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Notice of Appeal.

(Filed July 25, 1945.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

CATHERINE McNAMARA,
Plaintiff-Appellant,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant-Respondent.

10

Action at Law.
Notice of Appeal.

To *Drewen & Nugent, Esqs., Attorneys for De-*
fendant-Respondent, 921 Bergen Avenue, Jer- 20
sey City 6, New Jersey.

Sirs:

PLEASE TAKE NOTICE that the plaintiff-appellant
appeals to the Court of Errors & Appeals from the
whole of the judgment entered in the above named
cause in the New Jersey Supreme Court, reversing
the judgment of the First District Court of Jersey
City, upon the following ground:

(1) That the Supreme Court erred in re- 30
versing the judgment of the First District
Court of Jersey City.

EDWARD DESEVO,
Attorney for Plaintiff-Appellant.

Service of a copy of the within is hereby
acknowledged this 23rd day of July, 1945.

DREWEN & NUGENT,
Attorneys for Defendant-Respondent. 40

Order of Reversal and Remittitur.

NEW JERSEY SUPREME COURT,

No. 411—MAY TERM, 1945.

10

CATHERINE McNAMARA,
Plaintiff-Respondent,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant-Appellant.

On Appeal
from First
District Court
of Jersey City.

Order of
Reversal and
Remittitur.

20 This matter coming on to be heard on appeal from the First District Court of Jersey City, at the May Term, 1945, of this Court; and the Court having heard and considered the argument of Drewen & Nugent, Esqs., Attorneys for Metropolitan Life Insurance Company, Defendant-Appellant, and of Edward DeSevo, Attorney of Catherine McNamara, Plaintiff-Respondent, and having examined the record and proceedings of the First District Court of Jersey City;

30 IT IS HEREBY ORDERED AND ADJUDGED that the judgment of the said District Court of Jersey City herein be, and the same is hereby reversed, set aside and for nothing holden, with costs; and

IT IS FURTHER ORDERED AND ADJUDGED that the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

Rule actually entered May 28, 1945.

On Motion of:

40 DREWEN & NUGENT,
Attorneys for and of counsel
with Defendant-Appellant.

Opinion.

NEW JERSEY SUPREME COURT,

No. 411—MAY TERM, 1945.

 CATHERINE McNAMARA,
 Plaintiff-Respondent,

vs.

 METROPOLITAN LIFE INSURANCE
 COMPANY,
 Defendant-Appellant.

10

Submitted May, 1945. Decided, 1945.

Under the provision of the policy in suit the
 named beneficiary is not entitled to double indem-
 nity, when the insured started a fist fight with one
 who knocked him down, fracturing his skull.

20

ON APPEAL FROM THE FIRST DISTRICT COURT OF
 JERSEY CITY.

For Appellant, DREWEN & NUGENT, JOHN P.
 NUGENT.

For Respondent, EDWARD DeSEVO, ALEX R.
 DeSEVO.

30

Before Justices CASE, BODINE and PERSKIE:

BODINE, J. The suit was upon a policy of life
 insurance claiming a double indemnity. The perti-
 nent provision of the policy is as follows: "Acci-
 dental Death Benefit. Upon receipt of due proof
 that the death of the Insured resulted, independ-
 ently of all other causes, from bodily injuries
 caused solely by external, violent, and accidental
 means, the Company will pay, as an additional
 death benefit, an amount equal to the amount pay-

40

Opinion.

able under the Schedule, unless such injuries (injury) * * * is the result of participation in an assault or felony." The proofs show that the insured died as the result of a fractured skull.

On the night of February 14, 1942, he attended a dance. In the early morning of the next day, 10 accompanied by a friend he went to a saloon. Thereafter, they went to a restaurant at 203 Pavonia Avenue, Jersey City. A former pugilist was having his breakfast. There was plenty of room around the counter but the insured sat on a package containing the pugilist's lunch. A verbal altercation ensuing, the insured struck the protesting pugilist, and knocked out one of his teeth. The restaurant proprietor put the men out on the street. The pugilist then struck the insured a 20 blow which felled him to the street and fractured his skull so that he died in two days.

The learned trial judge found in favor of the beneficiary named in the policy, the reason given being that the insured must have been engaged in such an assault as would reasonably lead to his death, in order to avoid the indemnity provision of the policy. We think not. The policy provides that there shall be no double indemnity if the death is the result of participation in an assault or 30 felony. The insured not only was the aggressor, having started a fist fight, but he could have reasonably foreseen the fatal possibilities of its continuance. But under the language of the policy, it is enough that death results from his participation in an assault or felony. The insured was the aggressor, he provoked the fight and there is no right of recovery in such a case under the language used in this policy. He invited the en- counter and the double indemnity feature falls. 40 If the rule of foreseeable consequences applied—but we think it does not—the result would be the same since a fist fight may result fatally.

The judgment is reversed with costs.

Specification of Determinations.

(Filed February 28, 1945.)

NEW JERSEY SUPREME COURT.

CATHERINE McNAMARA,
Plaintiff-Appellee,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant-Appellant.

On Appeal from
First District
Court of Jersey
City—#283941.

10

Sat below :
WILLIAM E.
SEWELL,
D. C. J.

The following is a specification of the determinations of the First District Court of Jersey City with which this defendant-appellant is dissatisfied in point of law.

20

1. The trial court erroneously denied defendant's motion for judgment in its favor, which motion was made at the conclusion of the trial.

2. The evidence conclusively established and the trial court found that insured's death was the result of his unprovoked assault upon another; it was, therefore, as a matter of law, error to deny defendant's motion for judgment in its favor, which motion was made at the end of the trial.

30

3. The evidence conclusively established, and the trial court found that the insured was the aggressor in an unprovoked assault upon another from which insured's death resulted; it was, therefore, as a matter of law, error to deny defendant's motion for judgment in its favor and to enter judgment against defendant upon the policy of insurance which excepted such death from its coverage.

40

DREWEN & NUGENT,
Attorneys of Defendant-Appellant.

Summons.

Service upon me of a copy of the within specification of determinations is hereby acknowledged this 26th day of February, 1945.

EDWARD DESEVO,
Attorney of Plaintiff-Appellee.

10

Summons.

State of New Jersey }
County of Hudson } ss:
City of Jersey City }

20 The State of New Jersey, to the Sergeant-at-
[L. s.] Arms of the First District Court of the
City of Jersey City or to any Constable
of said County.

SUMMON

30 THE METROPOLITAN LIFE INSURANCE COMPANY
to appear before the FIRST DISTRICT COURT of Jer-
sey City, to be held at the First National Bank
Building, Entrance, No. 20 York Street, in said
City, on the third day of February, One Thou-
sand Nine Hundred and Forty-Four, at ten o'clock
in the forenoon, to answer unto, CATHERINE Mc-
NAMARA, Plaintiff, in an Action upon Contract De-
mand Two hundred fifty (\$250) Dollars.

Witness, JOSEPH C. GLAVIN, Esq., Judge of said
FIRST DISTRICT COURT at Jersey City aforesaid,
the 26th day of January in the year One Thousand
Nine Hundred and Forty-four.

EDWARD DESEVO, Plaintiff's Attorney.

40

B. FRANCES MARRON, Clerk.

(A True Copy)

State of Demand.

FIRST DISTRICT COURT OF JERSEY CITY

CATHERINE McNAMARA,
Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant.

Action at Law
State of Demand

10

The plaintiff, as complaining against the defendant, in the above entitled cause, says that:

1. Defendant is an insurance company engaged in the business of insurance and is authorized to transact the business of insurance in the State of New Jersey. 20

2. On or about the 23rd day of August, 1937, the defendant, in consideration of a certain premium issued to one, Christopher McNamara, a certain contract or policy of insurance known as a whole life policy with premiums payable for 20 years, numbered 127467866, whereby it insured plaintiff's decedent and agreed to pay unto the beneficiary of said policy the sum of Two Hundred and Fifty (\$250.00) Dollars in the event of the death of said insured. 30

3. Included in said policy, and as one of the benefits thereof, was an accidental death benefit, in which the defendant agreed to pay unto the beneficiary of said policy, upon the receipt of due proof that the death of the insured resulted independently of all other causes, from bodily injury caused solely by external, violent and accidental means, a sum equal to the amount payable under 40

State of Demand.

the ordinary face amount of that policy or an additional Two Hundred and Fifty (\$250.00) Dollars.

10 4. Subsequently thereto, and during the term of the said policy, plaintiff's decedent met with his death on February 17, 1942 from bodily injury caused by external, violent and accidental means.

5. Due proof of the death of said decedent caused as herein above mentioned was given to the defendant herein, but the defendant refuses and neglects to pay to the plaintiff, who was the named beneficiary under said policy the amount of the accidental death benefits thereof.

20 6. Plaintiff has performed all requirements of said policy to be performed by her and has demanded of the defendant the sum of Two Hundred and Fifty (\$250.00) Dollars, which the defendant has refused to pay.

WHEREFORE, plaintiff demands as damages against the defendant the sum of Two Hundred and Fifty (\$250.00) Dollars, together with interest and costs of this suit.

30 EDWARD DESEVO
Attorney for Plaintiff.

To the within named defendant:

TAKE NOTICE THAT in the event that the defendant intends to defend the within action, plaintiff demands that defendant file a written specification of the defenses intended to be used by the defendant, on or before the return date of the summons in this cause.

40 EDWARD DESEVO
Attorney for Plaintiff.

Specifications of Defenses.

FIRST DISTRICT COURT OF JERSEY CITY.

#283941

CATHERINE McNAMARA, Plaintiff,	(On Contract).	10
vs.	Action at Law.	
METROPOLITAN LIFE INSURANCE COMPANY, Defendant.	Specification of Defenses.	

Defendant, Metropolitan Life Insurance Company, as and for a specification of the defenses intended to be made by it at the trial of this action, sets forth the following: 20

1. Insured's death was the outcome of an unlawful assault which was provoked by him and therefore was a risk excepted in the policy sued upon.

2. Insured's death was the result of an assault in which he participated and therefore was a risk excepted from the policy sued upon. 30

DREWEN & NUGENT,
Attorneys of Defendant.

Transcript of Testimony.

FIRST DISTRICT COURT OF JERSEY CITY.

10 CATHERINE McNAMARA,
Plaintiff,
vs.
METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant.

Before:

HONORABLE WILLIAM E. SEWELL,
Judge.

20

November 28, 1944.

Appearances:

For the Plaintiff, EDWARD DE SEVO, Esq.

For the Defendant, DREWEN & NUGENT, Esqs.,
by JOHN NUGENT, Esq.

30

FRIEDA H. LIPSCHITZ,
Certified Shorthand reporter,
sworn as stenographer.

40 Mr. De Sevo: If the Court please, this is a suit upon a policy of insurance and particularly policy number 127467866 issued by the Metropolitan Life Insurance Company insuring the life of Christopher McNamara, in which policy the name of the beneficiary is the plaintiff herein, Catherine McNamara. Now, it appears that the insurance company, the defendant herein, has paid to the plain-

Testimony.

tiff the face amount of the policy insofar as the ordinary straight life provision is concerned.

The Court: Is this a stipulation that you will stipulate that these are the facts?

Mr. De Sevo: Yes.

The Court: The company paid a face amount of the value of the policy?

Mr. De Sevo: That is correct; and this suit is brought for the accidental benefits equal to the amount of the face value of the policy, to wit, \$250.00. 10

We have stipulated that due proof of death, in accordance with the requirements of the policy, have been given to the defendant, Metropolitan Life Insurance Company. We have also stipulated that the decedent died from injuries which were external and violent.

The Court: The decedent died of injuries which were what? 20

Mr. De Sevo: External and of a violent nature.

The Court: All right.

Mr. De Sevo: We have also stipulated that the policy was in full force and effect at the time of the death, which occurred on February 17th, 1942.

The Court: It is so stipulated, Mr. Nugent?

Mr. Nugent: Exactly.

The Court: All right. Proceed.

Mr. De Sevo: I would like to offer in evidence, if the Court please— 30

Mr. Nugent: I thought that is in the nature of an opening, and I think perhaps your Honor would like to hear what the defense intends to rely upon before any exhibits are offered.

(Opening by both counsel.)

Testimony.

Mr. De Sevo: I offer in evidence the policy in question, policy number 127467866, issued by the defendant, Metropolitan Life Insurance Company, insuring the life of Christopher McNamara, and in which policy the plaintiff herein, Catherine McNamara, is named as beneficiary.

10 The Court: Is that by consent?

Mr. Nugent: That is right, sir.

(Received in evidence and marked as exhibit "P 1".)

Mr. De Sevo: I now also offer in evidence, and which is consented to by Mr. Nugent, a proof of death, and particularly physician's statement as to proof of death, which was filed with the Metropolitan Life Insurance Company, on I think it is, the nineteenth of February.

20 Mr. Nugent: At least within time.

Mr. De Sevo: Within time; and ask it be marked in evidence.

Mr. Nugent: Signed by Dr. Haskins?

Mr. De Sevo: Arthur Haskins—yes.

Mr. Nugent: All right.

(Received in evidence and marked as exhibit "P 2".)

30 Mr. De Sevo: May I at this time read into the record question 7 of this statement, together with the answer of Dr. Haskins, who is the one who filled the statement out:

"Question: What was the cause of death?

Answer: In my opinion intracranial hemorrhage and laceration of the brain following fracture of the skull."

Catherine Briganti, Plaintiff—Direct.

CATHERINE BRIGANTI, the plaintiff, called as a witness on her own behalf, being first duly sworn according to law, upon her oath testified as follows:

Direct Examination by Mr. De Sevo:

Q. Mrs. Briganti, you are the Catherine McNamara who was named in the policy in question? 10
A. Yes.

Q. And you are a sister of the deceased, Christopher McNamara? A. Yes.

Q. Do you recall the day of his death? A. Well February 17th, 1942. It was on a Tuesday.

Q. And did you see your brother after this occurrence down at the restaurant? A. Yes.

Q. Where did you see him? A. I saw him up at the Medical Center. 20

Q. And what time did you see him? A. I saw him at seven o'clock, and then I——

Q. Seven o'clock at night? A. Monday night, yes.

Q. Will you describe your brother's condition to the Court as you observed it when you saw him in the Medical Center. A. I nearly went out of my mind.

The Court: Is that of any value, Mr. De Sevo? I mean, it is admitted his death was caused through external force? 30

Mr. Nugent: Yes.

The Court: It seems to me that your whole case comes down to what happened at the time of this assault, or the alleged assault.

Mr. DeSevo: I think the nature——

The Court: I don't want to stop you if you want to go ahead. 40

Catherine Briganti, Plaintiff—Direct.

The Witness: I want to go ahead myself.

Mr. De Sevo: Just a minute, please. Except, if the Court please, for whatever probative value the effects of the remarks, or the effects of the assault committed upon the decedent may have upon your Honor.

10

The Court: All right.

Mr. Nugent: I object, because this witness was not present, and whether these remarks were met by an assault that was involved in this case does not seem to me to be evidence that we can get from her. If she were there and saw the assault—

The Court: How does she know?

20

The Witness: My brother's head was broke.

Mr. De Sevo: Just a minute.

The Court: Ask the direct question and I will rule.

Mr. Nugent: May I have this witness warned, your Honor, not to talk except answer questions.

The Court: Yes. Wait until I rule.

30

Mr. De Sevo: Remember, you just listen to the question, and if the Court says anything wait until you are instructed to answer.

Q. At seven o'clock that evening you saw him in the Jersey City Medical Center? A. Yes.

Q. Now, will you describe for us his condition as you observed it. A. Well,—

Mr. Nugent: I object.

The Court: Sustain the objection.

40

Mr. De Sevo: Allow me an exception.

The Court: Exception is allowed.

Catherine Briganti, Plaintiff—Direct.

Q. Do you know when your brother had been brought to the Medical Center?

Mr. Nugent: I object, if your Honor please. Naturally it would be hearsay evidence.

The Court: I will admit it if she knows.

Mr. Nugent: If she knows of her own knowledge. 10

A. I know from the doctor up at the Medical Center.

The Court: I don't think it would make any difference, Mr. Nugent.

Mr. Nugent: I will withdraw the objection.

A. It doesn't make any difference. 20

The Court: I ask you, madam, when counsel objects to the question, will you please not answer until the question is ruled on. What is the last answer?

(Last answer read by the stenographer.)

Q. When was that, Mrs. Briganti, that he was brought in the Medical Center? A. He was taken in at 6:25. 30

Q. A. M.? A. Yes.

Q. In the morning. And did he remain in the Medical Center for any period of time? A. Yes; he remained there until he died.

Q. When did he die? A. He died Tuesday at twelve o'clock.

Q. In the morning or at night?

The Court: She just said Tuesday. 40

Catherine Briganti, Plaintiff—Cross.

Q. The following Tuesday after this happened? A. Yes. It happened Sunday, and he died on Tuesday.

Q. Two days after the happening? A. Yes.

Q. Was that twelve o'clock in the morning or twelve noon? A. Twelve noon.

10

Mr. De Sevo: Cross-examine.

Cross-examination by Mr. Nugent:

Q. That afternoon—just a moment—did your brother live with you at the time of his death? A. No. I was in the Medical Center myself.

Q. Where did your brother live? A. My brother lived down in Birmingham. He worked down there. He lived there.

20

Q. Where is Birmingham? A. Down in New Jersey.

Q. How big a man was your brother? A. My brother was about my size.

Mr. De Sevo: I object, on the ground that I am not even permitted to show what the man's condition was as she observed him.

The Court: I think you will have to make her your own witness, Mr. Nugent.

30

Mr. Nugent: I think, if your Honor pleases, that the rule that your Honor has in mind applies where the witness is a witness only and not a party to a suit.

The Court: I think not, Mr. Nugent. If you were trying to affect the woman's credibility, or something of that kind, I would allow you a great deal of latitude; but this is an entirely new subject you are introducing. In fact, you objected to Mr.

40

Walter Kloby, for Plaintiff—Direct.

De Sevo's asking the question as to the man's appearance.

