accident Ins. Co., 267
Ill. 267; L. R. A. 1915 E. 127;

Clay vs. States Insurance Co. (1917),
174 N. C. 642;

Postler vs. Travelers Ins. Co. (1916), 173
Cal. 1.

A case that seems to have extensive citation in briefs on this subject is *Lovelace vs. Travelers Protective Association*, 126 Mo. 104. But it has no application here. The facts there were that Lovelace remonstrated verbally with one Graves, who was boisterous and otherwise annoying in a hotel where Lovelace, a commercial traveler, was a guest. Lovelace was unarmed. It was obvious that the altercation as invited by him was not to go beyond a matter of fisticuffs. Graves suddenly drew a pistol, and without lawful provocation or excuse shot and killed Lovelace. The latter's death was said to be accidental. The *Lovelace* case on this argument does, however, serve the purpose of emphasizing the distinction between cases of its kind and that at bar.

In *Hutton vs. States Accident*, *supra*, insured did not use a deadly weapon in committing an assault, but the consequent injury suffered by him was held to be not the result of accidental means but one which might naturally have been expected under the circumstances prevailing.

The recent decision of our Supreme Court in *Kobylakiewicz vs. Prudential Ins. Co.*, 180 Atl. 491, does not apply. That decision turns entirely on the factor of insured's insanity. The Court was dealing with "accident" in one particular aspect. We read:

“Now an ‘accident’ *in this connection* is usually defined as an event that takes place without one’s foresight or expectation * * *. Foresight or expectation, of course, imply an ability to think and reason. * * * If the reasoning faculties of insured were so far impaired that he was not able to understand the moral character and general nature and consequences and effects of his acts in so resisting arrest, and was impelled thereto by an insane impulse of a disordered mind, which he had not the power to resist, such death was through * * * accidental means within the meaning of the policy.”

From a reading of this case it seems clear that but for the element of insanity there would have been nothing before the Court upon which to rest the conclusion it reached.

Moreover, the policy in the *Kobylakiewicz* case seems not to have contained, as does the policy here, the following provision in the accidental death benefit clause:

“No accidental death benefits shall be payable if the death of the insured results *directly or indirectly from bodily or mental infirmity or disease in any form*” (Exh. P-4, middle).

POINT TWO.

The Trial Court erred in its charge to the jury.

Under this point we shall discuss grounds of appeal from the 3rd to the 7th, inclusive.

The respective passages from the Court’s charge brought up by these grounds of appeal are here set out and argued in their order.

Third ground of appeal:

“Whether Scullion was justified in so doing is not the important question you have to

decide here as the cause of action in this case'' (p. 157, l. 1).

In this passage the Court virtually excludes from the jury all evidence in the case that went to justify the killing of insured. The Court did not realize that justification was the paramount and important thing; it did not see that it was under the aspect of justification that the problem of accidental death was presented by the facts in the case. The Court clearly told the jury that justification was *not* the important question, but nowhere does he state what *is* the important question. When confronted by an exception to the passage here in question the Court imparted additional instructions to clarify the point. The result was confusion worse confounded (case, p. 165, bottom).

Clearly this instruction was erroneous. Justification could have presented to the minds of the jury justification as seen strictly in relation to the facts before them; not abstractly, but as inherent in the undisputed testimony in the case. With this instruction, the jury were in a plight where even though they became satisfied that Scullion, because of what insured had done to him, could have done and should have done nothing to save his life but what he did do, they could not, nevertheless, rest a verdict on that finding, because they had been told that that was "not the important question" that they had to decide.

But if the jury were, in such juncture, to look for the "important question" wherein were they to find it? It is certainly not given them in the charge. And it is not in the charge because it was not in the case; that is, it was not in the case except in the aspect of justification, which the Court had definitely excluded.

Fourth ground of appeal:

“So you see you are not to decide whether Mr. Scullion was justified in killing Walters as bearing upon the question of his guilt or innocence of murder” (p. 157, l. 30).

Certainly not. No one so contended. But how and in what connection *was* it (justification) “to be considered” in the questions which the Court discussed with the jury? The Court did not say. There was only one possible consideration in the case and that was the absolute one of justification on the part of Scullion.

The fallacy of the Court’s treatment of justification in this way is more clearly disclosed when we realize what he meant by his statement that justification was to be considered *in other questions to be discussed with the jury*. The only other questions that the Court presented had to do with insured’s conduct in treating Scullion as he did, *in relation to whether or not insured knew that Scullion was armed with a pistol*. And that seems to have been the thing uppermost in the Court’s mind—whether or not Walters did see the pistol or did know that the man whom he had beaten and threatened to kill, whose wife he had beaten and threatened to kill, and whom he was then in the act of killing, was in possession of a deadly weapon. But what earthly connection did that have with justification on Scullion’s part? Any man is justified in taking life when necessary to defend himself against death or grievous bodily harm at the hands of a criminal assailant, whether the assailant knows that his victim is equipped with means adequately to resist him or not. What difference does it make whether or not insured saw the gun, or knew that Scullion had it, when we consider that in the extremity that insured had created it had become perfectly lawful, as we have shown, for

either Scullion or his wife, or both of them, to kill insured by any means that they could bring to hand. All of this about *insured's* apprehensions simply excluded from the case, in its consideration by the jury, the controlling question of *Scullion's* apprehensions, that is justification. And the trial court's preoccupation with the importance of knowing what *insured* had seen and was aware of in the defensive equipment of his victim becomes, in the light of all the facts, logically and morally fantastic. It was bound to have operated greatly to the prejudice of defendant.

Fifth ground of appeal:

"If Mr. Walters on this eventful night deliberately faced a loaded revolver—if he deliberately faced a condition that would in any way convey to his mind under the circumstances that the natural and probable consequences of his conduct would be his death, can't you see that he would then not be the victim of an accident but would be exposing himself voluntarily to his own death, and, therefore under such circumstances—which I am giving to you purely by way of illustration of the point that I make with regard to whether or not his death was caused by accidental means—under such circumstances you might find that it was a natural consequence to flow from his conduct" (p. 161, l. 18).

In the passage covered by this ground of appeal the Court gives further emphasis to the importance of determining whether or not insured "deliberately faced a loaded revolver." On that, virtually, the issue is made to turn. Insured, however, did just that—he *faced a loaded revolver; he gripped the hand that held it and face to face drove his victim across the kitchen floor, to a window and through it.* Every witness in the case testified to this. But assume that insured did not

exactly face a loaded revolver, deliberately or otherwise. He did deliberately threaten to kill. And he did deliberately set about to make good his threat. He was killed while making good his threat.

This straining to find what precisely were insured's reactions—not the victim's—to *his own lawless escapade*, is amazing.

The passages from the Court's charge covered by the 6th and 7th grounds of appeal are in effect repetitions and emphases of those already discussed.

The criticism we have made of the Court's treatment of justification was indicated to the Court by the exceptions that were taken. Evidently intending to clear the point, the Court gave added instructions. We have already said that the result was added confusion. This is what the Court said:

"At the outset of my charge I drew your attention to the fact that this was not a homicide case in the sense you were deciding whether or not Mr. Scullion were guilty of murder. I may have said that whether or not he was justified in killing Mr. Walters was not the important question to be decided. Well, of course that enters into the balance of my charge, but at that particular time I intended to qualify it, and I thought I did qualify it, by merely saying that this was not a charge of murder that we were deciding, and that you are not concerned with the justification so far as the murder case would be concerned" (p. 165, l. 38).

Surely there is no cure in this. Nobody had said that the case was a murder case; and the Court's repeated reference to a murder case and his repeated identifying of justification with a murder case, *and thus excluding the one with the other from the jury's consideration, simply accentu-*

ated the error and deepened the prejudice done defendant.

And then immediately follows this:

“Now, throughout my charge—if there has been any misapprehension about it—I might say that of course the question of justification enters into this question of whether or not under all the circumstances of the case this death was an accidental death” (p. 166, l. 15).

The Court had already said unequivocally that justification was *not* the important question in the case. He now says that it “enters into” the problem of whether this was an accidental death “under all the circumstances of the case.” But how it enters into it, and to what extent it is to be controlling upon the verdict, what relation it bears to the issue upon trial, the Court does not say.

It seems to us incomprehensible that the jury could have been otherwise than in a state of utter confusion upon the issue given them to decide.

Then the Court said this, and what it could possibly have meant by it we cannot determine:

“I did not mean to exclude from your consideration thereby the matter that I alluded to. I was directing your attention to the fact that this case was not based upon a charge of murder so that we were not deciding whether a murder had been committed, because justification is probably a defense in a case of murder” (p. 166, l. 20).

By this time the jury must have been pretty sure that they *were* trying a murder case; and small wonder if they found that Scullion murdered the insured.

So much for the Court’s “correction” of his justification precepts.

The Court was also moved to give the jury added instruction by the exceptions taken to those passages in the charge relating to the reasonable apprehensions to be ascribed to insured and the hypothesis of his "deliberately facing a loaded revolver." Apparently intending to overcome these exceptions also, the Court said (p. 166, l. 25):

"Later on in the charge I referred to a situation which I gave you to explain a point that I had previously made, and referred to apprehensions which Walters may have had. I did not mean to confine you only to a consideration of Walter's apprehensions at that particular time disassociated from the conduct and the justification that might have been found in Mr. Scullion's situation."