Mr. Nugent: May I suggest to your Honor the fact that your Honor will undoubtedly want to have in mind the size and weight of his alleged assailant, which would be a condition.

10

The Court: I think that is an important factor, but if you want to bring it out by this witness, you will have to make her your own witness.

Mr. Nugent: I have no further questions.

Mr. De Sevo: That is all.

WALTER KLOBY, called as a witness on behalf of the plaintiff, being first duly sworn according to law, upon his oath testified as follows: 20

Direct examination by Mr. De Sevo:

The Court: Where do you live?

The Witness: 203 Pavonia Avenue.

Q. You have been subpoenaed here by the Metropolitan Life Insurance Company? A. Well, I had two of them. I got them with me. 30

Q. From the Metropolitan. You have never spoken to me, have you? A. No, sir.

Mr. Nugent: In other words, you were supposed to be my witness; is that right?

Mr. De Sevo: That's right. You still are.

Mr. Nugent: All right.

Q. Now, Mr. Kloby, did you, on February 17th—? A. February 15th. 40

Walter Kloby, for Plaintiff—Cross.

Q. Pardon me—February 15th strike Christopher McNamara with your fist? A. Well,—

Q. Please answer the question “Yes” or “No”.
A. Yes.

Q. And as a result of striking him with your fist did he fall to the ground? A. Yes; he fell
10 down.

Q. And did you observe his condition as he was upon the ground? A. No, sir. I just took my coat and I went to work, because that’s all I had on my mind.

Mr. De Sevo: May I ask that be stricken as not responsive.

The Court: Read it.

(Last question and answer read by the
20 stenographer.)

A. That’s right.

The Court: I think it is responsive. I will allow it.

Mr. De Sevo: Exception.

The Court: He said “No.”

Mr. De Sevo: I think the rest of it is surplusage as far as the answer is concerned.
30

The Court: I will allow it to stand.

Mr. De Sevo: That is all.

Cross-examination by Mr. Nugent:

Q. Mr. Kloby, you say that it was on the fifteenth of February, 1942? A. Yes, sir.

Q. At what hour in the morning? Was it in the morning? A. Yes; that was on a Sunday morning.
40

Walter Kloby, for Plaintiff—Cross.

Q. At what hour on Sunday morning? A. Well, I would say between six and six-thirty, somewhere around there.

Q. And where did this thing occur? A. In front—well, first it started in the restaurant.

Mr. De Sevo: I object, if the Court please. 10

The Court: I will allow it.

Mr. De Sevo: The question is where.

The Court: I know it. Certainly you opened the door.

Mr. De Sevo: I beg your pardon?

The Court: You opened the door. You asked this man did he strike the deceased, and he said "Yes". So Mr. Nugent has a right to go in and cross-examine on it. 20

Mr. De Sevo: I have no objection to that. I object to the answer that first it started some place else.

The Court: I don't know what the answer will be.

Mr. De Sevo: If the Court please, my question was directed at one blow which caused the man to fall.

The Court: Read the question and answer. 30

(Last question and answer read by the stenographer.)

Q. Where did it occur? A. It was inside the restaurant where I was eating. Then we went outside.

Mr. De Sevo: If the Court please, I object to the answer on the ground it is not responsive. My question was directed at 40

Walter Kloby, for Plaintiff—Cross.

one blow which caused the man's head to hit the sidewalk.

10 The Court: Mr. De Sevo, you are making an objection that it is not responsive; then you go on to tell what your question was. That is not a criterion whether it is responsive. Mr. Nugent is asking a question whether the answer is responsive or not has nothing to do with what you asked him. In other words, if the question is proper, then you should direct your objection to the question, not the answer.

20 Mr. De Sevo: No, if the Court, please, with due deference, I think if the question is proper and the witnesses does not answer properly, and it is a material part of the case, I have a right to ask it to be stricken.

The Court: Yes; but not on the ground in the manner you have raised.

Mr. DeSevo: I say it is not responsive.

The Court: Then you go on to say you have not asked that question. Of course you did not—Mr. Nugent did.

30 Mr. De Sevo: If the Court please, all Mr. Nugent has developed by that question is where the blow took place. The witness is going into something else.

The Court: What is the last question?

(Last question read by the stenographer.)

Mr. Nugent: I withdraw that question.

Q. Where did you see Mr. McNamara the first time on this Sunday morning?

Mr. De Sevo: I object.

40

A. In the restaurant.

Walter Kloby, for Plaintiff—Cross.

Mr. De Sevo: May I have my—

A. I was eating.

The Court: I have to admonish you the same way. When an objection is made, please do not answer until we tell you to go ahead.

10

Mr. De Sevo: I object to the question on the ground it is not within the scope of the direct examination.

The Court: I will permit it.

Mr. De Sevo: Exception.

The Court: You may have an exception.

Q. What is the address of that restaurant? A. Well, all I know is "Barbecue" as long as I have been going in that restaurant.

20

Q. On what street is it located? A. Pavonia Avenue, right on the corner of Pavonia and Grove.

Q. This, you say, was what hour of Sunday morning? A. Between six and six-thirty.

Q. What were you doing in the restaurant? A. I was eating, having my breakfast.

Mr. De Sevo: I object.

Mr. Nugent: Please wait until an objection is made?

The Court: Strike that answer out.

30

Mr. De Sevo: I object on the same ground as before, that the question is not within the scope of the direct examination; on the further ground it appears now that Mr. Nugent is making this man his own witness.

Mr. Nugent: I do not agree with you.

The Court: Mr. De Sevo, you asked a question of this witness as to whether or not he struck a blow against the deceased.

40

Walter Kloby, for Plaintiff—Cross.

10

Now, it seems to me that Mr. Nugent then has a right, in view of the importance of that question that you asked and the purpose for which you asked it, to go in and show what kind of blow was delivered, what were the circumstances under which the blow was delivered. It is the very crux of the whole case.

Mr. De Sevo: If the Court please, the only purpose of my question was to show the death caused outside of the premises by a blow, which he admitted he struck, and as a result of which the decedent's head struck the sidewalk.

20

The Court: No; that is not the purpose of your question at all. The purpose of your question was to bring your case within the category of the language in the policy. Now, that—I just read it very briefly here—refers also to the word “accidental”.

Mr. De Sevo: Exactly.

The Court: And it seems to the court that the purpose of your question was to show it was an accidental death; otherwise you have no proof in the case as yet that there was an accidental death.

30

Mr. De Sevo: There may be a presumption in this case of accidental death, under the cases, by the statement made.

The Court: I will permit the question. You may have an exception.

Mr. De Sevo: Exception.

Mr. Nugent: Please read the last question.

(Last question read by the stenographer.)

40

Walter Kloby, for Plaintiff—Cross.

Q. What were you doing in the restaurant? A. Having my breakfast.

Q. Was Mr. McNamara in there when you came into the restaurant? A. No, sir; he wasn't.

Q. How long were you in the restaurant before Mr. McNamara came in?

Mr. De Sevo: I press the same objection, that these questions are not within the scope of the direct examination. 10

The Court: Question will be allowed. You may have an exception.

Mr. Nugent: Please read the question.

(Last question read by the stenographer.)

A. A couple of minutes.

Q. And what were you doing when Mr. McNamara came into the restaurant? A. I was drinking—eating my apple turnover and a cup of coffee; and I had my lunch beside me. I was the only customer in there, and he sat on my lunch. 20

Q. All right. Wait a minute. Don't go too fast, Mr. Kolby. You say you had your lunch beside you. Were the lunch and you on the same seat or on different seats?

Mr. De Sevo: Same objection, on the ground it is not within the scope of the direct examination; on the further ground that Mr. Nugent is now making this man his own witness by bringing out on cross examination matters which have nothing whatsoever to do with the direct. 30

The Court: I will permit the question.

Mr. Nugent: Please read the question.

(Last question read by the stenographer.)

A. No, sir. 40

Walter Kloby, for Plaintiff—Cross.

Q. Was the lunch on a different seat? A. Yes, sir. He sat on my lunch.

Q. Tell us what happened after Mr. McNamara came into the restaurant.

10 Mr. De Sevo: I object to the question on the ground it is too broad; on the further ground that it is not within the scope of the direct examination. I object to the question on the ground that the witness is now testifying to new matters not germane to the direct examination. I have no objection to this man testifying as he is now testifying, providing I am accorded the right of cross examination. As appears manifest now, he is Mr. Nugent's witness.

20 The Court: Permit the question.

Mr. De Sevo: Exception.

The Court: You may have an exception.

Mr. Nugent: Please read the question.

(Last question read by the stenographer.)

30 A. He sat on my lunch, and I said, "Get off my lunch, buddy". I turned around to drink the coffee, and I got a punch in the mouth; and I threw my foot, my left foot, out to break the fall, because I was falling off the foot, and he kept raining blows. I couldn't get back at him. I had my boy's coat on, and I got the coat off. I ran around.

Q. Just one moment, Mr. Kloby. Now, who was the person who hit you? A. McNamara.

Q. And he was the person who continued to hit you, you say? A. That's right.

Q. Rained blows on you? A. That's right.

40 Q. Did he do any damage to your body, your mouth? A. Yes; he knocked my tooth out.

Walter Kloby, for Plaintiff—Cross.

Mr. De Sevo: I object.

Mr. Nugent: I insist.

The Court: Permit the question and allow you an exception.

Mr. De Sevo: May I state my ground?

The Court: Yes.

Mr. De Sevo: I object on the ground it is beyond the scope of the direct examination. I object on the ground that it is bringing in new matters which were not developed on the direct examination, in which examination I circumscribed myself to two questions. I have no objection to Mr. Nugent asking the question he is now propounding, providing I am allowed the right of cross; and it appears to me he is now testifying to new matters and as the witness for Mr. Nugent. 10 20

The Court: Permit the question. You may have an exception.

Mr. De Sevo: Will your Honor make the ruling as to whether or not I will be allowed the right of cross examination on the new matters brought into this case.

The Court: You will not be permitted the right to cross examine, but the right to re-examine your own witness.

Mr. De Sevo: I have called this witness only for the purpose of two questions. 30

The Court: Mr. De Sevo, you asked this witness whether he hit McNamara.

Mr. De Sevo: In the street.

The Court: In the street. He said, "Yes". It seems to the court that that opened the door for the cross examination, to show why he hit him and the circumstances. 40

Walter Kloby, for Plaintiff—Cross.

Mr. De Sevo: I disagree with you. That may be in his case.

The Court: All right. I will permit it. You may have an exception.

10 Q. You got to a point in the story where you say you had your boy's coat on—you were doing something with that. A. I took it off and my hat and I put it on the ground in the restaurant. I ran outside, ran on the corner to see if there was a bus coming. There was no bus coming.

Q. Wait a minute. One more question. Were you going to work this morning? A. That's right.

Q. Where did you work at that time? A. Federal Shipyards, Kearny.

20 Q. Was it your custom to get your coffee at the same restaurant every morning? A. For the past two years—yes, sir.

Q. You took your bus from around there after you were finished with your breakfast? A. Right on the corner outside of the restaurant.

Q. You went outside to see if the bus was coming? A. Then this fight occurred, because when I came back he hollered, "Here is your coat and hat".

30 Q. Did McNamara follow you out into the street? A. Yes; with two men.

Mr. De Sevo: I object on the ground it is leading, also on the same grounds mentioned before.

The Court: It is slightly leading.

Mr. Nugent: All right. I will withdraw it.

40 Q. When you ran outside where was McNamara? A. He was still in the restaurant when I ran outside, but when I went on the corner there

Walter Kloby, for Plaintiff—Cross.

were two men outside. So I ignored the men, I went over, because Walter hollered, "Here is your coat and hat", and I went over to get my coat and hat; and here is where the fight started. I turned around and I got a smack here. (Indicating.)

The Court: Don't go so fast. Who is Walter? 10

The Witness: The night manager of the restaurant. He took my coat and hat out.

Q. Do you know whether that Walter had the coat and hat in his hand outside the restaurant?

A. Yes, sir; standing in the doorway.

Q. Where was McNamara when Walter said that to you? A. He was in back of him.

Q. What did McNamara do, if anything, to you out on the street? A. He hit me. 20

Q. How many times did he hit you? A. In the back of the neck.

Mr. De Sevo: That is not a responsive answer, if your Honor please. The question was "How many times", and the answer "In the back of the neck".

The Court: All right.

Mr. Nugent: All right.

Q. How many times did he hit you out in the street? A. Once, and I hit him once. 30

Mr. De Sevo: Let us get it on the record: "Once, and I hit him once". He struck you one blow, and you struck him?

The Witness: Yes, as I was stooping over to pick up me coat and hat.

Q. One thing further; How big was McNamara?
A. He was a pretty— 40

Walter Kloby, for Plaintiff—Cross.

Mr. De Sevo: I object on the same grounds as before.

The Court: I think you will have to make him your own witness on that.

Mr. Nugent: All right.

10 Q. And you say that what happened after you hit McNamara?

Mr. De Sevo: Just a minute——

A. I took me coat and hat.

Mr. De Sevo: Just a minute. Do I understand the other question was withdrawn?

Mr. Nugent: Yes, with respect to how big was McNamara.

20

The Court: All right.

Mr. Nugent: Or to the effect I should make him my own witness?

Mr. De Sevo: You know what it is.

Mr. Nugent: Yes.

Q. After you hit McNamara one time, what did you do? A. Took me coat and hat and I went to work, grabbed the bus and went to work.

30 Q. Now, at any time during the fight did McNamara hit you in the mouth?

Mr. De Sevo: I object on the ground it is leading, also on the ground it is not within the purview of the direct examination.

The Court: It is leading. Sustain the objection.

40 Q. Did McNamara do any damage to your mouth or your teeth, or any part of your body?

Walter Kloby, for Plaintiff—Re-direct.

Mr. De Sevo: Objection on the same ground.

The Court: Sustain it on the same ground.

Q. What did McNamara do to you in the way of injury to your teeth? 10

Mr. De Sevo: I object on the ground it is leading and based on an unwarranted assumption of fact.

The Court: If any.

Q. If any. A. He done the damage inside.

Q. What damage did he do? A. He knocked my teeth out.

Mr. Nugent: I think that is all. 20

Re-direct examination by Mr. De Sevo:

Q. Mr. Kolby, have you been brought here by subpoena today? A. Yes, sir.

Q. And have you talked this case over with anybody? A. No, sir.

Mr. Nugent: I object. This is his own witness.

The Court: The answer is "No". 30

A. I talked to nobody.

Q. You talked to nobody? A. No, sir.

Q. Are you receiving any compensation for your testimony here today?

Mr. Nugent: I object, if your Honor please.

Mr. De Sevo: To show interest.

Mr. Nugent: This is his own witness, sir. He has made him his own witness. 40

Walter Kloby, for Plaintiff—Re-direct.

The Court: I will permit it just the same.

Mr. Nugent: May I have an exception.

The Court: Yes.

10 Q. Are you receiving any compensation for your testimony here today? A. No, sir.

Q. Are you receiving any compensation from anyone as a result of anything you have done in this case? A. What do you mean—"compensation"?

Q. Money. A. I was paid to come over here from my job, the day that I lost.

Q. When were you paid? A. Sometime last week.

Q. How much were you paid? A. Ten—

20 Mr. Nugent: I object, if your Honor please. It is all an attempt to discredit his own witness' credibility.

The Court: I will allow it. I think we all realize lawyers often compensate witnesses for appearances in court.

Mr. Nugent: Not for appearances in court, but for the time he is losing.

Mr. De Sevo: Let him testify.

30 The Court: That is exactly what I mean. Repeat the question.

(Last question read by the stenographer.)

A. Ten dollars for taking off that day.

Q. And have you any agreement with reference to your testimony here today?

Mr. Nugent: I object, if your Honor please—with reference to your testimony here today.

40

The Court: I will permit it.

Walter Kloby, for Plaintiff—Re-direct.

Mr. Nugent: It implies that we are purchasing testimony, by the nature of answering the questions to pay for testimony.

The Court: I will permit it. Has anybody promised you anything more?

The Witness: No, sir.

Q. Have you talked this case over with any of the representatives of the Metropolitan Life Insurance Company before you sat on the witness stand here today? 10

Mr. Nugent: I object, if your Honor please, on the same ground.

The Court: I will permit it.

Mr. Nugent: Exception, sir.

A. I did. I talked to the insurance man that came in. When I lived at 204 Ninth Street, he came over to me and he asked me—— 20

Q. Don't, please.

The Court: Don't say what he asked you. Go ahead.

Q. You did? A. Yes, sir.

Q. When was that? A. That was a couple of weeks after.

Q. A couple of weeks after? A. Yes. 30

Q. Did you then give him a statement? A. Yes. He asked me how it happened. I told him that we had a fight.

Q. You gave him a written statement? A. Yes; and he had a piece cut out of the paper he was showing me.

Q. And were any promises made to you at that time as to whether you would be helped in the impending criminal proceedings which were taken against you? 40

Walter Kloby, for Plaintiff—Re-direct.

Mr. Nugent: I object, if your Honor pleases.

The Court: I will permit it.

Mr. Nugent: May I have an exception, sir. Do you understand the question, Mr. Kloby?

10 The Witness: No, I don't.

The Court: Repeat the question.

(Last question read by the stenographer.)

The Court: If you don't understand it, tell us. A. By whom? Who asked me?

Examination by the Court:

20 Q. Young man, so you will understand it: After this happened you were arrested? A. That's right.

Q. Did anybody promise to help you get out of that trial if you promised to testify or help them?

A. No; they just—

Q. All right.

Mr. De Sevo: They just what?

The Witness: They just took me in jail, took me right off the job.

30 Q. Did anybody from the insurance company tell you they were going to help you out of the trouble, or anything of that kind? A. The insurance people?

Q. Yes. A. No, sir. That I wouldn't say. Nobody told me.

Q. Nobody told you anything of that kind? A. No, sir.

Re-direct examination by Mr. De Sevo continued:

40 Q. You are sure of that? A. I am sure of that.

Walter Kloby, for Plaintiff—Re-cross.

Q. What is your business? A. I am a machinist in the shipyard.

Q. Are you known by any other name besides Walter Kloby? A. Yes, sir.

Mr. Nugent: I object, if your Honor pleases.

The Court: What is your purpose of it? 10

Mr. De Sevo: The purpose of identifying the witness properly in court.

Mr. Nugent: Did you produce him?

Mr. De Sevo: He just said "Yes".

The Court: I will permit it.

Q. By what other name are you known? A. Jack Tracy.

Q. How long are you known by that name? 20
A. Since I was a boy of twelve or thirteen.

Q. Did you ever engage in any other business or trade as Jack Tracy? A. Yes, sir.

Mr. Nugent: I object.

The Court: I will permit it.

Q. What was the answer? A. Boxing.

Q. Professional boxer? Please don't shake your head. A. Yes.

Mr. De Sevo: I think that is all. 30

Re-cross examination by Mr. Nugent:

Q. Mr. Kloby, how tall are you? A. I am about five foot two.

Q. And how much do you weigh? A. Well, now I lost weight.

Q. Well, how much did you weigh on February 14th, 1942? A. About 140 pounds.

Mr. Nugent: That is all. 40

Walter Kloby, for Plaintiff—Re-direct.

Michael Enright, for Plaintiff—Direct.

Re-direct examination by Mr. De Sevo:

Q. Just a minute. Have you ever been convicted of a crime?

10 Mr. Nugent: I object, if your Honor pleases.

The Court: Sustain the objection.

Mr. De Sevo: Exception.

The Court: Yes.

Q. How old are you? A. Forty-two, going on forty-three.

Q. During what years were you a professional boxer?

20 Mr. Nugent: I object, if your Honor pleases.

The Court: I will permit it.

Mr. Nugent: This is rebuttal.

The Court: I understand. I will permit it.

Mr. Nugent: All right.

A. 1914 all the way up to 1927.

Q. Thirteen years you were a professional boxer.

30 Mr. De Sevo: That is all.

MICHAEL ENRIGHT, called as a witness on behalf of the plaintiff, being first duly sworn according to law, upon his oath testified as follows:

Direct examination by Mr. De Sevo:

The Court: Where do you live?

40 The Witness: 709 Jersey Avenue, Jersey City.

Michael Enright, for Plaintiff—Direct.

Q. Mr. Enright, is it? A. That's right, sir.

Q. You also were subpoenaed here by the Metropolitan Life Insurance Company? A. I was, yes.

Q. Were you with Mr. McNamara on the morning in question? A. I was, sir.

Q. And where had you been before you entered this restaurant? A. We were at a dance. We were coming home. 10

Q. You were coming home from a dance? A. That's right.

Q. You stopped in this restaurant for something to eat; is that what it was? A. That's right; to have some coffee.

Q. To have some coffee? A. That's right.

Q. Now, as you entered the restaurant with Christopher McNamara, how was he behaving himself? What mood was he in? A. He was just happy and jolly. 20

Q. Happy and jolly? A. That's right; to my recollection.

Q. And what happened when you went into the restaurant? A. We both sat down on a seat.

Q. When you say a "seat", do you mean at the counter? A. That's right.

Q. Or at a table? A. That's right, sir.

Q. At the counter? A. At the counter. 30

Q. Tell us what happened. A. As we sat down, a friend that was with us that morning, he accidentally sat down on the package. I couldn't say what was in the package.

Mr. Nugent: May I have the word "accidentally" stricken. It is his conclusion of the actions of another person.

The Court: Yes, I think so. He sat down on another chair—?

Michael Enright, for Plaintiff—Direct.

The Witness: That's right, sir.

The Court: —that contained a package?

The Witness: That's right, sir.

10 Q. When he sat down on that chair what, if anything, happened? A. I believe Mr. Kloby asked him what was the idea of his sitting on this package, and that's all that I can recall; but I didn't see no——

Q. Don't get ahead of this, now. Mr. Kloby said, "What's the idea of your sitting on this package?" A. I believe he did, yes.

Q. Did Mr. McNamara say anything to him? A. That I don't remember, Christopher McNamara saying anything to Mr. Kloby at that time.

20 Q. Did anything occur after that between the men? A. They both were standing up inside, and the manager that was there on that morning——

Q. The manager who was there that morning—do you see him in court here today? A. That's right, sir.

Q. Will you identify him. Is this man? Will you stand up. A. Yes, sir; he is the man.

30 Mr. De Sevo: May we have the record show what his name is, Mr. Nugent?

Mr. Nugent: That is Mr. Watkowski.

Mr. De Sevo: Walter Watkowski?

Mr. Nugent: Walter Watkowski.

Q. What did the manager say in the presence of both of these men? A. They both started arguing. He says, "If you are going to start fighting and arguing about it, you better go out on the street".

40 Q. What happened; they went out? A. Yes, sir.

Michael Enright, for Plaintiff—Direct.

Q. Both of them went outside? A. Yes, sir.

Q. After they went outside what, if anything, happened? A. They both had the argument on the outside. I guess they punched one another.

Q. You don't know, do you? A. I don't know.

Mr. Nugent: I ask that be stricken from the record. 10

The Court: It will be stricken out. Do you know what took place outside?

The Witness: No, sir. I was on the inside.

The Court: You don't know. That's all.

Q. How long was it between the time that they were put out—are you listening to me, sir? A. Yes, sir.

Q. How long was it before they were put out that anything happened? A. Maybe five or seven minutes. 20

Q. I beg your pardon? A. From the time they were put from the inside outside?

Q. Yes. A. It could be five minutes.

Q. Something happened. Did you observe them during the time that they were outside? A. No, sir; I didn't see them.

Q. You didn't see them? A. No, sir.

Q. And did you subsequently go outside? A. That's right. 30

Q. And did you see McNamara? A. Yes; laying on the floor.

Q. Beg pardon? A. Laying on the ground.

Q. Lying on the ground? A. That's right.

Q. Did Kloby walk away and go to work—or what happened to Kloby?

Mr. Nugent: I object. How would he know whether Kloby went to work or not? 40

Michael Enright, for Plaintiff—Direct.

By the Court:

Q. When you went out there did you see Mr. Kloby? A. I seen Mr. Kloby running from the Barbecue on to Ninth Street.

Q. Was he running? A. That's right, sir.

10 *Direct examination by Mr. De Sevo continued:*

Q. Now, Mr. Enright, this restaurant is located on the north side of the street, near the intersection of Grove Street and Newark Avenue; is it not? A. Grove and Pavonia Avenue.

Q. Pavonia, rather. And when Kloby ran was he running in the direction of the Grove Street tube, or was he running away from that direction? A. Running away from that direction.

20 Q. Was he running in the direction of Hoboken? A. That's right, sir; he was running towards Ninth Street.

Q. Did you run after him? A. That's right.

Q. Were you able to apprehend him, or catch him? A. I couldn't catch up with him, sir.

Q. You couldn't catch up with him? A. No, sir.

30 Q. I ask you again: Was any blow struck in the restaurant while you were there? A. I did not see any blow struck in the restaurant.

Q. Were you in a position to see if any blows were struck in the restaurant? A. I was sitting in a seat that way—(indicating)— and I didn't see no blows struck.

Q. You say there were some words exchanged between them, and the proprietor put them out? A. That's right.

Q. It was after that that you saw McNamara lying on the sidewalk? A. That's right.

Michael Enright, for Plaintiff—Cross.

Q. What was his condition then; was he conscious or unconscious? A. Unconscious.

Q. Do you know what they did with McNamara after that? A. Brought him to the hospital.

Q. To the Jersey City Medical Center? A. That's right.

Q. Did you see him after that? A. No; I didn't 10
until he was dead.

Q. He did not come out of the Medical Center at any time from the time he was brought in until the time he died? A. No, sir.

Mr. De Sevo: Cross examine.

Cross examination by Mr. Nugent:

Q. Mr. Enright, what time was it that you left this dance? A. Oh, I guess around three o'clock 20
in the morning.

Q. Between three and three-thirty, would you say? A. Yes, I would.

Q. And then what did you do? A. The dance was down Greenville.

Q. After you left the dance what did you do? Where did you go? A. We went to some place in the city, in Jersey City itself.

Q. Some place—what kind of a place? A. A 30
saloon.

Q. At three or three-thirty in the morning? A. Well, it could be maybe five o'clock when we got there.

Q. Wait a minute. You left the dance, you say, between three and three-thirty? A. That's right.

Q. Where was the dance? A. Clinton and Jackson Avenue.

Q. In Jersey City? A. That's right.

Q. Where did you go immediately after you left the dance? A. We were on our way home, sir. 40

Michael Enright, for Plaintiff—Cross.

Q. Where did you go, the first stop, if any? A. Thirteenth Street and Jersey Avenue.

Q. That was a saloon, was it? A. That's right.

Q. How long did you stay at the saloon? A. About an hour, maybe more.

10 Q. That would be about four-thirty? A. I am not sure of the time.

Q. Now, did you make any other stop before you went to the Barbecue Restaurant? A. No, sir.

Q. What time did you arrive at the Barbecue Restaurant? A. Around six or six-fifteen, six-thirty.

20 Q. So it took you about an hour and a half or two hours to go from the Thirteenth Street tavern, or saloon, to the Barbecue; is that true? A. No, no; that couldn't be the truth. It wouldn't take us that long.

Q. Did you make any other stops between the Thirteenth Street saloon and the Barbecue Restaurant? A. No, sir; just took time walking along—that's all.

Q. Isn't it a fact that you stayed in the Thirteenth Street saloon until around five-thirty? A. I couldn't tell what time I left the salon.

30 Q. All the time you were in the Thirteenth Street saloon, were you and Mr. McNamara drinking? A. Yes, sir; we had some beer.

Q. And had you been drinking at the dance? A. Just a little beer.

By the Court:

Q. You had been drinking, you say, at both places? A. At both places, yes. Just a few beers—that's all.

Q. Just beers? A. That's all.

Michael Enright, for Plaintiff—Cross.

Cross examination by Mr. Nugent continued:

Q. You stayed from about three-thirty until about four-thirty at the Thirteenth Street saloon?

A. I might be two hours in the saloon. I really couldn't say what time it was.

Q. It might have been two hours you were there? A. I really couldn't say the time. 10

Q. What time did you arrive in the Barbecue Restaurant? A. Around six or six-fifteen.

Q. Had you ever been in the Barbecue Restaurant before? A. Sure; hundreds of times.

Q. Do you know the counter at which they serve dinners at that hour? A. That's right.

Q. Do you know about how many stools there are in front of the counter? A. I have no exact count. I would say about a dozen, anyway. 20

Q. Was there any stool occupied at the time you arrived in there other than the one on which Mr. Kloby was sitting? A. Only the one myself and the one by Mr. McNamara. 20

Q. You misunderstood me. When you arrived at the Barbecue Restaurant—? A. Yes.

Q. —was there any other stool occupied? Was anybody sitting on any other stool? A. Mr. Kloby.

Q. That is all? A. That's all. There was only the three—and the manager—the four of us. 30

Q. He was behind the counter? A. At that time.

Q. There were about twelve stools altogether? A. That's right.

Q. Did you observe that Mr. Kloby's lunch was on the stool to his right? A. I don't know. There was a package. I didn't know if it was his lunch. It was just an ordinary package, as far as I could see.

Q. It was something you could see—it was open to your view? A. It was paper wrapped up. That's all I could see of it. 40

Walter Watkowski, for Defendant—Direct.

Q. Had you known Mr. McNamara for long?
A. Yes, I did.

Q. Do you know about how tall he was? A.
I would say five foot seven, five foot eight.

Q. Do you know approximately how much he
weighed? A. I would say 155 to 160.

10 Q. 155 to 160? A. I am not a——

Q. Is that your best judgment? A. That's
right.

Q. You would not know that he weighed 185,
would you? A. I couldn't say.

Mr. De Sevo: I object to the unwar-
ranted assumption of fact.

The Court: He said he does not know;
his best judgment was 155 to 160.

Mr. Nugent: I think that is all.

20

Mr. De Sevo: That is all, sir. The plain-
tiff rests.

WALTER WATKOWSKI, called as a witness on
behalf of the defendant, being first duly sworn
according to law, upon his oath testified as fol-
lows:

30 *Direct examination by Mr. Nugent:*

The Court: Where do you live?

The Witness: 169 Erie Street.

Q. On Sunday morning, February 15th, 1942,
Mr. Watkowski, where were you? A. I was work-
ing in a restaurant.

Q. What restaurant? A. Barbecue, Pavonia
and Grove.

40 Q. Were you there between six A. M. and six-
thirty A. M. on that morning? A. I was.

Walter Watkowski, for Defendant—Direct.

Q. Do you know Mr. Kloby, who testified on behalf of the plaintiff in this case? A. I know him as a customer.

Q. And had he been coming into the restaurant for sometime prior to this day? A. About the last two years.

Q. Now, did you know Mr. McNamara, the person about whom we have been speaking? A. I knew him as a customer's acquaintance. 10

Q. Did he come into your restaurant, also? A. Whenever he was in town.

Q. On the morning of February 15th, 1942 did Mr. Kloby come to your restaurant? A. That's right; he did.

Q. Do you recall what hour of the morning it was? A. Between six-fifteen and six-thirty.

Q. Now, when he came into your restaurant what did he do? A. Well, he had his breakfast, coffee and cake. 20

Q. And did he have any lunch package with him? A. He had a package alongside of him on a stool.

Q. Now, did you see Mr. McNamara on that day, that morning? A. Well, he came in that morning.

Q. He came in your restaurant that morning? A. That's right.

Q. And how long had Mr. Kloby been in your restaurant before Mr. McNamara arrived? A. About ten minutes. 30

Q. Now, after Mr. McNamara arrived what did he do? What did you observe him doing? A. Well, it was around between six and six-thirty, and Kloby was there alone, and McNamara and Enright came in, and there were fifteen stools at the counter.

Q. Fifteen? A. Kloby was sitting on one stool and had his lunch on the other stool, and McNamara came in and sat right on his lunch. 40

Walter Watkowski, for Defendant—Cross.

Q. Did Kloby say anything to McNamara? A. Just a few words were said: "What's the idea, sitting on my lunch?"

Q. What, if anything, did McNamara then do? A. McNamara said, "What are you, a wise guy?" The first thing, a couple of swings were made, and
10 I pushed them all out.

Q. By whom were the swings made? A. McNamara.

Q. Did you see any of the blows by McNamara land on Kloby? A. McNamara wade a swing. He hit Kloby in the face and knocked his tooth out.

Q. What happened then? A. I got outside of the counter and chased them all out. Kloby ran out without his hat to go to see if his bus was coming. I threw his hat and coat out and said,
20 "You better go to work and forget about the whole shooting match."

Q. Did you observe anything occur outside? A. Then McNamara went over and made another swing and hit him again, and Kloby made one swing and he hit him and he went down; and I think that's all there was to it.

Q. How tall a man was McNamara? A. I would say about five foot eight.

Q. And about how much did he weigh? A.
30 About 175 or 180.

Mr. Nugent: I think that is all.

Cross examination by Mr. De Sevo:

Q. You have been telling us the truth; have you not, sir? A. Yes, sir.

Q. You say that McNamara outside hit Kloby, and then Kloby hit him and knocked him down?

A. That's right.
40

Walter Watkowski, for Defendant—Cross.

Q. Is that correct? A. That's right.

Q. You also say that McNamara hit him inside of your place and knocked a gold tooth out; is that correct? A. That's right.

Q. I show you this statement and ask you if that is your signature. A. That's my signature.

Q. I show you this and ask you whether that is your signature on the second page of that statement. A. I wouldn't know if that is. It doesn't look like mine. 10

Q. Did you give a statement of your knowledge of these happenings to Lieutenant Gannon? A. That's right.

Q. And did he take it down in writing? A. He sure did.

Q. Did you read the statement before you signed it? A. I don't remember that I did. 20

Q. Did you tell him the truth at that time? A. I did.

Q. Your memory then was better at that time than it is now? A. I would say it is.

Q. As a matter of fact, you did not say anything in that statement about McNamara striking any blow; did you?

Mr. Nugent: I object, unless he gives him the opportunity of reading the statement and then determining whether or not it was the result of a question and answer, and whether that question was asked of him. 30

The Court: All right.

Q. Read the statement. You have read the statement? A. That's right.

Q. On two pages, which I just showed you? A. That's right.

Q. And that statement is a true account of your knowledge of the happenings of that morning as 40

Walter Watkowski, for Defendant—Cross.

given by you to the Police Department of Jersey City—is it? A. That's right.

10 Q. Do you remember saying this to the Police Department—I am reading from your statement: “I went outside to keep them away from the windows and took Tracy's lunch away from McNamara, and as I did McNamara made a swing at Tracy but missed him”? A. Well, I don't know—maybe. That could be a mistake on the part of the Police Department.

Q. Do you deny that you said that to the Police Department? A. I don't deny it. I just don't remember now.

Q. Do you admit it? A. If it is in the statement, I must admit it.

20 Q. Then which is true, that he missed or that he struck him? A. He struck him.

Q. How do you reconcile your statement to the Police Department made the same day? A. I don't know how they made it. I told them what I said. If they put it down, I don't know anything about it.

Q. You read this statement before you signed it?

Mr. Nugent: He did not say it.

Mr. De Sevo: He did say. Shall we refer back to his testimony?

30

Mr. Nugent: If you say so.

Q. You read this statement before you signed it, and the matters therein contained were true at the time you signed it? A. Just a minute—

Q. Please answer the question. A. I want to answer the question. You don't give me a chance to answer it.

40 Q. Were not the matters contained in that statement at the time you signed it the truth? A. When I signed the statement I didn't read it.

Walter Watkowski, for Defendant—Cross.

Q. Please answer the question.

Mr. Nugent: Let the witness answer the question.

A. Your Honor, I was working in that restaurant by myself, a very busy restaurant. The police came in with the statement. The defense workers were rushing to work. I was in there by myself. I didn't read the statement before I signed it. 10

Q. Why did you tell us before that you had read the statement before you signed it? A. I read it now.

Q. Why did you tell us before that you had read the statement before you signed it? A. I only read parts of it at the time, because I was in a rush to take care of the people. I couldn't have them wait in the store. 20

Q. What parts of it did you read? A. I don't remember.

Q. Is that your best answer, sir? And do you also recall that in your statement you were asked what happened inside the restaurant? A. That's right.