Well, now that the jury were no longer "confined * * * to a consideration of Mr. Walter's apprehensions," what effect were they to give to the "justification that might have been found in Mr. Scullion's situation"? The Court does not say. Moreover, what *is* the justification that "*might have been found in Mr. Scullion's situation*"? There was not a word of dispute in the testimony as to what that situation was, nor did the testimony admit of the least rational doubt that it justified Scullion in what he did, because it presented to him *in articulo mortis* the alternative of his lawful killing of the insured, or insured's lawful killing of him.

When a case that should be decided by the Court is submitted to a jury, the error is usually revealed in the charge. The attempt to propound an issue when there is none usually reaches an inept result. For example, the Court said:

"Now what is meant by accidental means? Now you would have little difficulty in deciding that in the event of a person walking down a street, dropping dead on the side-

walk, found to have been killed by a bullet from a revolver shot by some person unknown to the deceased—that that was an accidental death, and no one would claim it to be otherwise; but you see, gentlemen, in this case you have an entirely different situation presented, because there was evidently an altercation preceding the death of Mr. Walters, to say the least” (p. 159, l. 26).

This reads like an outlandish and impertinent contrast. Of course, the case supposed by the Court would be one of accidental death. Who, as he says, could doubt it? But the difference between such a case and the one before him certainly does not lie in the fact that “here there was evidently an altercation preceding the death of Mr. Walters, to say the least.” The difference lies in the fact that one is obvious accident, and the other is obvious self-defense against a deadly assault.

What modification the Court’s “to say the least” is intended to have on its concept of the “altercation” in the case, we cannot say; but the fact remains that there was no “altercation”—unless this term must be taken to mean the dissent of an innocent, law-abiding citizen to his murder or grievous injury at the hands of a criminal assailant. This is the only kind of “altercation” there was in the case. And that “altercation” left nothing whatever for the jury to pass upon “in the conduct of Mr. Walter’s in conjunction with the conduct of his brother-in-law in determining whether or not the death here resulted from accidental means.”

And the Court told the jury that he had denied defendant’s motions because—

“this was a case where there were conflicting questions of fact and inference that would have to be decided by you before the law could be applied” (p. 163, l. 8).

But what these conflicting questions of fact were, the Court did not tell the jury. Nor did he give a word of explanation of the "conflicting inferences" that would have to be decided by the jury. Nowhere in the entire charge does the Court point to any conflict or dispute. Nothing could better emphasize than does this very passage the absence of conflict in the proofs. There really was nothing for the jury to decide. So it is that the charge presents nothing.

POINT THREE.

This Court cannot, as matter of public policy, decide that a contract of accidental death insurance was intended or designed, or indeed that it can be permitted, to insure against death that is incurred by one in the perpetration of criminal homicide, whether with a deadly weapon or by any other lethal means whatever.

The judgment below should be reversed.

RANDOLPH PERKINS,
Counsel for The Prudential Insurance Company of America, Defendant-Appellant.

JOHN DREWEN,
Of Counsel with
Defendant-Appellant.

141067.1.1935

New Jersey Court of Errors and Appeals

OCTOBER TERM, A. D. 1935.

VIOLA E. WALTERS,
Plaintiff-Appellee,

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a cor-
poration,
Defendant-Appellant.

Action at Law.
On Appeal from
New Jersey
Supreme Court,
Hudson County.

BRIEF FOR VIOLA E. WALTERS, PLAINTIFF-APPELLEE.

This is the defendant's appeal from a judgment of the Supreme Court rendered by a jury in favor of plaintiff against defendant for the sum of \$2,000.00 and interest of \$780.00, the amount of an accidental death benefit under a policy of insurance issued by defendant on the life of William Walters.

Statement of Facts.

The insured, his wife and infant son, were invited to spend the night of December 31, 1928 (New Year's Eve), at the home of his brother-in-law, Walter Scullion, of West New York, to stay the next day, New Year's Day, to have dinner and join in celebrating Mrs. Scullion's birthday, the insured's wedding anniversary and New Years.

Insured and family arrived about 9 o'clock in the evening, bringing with him a jug of wine. They commenced drinking wine, eating, talking and fooling (Case, p. 28, ll. 8, 9, 10). About 11:30 insured's wife put the baby to bed and laid down with him, leaving the insured, Mr. and Mrs. Scullion in the kitchen, where they were talking, drinking, fooling and carrying on. At about 1 o'clock in the morning, insured decided to go home, and requested his wife to leave with him. His wife wanted to stay, but he stated he wanted to sleep home in his own house. His wife thereupon dressed herself and the baby (Case, p. 28, l. 40; p. 29, l. 4; p. 30, ll. 31, 32). She waited in the hall and went to her mother's with the baby (Case, p. 29, ll. 7, 8, 9).

Mrs. Scullion requested insured to spend the night. He refused, saying: "I am not going to stay and neither is my wife. I want you to keep out of my affairs. I am sick of you butting into my trouble" (Case, p. 52, ll. 10, 11, 12, 13). Mrs. Scullion grabbed hold of his arm (Case, p. 52, ll. 9, 10). Insured thereupon pushed Mrs. Scullion and tore her dress (Case, p. 52, ll. 13, 14, 15) and slapped her, because, as she testified: "I was giving him a lot of guff" (Case, p. 55, ll. 8, 9, 10). Her nose began to bleed from the excitement (Case, p. 55, ll. 3, 4). Mr. Scullion was at that time sitting in the kitchen with his child on his lap and she called to him: "Are you going to stand there and let Bill talk like that to me?" (Case, p. 52, ll. 17, 18.) Scullion said: "I got up, set the child on the floor and grabbed insured by the arm and tried to lead him out of the door" (Case, p. 125, ll. 13, 14; p. 141, ll. 37-39). At that moment Dillon, brother-in-law of both insured and Scullion, came into the house (Case, p. 125, ll. 15, 16). Scullion, defendant's witness, testified:

“He (meaning insured) asked me if I was putting him out; I said ‘Yes’. So he started to wrestle with me, broke away from me, grabbed for me and I tried to shove him out of the door” (Case, p. 125, ll. 37-40). No blows were struck (Case, p. 57, ll. 2, 3). They wrestled from the kitchen into the dining-room and Scullion fell on a settee where insured struck him one blow (Case, p. 94, ll. 19-22; p. 145, ll. 9, 10). Insured grabbed Scullion by the trousers and tore the pockets (Case, p. 145, ll. 4, 5). Scullion was in a sitting position on the settee (Case, p. 144, ll. 17-19). Then the scuffle completely terminated and insured went out of the room and “walked out to the kitchen” (Case, p. 93, ll. 38-39). Defendant’s witness Scullion testified: “He (meaning insured) and Ed went into the kitchen” (Case, p. 127, ll. 8, 9, 10; p. 103, ll. 27, 28) leaving Scullion in the living room alone (Case, p. 127, l. 10). Insured was in the kitchen getting ready to go home. He was facing the entrance door (Case, p. 104, ll. 12, 13); Dillon, his brother-in-law, was behind him assisting him in putting on his coat (Case, p. 104, ll. 14, 15) when Scullion came into the kitchen from the living room (Case, p. 104, ll. 9, 10). Insured had his back to Scullion (Case, p. 128, l. 9). Dillon, who was assisting insured with his coat, was in back of insured, and in back of Dillon was Scullion (Case, p. 57, ll. 35-37). Scullion said: “Get out of here and get out quick” (Case, p. 128, l. 17). Insured without turning around and with his back still turned to Scullion, responded: “All right I will go home” (Case, p. 133, l. 29). Then Scullion testified: “I turned my back to him and walked toward the tubs” (Case, p. 133, ll. 33, 34, 35). Insured then turned and lunged at Scullion (Case, p. 104, ll. 29, 30). He did not strike or punch Scullion, but “pushed him” (Case, p. 59, l. 10) through a window in the kitchen. Mrs. Scullion

and her brother Dillon tried to push Scullion away (Case, p. 53, ll. 19-23). Mrs. Scullion then asked her brother to go out and call a policeman (Case, p. 53, ll. 24-26). Then while they were together Scullion fired a shot and the insured struggled across the kitchen to the dish closet and fell on the floor. He died of the injuries he sustained.

Insured had no gun. Insured had not at any time during the scuffle displayed any weapon. There is nothing in the testimony to indicate that insured ever saw a gun or knew there was a gun (Case, p. 142, ll. 37 to 40; Case, p. 143). Scullion testified that when he had previously handled the gun, it was not loaded, and that he had never loaded it (Case, p. 143, ll. 4-10; ll. 17, 18), and that he took the gun "to scare him (meaning insured) out of the apartment (Case, p. 128, l. 21). Scullion testified he gave no warning or threat that he intended to shoot or kill (Case, p. 135, ll. 32-35) but that in the pushing, his finger "contracted" the trigger and it discharged (Case, p. 131, ll. 33-34).

Mrs. Scullion testified that the first time she saw the gun, was after the shooting, when it fell on the kitchen floor out of her husband's hand (Case, p. 54, ll. 27-28). Dillon testified that he did not see any gun until he came back to the apartment, and there was a gun alongside of the body of the insured (Case, p. 108, ll. 34-36).

The insured was a peaceful man. There is nothing in the evidence which justifies defendant in placing the construction that he does in characterising the insured. Counsel would also have it appear that the deceased engaged in a deadly encounter. This is not so, the deceased was not a violent, vicious brute, nor did he knowingly engage in a deadly encounter.

POINT ONE.

The death of the insured was by accident affected solely through external, violent and accidental means. As defined by the provisions of the policy.

The term "accident" or "accidental" should be given its ordinary and usual significance as being an event that takes place without one's foresight and expectation. The death of the insured was none the less an accident so far as he was concerned, even if he was an aggressor in the scuffle.