Q. And you said: "McNamara and another guy walked in and McNamara sat on Tracy's package"? You told that to the police, did you not? A. That's right. 30

Q. You read that? A. That's right.

Q. And it was true. "Tracy said, 'Watch where you are sitting'"—that is true? A. That's right.

Q. "So McNamara said, 'What are you, a wise guy'"? That is true? A. That's right.

Q. And you were then telling the Police Department what happened? A. That's right.

Q. They had asked you what happened? A. That's right. 40

Walter Watkowski, for Defendant—Cross.

Q. And then you further said: "But I don't want my package broke", meaning Kloby speaking. "So McNamara and the other guy were coming close to Tracy as if to fight, so I put them out". Isn't that what you told the Police Department? A. I told them the fight started in—

10 Q. Please—isn't that what you told to the Police Department? A. I told them the fight started in my place, and I put them out.

Mr. De Sevo: I ask that be stricken. It is not responsive.

The Court: It is not responsive.

A. The fight started there, so I put them out.

Q. Isn't it a fact you told the Police Department that they approached each other as if to fight, and you put them out?

20

Mr. Nugent: I submit he has already answered that question.

The Court: Answer that question "Yes" or "No".

A. Yes.

Q. It is a fact that they were merely coming close to each other and you put them out? A. The first time was a swing, and the next time they started all over.

30

Q. Please. Isn't it a fact that these men were approaching each other and that you put them out, as you told the Police Department? A. After the first blow.

Mr. Nugent: I object. The witness has already explained that this was the second time they were coming together.

The Court: What is your objection, Mr. Nugent?

40

Walter Watkowski, for Defendant—Cross.

Mr. Nugent: I object to the question as presented now, as it distorts the very answer as the witness has given. The witness has explained himself by saying the first time they came together there were blows struck by McNamara; the second time, which is the time referred to, they only came together and no blows struck. 10

The Court: Any indication that any such thing was suggested in the statement?

Mr. Nugent: He said it before.

The Court: I don't think he said that.

Mr. Nugent: Not in the statement, but here in the testimony.

The Court: That is right. I think that is what the question is directed to.

Mr. De Sevo: That is right. 20

The Court: Suppose you reframe your question, Mr. De Sevo.

Q. Isn't it a fact that you told the police on this day in question, in answer to their inquiry, to wit: "Tell me in your words what you know about this assault", that the two men were approaching each other and you put them out? A. I was there when the second blow was being struck. There was a first one struck, and this is when I put them out on the second. 30

Q. Why didn't you tell them about this blow?

A. I told them. If they didn't put that in, I am not responsible.

Q. Nevertheless you read this statement, and it was true? A. I didn't read it. I had a business to take care of. I had no chance.

Q. You had read those parts you admitted to me were true, but the parts you do not admit you say are not true—is that your answer? 40

Walter Watkowski, for Defendant—Cross.

Mr. Nugent: I object.

The Court: I think the man has said he read parts, but did not read all.

The Witness: Your Honor, I had to go up and down all the time. I had nothing to do but sitting there all day looking at the papers.

10

Q. In other words, it is your testimony now that, although you told the police that McNamara hit Kloby and knocked his tooth out, the police did not put it in the statement? A. I don't know whether they did or not.

Q. Well, is it in the statement? A. I don't know.

Q. Look at it. A. They had the gold tooth in the station house.

20

Mr. De Sevo: I ask that be stricken as not responsive.

The Court: Well, is it in there Mr. De Sevo?

Mr. De Sevo: No; it is not in there at all.

The Court: He has read the statement. There is no use wasting time.

Mr. De Sevo: It is not in there.

30

The Court: It is not in there. All right.

Q. There is also in there the affirmative statement by you that McNamara outside did not hit Kloby; isn't that so? A. I told him he hit him. If they put it in—

Q. You mean that the police put in here, without your sanction: "As I did McNamara made a swing at Tracy but missed"? A. I just don't remember, just what was in his mind.

40

Mr. Nugent: I object.

Walter Watkowski, for Defendant—Cross.

Q. Do you deny that you told that to the police?

A. I don't deny it.

Q. Do you admit it? A. That's right.

Q. How do you reconcile your testimony before when you say that McNamara hit Kloby outside?

Mr. Nugent: What are you referring to
"That you told that to the police"?

10

Mr. De Sevo: That he missed.

Examination by the Court:

Q. Mr. Witness, what counsel wants you to do is try to reconcile, if you can, your statements. Today you say that Kloby was struck by McNamara and then struck back. Is that correct?

A. That's right.

Q. In the statement apparently to which counsel refers you said that McNamara delivered a blow at Kloby but missed. Now, can you reconcile that? A. I can't say exactly what they done in the statement. I told them one story, and they put a different thing in.

20

Q. But your story is that McNamara actually struck Kolby outside? A. That's right.

Q. But you did not tell that to the police? A. I don't remember if I told that to them or not. I was all excited that morning. It is a long time.

30

Q. When did the police come in; the same morning? A. That's right; I called him.

Q. You started to say something that the police have the gold tooth. A. They had the gold tooth with them.

Q. Kloby's tooth? A. That's right. The next day they got it in the shipyard.

Q. Who gave it to them? A. Kloby.

Q. How do you know? A. I had to go to the shipyard. Kloby gave it to them.

40

Walter Watkowski, for Defendant—Cross.

Q. Was this after or before you gave your statement? A. After. I gave the statement in the morning. I was in the shipyard all day till eight at night trying to identify the man.

Q. Trying to identify whom? A. Kloby, that had the fight, that struck the blows to McNamara that morning.

The Court: All right.

Cross examination by Mr. De Sevo continued:

Q. You say you went to the shipyard to identify Kloby? A. That's right.

Q. You don't know him by the name of Kloby? A. I do now, but I didn't then.

Q. He is an old friend of yours? A. Not a friend; he is an acquaintance.

Q. How long had he been coming into your restaurant before this? A. I know off and on coming in the restaurant five or six years.

Q. Before this? A. That's right.

Q. He used to come in every morning? A. Not every morning.

Mr. De Sevo: May I have this statement marked for identification, if the Court please.

(Two sheets of paper marked for identification "I P a" and "I P b" respectively.)

Q. Do you now admit or deny that you told the Police Department on the day this statement was taken that McNamara made a swing at Tracy but missed him? A. I remember I said it that time—that's right.

Q. And that was the truth? A. That's what I said that time—that's right.

Walter Watkowski, for Defendant—Cross.

Q. And that was the truth? A. That's what I said.

Q. Please—was it? A. Yes.

Q. Yes. And you also told the Police Department that: "After that Tracy hit McNamara with his fist in the face, knocking him to the ground"—is that right? A. That's right. 10

Q. Did Tracy walk away then? A. Well, I went inside to wait on somebody. I came outside. There was nobody there, just McNamara.

Q. Didn't you also tell the police: "Then Tracy ran away, and McNamara's friend ran after him, and that's the last I saw of them"? A. Well, I saw both of them again, but I didn't see them running. When I went out of the store I saw both of them again.

Q. Did you see Mr. Enright chase them? A. 20
No.

Q. When you told that to the police you were mistaken? A. I didn't tell them that.

Q. You did not tell them—the police put that in? A. When I went outside from the waiting on the customers everybody was gone—that's what I told them—I took care of McNamara.

Q. And do you admit or deny that you told the police: "McNamara and the other guy were coming close to Tracy as if to fight"—speaking of 30
inside the restaurant—"so I put them out"? A.
That was after the first blow.

Mr. Nugent: If your Honor please, we have gone all over that.

The Court: We have gone over that.

The Witness: That was after the first blow.

Mr. De Sevo: I think your Honor is correct on that. That is all.

Walter Watkowski, for Defendant—Re-direct.

Re-direct examination by Mr. Nugent:

Q. Mr. Watkowski, I just want to be clarified in my mind; what is the fact, the real fact? You say you saw these two men outside of your restaurant. Did McNamara hit Tracy—hit this man?

10

Mr. De Sevo: Now, if the Court please, I object on the ground it is not proper re-direct. I object on the ground that the question has been asked and answered at least ten times.

Mr. Nugent: In several different ways.

The Court: I will admit it. I think it has been asked and answered. You can cross examine him if necessary.

20

Mr. Nugent: But you are confusing him with what he said in the statement. I want him to know what the fact is.

Mr. De Sevo: I ask that that be stricken from the record.

The Court: Please do not argue.

What is the question?

(Last question read by the stenographer.)

Mr. De Sevo: When—if the Court please?

Examination by the Court:

30

Q. Let me ask the question now. What did you actually see happen outside of the restaurant after the men were outside? A. I went out and brought the man's hat and coat outside. I said, "Here is your coat; go to work". I seen there were blows struck. Each one hit each one once, and McNamara went down.

Q. Who delivered the first blow? A. McNamara.

40

Q. Are you sure of that? A. That's right.

Walter Watkowski, for Defendant—Re-cross.

Q. How did Tracy happen to get his hat and coat off? A. I threw them.

Q. How did he happen to get them off? A. He threw them off in the restaurant.

Q. What was the occasion for it? A. I guess he was going to get ready for a fight.

Q. Never mind what you guess. Tell us what you saw at or about the time of the removal of Tracy's hat and coat. 10

Mr. Nugent: That hat was off?

Q. The hat was off? A. McNamara hit him.

Q. McNamara hit him before he had his coat off? A. That's right. He had his coat off. I told Tracy to forget about it; and it was through for a couple of minutes, everything was peaceful for a couple of minutes. So then Tracy was going out, and McNamara and Enright went out after him. So words were said again outside and blows were struck at each other—and that's all there is to it. 20

The Court: All right. Cross examine if you wish.

Mr. Nugent: Nothing further.

Re-cross examination by Mr. De Sevo:

Q. Just a minute. Why did you tell me before, when I was nearly concluded with my cross examination of you, when I read to you from this statement—? A. I told you— 30

Q. Wait a minute, please. Let me take over for a minute. "I took Tracy's lunch away from McNamara, and as I did McNamara made a swing at Tracy but missed him. When Tracy got the chance, he hit McNamara." I asked you if that was what you told the police. You told me, 40

Walter Watkowski, for Defendant—Re-cross.

“Yes”; and when I asked you if that was the truth, you also said, “Yes”. A. That’s right; according to that statement, yes.

Mr. Nugent: That is right. That is what I understood it to be.

10 Q. Why do you——?

The Court: There is no necessity for this. I think I get the situation. I think the man said he told the police exactly what he told us today.

Mr. De Sevo: He admits he told the police the truth, that it is the truth.

The Court: I can see that.

20 Mr. De Sevo: The only purpose is credibility now to show what the true statement is.

The Court: I can understand that.

Mr. De Sevo: That is all.

Mr. Nugent: The defendant rests.

The Court: Both sides rest?

Mr. De Sevo: Both sides rest. I offer the statement in evidence.

(Received in evidence and marked “P 3a” and “P 3b”, respectively.)

30 Mr. Nugent: I respectfully move at this time for judgment in favor of the defendant, which is in the nature of a motion for direction of verdict.

(Argument.)

(Decision reserved by the Court.)

Certificate by Stenographer.

I, Frieda H. Lipschitz, a stenographer designated by the Court and sworn,

Do HEREBY CERTIFY that the foregoing is a true and correct transcript of the minutes and proceedings taken by me at the trial of the case of Catherine McNamara, plaintiff, *vs.* Metropolitan Life Insurance Company, defendant, at the First District Court of Jersey City on the twenty-eighth day of November 1944.

10

Dated, February 13, 1945.

FRIEDA H. LIPSCHITZ.

20

Certificate of Judge.

To the Justices of the New Jersey Supreme Court:

I do hereby, on this 14th day of February 1945, certify the foregoing transcript, made by the Stenographer designated by me and sworn, as the minutes and proceedings of the trial in the case of Catherine McNamara, plaintiff, *vs.* Metropolitan Life Insurance Company, defendant, to be used on the appeal herein.

30

WILLIAM E. SEWELL,
Judge of the First District
Court of Jersey City.

40

Opinion.

(Filed January 11, 1945)

FIRST DISTRICT COURT OF JERSEY CITY.

10

CATHERINE McNAMARA,
Plaintiff,*vs.*METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant.

Opinion.

20

This is a suit instituted by one Catherine McNamara, beneficiary under insurance policy issued by the defendant company, insuring the life of one, James McNamara, in which policy the plaintiff was named as beneficiary in the event of death. It was stipulated by counsel for the respective parties that James McNamara died on February 17, 1942 of injuries which were external and of a violent nature sustained by him on February 15, 1942. It was further stipulated that the cause of death was "intracranial hemorrhage and laceration of brain, following fracture of skull." It was

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further stipulated that the policy of insurance contained the following clause, from which has been deleted all unnecessary phraseology:

40

"Upon receipt of due proof that the death of the insured resulted independently of all other causes, from bodily injuries caused solely by external, violent and accidental means, the Company will pay, as an additional death benefit, an amount equal to the amount payable under the Schedule. * * * The addi-

Opinion.

tional death benefit shall not be payable if the Insured's death * * * (e) is the result of participation in an assault or felony * * *''.

It was further stipulated by counsel that the necessary premiums on the insurance policy had been paid; that due proof of death had been submitted by the plaintiff to the defendant; that the policy was in full force and effect at the time of the death and that the defendant had paid to the beneficiary the sum of Two Hundred and Fifty (\$250.00) dollars, which was the face value of the policy. 10

The question in dispute is whether or not the Company should be compelled to pay an additional sum of Two Hundred and Fifty (\$250.00) dollars, under and by virtue of the aforesaid accidental clause in the said policy. 20

The deceased died on February 17, 1942 two days after injuries received by him in an affray with one, Walter Kolby, a former professional prizefighter. On the night of February 14, 1942 the deceased McNamara and a friend, one, Michael Enright, attended a dance in the Greenville section of Jersey City. They remained at the dance until about 3 o'clock in the morning and then went to the lower section of Jersey City, to a saloon, where they remained until about 6 o'clock in the morning; left the saloon and came to a restaurant located at No. 203 Pavonia Avenue, Jersey City. As they entered the restaurant Kolby was having his breakfast before going to work. A package containing his lunch was on the stool next to him. There were 15 stools before the counter, none of which were occupied except the aforesaid two. McNamara sat on the package containing Kolby's lunch and a verbal alterca- 30 40

Opinion.

tion took place between Kolby and McNamara which led to McNamara striking Kolby several blows with his fists. One of these blows knocked out one of Kolby's teeth. During the assault Kolby removed his hat and coat. The proprietor of the restaurant stopped the assault, whereupon Kolby
10 left the restaurant and went out on the sidewalk immediately in front thereof. The restaurant manager took Kolby's hat and coat and threw them out to him. At this time McNamara followed Kolby to the sidewalk and struck or attempted to strike Kolby again. Kolby then struck McNamara one blow with his fist knocking him to the sidewalk, causing injuries which resulted in McNamara's death two days later.

20 The attorney for the defendant conceded at the trial, and in a memorandum subsequently filed with the Court that "had the policy not contained the 'assault' clause, the plaintiff would be entitled to recover." This agreement is founded on the legally recognized fact that the death was due to means that were external, violent and accidental, as this latter word excludes only deaths that are the reasonably, foreseeable results of encounters obviously deadly in nature." *Walter V. Prudential Insurance Co. of America*, 116 L. 304.

30 Defendant's counsel contends however, that the presence in the policy of the word 'assault' in addition to the "external, violent and accidental means" clause relieved the defendant of the responsibility where the assured met his death as the result of being an aggressor in an assault.

It is the opinion of this Court that the word 'assault' as here used, means something more than a simple assault. The language is that the
40 double indemnity shall not be paid to the insured if the insured's death "is the result of participa-

Opinion.

tion in an assault or felony." If the insured had been killed while committing larceny, burglary, robbery, arson or any other felony, no liability would attach. The word 'assault' as here used refers to such an assault as would justify the person assaulted, that is Kolby, in taking the assured's life. In other words, before the defendant would be exempted from liability under the policy here sued on, McNamara must have been guilty of such an assault as would justify Kolby acting as a reasonable, prudent person in taking his life. I find as a matter of fact that while McNamara was the aggressor, the assault was not of such a character as would have led McNamara to reasonably contemplate that Kolby would be justified in taking his life in order to resist the same. Therefore, the defendant Insurance Company is not relieved of its liability to pay the additional indemnity under the policy. See *Gilman vs. New York Life Insurance Co.*, 97 A. L. R. 755 at p. 758. 10 20

I find a verdict in favor of the plaintiff and against the defendant in the sum of Two Hundred and Fifty (\$250.00) dollars, together with costs of suit.

(Signed) WILLIAM E. SEWELL, 30
Judge.

Transcript of Proceedings.

(Filed February 28, 1945.)

No. 283941.

**FIRST DISTRICT COURT OF
JERSEY CITY.**

10

STATE OF NEW JERSEY,
HUDSON COUNTY,
CITY OF JERSEY CITY, } ss.:

20

CATHERINE McNAMARA,
Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant.

Upon Contract
Demand \$250.00.

Edward De Sevo,

Plff's. Atty.

Drewen & Nugent,
Deft's. Atty.

921 Bergen Avenue.

Before:

WILLIAM E. SEWELL, Esq.,
Judge.

30

City	Costs	Al
Summons, copy	\$1.50	
Service, return		\$.60
Mileage		.20
Trial Fee	1.50	

40

A summons was issued tested January 26, A. D. 1944 returnable February 3, A. D. 1944 at 10 o'clock in the forenoon at the Court Room of said Court in the City of Jersey City. The Constable returned the summons as follows, viz:

Transcript of Proceedings.

I served the within summons, January 27, 1944 on Mr. Sewick of the defendant company, by reading the same to him and delivering to him a copy thereof.

Plaintiff demand was filed January 26, A. D. 1944.