A leading case in point is that of *Lovelace v. Travelers Protective Assn.*, 126 Mo. 104, 30 L. R. A. 209, 28 S. W. 877. The facts are these: Insured was a guest at a hotel. A man named Graves was in the office cursing and boisterous. Lovelace remonstrated with him and an altercation ensued in which Graves challenged Lovelace to eject him, whereupon Lovelace slapped Graves and pushed him back until the latter struck the door which was closed, and while they were thus together Graves drew a pistol and shot Lovelace, who died from the wound inflicted. Lovelace weighed 175 lbs. Graves was much lighter and smaller and would have been pushed out of the door if it had been open. The court quoted from various cases defining and indicating the very wide range of meaning borne by the word "accident". The opinion concludes thus:

"Whether he acted lawfully as a guest of the hotel, during the absence and illness of the proprietor in attempting to remove Graves from the hotel office by force, we

think needless to investigate. It may be assumed that, by his course of conduct, he voluntarily assumed the risk of a fight. But there is nothing in the circumstances to show that he voluntarily assumed the risk of death. We consider this killing an 'accident' in the popular and ordinary sense in which the word is generally used."

The case of *Lovelace v. Travelers Protective Ass'n*, *supra*, is cited in cases too numerous to set forth. It represents the general rule of law on the question. We refer to a few of the many cases which illustrate and enforce the rule.

American Accident Co. v. Carson, 99 K. 445, 34 L. R. A. 302, 57 Am. St. Rep. 473, 36 S. W. 169 (holding intentional killing of insured by another is an accident within the meaning of the policy).

Union Casualty & Surety Co. v. Harroll, 40 S. W. 1080 (holding killing of insured while quarreling with person not knowing him armed, accidental).

Collins v. Fidelity & C. Co., 63 Mo. App. 257 (holding shooting of insured while in controversy with another, accidental injury).

Hester v. Fidelity & C. Co., 69 Mo. App. 191 (holding it a question for the jury whether injuries sustained from gun-shot wound in quarrel were accidental).

Phoenix Accident & Sick Benefit Ass'n v. Stiver, 42 Ind. App. 641, 84 N. E. 772 (holding death was accidental within the

meaning of an accident where deceased was stabbed by an insane person because deceased had ejected him from the premises of another).

Price v. Occidental L. Ins. Co., 169 Cal. 800, 147 Pac. 1175.

Taliaferro v. Travelers Protective Ass'n, 25 C. C. A. 494, 49 U. S. App. 275, 80 Fed. 368.

Clay v. State Insurance Co., 174 N. C. 642.

Interstate Business Men Acc. Ass'n v. Lester, 257, Fed. 230 (C. C. A.).

Employers Indemnity Corp. v. Grant, 271 Fed. 139 (C. C. A.).

Norris v. New York Life Ins. Co., 49 Fed. (2) 63 (C. C. A.).

New York Life Ins. Co. v. Gustafson, 55 Fed. (2) 235, judgment affirmed at p. 236.

Camp v. Prudential Ins. Co., 163 Atl. 320 (Pa.).

Washington Theatre v. Hartford Accident & Indemnity Co., 157 Atl. 111 N. J.

An extract is made from the opinion of the Court in one of the above cited cases which will suffice to show the rule of law on this point.

Union Casualty & Surety Co. v. Harroll, 98 Tenn. 491, 40 S. W. 1080, was an action on a death policy. Harroll was killed by a pistol fired by one McNeal. They were employees of a railroad. There had been bad feeling between them breaking

out into occasional quarrels in which profane language was used by Harroll towards McNeal. Harroll gave McNeal an order which he refused to obey. Harroll applying a vulgar and abusive epithet to McNeal, advanced threateningly upon him four or five steps where McNeal having retreated a corresponding distance, believing himself to be then in danger of death or great bodily harm, suddenly drew a pistol and fired the fatal shot. The assured was unarmed at the time. The case was submitted to jury, who returned a verdict in favor of defendant. The court said:

“The death was none the less an accident so far as he was concerned, under the authorities, though he was moving aggressively upon his slayer when shot, if the deceased did not know and had no reason to believe that McNeal was armed and intended upon his advance to slay. He was unarmed, and, though he advanced with offensive words, and a manner constituting a challenge to fight, yet ignorant of the fact that there was a deadly weapon on the person of his adversary and receiving no warning from him that he would be shot if the advance continued, Harroll had the right to presume, if the fight occurred, it would be carried on without the use of such a weapon. *Price v. State*, 36 Miss. 531. And the death under such circumstances would be accidental as to the assured, though the act producing it was intentional on the part of McNeal. *Insurance Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723. *Lovelace v. Association*, 126 Mo. 104, 28 S. W. 877.”

This case is also cited by many cases.