February 8, 1944 Specification of Defenses filed. 10

November 28, 1944 the plaintiff appearing and the defendant appearing, and the trial of the cause was proceeded with as follows:

Upon application of defendant, Frieda Lipschitz was appointed and sworn as Stenographer.

On the part of the plaintiff, Catherine McNamara (now Cathrine Breganci), Walter Kloby, Michael Enright, sworn and testified. 1 policy, 1 Statement of Death and Statement of Police.

On the part of the defendant, Walter Watkowsky, sworn and testified. 20

Decision reserved.

Whereupon it is on this eleventh day of January, A. D. 1945 by this Court considered and adjudged that said, Catherine McNamara, plaintiff, recover against said Metropolitan Life Insurance Company, defendant, the sum of Two Hundred and Fifty dollars, and no cents, debt and Sixteen dollars and thirty cents, costs of suit.

January 30, 1945 Notice of Appeal and Stipulation Waiving Appeal bond, filed. 30

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Exhibit P-1.**Policy of Insurance.**(Opposite )

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THIS IS A WHOLE LIFE POLICY WITH PREMIUMS PAYABLE FOR 20 YEARS, AND NOT A 20-YEAR ENDOWMENT POLICY.



METROPOLITAN LIFE INSURANCE COMPANY

A Mutual Life Insurance Company Incorporated 1866 by the State of New York
HOME OFFICE - NEW YORK

(HEREIN CALLED THE COMPANY)

PROMISES TO PAY

to the Beneficiary, if living, upon receipt of due proof of the death of the Insured named in the Schedule on the fourth page, and upon surrender of this Policy, the amount of the death benefit stated in such Schedule, subject, however, to the provisions of the next paragraph.

FACILITY OF PAYMENT

If the Beneficiary does not surrender this Policy with due proof of death within 30 days after the death of the Insured, or if the Beneficiary is the estate of the Insured, or is a minor, or dies before the Insured, the death benefit will, upon surrender of this Policy with due proof of death, be paid to the executor or administrator of the Insured, but in any such case the Company may, in lieu of payment to the executor or administrator, pay the death benefit to any relative by blood or connection by marriage of the Insured, or to any person appearing to the Company to be equitably entitled to such payment because of having been named as Beneficiary or because of having incurred expense for the maintenance, medical attention or burial of the Insured.

PREMIUMS

The consideration for this Policy is the payment of the premium stated in the Schedule on or before the date of issue, and of a like weekly premium on each succeeding Monday until premiums for twenty full years have been paid or until the prior death of the Insured. If any premium is not paid when due, this Policy shall lapse, subject to the provision for Grace Period and to the Nonforfeiture Privileges.

GRACE PERIOD

A grace of four weeks shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occurs within the Grace Period, the overdue premiums shall be deducted from the amount payable.

REVIVAL

If this Policy shall lapse, it may be revived within two years from the due date of the first premium in default, upon payment of all premiums in arrears and upon submission of satisfactory evidence of insurability, provided that the cash surrender value of the Policy has not been paid.

INCONTESTABILITY

This Policy shall be incontestable after it has been in force, during the lifetime of the Insured, for one year from its date of issue, except for nonpayment of premiums.

NONASSIGNABILITY

Any assignment or pledge of this Policy or of any of its benefits shall be void.

EFFECTIVE DATE

This Policy shall take effect on the date of issue stated in the Schedule, provided the Insured is then alive.

ENTIRE CONTRACT

This Policy includes all matter printed or written by the Company on this and the following pages and constitutes the entire agreement. Its terms cannot be waived by any agent and cannot be changed except by endorsement hereon signed by the Secretary.

In Witness Whereof, the Metropolitan Life Insurance Company has caused this Policy to be executed on the date of issue stated in the Schedule.

J. P. Bradley.
Secretary.

Harry A. Lincoln.
President.

PROVISIONS AND BENEFITS

OPTION TO SURRENDER WITHIN TWO WEEKS. If this Policy is not satisfactory it may be surrendered for cancellation, within two weeks from its date of issue, at the District Office through which it was delivered, and the premiums paid will be returned.

WHEN POLICY IS VOIDABLE. If (1) within two years prior to the date of issue of this Policy the Insured has been a patient at, or an inmate of, any institution for the treatment of physical or mental disease, or has undergone any surgical operation, or has been attended by a physician, unless it shall be shown by the Insured or any claimant that no such institutional, surgical, or medical treatment or attention was for a serious disease, injury, or physical or mental condition; or if (2) prior to such date of issue the Insured has been rejected for life insurance by this or any other insurer; then, in any such case, this Policy shall, subject to the clause entitled Incontestability, be voidable by the Company, unless reference to such institutional, surgical, or medical treatment or attention, or such prior rejection, is endorsed on this Policy by the Company. If this Policy does not take effect, or is voided by the Company, the Company will return the premiums paid.

MISSTATEMENT OF AGE. If the age of the Insured is misstated in the Schedule, the amount payable under this Policy shall be less than the premium paid would have purchased at the correct age.

PARTICIPATION IN SURPLUS. This Policy is a participating contract and, while in force, except when it becomes a Paid-up Policy because of lapse, the Company will annually ascertain and apportion any divisible surplus accruing on this Policy. The distribution of such surplus shall be made annually in such manner as may be determined by the Company with the approval of the Superintendent of Insurance of the State of New York.

NOTE—There will probably be no divisible surplus to apportion under policies of this class for several years after the date of issue.

REFUND ON DIRECT PAYMENT OF PREMIUMS. If, while premiums are not in default beyond the Grace Period, notice is given to any Office of the Company which maintains an account for receiving direct payment of premiums, that premiums will in future be paid directly to such an Office, and if premiums are so paid continuously for a period of one year without default beyond the Grace Period, the Company will, at the end of such year, refund 10 percent of the total of the year's premiums so paid; if there is default in such payment of premiums beyond the Grace Period, followed by revival of the Policy without the services of an Agent, such refund will be made, but will be reduced for each such default by 10 percent of the premiums due on the date of the application for revival, unless premiums for more than 26 weeks were then due, in which case no refund will be granted as to premiums which were then due or as to premiums paid prior to default.

A similar refund will be made annually upon continuous payment of premiums in the same manner.

BENEFICIARIES. The Insured may at any time, by written request, change the beneficiary. No designation of a beneficiary shall be binding on the Company unless endorsed on this Policy by the Company. The Company may refuse to endorse the name of any proposed beneficiary who does not appear to the Company to have a substantial insurable interest in the life of the Insured.

BENEFIT FOR LOSS OF EYESIGHT OR LIMBS. Upon receipt of due proof that the Insured has suffered the loss by severance of both hands, or of both feet, or of one hand and one foot, or has suffered irreversibly the loss of the entire sight of both eyes and has survived total loss of sight for 30 days, then the Insured will be deemed totally and permanently disabled, and (1) the Company will pay to the Insured, living, and otherwise in the same manner as the death benefit, one-half of the amount that would be payable under the Schedule in the event of death on the date of such loss, and (2) after the receipt of such proof the Policy will, upon endorsement by the Company, be continued for full amount without payment of future premiums. This benefit shall be granted only if such loss occurs (a) while premiums are not in default beyond the Grace Period, and (b) solely as the result of disease contracted after or injury sustained after the date of issue. This benefit is granted without specific extra premium, the cost being included in the premium for this Policy.

ACCIDENTAL DEATH BENEFIT. Upon receipt of due proof that the death of the Insured resulted, independently of all other causes, from bodily injuries caused solely by external, violent, and accidental means, the Company will pay, as an additional death benefit, an amount equal to the amount payable under the Schedule, unless such injuries were sustained while employed in a mine occupation on an (open pit or underground) premises, in which case only one-half of the additional amount shall be payable. The additional benefit shall be payable only if (a) death occurs within 90 days from the date of such injuries and while premiums are not in default beyond the Grace Period, and (b) such injuries were sustained by the Insured after attaining age 15 and before attaining age 70. The additional benefit shall not be payable if the Insured's death (a) is caused or contributed to by disease or infirmity, or (b) is the result of self-destruction, whether sane or insane, or (c) is the result of the inhaling of any gas or fumes, whether voluntarily or otherwise, or (d) is the result of travel or flight in any species of aircraft, except as a fare-paying passenger, or (e) is the result of participation in an assault or felony, or (f) occurs while in military or naval service in time of war. The additional benefit shall be reduced by any amount payable as Benefit for Loss of Eyesight or Limbs as a result of the same injuries. This benefit is granted without specific extra premium, the cost being included in the premium for this Policy.

CONFORMITY WITH STATE OR PROVINCIAL LAWS. The provision of this Policy which is in conflict with the statutes of any State or Province in which this Policy is issued or delivered is understood to be amended to conform to such statutes.

Nonforfeiture Privileges

AUTOMATIC PAID-UP TERM INSURANCE. After premiums have been paid for the respective periods specified in the table below, in case of default beyond the Grace Period in the payment of any subsequent premium, the Policy will, without action on the part of the Insured, be continued in force for the amount stated in the Schedule, plus

any dividend additions, as nonparticipating paid-up term insurance (without the Benefit for Loss of Eyesight or Limbs and the Accidental Death Benefit) for the term stated in such table, commencing from the due date of the premium in default. The values stated in the table are for a policy free from indebtedness and without dividend additions.

TERM OF AUTOMATIC PAID-UP TERM INSURANCE AFTER PREMIUMS HAVE BEEN PAID FOR:

Age Next Birthday at Issue	35 Weeks	39 Weeks	1 Year	2 Years	3 Years	4 Years	5 Years	6 Years	7 Years	8 Years	9 Years	10 Years	11 Years	12 Years	13 Years	14 Years	15 Years	16 Years	17 Years	18 Years	19 Years
Weeks	Weeks	Weeks	Years	Years	Years	Years	Years	Years	Years	Years	Years	Years	Years	Years	Years	Years	Years	Years	Years	Years	Years
20	8	15	25	1	25	4	8	5	33	7	6	8	34	10	28	12	19	14	6	15	40
21	8	15	25	1	25	4	8	5	32	7	4	8	32	10	28	12	11	13	47	15	25
22	8	15	25	1	25	4	8	5	30	7	1	8	29	10	18	12	3	13	35	15	10
23	8	15	25	1	25	4	7	5	29	6	5	8	27	10	13	11	46	13	23	14	46
24	8	15	25	1	25	4	6	5	27	6	4	7	23	10	6	11	36	13	9	14	29
25	8	15	25	1	24	4	5	5	25	6	4	3	19	9	5	11	25	12	47	14	11
26	8	15	25	1	24	4	4	5	22	6	3	8	13	9	4	11	12	16	29	17	32
27	8	15	25	1	23	4	2	5	19	6	3	8	7	9	3	11	1	12	16	13	25
28	8	15	25	1	23	4	0	5	15	6	2	7	0	9	2	10	4	10	11	51	13
29	8	15	25	1	22	3	49	5	10	6	20	7	45	9	12	10	25	11	34	12	37

(The term is the same for any amount of weekly premium payable.)

PAID-UP WHOLE LIFE INSURANCE. Within thirteen weeks after default in premium payment, after premiums have been paid for the respective number of years specified in the table below, upon written application by the Insured and presentation of this Policy for endorsement, the Company will, in lieu of the automatic benefit specified in the

last preceding clause, continue this Policy as nonparticipating paid-up whole life insurance (without the Benefit for Loss of Eyesight or Limbs and the Accidental Death Benefit) for the reduced amount stated in the table below. The values stated in the table are for a policy free from indebtedness and without dividend additions.

PAID-UP WHOLE LIFE POLICY VALUES FOR EACH \$250 OF INSURANCE AFTER PREMIUMS HAVE BEEN PAID FOR:

Age Next Birthday at Issue	5 Years	6 Years	7 Years	8 Years	9 Years	10 Years	11 Years	12 Years	13 Years	14 Years	15 Years	16 Years	17 Years	18 Years	19 Years
20	\$48.50	\$58.50	\$71.00	\$83.50	\$96.10	\$108.70	\$121.30	\$134.00	\$146.80	\$159.60	\$172.50	\$185.50	\$198.00	\$211.00	\$225.30
21	48.50	58.90	71.40	83.90	96.50	109.10	121.70	134.40	147.10	159.90	172.70	185.70	198.80	212.00	225.50
22	48.70	59.30	71.80	84.30	96.90	109.40	122.10	134.70	147.40	160.20	173.00	186.00	199.00	212.20	225.70
23	48.80	59.70	72.30	84.80	97.30	109.90	122.40	135.00	147.70	160.40	173.20	186.10	199.20	212.40	225.80
24	49.00	60.20	72.70	85.20	97.70	110.20	122.80	135.40	148.00	160.70	173.40	186.30	199.30	212.60	226.00
25	49.10	60.60	73.10	85.60	98.10	110.60	123.10	135.60	148.20	160.90	173.60	186.50	199.50	212.70	226.10
26	49.30	61.10	73.50	86.00	98.50	110.90	123.40	135.90	148.40	161.10	173.80	186.60	199.60	212.80	226.20
27	49.40	61.40	73.90	86.30	98.80	111.20	123.70	136.10	148.60	161.20	173.90	186.70	199.70	212.90	226.30
28	49.50	61.80	74.20	86.70	99.10	111.50	123.90	136.30	148.70	161.30	173.90	186.70	199.70	212.90	226.30
29	49.60	62.10	74.60	87.00	99.30	111.70	124.00	136.40	148.90	161.40	174.00	186.70	199.70	213.00	226.40

CASH SURRENDER VALUE. Within thirteen weeks after default in premium payment, after premiums have been paid for the respective number of years specified in the table below, upon written application and presentation of this Policy, the Company will pay to the Insured the cash surrender value stated in such table. The values stated in the table are for a policy free from indebtedness and without dividend additions. After premiums upon this Policy have been paid for five years, the

insurance provided under the clause entitled Automatic Paid-up Term Insurance or the clause entitled Paid-up Whole Life Insurance may be surrendered at any time for its then cash surrender value (viz., its full reserve at the date of such surrender).

The Company, at its discretion, may defer the payment of any cash surrender value for the period permitted by law, but not to exceed six months, after the application therefor is received by the Company.

CASH SURRENDER VALUES FOR EACH \$250 OF INSURANCE AFTER PREMIUMS HAVE BEEN PAID FOR:

Age Next Birthday at Issue	5 Years	6 Years	7 Years	8 Years	9 Years	10 Years	11 Years	12 Years	13 Years	14 Years	15 Years	16 Years	17 Years	18 Years	19 Years	20 Years
20	\$30.72	\$25.41	\$31.41	\$37.63	\$44.09	\$50.80	\$57.77	\$65.01	\$72.53	\$80.35	\$88.48	\$96.94	\$105.75	\$114.94	\$124.53	\$140.80
21	31.11	26.04	32.15	38.50	45.09	51.92	59.02	66.39	74.05	82.00	90.28	98.89	107.86	117.21	126.97	143.42
22	31.55	26.71	32.94	39.41	46.12	53.08	60.31	67.81	75.60	83.70	92.11	100.87	109.99	119.60	129.44	146.07
23	32.50	27.41	33.77	40.36	47.19	54.28	61.63	69.26	77.19	85.42	93.97	102.88	112.15	121.83	131.63	148.76
24	32.96	28.35	34.66	42.30	49.28	56.49	63.97	71.74	79.79	87.16	95.85	104.90	114.33	124.17	134.45	151.47
25	33.46	29.60	36.32	43.29	50.38	57.72	65.33	73.22	80.41	88.91	97.75	106.95	116.53	126.63	136.99	154.20
26	33.94	30.94	37.20	44.28	51.62	59.21	67.08	75.22	83.67	92.45	101.56	111.05	120.94	131.28	142.10	159.71
27	34.47	31.09	38.07	45.29	52.74	60.47	68.45	76.73	85.31	94.22	103.47	113.11	123.15	133.65	144.66	162.48
28	34.98	31.88	38.96	46.29	53.88	61.72	69.84	78.24	86.95	95.99	105.38	115.16	125.36	136.03	147.22	165.26

The values in the above three tables are based on premium payments for the exact periods stated; the Company will make appropriate increase based on any additional years of premium payments. The amounts in the two tables next above are the amounts for each \$250 of insurance. If the amount of insurance is \$500, the amounts should be doubled, and so on. Cash Surrender Values for subsequent years will be furnished on request.

BASIS OF NONFORFEITURE VALUES. The net value applicable to the purchase of each nonforfeiture benefit after premiums have been paid for three years is based on the reserve on the Policy (exclusive of reserve on the benefits for Loss of Eyesight or Limbs and for Accidental Death) and on dividend additions, if any, less a surrender charge up to the end of the twentieth year not exceeding two and one percent of the amount insured by the Policy, including dividend additions; at the end of twenty years and thereafter no surrender charge

is made. If there is any indebtedness under the Policy, such indebtedness will be deducted from the cash surrender value, or from the net value to be used as a single premium in determining the term of the automatic paid-up term insurance or the amount of paid-up whole life insurance. The reserves and net single premiums herein referred to shall be computed upon the Standard Industrial Mortality Table with interest at 3½ percent per annum.

20-Year Payment Life (\$250 or Multiples)
Whole Life, Weekly Premiums Payable for 20 Years

EBP401 **SCHFDULE**

Ages 30 to 39

Form 9728 S
Jan. 1937

Number of Policy	Date of Issue	Name of the Insured	Age Next Birth-day at Issue (yrs.)	Amount of Insurance	Weekly Premium
127467866	AUG 23 1937	CHRISTOPHER MC NAMARA	34	\$250-	\$.23

Name and Relationship of the Beneficiary
CATHERINE MC NAMARA-SISTER

SPACE FOR ENDORSEMENTS

1942
DIVIDEND PAID

NOTICE TO POLICYHOLDER
Please Read Your Policy Carefully.

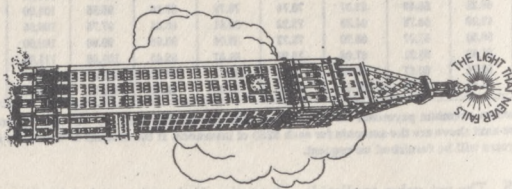
An election of Directors of the Company is held in New York on the second Tuesday in April of every odd-numbered year. The holder of this Policy, after one year from its date of issue, while it remains in force, will have a right to vote either in person or by proxy or by mail. For particulars as to how to vote, apply to the Secretary, 1 Madison Avenue, New York, N. Y.

If claim arises the office through which premiums have been paid should be notified as soon as possible. Do not employ undertaker or anybody else to collect. Deliver the Policy only to the Company's representative. The Company is anxious to pay promptly every proper claim and there is no necessity for help or alleged influence in collecting.

IF IT BECOMES IMPOSSIBLE TO CONTINUE PAYMENT OF PREMIUMS, PRESERVE THIS POLICY BECAUSE OF SUCH PROTECTION AS MAY STILL BE AFFORDED UNDER ITS PROVISIONS.

PRINTED IN U.S.A.

**METROPOLITAN LIFE
INSURANCE COMPANY**
1 Madison Avenue, New York, N. Y.



**20-YEAR PAYMENT
WHOLE LIFE
INDUSTRIAL POLICY**
(\$250 or Multiples)
Weekly Premiums Payable for 20 Years
or Until Prior Death
INSURANCE PAYABLE AT DEATH ONLY
Annual Distribution of Divisible Surplus

63

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Policy no. _____
 Name _____
 The _____
 instruction _____

 1. Full name _____
 2. Address _____

 City of _____
 3. Occupation _____
 (a) Trade _____
 (b) Industry _____
 (c) _____
 (d) _____
 (e) _____
 (f) _____
 (g) _____
 (h) _____
 (i) _____
 (j) _____
 (k) _____
 (l) _____
 (m) _____
 (n) _____
 (o) _____
 (p) _____
 (q) _____
 (r) _____
 (s) _____
 (t) _____
 (u) _____
 (v) _____
 (w) _____
 (x) _____
 (y) _____
 (z) _____
 4. Male _____
 Female _____
 5. What was _____

What was the
City or town
What was the
Duration from
Contributor's
secondary of
When were
the condition
of indirectly
What was
first visit in
What was the
I HEREBY

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Date _____

Part 2—Non _____

Clinical Division
Subsidiary Section

METROPOLITAN LIFE INSURANCE COMPANY

PROOFS OF DEATH

Part 2—PHYSICIAN'S STATEMENT

FEB 18 1942

11/6/44
FHL

26 JERSEY CITY, N.J.

19

Manager

It is hereby agreed that this certificate of Dr. _____ shall be considered as part of the proofs of death under

Policy number 17467866 etc

Dr. *John P. Harty*

Bathaine McNamara

The physician will be of great help to the claimant in securing prompt action on the claim if he will answer the following questions completely and fully in accordance with the information on the reverse side of this form.

1. Name of the decedent
Christopher McNamara

2. Address
Number and street *273 8th St*
City or town *Jersey City* State *NJ*

3. Occupation (See the reverse side.)
(a) Trade, profession, or particular kind of work done, as spinner, weaver, bookkeeper, etc. *laborer*
(b) Industry or business in which work was done, as silk mill, sawmill, bank, etc.

4. Was death caused by any condition arising from the decedent's occupation?

5. (a) Male or female (b) Color or race (c) Age at death (d) Apparent age at death
Male *White* *38* *38*

6. What was the date of death?
Feb 17 1942

7. What was the place of death? (If death occurred in a hospital or institution, give name.)
Number and street *Medical Center*
City or town *Jersey City* State *NJ*

8. What was the cause of death? (See the reverse side.)
My wife was struck by a car while crossing the street following the funeral of her father.
Duration from personal knowledge _____ years _____ months _____ days
Duration from history given _____ years _____ months _____ days
Cause of death from history given _____ years _____ months _____ days
(Duration) _____ years _____ months _____ days

9. When were you first consulted for the condition which either directly or indirectly caused death?
2 days before death

10. What was the date of the last visit in the last illness?
the day before death

11. What was the date of the last visit?
the day before death

9. How long had the deceased been ill when you were called to attend in the last illness? *2 or 3* 19__

10. Was the deceased afflicted with any infirmity or deformity (for example, missing limbs) or with any chronic ailment (for instance, any form of tuberculosis, diabetes, heart disease, alcoholism, drug addiction, etc.)? If so, please specify which, and give duration. *No*

11. Please state the disease or diseases, other than those referred to in answer to questions 7, 8, and 9, for which you attended the deceased, and give the dates of attendance.

For	From	For	From
	<i>2 or 3</i>		
	19__		19__
	19__		19__
	19__		19__
	19__		19__

12. Did the deceased have any surgical operation within three years prior to death? If so, please give the name of the institution, the dates, and the cause.
Yes. Medical Center Feb 14 1942

13. (a) Was there an autopsy, inquest, or post-mortem examination? *Yes*
(b) If so, by whom? *Autopsy by myself*

14. Was the deceased ever treated by another physician or at any hospital or other institution prior to, during, or subsequent to your attendance? If so, please specify the date and condition for which treatment was given.
Hospital Staff Medical Center 20

15. (a) Was death certified as due to accident, suicide, or homicide? If so, which? *acc 7*
(b) If the answer to (a) is "accident," give the date of the injury. *Feb 15 1942*
(c) Specify whether the injury occurred at work, at home, or in a public place. *Public Place*
(d) What was the manner of injury (fall downstairs, explosion of stove, etc.)? *acc 7*
(e) What was the nature of the injury (fracture of skull, burns, etc.)? *acc 7*

16. Did you certify the death to the Board of Health or Registrar of Vital Statistics? *Yes*

17. Have you filled out a certificate in this case for this or any other company? If so, please specify which company. *No*

18. From what medical school did you graduate, and when? *Cal MS N.Y.C. 1903*

I HEREBY CERTIFY that the answers as recorded are complete and true to the best of my knowledge and belief.

Signature of physician *Arthur Mackay* Date *Feb 19* 19__
City or town *Jersey City* State *NJ*

Witness and subscribed to before me this 19th day of February, 1942.

Signature _____ Date _____ 19__
SIGNATURE _____
NOTARY PUBLIC OF NEW JERSEY
My Comm. Assistant Manager
Detached Assistant Manager
Cashier

TO THE PHYSICIAN:

The Metropolitan Life Insurance Company invites the cooperation of all physicians in its program of welfare work in social hygiene. To this end, it is essential that the Company possess vital statistics of sufficient worth to indicate more clearly the precise lines of endeavor it should pursue. Physicians can improve the Company's statistics by exercising care in supplying the following items of information:

CAUSE OF DEATH.

Name first the disease causing death, using always the accepted title for the disease. Examples: Diphtheria (avoid use of "Croup"); Typhoid fever (never report "Typhoid Pneumonia"); Lobar Pneumonia, Bronchopneumonia ("Pneumonia" unqualified is an indefinite title).

Secondary or contributory causes should be reported as such, *vis.*: Measles (disease causing death), 25 days; Bronchopneumonia (secondary), 10 days.

Never return mere symptoms or terminal conditions, such as Asthenia, Coma, Heart Failure, Shock, Uremia, Dropsy, Convulsions, or Hemorrhage, when a definite disease can be ascertained.

Always qualify puerperal causes, such as: puerperal septicemia; puerperal peritonitis. State cause for which surgical operation was undertaken. Example: Uterine tumor, nonmalignant—Hysterectomy.

For violent deaths, state the means of injury and qualify it as accidental, suicidal, or homicidal, or as probably such. Examples: Accidental drowning; struck by railway train—accident; revolver wound of head—homicide; poisoned by carbolic acid—suicide.

Indicate deaths due to occupational poisoning, accident, neurosis, or other occupational stress.

OCCUPATION.

The exact statement of occupation is important. Indicate (a) the trade or particular kind of work; and (b) the general nature of the industry or business.

Examples:

TRADE OR PARTICULAR KIND OF WORK	GENERAL NATURE OF INDUSTRY OR BUSINESS
(a) Machinist	(b) Automobile factory
(a) Weaver	(b) Silk mill

Such information will tend to accelerate the payment of claims and will, at the same time, serve to advance the scientific study of mortality by causes and occupations.

E. KRAFTNER
 CLAIM DIV. (CND)
 MAR 2 1932
 CODE 152

Christophorus de Hamann

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Exhibit P-3(a) (b).

Statement of Walter Watkowski.

(Opposite )

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P 3 (a)
11/28/44
FHL

Feb 15/45

Statement of Walter Watkowsky Age 32 Res
169 Erie St employed at Barbecue Restaurant
192 Pavonia Av. Jersey City as night manager
made to Det Matthew J Sutton in reference
to an assault upon one Christopher Peter
McNamara age 37 Res 573-8th St Jersey
City which occurred outside of 507 Grove
St causing him to be removed in ambulance
to medical center by Dr. Thompson and
treated for poss. fracture of skull and detained.
Ques? Tell me in your own words what you
know about this assault.

About 6.30 A.M. a fellow by the name of Tracy
was finishing his meal and he had a package on
the stool alongside of him. McNamara and another
guy walked in and McNamara sat on Tracys
package, Tracy said watch where your sitting,
McNamara said what are you a wise guy.
Tracy said no I'm not a wise guy, but I don't
want my package broke, so McNamara and
the other guy were coming close to Tracy as
to fight. So I put them out. Tracy
left his package and coat on the bar, while
he was waiting for the buss, then McNamara
grabbed Tracys coat and lunch and I went
outside to keep them away from the windows
Sgt. James J. Cannon Walter Watkowsky

Feb 15/42

3/4
1/4
1/4

Statement of Walter Mathias by 32 Re
I was employed at Barber's Restaurant
22 Avenue Du Prince as night manager
and to the Mathias family in reference
to an account upon one Christopher Mathias
The name of Christopher Mathias is 73-8
I recall no other names of 703 more
I cannot find to be removed in reference
to Mathias family for the purpose and
needed for pass. I could not determine
any tell me in your own words what you
know about this account.
About 1902 a fellow by the name of Tracy
was furnishing his wife and her father with
the food supplies of him. The name and under
my recollection and the name of Tracy
Tracy, Tracy and Tracy were supporting
the Mathias family what are you a close guy.
I could not say a word about Tracy but I don't
know my package for the Mathias and
other guy were coming close to Tracy as
to fight so I put them out. Tracy
to his father and mother the father
was waiting for the day when the Mathias
would be able to pay and buy and Tracy
tried to keep them away from the money
" Tracy Mathias

Feb 15/42

continued

I took Tracys lunch away from Mc Namara and as I did Mc Namara made a swing at Tracy but missed him when Tracy got the chance he hit Mc Namara with his fist in the face knocking him down to the ground, then Tracy ran away and Mc Namara's friend ran after him and thats the last I saw of them.

Ques. What is Tracys right name?

Ans. I dont know all I ever heard him called was Tracy

Ques Where does Tracy live?

Ans I dont know

Ques Do you know where he works

Ans As far as I know he works in the Federal Shipyards.

Ques How long has Tracy been eating in this restaurant

Ans On and off about five (5) or six (6) years.

Ques Who is the man was with Mc Namara.

Ans. I dont know his name but he comes in here once in a while

Ques Do you know where he lives

Ans No I dont

Ques Do you know where he works

Ans No I dont

Ques Is there anything else you would like to say about this assault

Ans. No thats all.

Witness
J. F. Gannon

Matthew Estab

Feb 15/42

Original

Statement of
Walter Wathausky
Material Witness
in case of
Walter Kloby
Charge

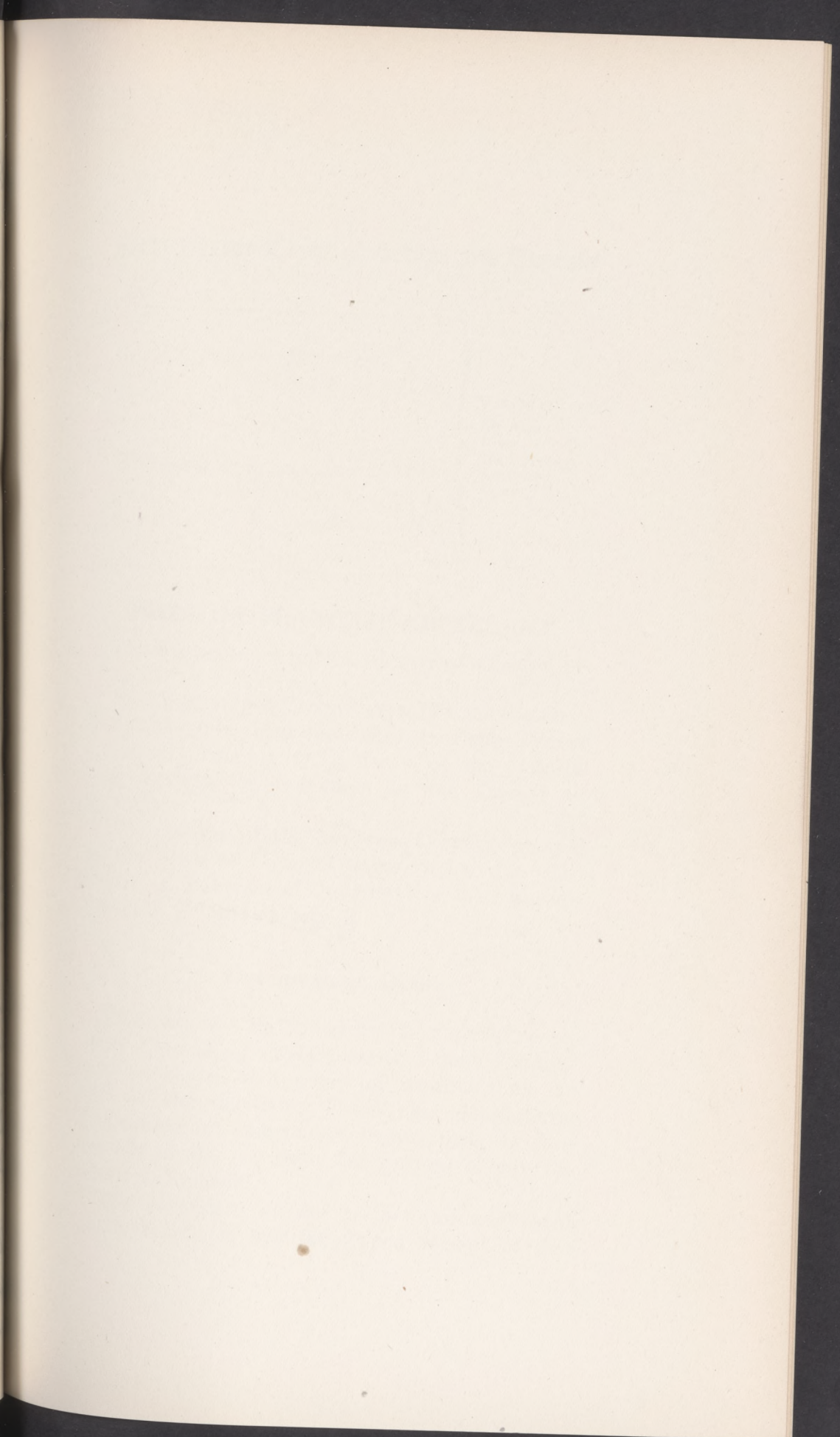
Atrocious Assault
and Battery

To

Harry W. Walsh
Chief of Police

Respectfully
Harry Norton
Act Captain.

3 B/2



3 FEB T. 1946

New Jersey Court of Errors and Appeals

CATHERINE McNAMARA,
Plaintiff-Appellant,

VS.

METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant-Appellee.

Action at Law.
On Appeal
from
New Jersey
Supreme
Court.

BRIEF OF PLAINTIFF-APPELLANT.

(Italics are ours unless otherwise indicated.)

This is an appeal from reversal by the Supreme Court of a judgment entered in the First District Court of Jersey City, in favor of the plaintiff and against the defendant in the amount of \$250.00.

The opinion of the Supreme Court is printed in the State of Case, at pages 2a and 2b. The Order of Reversal of Judgment in the Supreme Court is printed at page 2.

Statement of Case.

This suit was instituted by the plaintiff to recover the sum of \$250.00, under a double indemnity provision of a policy of insurance on the life of the decedent, Christopher McNamara. The defendant insurance company paid the face amount of the coverage, but refused to pay the additional benefit.

The defendant agreed to pay an additional death benefit of \$250.00, "upon receipt of due

proof that the death of the insured resulted, independently of all other causes, from bodily injuries caused by external violent and accidental means * * *." This is followed by an exclusion clause which denies payment of the additional benefit if the insured's death "is the result of participation in an assault or felony." The determination of this appeal rests largely upon the interpretation given to this clause by this Honorable Court. The trial court found as a fact that the "assault" committed by the insured was not of such character as to justify the person assaulted in taking decedent's life (Case, p. 56).

The Supreme Court reversed the judgment of the District Court in an opinion filed May 18, 1945.

The Issue.

Appellee would contend that the words "result of participation in an assault," as used in this policy, must be construed *literally* and that, no matter how slight the assault in which assured participated and even though the assured, acting as a reasonable man, would not contemplate that the result would be *fatal*, the insured is exempted from liability if death occurs.

Appellant, on the other hand, contends that a literal construction of the words "result of participation in an assault" does violence to the reasonable intention of the contracting parties, is absurd, and resolves a doubt in construction in favor of the insurer. Appellant further contends that whether the death is the "result of participation in an assault" is a question of fact for the District Court sitting as a fact finding tribunal to decide and that, under the evidence in this

case, the Supreme Court was in error in finding in favor of the insured *as a matter of law*.

Comment on Supreme Court Opinion.

It is most respectfully noted that this is the first time in New Jersey that the clause in question has been construed. The learned opinion of the Supreme Court fails to cite or discuss any of the out of state cases interpreting the same clause.

The Supreme Court found, *as a matter of law*, that the death of the insured was "the result of participation in an assault." It is also noted that the Supreme Court based its opinion on the further ground, *as a matter of law*, that the insured "could have reasonably foreseen the fatal possibility of its (the assault's) continuance."