Extracts might be made from the opinions in the other cases cited above to the same effect, but the foregoing clearly show that the rule is based on reason and is enforced by the State and Federal Courts.

The cases cited by defendant on pages 8, 9, 10, 11 and 12 of its brief, pertain to the question of whether in a homicide case one is excused or justified in taking human life. They have bearing on the issue in this case.

The facts in the cases cited by defendant on pages 14, 15, 16, 17 and 18 of its brief are unlike those found in the instant case and are distinguishable.

Let us examine the cases cited by defendant.

In *Talliaferro v. Travelers Protective Ass'n*, 80 Fed. 358, the insured entered into a quarrel with another, told the latter that "he must have revenge" and "to put himself in shape", and drew a *pistol* and struck the other, whereupon the latter then drew a pistol and shot him. The court said:

"He was the first to draw a deadly weapon accompanying the action with the exclamation that 'he must have revenge' and at the same time warning Firth 'to put himself in shape'. This can be regarded in no other light than an invitation to a deadly encounter in which the deceased voluntarily put his life at stake and took the chances of getting killed."

The Court cites the case of *Lovelace v. Travelers Protective Association*, *infra*, and distinguishes it by saying that while it appeared in that case that the deceased had engaged in a quarrel which he

might very well have avoided, it did not appear that he had drawn a weapon of any sort, or that he knew, when he engaged in the quarrel, that his opponent was armed, and the court held that the unexpected result of the affray was an accident, so far as deceased was concerned.

In *Fabian v. Prudential Insurance Co. of America*, 249 N. Y. Supp. 1, the question for determination was whether insured met his death through "accidental means" within the meaning of the policy of insurance. Insured shot his wife. The court said:

"We think the evidence justifies the finding that the insured at the time of being shot was engaged or had immediately preceded his being shot been engaged in the commission of murder * * *. The evidence justifies the conclusion he in turn threatened the officer who was justified in believing he intended shooting him."

The court cites the Talliaferro case

In *Manno v. Metropolitan Life Ins. Co.*, 249 N. Y. Supp. 471, the facts are: Three police officers had recognized and were attempting to apprehend decedent in a dance hall in New York City. One of the officers placed his hand on Manno's shoulder and told him he was a police officer. The officer struggled with Manno who drew a gun. The officer tried to save himself from Manno's gun and during the struggle succeeded in reaching his own gun with which he shot and killed Manno. The court relies on the Talliaferro case. But differentiates the case of *Lovelace v. Travelers Protective Ass'n*, *supra*. The court said:

“He became a wrongful aggressor when he drew his *gun* at such slight provocation. He should have reasonably expected and known that the police officer possessed a gun which he might use in self defense.”

In *Raven Halls, Inc. v. U. S. Fidelity & Guaranty Co.*, 254 N. Y. Supp. 589, the defendant in quoting this case apparently copied the head not from 254 N. Y. Supp. 589. The case is also reported in 142 Mis. 454, but no such headnote appears.

The facts of the case are—defendant issued a *liability* policy to plaintiff indemnifying it against loss from all claims for bodily injuries including death resulting therefrom accidentally suffered by any person other than employees of assured.

Plaintiff owned a bathing establishment at Coney Island. Curry, a policeman, was a patron. He with others visited a restaurant on the premises. Curry drank whiskey and became intoxicated. He was boisterous and disorderly and indulged in abusive language to plaintiff's cashier and threatened to beat and kill him. Avitable, an attendant employed at the bathing pavillion, was near the cashier's cage and without warning or provocation Curry brutally assaulted him, striking him a number of times in the head and shoulders with a *bottle*. During the scuffle, Avitable seized a knife from a frankfurter stand and stabbed Curry, who later died. The court, among other things, said:

“I know of no case where the courts of this state have determined whether a person assaulted and injured by an employee of the assured sustained accidental injury within the purview of the *liability* policy.”

In *Piotrowski v. Prudential*, 252 N. Y. Supp. 313, the facts are these: At time of death insured was in company of three other men. They, together with the insured had stolen a Dodge car and were engaged in an endeavor to escape from police officers who were pursuing them for the purpose of arresting them. In order to prevent them from escaping the police officers fired at the car in order to stop it. The shots killed the insured. The court said:

“If the conduct of the insured was such as to show that he voluntarily put himself in a position where he should expect that the natural and probable result would be that the police officers would fire at him and his companions, he was voluntarily assuming the risk of being killed and his death was not an accident. 1 C. J. 429, Sect. 73.”

The court cites the Talliaferro case.

In *Cory v. Woodman Accident Co.*, 164 N. E. 159, defendant's quotation is apparently a copy of the syllabus of the case. One of the by-laws of the company provided “no indemnity shall be provided for either disappearance or injuries, disability or death sustained under any of the following conditions * * *. While insured is engaged in any of the following risks or acts: Duelling or *fighting*.” It also recited that: “No indemnity shall be provided to cover injuries, disability or death due wholly or in part directly or indirectly to any of the following causes—Intentional acts of the insured or any other person.” The facts are: There was an argument between Cory and one Seybold. Cory advanced toward Seybold who told Cory to stand back or he would shoot him.