Facts.

The substantial facts set forth in the Supreme Court opinion are as follows (Case, p. 2b, ll. 3-21):

"The proofs show that the insured died as the result of a fractured skull.

"On the night of February 14, 1942, he attended a dance. In the early morning of the next day, accompanied by a friend he went to a saloon. Thereafter, they went to a restaurant at 203 Pavonia Avenue, Jersey City. A former pugilist was having his breakfast. There was plenty of room around the counter but the insured sat on a package containing the pugilist's lunch. A verbal altercation ensuing, the insured struck the

protesting pugilist, and knocked out one of his teeth. The restaurant proprietor put the men out on the street. The pugilist then struck the insured a blow which felled him to the street and fractured his skull so that he died in two days."

ARGUMENT.

POINT I.

Unless the "assault" in which the insured engaged was such an assault that McNamara reasonably contemplated that Kloby would be justified in taking his life, and unless McNamara, as a reasonable man, should have contemplated that the result would be fatal, the insurer is not exempted from liability.

We respectfully submit that the issue of law presented by this appeal should be approached in the light of the following principles:

(1) That where a clause in an insurance policy is capable of more than one construction, it will be construed strictly against the insurer and that construction will be adopted which is most favorable to the insured. Also, when a stipulation or exception to a policy of insurance emanating from the insurer is capable of two meanings, the one is to be adopted which is the most favorable to the insured.

See *Union Accident Co. v. Willis*, 145 Pac. 812; 44 Okla. 578;

Fleming v. Connecticut General Insurance Co., 116 N. J. L. 6;

Davis v. Automobile Association of New Jersey, 124 N. J. L. 364;

Michler v. New Amsterdam Casualty Co., 104 N. J. L. 30; Aff. 104 N. J. L. 663;

Connell v. Commonwealth Insurance Co., 96 N. J. L. 510;

Gans v. Columbia Insurance Co., 99 N. J. L. 44; Aff. 100 N. J. L. 400;

Weiss v. Union Indemnity Co., 107 N. J. L. 348;

Jasion v. Preferred Accident Insurance Company of New York, 113 N. J. L. 108.

(2) To construe the clause "the result of participation in an assault or felony" in its literal interpretation leads to an absurdity and the weight of authority does not so construe it.

(3) This is not a case where the insured, armed with a deadly weapon, deliberately engaged in an altercation with another and was killed. In such cases, the death of the insured is not "accidental" but is the result naturally to be expected of the voluntary act of the insured. Thus, such cases as *Taliaferro v. Travelers Protective Association of America* (C. C. A.), 80 F. 368 and *Occidental Life Insurance Co. vs. Holcomb* (C. C. A.), 10 F. 2d, 125, have no application on the facts. Nor is this a case where the insured moved upon one who was armed and later killed him, for likewise, in such cases, any

reasonable man should foresee the probable fatal consequences of his acts.

(4) This is not a suit for accidental *injuries*, but a suit arising out of accidental *death*. Thus, we concede that, if it were a suit for accidental injury, the insured who engages in a fist fight, as a reasonable man, should contemplate that he is likely to be *injured*. However, it is our position that one who engages in a fist fight, while he may anticipate injury cannot be said, *as a matter of law*, to have reasonably contemplated the fatal result.

If we were to take the excepting clause in its literal meaning, as defendant would have the clause construed, then no matter how slight may be the assault in which the insured participates and out of which unforeseen death results, there could be no recovery. We submit that such a construction is absurd. We submit that the proper rule of construction is that stated in the case of *Clancy v. John Hancock Mutual Life Insurance Co.*, 282 N. Y. S. 510, at p. 513. In that case, the policy provided that the double indemnity provision would not be paid "if the death of the insured results *directly or indirectly* * * * from homicide, *or from any violation of law* by the insured." The insured undoubtedly was violating the law in having attempted to assault another man who thereupon struck the insured and killed him. The death undoubtedly resulted from homicide. Yet, the Court refused to adopt the literal meaning of the clause and laid down the following rule of construction:

"My attention has not been directed to, nor have I been able to find, any authority

in this State, in which the consequences of a voluntary act have been pushed so far in defeating the right to recovery upon a policy providing for double indemnity. The Court's point of view, in fixing the meaning of the word 'accident' in the contract at bar, must be that of the average man. 'Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary and unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of man—is also the test to be applied by Courts.' *Lewis v. Ocean Accident & Guaranty Corp., Limited, of London, England*, 224 N. Y. 18, 21, 120 N. E. 56, 57, 7 A. L. R. 1129. The language just quoted seems to me to be applicable to the situation presented by the manner of Clancy's death. The average man would probably consider him the aggressor in his quarrel with the stranger. But it is not consistent with the experience of the average man that the one who enters into a brawl with his bare hands does so with the expectation that it may result fatally, if he has no reason to believe his antagonist is armed. At bar, 'the dire result, so tragically out of proportion to its trivial cause,' was something entirely unforeseen."

The facts in that case were very similar to those herein. The deceased, during an argument in a nightclub, had invited the other man to go outside. They did so. The deceased swung at the other and missed, just as here the insured, after going outside the restaurant, swung at Kolby and missed (Case, p. 44, ll. 10-11). The

other man pushed Clancy whereby he struck his head on a pavement and died from a fractured skull. In the *Clancy* case, the Court directed a verdict for the plaintiff.

The leading case in the country is that of *Gilman v. New York Life Insurance Co.*, Arkansas, ; 79 S. W. 2d, 78; 97 A. L. R. 755. In that case, the policy contained an exception providing that the double indemnity would not be paid if the insured's death resulted from committing an assault or felony. If the literal meaning of the clause had been adopted by the Court, there could have been no verdict for the plaintiff. Gilman undoubtedly was committing an assault upon another which resulted in the other shooting the insured and killing him. The defendant insurer contended that it was entitled to a directed verdict. The Court said:

“We cannot agree that it was so entitled. This contention is based on the theory that the parties expressly agreed that there should be no liability or double indemnity if death resulted from committing an assault, and that the undisputed proof shows that Gilman was committing an assault upon Walker at the time he was killed. We cannot agree with the appellee that Gilman was *as a matter of law* committing an assault upon Walker *within the meaning of the policy* * * *.”

The Court laid down the rule adopted by the District Court in this case:

“We think the word ‘assault’ as here used means something more than a simple assault.
* * * The word ‘assault’ as here used re-

fers to such an assault *as would justify the person assaulted in taking his life*. In other words, before the appellee would be exempted from liability under its policy, Gilman must have been guilty of such an assault as justified Walker acting as a reasonably prudent person, in firing the fatal shot. Whether Gilman made such an assault upon Walker *was a question for the jury, under proper instructions from the Court.*"

Then, citing Couch on Insurance, Vol. 5, *Cyclopedia of Insurance Law*, Sect. 1158, p. 4068, the Court stated:

"It is generally held that injuries sustained by the insured who assaults another with a deadly weapon or upon one he knew had such a weapon are not sustained by accident, for the reason that his injury or death resulted from a natural and probable consequence of his own act. On the other hand, there is authority to the effect that where the insured did not use a deadly weapon in assaulting the one who killed him and did not know that the other had such a weapon, his death resulted from accident since the result was one which could not have been anticipated from the circumstances. *Even where the insured is the aggressor, if he could not reasonably anticipate bodily injury resulting in death to himself at the hands of another, the beneficiary may recover for the accidental death.*"

Continuing, the Court said:

"The killing of an unarmed person by one

upon whom he is moving aggressively is by accident or accidental if the insured did not know and had no reason to believe that his adversary was armed and intended to kill him upon such advance. It is for the jury to determine whether or not death by being shot by another is accident where the evidence is conflicting as to whether or not the 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."

In the case of *New York Life Insurance Co. v. Gustafson* (C. C. A.), 55 F. 2d, 236, the decedent insured was a professional boxer. While engaged in a boxing match which, of course, he intended to do, the insured was struck, his neck was broken and he died as a result of the injury. A question arose as to whether he was entitled to double indemnity under an accident policy. The Court reiterated the rule of construction that where a provision of a policy is ambiguous, the law gives the insured the benefit of the more favorable construction because the provision was one which the insurance company itself chose to put into its contract.

The Court said:

"That the man's death resulted from a boxing blow is a fact; that a man enters such a contest knowing that his opponent would inflict the hardest blows possible, that death occasionally comes in a boxing match, all are facts. * * * Accidental has in it the element of improbable, unusual, by chance. In the present case, while there was the remote

possibility of death, there was no probability, and reflection will show that the reason death came in this particular case was because a large number of independent, unconnected factors chanced to combine and cooperate to make this blow break the neck of the deceased."

The Court then went on to say that the particular angle of the decedent's chin at the time of the blow, the angle from which the blow came and the position of his opponent at the time of the blow fortuitously combined and, without such combination, there would have been no fatal result. It was held that the death was accidental.

So here, even if it be assumed that the insured was the aggressor and that he engaged in a fist fight, it is a fact that a blow in that fight resulted in his death. It is likewise a fact that he should have expected to be struck. It is also a fact that death occasionally results from a fist fight, but the fact that it occasionally happens does not take from such a fatal result its accidental feature and its element of an improbable, unusual, by chance result. That result does not come from a blow alone. It came from the unforeseeable combination of circumstances culminating in the striking of the insured's head upon the sidewalk, and death.

In *New York Life Insurance Co. v. Murdaugh*, (C. C. A.), 94 F. 2d, 104, the policy contained the clause that:

"Double indemnity shall not be payable if the insured's death resulted * * * from committing an assault or felony."

The Court stated the rule citing from *Mutual Life Insurance Co. vs. Sargent*, 51 F. 2d, 4:

"That death is nonetheless accidental, within the terms of the policy like the one in suit, because of the fact that it results from the unintentional act of another, if the insured is innocent of aggression or wrongful doing or *even if he is the aggressor*, if he could not reasonably anticipate bodily injury *resulting in death* to himself at the hands of another."

The Circuit Court affirmed judgment for the plaintiff.

In *Riggins v. Equitable Life Assurance Society*, Ct. of App. Ga., 64 Ga. Ap. 834; 14 S. E. 2d, 182, the clause in question was almost identical, though broader in fact than the clause here in question. It provided:

"The insurance under this policy shall not cover accident, injury, death * * * caused *directly or indirectly* * * * by participating in or in consequence of having participated in the commission of an assault or felony."

The clause is more favorable to the insurer than the clause herein because the clause herein would not allow the exception to operate if the death was *indirectly* caused by participation in an assault or if the death was merely "in consequence of having participated" in an assault, because in the policy *sub judice* the assault must have *directly* caused the fatal result.

The Court reiterated the rule at page 184, 14 S. E. 2d; saying:

"*And even where the assured is the aggressor*, if he could not reasonably anticipate bodily injury *resulting in death* to himself at

the hands of another, the beneficiary may recover. *Employers Indemnity Co. v. Grant*, 6 Circ. 271 F. 136; 209 A. L. R. 1118. See *Newsome v. Travelers Insurance Company of Hartford*, 143 Ga. 785; 85 S. E. 1035."

In that case, there was testimony that the insured on the night of his death had met his widow at a carnival. He told her to go home and, when she refused, he picked her up and carried her outside of the carnival, hit her on the nose, made her nose bleed, hit her on the head and chased her home. He also threatened her with his knife and said: "I'll kill you." When he arrived home, he pounded on the door, but his wife would not let him in. He broke in the door, reached for his knife and she ran away and succeeded in getting a police officer. The insured left with the officer but some time later came back to his house and knocked on the door. She then pulled the trigger and shot him "when he broke in the door." Thus, there was ample evidence that the insured was the aggressor. *The Court left it to the jury to determine* whether the plaintiff should recover and held that it could not, *as a matter of law*, hold that the exception in the policy barred recovery.

In the case of *Patton vs. Kansas City Life Insurance Co.*, 175 S. E. 334, the policy provided that there would be no liability for double indemnity for death resulting from injuries intentionally inflicted by another, or from any violation of law by the insured. In that case, a literal construction of the words "violation of law by the insured" would have defeated recovery, taking the case as the Court viewed it.

The Court said:

“The contractual clause which excepted the insured from protection of double indemnity if death resulted from violation of law by the insured *must be interpreted in the light of usual and ordinary experience of mankind. The causal connection must be plain.* A narrow, constrained interpretation is not reasonable.”

The Court affirmed the *jury verdict* for the plaintiff.

In *Murray v. New York Life Insurance Co.*, 96 N. Y. 614, the Court said:

“If the violation of law in which the deceased was engaged was trivial, although calculated to some extent to excite opposition or resistance but the taking of life was the result which no reasonable man could have contemplated as *likely* to follow from the unlawful act, there would be no such relation between the act and the death that the former could be said to be the cause of the latter.”

So in this case, mere “participation” in an assault would not even literally bring the exception clause into operation for under the clause the death must “result” from participation in an assault. In other words, there must be some causal relation between the assault and the death. And the observation of the Court in the *Patton* case that “the causal connection must be plain” is most apt. It may be argued that there was some causal connection between the acts of McNamara and the final result of death, but that causal connection between the assault and *that* result, namely, *death* is not plain. It certainly is not so plain that it becomes a matter of law

rather than a fact. In order to sustain the Supreme Court opinion it must be so clear as to be a matter of law and not of fact. The finder of the *fact* below found no such causal connection.

We shall establish in Point II hereunder that such a question as to the *causal relation is one for the jury* or for the District Court below, but intervening the first act of McNamara and his death, there were many unforeseen and unforeseeable elements that culminated in the most improbable result that he should die.

As in the *Gustafson* case above, the result of *death* was merely by chance.

True, using the standard of the *Murray* case above, as a reasonable man, McNamara could have contemplated that he would be *struck* by Kolby, but it certainly reaches far beyond the ordinary reasonable man's foresight that the engagement in a fist fight—and that is all this was—would result in *death*. Certainly, it is no more likely to result in a fight such as this than it would be in the case of the professional boxer such as in the *Gustafson* case.

The case of *Walters v. Prudential Insurance Company* (cited in the Supreme Court by the Insurance Company), also deals with an assault committed by the insured with a deadly weapon. This case also recognizes the general rule, citing *Manno v. The Metropolitan Life Insurance Company*, 249 N. Y. Sup. 471, in which case, the deceased drew a gun when placed under arrest by a police officer and, in the ensuing struggle, was shot. The Court held, in that case, that one who wrongfully attacks another under circumstances leading to the reasonable belief that counter-attack might take his life is not killed by accidental means. The Court cited the general rule

applicable to the case at bar and further observed as follows:

"The courts of other states and the federal court have held that, where one acts as the 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" (citing a long line of decisions throughout the nation).

In the case of *Piotrowski v. Prudential Insurance Company of America*, 252 N. Y. Sup. 313, the insured was shot by a police officer in a chase after he and others had stolen an automobile. The test laid down by the Court, at page 315 of the opinion is:

"Under all the circumstances was the insured bound to expect to be killed by the police officer in the manner detailed by the witnesses. The killing was under circumstances as justified homicide."

It will undoubtedly be argued that the insurance company would have a right to limit its risks, but it has not limited its risks by asserting that it need not pay if the insured suffered death "while participating in an assault." The point is that it has not so limited its risks either by the literal meaning of the exception clause or by its reasonable construction. The policy does not say that the exception shall apply if death occurs "while participating in an assault." Such a phrase referring to the conditions existing at the time of death was adopted in this policy in the very next clause (Clause F), where it says that

accidental death benefits shall not be paid if it "occurs while in the military or naval service in time of war" (Ex. P-1, p. 42 of State of Case). Under the latter clause, the mere existence of the *circumstance* that the death occurs *while* in military or naval service in time of war, it may be argued, would defeat recovery. That clause does not necessitate that death *result* from service in the military or naval service in time of war. A change of phraseology between Clauses E and F made by this insurance company must have been done by this insurance company with an intentional change in the meaning.

In the construction of an insurance policy, the entire policy in all its parts must be considered, so that each clause shall have effect. *Smith v. Fidelity and Deposit Company of Maryland*, 98 N. J. L. 534.

We submit that Clause E, operating only when a plain *causal connection* between the assault and death is found as a fact, necessitates and depends for its operation upon a finding of fact by the jury or District Court Judge that the *death* resulted from assault by McNamara. The finding of fact below is to the contrary.

POINT II.

The finding of fact of the District Court that the assault "was not of such a character as would have led McNamara to reasonably contemplate that Kloby would be justified in taking his life in order to resist the same" was binding upon the Supreme Court and postulated an affirmance of the judgment in favor of plaintiff.

In the first point foregoing, we have advocated

the rule of the *Gilman* case that, before an insurer could be exempted from liability under a clause such as is present in this policy, the insured must have been guilty of such an assault as justified the other acting as a reasonably prudent person in killing the insured.

Appellee's argument in Supreme Court and probably here also will attempt to evade the finding of fact of the District Court, and will attempt to imply that the insured so viciously attacked Kloby that Kloby would have been justified in taking the insured's life. A complete answer to such an attempt is that the District Court Judge made the following factual finding:

"I find as a matter of law that while McNamara was the aggressor the assault was not of such a character as would have led McNamara to reasonably contemplate that Kloby would be justified in taking his life in order to resist the same."

There was ample justification for such a finding in the record. The evidence was conflicting as to whether or not any blows were struck inside the restaurant. Kloby testified that McNamara struck him inside the restaurant and there knocked out one of his teeth (an artificial tooth) (Case, p. 22). Watkowski, the proprietor of the restaurant, first testified that he saw a couple of swings made by McNamara (Case, p. 42, ll. 9-11). Then that McNamara "made a swing" (l. 14); but the statement he had given to the police immediately after the incident merely said that McNamara and Enwright "were coming close to Tracy as if to fight, so I put them out" (Exhibit P-3 (a) p. 67 of State of Case). Enwright was in a position to see whether or not blows were

struck and said that he did not see any blows struck in the restaurant (Case, p. 36, ll. 29-38).

While it is true that the District Court Judge found that McNamara struck Kloby several blows while in the restaurant (Case, p. 58), however, even assuming that such blows were struck in the restaurant, that altercation ceased when the men went outside. The testimony is uncontradicted that, on the sidewalk, no more than one blow was struck by McNamara.