Cory advanced and grabbed Seybold by neck, and Seybold retreating pulled gun from his pocket and fired a shot to one side of Cory. Cory continued to advance, tightening his grip on Seybold's neck, *reached toward his own hip pocket* with his left hand and Seybold intentionally fired a second shot, causing the fatal injury to Cory.

The court held it was not accidental under terms of the policy in the case and further said:

“The facts as presented by this record are unlike those found in the cases of Lovelace and Union Casualty relied upon by defendant in error.”

In *Mello v. John Hancock Mutual Life Ins. Co.*, 183 N. E. 255, deceased was a fisherman and a member of the crew of a boat. After midnight a Coast Guard Picket displaying ensign and pendant to haul to, fired two shots and then fired a machine gun. The boat hauled to and insured was found inside the boat shot and mortally wounded by machine gun bullet. The boat had sacks of liquor on board attempting to smuggle in violation of federal law. The Court said:

“That insured was shot and killed while engaged in transportation of intoxicating liquor and was presumed to know his act was illegal and that Coast Guard would fire upon him and he would be killed. We are of the opinion that in these circumstances it would be contrary to public policy to permit recovery.”

In *Prudential Casualty Co. v. Curry*, 10 Ala. App. 642 (1914), it appeared that while holding a rifle in his hand, insured accosted a man passing

along the highway whom he knew was armed with a rifle and made insulting remarks to him and pointed his rifle, which was cocked and loaded, at the other, whereupon the latter shot and killed him. The court relied upon and approved the decision in the Talliferro case.

In *Dozier v. Fidelity and Casualty Co.*, 46 Fed. 446 (Circuit Missouri), the question to be decided was "whether or not death resulting from sun-stroke or heat prostration comes within the meaning of injury against insured", and is not analogous to the facts of the case at bar.

In case of *Fidelity & Casualty Co. v. N. Y. Stacey's Executors*, 143 Fed. 271 (5 L. R. A. N. S. 657), Stacey struck Carroll with his right hand staggering him and immediately followed it up with a blow from his left hand upon the mouth, knocking him down. Porter made no resistance, got up and walked off. Stacey cut the knuckle of his finger. It grew worse developing into blood poison followed by amputation and death. Court held insured intended to do exactly what he did on that occasion and that the injury he received at the time was the natural and logical result of an intentional act on his part. (Distinguishes *Mutual v. Barry*, 131 U. S. 100.)

In *Hutton v. States Accident Ins. Co.*, 267 Ill. 267; L. R. A. 1915 E. 127, the facts are: Hutton entered a restaurant and saw Huddlestun sitting on a stool. Without saying a word he walked up behind him and struck him a blow with his fist on the side of the head intending to hit him so hard that "he wouldn't get up and begin it all over". Huddlestun arose and Hutton struck him again.

Huddlestun then pushed and knocked Hutton down, breaking his leg. Court held Hutton was bound to know that one of the natural and probable consequences was that he might be injured. The court cites Talliaferro case. It cites and distinguishes the case from the Lovelace case, saying:

“In this case a different question would be presented if Huddlestun had resisted the attack on appellee by the use of a *deadly* weapon; but instead of that it is conclusively shown that the assault was met in kind * * *.”

In *Clay v. State Insurance Co.*, 174 N. C. 642, the Court in its decision relied upon the Talliaferro case, and the facts were that the insured announced that he would kill his adversary and wrongfully assaulted him with a pole and then pursued the fight with a *pistol which he fired first* and was then himself shot and killed. The Court in this case also distinguished the case of *Lovelace v. Travelers*.

In *Postler v. Travelers Ins. Co.* (1916), 172 Cal. 1, Postler was a painter and visited a gambling resort and apparently lost money there. Postler later went to a store and bought a revolver and bullets and went to the gambling resort to get back the money he lost. He held up three men who ran out, one of them met a police sergeant from whom he obtained a pistol. This man and Postler went into an adjoining room where there was an exchange of shots from which Postler died.

It was held: A man who attempts to get money by display of a *deadly weapon*, aiding such display

by threats of killing, must contemplate as the natural and probable consequence of his actions that there will be resistance to or interference with the consummation of his plan, and that such resistance or interference will result in serious injury to participants. The killing was the natural and probable consequence of his own voluntary act.

It is clear from the cited cases that if a man deliberately assaults another with a *deadly* weapon in his hand, it cannot be said that the injuries he receives in the resulting struggle are accidentally received. The very act of assaulting another with a gun is an invitation to the other to resist unto death, and if the aggressor is killed, it is a natural and logical consequence of his own voluntary act. But these are not the facts in the instant case. In this suit, insured and Scullion were brothers-in-law. They were friendly. Insured and his family were at the time, guests in his brother-in-law's home. When insured wrestled and scuffled with his brother-in-law, the insured was unarmed and did not exhibit any weapons and did not invite that species of combat. He was ignorant of the fact that there was a deadly weapon on the person of his brother-in-law and received no warning from him. Certainly, a reasonable man may not anticipate or foresee that his brother-in-law would shoot him, and such an act on the part of one's own brother-in-law is contrary to all preconceived ideas upon which reasonable men act. The shooting by his brother-in-law was not intentional. It may be assumed that insured, by his course of conduct, voluntarily assumed the risks of a scuffle. But there is nothing in the circumstances to show that he voluntarily assumed the risk of death. Insured had the right

to presume if the scuffle continued that it would be carried on without use of such a weapon, but would be met in kind. When his brother-in-law did shoot and kill him, the death under such circumstances was accidental as to the insured, even if the act producing it was intentional on the part of his brother-in-law.

POINT TWO.

Whether the insured's death was caused by external, violent and accidental means is for the Jury.

The trial court properly permitted the jury to pass upon the questions of fact. The testimony produced on the part of the plaintiff differed from that produced by defendant.

A similar question was raised in the case of *Camp v. Prudential Insurance Co. of America*, 163 Atl. 320 (Superior Court of Pa.) where insured was killed by reason of being assaulted and violently struck with the hand and fist of one Kundervitch, causing insured to fall and strike an iron rail, and as a result of the injuries sustained he died. Plaintiff was paid the ordinary amounts under the policies but defendant refused to pay the sum of \$386.00 accidental death benefits. The defendant denied that insured was killed through "external, violent and accidental means". The court speaking thereon said:

"Defendant's affidavit of defense avers (Par. 8). '* * * That the said Robert S. Camp, by his own conduct invited the violence used against him by the said Martin

Kundervitch, and that the injuries which he suffered therefrom were the reasonable consequence of his own act and should have been anticipated by him.' This raised a question of fact which should be passed upon by the jury, or by the court if sitting without a jury. This is in accordance with the principle laid down by text-book writers as well as by the cases in most jurisdictions.

'It is for the jury to determine whether or not death by being shot by another is an accident, where the evidence is conflicting as to whether or not insured's own wrongful conduct produced his death, or he voluntarily and intentionally committed acts from which he foresaw, or should have foreseen, that death or injury might result.' Couch, *Cyclopaedia of Ins. Law*, vol. 5, p. 4072, Sect. 1158.

'Whether the death of an insured was caused by an accident is for the jury, unless the evidence is so convincing that all reasonable men in the fair exercise of their judgment would adopt the same conclusions (citing cases).' Cooley, *Briefs on Insurance* (2d Ed. 1928) vol. 6, p. 5291.

'It is for the jury to pass upon all questions of fact as to which there is conflicting evidence, such as * * * whether the injury, disability, or death was caused by external, violent and accidental or other means. * * *'
1 C. J., p. 508, Sect. 337."

The Court's charge was proper. The question of justification was not pertinent.

Horan v. Prudential Insurance Company of America, 159 Atl. 69 (Superior Court of Penn.), was an action on a life insurance policy, and the question involved was whether death was the result directly or indirectly of all other causes, of bodily injuries, effected solely through external, violent and accidental means. The Court said:

“The fourth assignment covers the rejection of evidence to prove that the watchman believed, when he hit the deceased, that he was acting in self-defense. If the watchman had been on trial, his motive may have been material (*Com. v. Gormley*, 77 Pa. Super. Ct. 298, 303), but it is not pertinent under the facts in this case. It was for the trial judge, sitting without a jury, to determine whether the death was the result of accidental means, independent of the watchman's intention or motive when he fired the last shot.”

The Court's charge made it clear that they were not deciding a homicide case and that they were not concerned with justification as a defense in a case of murder. The Court charged the jury that the question presented was whether the death of Mr. Walters was a result directly or independently of all other causes of bodily injury, effected solely through external, violent and accidental means, within the terms of the policy. That was a clear and concise statement of the question to be decided. It was on that theory the case was submitted to the jury.

When defendant excepted to the charge pertaining to justification, the Court corrected any misapprehension, if there had been any, as to

justification as a probable defense in a case of murder. The charge was more helpful than harmful to the defendant. When the Court corrected any misapprehension, defendant apparently was satisfied.

Defendant attempts to argue that the charge is erroneous by catching at phrases and single sentences and separating them from the real scope of the charge. The charge must be read as a whole.

The judgment below should be affirmed.

ADELMAN & ADELMAN,
Counsel for Plaintiff-Appellee.

A. HARRY ADELMAN,
Of Counsel with
Plaintiff-Appellee.