Walter Kloby testified at page 27, lines 30-37, State of Case,

“Q. How many times did he hit you out in the street? A. Once, and I hit him once.

“Mr. DeSevo: Let us get it on the record: ‘Once, and I hit him once.’ He struck you one blow, and you struck him?

“The Witness: Yes, as I was stooping over to pick up me coat and hat.”

Kloby also testified that the only damage done to him by McNamara was that done inside (Case, p. 27, l. 16). Enwright did not know what happened outside (Case, p. 35, l. 8).

From this state of facts, appellee would argue that *as a matter of law*, McNamara's death “resulted from participating in an assault.”

In the Supreme Court, appellee insurance company failed to cite a single case which held that as a matter of law such a death resulted from participation in an assault. In the Supreme Court appellee cited the case of *O'Neill v. Metropolitan Life Insurance Co.*, 26 Atl. Rep. 2d, 898. That case is authority for nothing more than that the question of the causal connection of insured's conduct with the accidental death was a question *for the jury*.

The Court said:

“In the instant case, ‘the causative connection’ of the insured’s unlawful conduct ‘with the accident’ was a legitimate inference for the jury to draw.”

The overwhelming weight of authority is to the effect that it is a question of fact for the jury whether the insured’s wrongful conduct *produced* his death or whether he could reasonably anticipate bodily injury *resulting in death* to himself at the hands of another.

Thus, in the *Gilman* case, *supra*, it was held:

“In other words, before the appellee would be exempted from liability under its policy, Gilman must have been guilty of such an assault as justified Walker acting as a reasonably prudent person, in firing the fatal shot. *Whether Gilman made such an assault upon Walker was a question for the jury under proper instructions from the Court.*”

In *Riggins v. Equitable Life Assurance Company, supra*, the lower court had directed a verdict for the defendant. The upper court said:

“In a case like this, before a verdict for the defendant can be properly directed, the evidence must not only support the inference that the person charged with the killing killed the assured as contended by the defendant, but must also include any other reasonable inference. In such a case it seldom happens that under the testimony adduced, it is proper for the court to say, *as a matter of law*, that the defendant has sus-

tained the burden cast upon it. In nearly every instance the jury is the proper tribunal to draw inferences from the testimony."

And, again:

"However, 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 the assured'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.*"

And, again:

"In other words, the insured did not *necessarily* appreciate that by doing the act of forcing the door and breaking into his own home he was putting his life in hazard."

In *New York Life Insurance Company v. Murchugh*, *supra*, another case in which an exception clause like that herein was in question, it was held that it was proper to submit the question as to whether the death resulted from an assault to the jury and a verdict for the plaintiff was affirmed.

Thus, it is important to examine decisions wherein recovery has been barred under a case like this, to determine whether or not it was by a jury verdict.

In *Hope v. New York Life Insurance Co.* (Sup. Ct. of N. C.), 195 S. E. 110, the Court said, at page 112:

“The view preferred and adopted in this State is that one injured, *even if he be the aggressor in an encounter* in which he is injured or killed does not forfeit his insurance if he could not reasonably anticipate that he would receive bodily injury or be killed; and that ordinarily makes a question for the jury.”

In *Employers Indemnity Corporation v. Grant* (C. C. A.), 271 F. 136, the Court said, at page 140:

“Obviously, in applying these legal principles many cases of unintentional and designed killing will arise in which it will become necessary to determine, from conflicting evidence, whether the deceased, by his wrongful conduct, produced his death or voluntarily and intentionally committed acts from which *he foresaw or should have foreseen that death or injury is the result*. In all such cases, the issue *must be submitted to a jury* in a proper charge (Citing numerous cases from various jurisdictions).”

We, therefore, respectfully submit that the question as to whether or not the death of McNamara “resulted from participation in an assault” was a question of fact. That question was decided adversely to the insurance company by the District Court Judge sitting as a jury. The question as to whether or not McNamara made such an assault upon Kloby as justified Kloby, acting as a reasonably prudent person in killing McNamara, was likewise a question of fact for the District Court Judge, sitting as a jury, to decide. He decided the fact in favor of the plaintiff in that court.

We respectfully submit that the Supreme Court was bound by the finding of fact by the judge of the District Court that:

“The assault was not of such a character as would have led McNamara to reasonably contemplate that Kloby would have been justified in taking his life in order to resist same.”

We respectfully further submit that, under the facts in this case, the Supreme Court could not, as it attempted to do, find, *as a matter of law*, that the death resulted from participation in an assault as that word should be construed by reasonable men. In this, we submit, the Supreme Court was in error.

CONCLUSION.

It is, therefore, respectfully submitted that the order of the Supreme Court should be reversed and judgment entered in favor of appellant, Catherine McNamara, with costs.

Respectfully submitted,

EDWARD DE SEVO,
Attorney for Plaintiff-Appellant.

JOHN F. LYNCH, JR.,
Of Counsel.

(To be argued orally by JOHN F. LYNCH, JR.)

It is respectfully submitted that the Supreme Court was bound by the finding of fact by the judge of the lower court that the appellant was not a member of the bar at the time of the trial. The appellant was not of such a character as to be held liable to responsibility for the acts of the jury. It is respectfully submitted that the appellant was not of such a character as to be held liable to responsibility for the acts of the jury. It is respectfully submitted that the appellant was not of such a character as to be held liable to responsibility for the acts of the jury.

It is respectfully submitted that the Supreme Court should not be bound by the finding of fact by the judge of the lower court that the appellant was not a member of the bar at the time of the trial. The appellant was not of such a character as to be held liable to responsibility for the acts of the jury. It is respectfully submitted that the appellant was not of such a character as to be held liable to responsibility for the acts of the jury. It is respectfully submitted that the appellant was not of such a character as to be held liable to responsibility for the acts of the jury.

CONCLUSION.

It is, therefore, respectfully submitted that the order of the Supreme Court should be reversed and judgment entered in favor of the appellant, Catherine McNamara, with costs.

Respectfully submitted,

John F. Laxson, Jr.,
Attorney for Appellant.
By _____, Attorney for Appellant.
By _____, Attorney for Appellant.
By _____, Attorney for Appellant.
By _____, Attorney for Appellant.
By _____, Attorney for Appellant.
By _____, Attorney for Appellant.
By _____, Attorney for Appellant.
By _____, Attorney for Appellant.
By _____, Attorney for Appellant.

3 FEB T. 1946

New Jersey Court of Errors and Appeals

FEBRUARY TERM, 1946.

CATHERINE McNAMARA,
Plaintiff-Appellant,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant-Appellee.

On Appeal from
New Jersey
Supreme Court.

Sat below:
Justices Case,
Bodine and
Perskie.

BRIEF FOR DEFENDANT-APPELLEE.

Foreword.

Appellee by its policy of insurance agreed to pay appellant, as designated beneficiary, the sum of \$250.00 upon receipt of due proof of the death of her brother, Christopher McNamara. This amount was paid, and no question respecting it is presented on this appeal. The policy contained the further agreement to pay a like sum to the beneficiary "upon receipt of due proof that the death of the Insured resulted, independently of all other causes, from bodily injuries caused solely by external, violent, and accidental means * * *". Too, that this additional benefit would not be paid if insured's death "*is the result of participation in an assault or felony*". Appellant's claim for this additional benefit was denied. This suit is her means of enforcing her alleged right to receive this additional payment. It is resisted upon the ground that the insured's death was the result of his unprovoked, criminal assault and battery upon another, and was, therefore, a risk excepted from policy coverage. Judgment was entered in the trial court in favor of the appellant and against the appellee for the amount of this additional bene-

fit. That judgment was appealed to and reversed by the Supreme Court.

Restatement of the Issue.

Appellant has gratuitously undertaken to state what she believes to be appellee's contention in this case and, as usually follows such procedure, she does so mistakingly. It seems to us that any inquiry into the meaning of the words "result of participation in an assault", as used in the quoted exception clause of the policy in suit, beyond their inclusion or exclusion of the facts in this case, can be academic only. Therefore, it is appellant's contention that as the death of this insured was the result of his own unprovoked, wanton, criminal assault and battery of another there can be no recovery of the accidental death benefit provided in the policy *sub judice*.

Facts.

NOTE: This recital of facts is taken verbatim from the trial court's opinion (Case, p. 57).

"On the night of February 14, 1942 the deceased McNamara and a friend, one Michael Enright, attended a dance in the Greenville section of Jersey City. They remained at the dance until about 3 o'clock in the morning and then went to the lower section of Jersey City to a saloon, where they remained until about 6 o'clock in the morning; left the saloon and came to a restaurant located at No. 203 Pavonia Avenue, Jersey City. As they entered the restaurant Kloby was having his breakfast before going to work. A package containing his lunch was on the stool next to him. There were 15 stools before the counter, none of which were occupied except the aforesaid two. McNamara sat on the package containing Kloby's lunch and a verbal altercation took place between

Kloby and McNamara which led to McNamara striking Kloby several blows with his fists. One of these blows knocked out one of Kloby's teeth. During the assault Kloby removed his hat and coat. The proprietor of the restaurant stopped the assault, whereupon Kloby left the restaurant and went out on the sidewalk immediately in front thereof. The restaurant manager took Kloby's hat and coat and threw them out to him. At this time McNamara followed Kloby to the sidewalk and struck or attempted to strike Kloby again. Kloby then struck McNamara one blow with his fist knocking him to the sidewalk, causing injuries which resulted in McNamara's death two days later."

POINT I.

It appears clearly from the findings of the Trial Court that the assault and battery upon Kloby by the deceased was culpable, unprovoked, and criminal.

It is not our intention to contend herein that the facts of this case were other than as found by the trial court. Neither shall we insist that the trial court's factual findings are without basis in the evidence. We accept these fact findings as statutorily conclusive.

"If the parties to an action in a District Court fail to demand a trial by jury, where demand is necessary, thereby electing to permit questions of fact to be determined by a Judge of the Court, the determination of the Judge, or, where a jury trial is had, the verdict of the jury, and the judgment, shall be final and conclusive between the parties to the action upon questions of fact, except as otherwise herein provided."

R. S. 2:32-202.

However, these found facts do not truly point up the heinousness of insured's offense, nor the full extent of the assault and battery. The facts upon which the court based its conclusions appear clearly in the record (Case, p. 22, l. 26):

"A. He sat on my lunch, and I said, 'Get off my lunch, buddy'. I turned around to drink the coffee, and I got a punch in the mouth; and I threw my foot, my left foot, out to break the fall, because I was falling off the foot, and he kept raining blows. I couldn't get back at him. I had my boy's coat on, and I got the coat off. I ran around.

Q. Just one moment, Mr. Kloby. Now, who was the person who hit you? A. McNamara.

Q. And he was the person who continued to hit you, you say? A. That's right.

Q. Rained blows on you? A. That's right.

Q. Did he do any damage to your body, your mouth? A. Yes; he knocked my tooth out."

This evidence and the court's findings of fact create a picture of the insured ending his night of carousing by violently setting upon, assaulting and battering a war worker whose only offense was the timid request, "Get off my lunch, buddy" (Case, p. 22, l. 27). Likewise, these facts unmistakably evidence the insured's pugnacious belligerency. He was intent upon fighting without the slightest provocation therefor appearing in the evidence. Although there were fifteen stools around the service counter, of which only two were occupied, he chose to sit on the very one upon which this war worker had placed his lunch. Why? There is no evidence in the case that the insured, for any reason, did not see the lunch, and from all that followed, it appears that he must have seen it and deliberately sat upon it. If words can ever be justification for an assault and battery, and we insist that they cannot, certainly the words of the

war worker were no justification for the violence inflicted upon him by the insured. That the battering administered by the insured upon this war worker was unprovoked, wanton, and culpable, conclusively appears in the evidence. It was also criminal because as a result of it the assailed was maimed (Case, p. 22, l. 40; p. 58, l. 6).

"Any person who shall commit an atrocious assault and battery by maiming or wounding another shall be guilty of a high misdemeanor."

R. S. 2:110-1.

"Very little has been said in our cases in definition of the term, probably because the meaning is rather obvious, but our Court of Errors and Appeals has approved this statement: 'An atrocious assault and battery is by maiming and wounding.' *State vs. Staw*, 97 N. J. L. 349; also Cf. *State v. Lambertino*, 13 N. J. Mis. R. 687."

State v. Capawanna, 118 N. J. L. 429 at 431.

But whether we regard the insured's criminal act as atrocious assault and battery, or a simple assault and battery, the result from the viewpoint of the policy exception is the same. It is only the degree of the crime—high misdemeanor or misdemeanor—that remains in question. Most certainly it was one or the other.

"Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offences of an indictable nature at common law, and not expressly provided for by statute, shall be misdemeanors."

R. S. 2:103-1.

"To constitute the offenses of simple assault and battery there must be two elements,

the physical injury or corporal hurt, together with the intention to inflict the injury."

State v. Staw, 97 N. J. L. 349 at 350.

In the light of the trial court's findings, and of the uncontradicted testimony in this case, it is pointless to argue, as appellant does, that the word "assault", as used in the exception clause of the policy, does not include every simple assault. We are not here concerned with any assault but the very one committed by insured upon Kloby. It is plainly apparent from appellant's argument that the simple assault, which she claims is not included in the policy provision, is a trivial one. She removes therefrom every desire of the assailant to inflict injury upon the assailed. This observation very logically follows from appellant's citation and reliance upon the case of *Gilman v. New York Life Insurance Company*, 79 S. W. 2d, 78; 97 A. L. R. 755, for in that case the assault was of the most trivial kind—a laying on of one hand without threat of bodily harm, real or apparent, and without intention to inflict injury. Too, appellant seemingly stresses the word "simply" without any connotation of illegality, for she cites and relies upon the case of *New York Life Insurance Company vs. Gustafson* (C. C. A.), 55 F. 2d, 236, in which case the assault was a legal boxing bout. However, such arguments illustrate only how very far afield appellant wanders through the witting or unwitting loss of sight of the facts in this case. The assault and battery committed by insured upon Kloby was neither trivial nor legal. It was grievous and criminal.

"The decided weight of authority is to the effect that the terms 'assault', 'combat', and 'fighting', as used in provisions of life and

accident insurance or benefit policies or certificates, limiting or relieving the insurer from liability for injuries or death, inflicted during such an altercation, import, causation, aggression, or fault on the part of the insured."

(Citing cases) 97 A. L. R. 760:

"An injury inflicted on one who did not voluntarily enter into an affray is an accident, and a recovery may be had therefore in the absence of an exception. Frequently, however, injuries caused by fighting are excepted risks. It has been said that a stipulation against liability for injuries caused by fighting refers to voluntary fighting by the insured, or involuntary fighting brought on wholly or partially by his fault or temerity, fighting for which he is partially responsible, either as a volunteer, or as a rash speaker or wrongdoer. In order to attribute to the insured anything caused by the fight, he must have had some voluntary agency in causing the fight itself."

14 R. C. L. 433.

In continuance of the error into which the trial court fell, appellant argues that although insured was the aggressor, the assault was not of such a nature as would lead the insured to reasonably contemplate that Kloby would be justified in taking his life in order to resist the assault and protect himself. Only a moment's reflection is needed to discern this to be an attempt to define the crime, if any, committed by Kloby—was it murder or justifiable homicide. A resolution of that immaterial question depends upon the degree of the apprehension of injury Kloby felt. In view of the proven criminality of insured's own acts a determination of the crime committed by Kloby is, we submit, immaterial. It is upon insured's

acts that attention must be focused in order to properly determine whether the insured's death was a risk excepted by the quoted policy exception, for it is only through consideration of those acts that we can determine whether they were legal or illegal. The apprehension of danger that was created in Kloby's mind by insured's criminal acts does not appear, nor is there any basis for judging its extent. Nevertheless, the appellant's argument seemingly amounts to an insistence that Kloby's blow was delivered with a malicious intent and force far beyond the need of self-defense. This must follow upon consideration of the trial court's and appellant's endeavor to measure the extent of Kloby's apprehension of danger from the result of the blow upon the insured.

It is axiomatic in the law that one who, as the insured in this case, criminally assaults and batters another is bound to know that injury may result. This principle of law does not include in such contemplation the precise injury or the extent of it. *Tallifero v. Travelers Protective Association*, C. C. A. 80 F. 368; *Hutton v. States Accident Insurance Co.*, 267 Ill. 267; 108 N. E. 296. In this latter case, the Supreme Court of the State of Illinois said, an insured "was bound to know that one of the natural probable consequences of voluntarily engaging in an assault under such circumstances was that he might be injured although he could not, of course, foresee the exact form of injury he might receive or be able to know certainly that he would be injured at all".

POINT II.

Appellant's argument that the assault referred to by the quoted policy exception must be of such a character as to lead the assailant to reasonably contemplate that the assailed will be justified in taking his life in order to resist, renders the exception clause meaningless surplusage.

Neither the trial court nor the appellant can find in the "assault" clause of the policy in suit any limitation upon insurer's agreement contained in the "accidental" death portion of the same policy provision. The wilfulness or culpability of insured's battery of Kloby is not the determining factor—so reasons the appellant—but rather is it whether or not the battery was so violent as to fairly lead the insured to believe that Kloby believed he was justified in taking his life. Now, to so reason, is to draw from the "assault" clause the intended limitation upon the "accidental" death clause. The reasoning of the appellant would probably be sound if we were dealing only with the accidental death provision without the noted exception. A fatal result is only a probable consequence of a deadly encounter and would not be accidental within the meaning of the "accidental" death clause. *Walters v. Prudential Ins. Co.*, 116 N. J. L. 304.

The additional benefits were to be paid "upon receipt of due proof that the death of the insured resulted, independently of all other causes, from bodily injuries caused by external, violent, and accidental means, * * *". It would not be paid if the insured's death "(e) is the result of participation in an assault or felony." This same policy provision contained additional limitations upon and exceptions to liability. Unquestionably this

insurer had the right, in the absence of statutory prohibition, to place limitations upon its liability.

“In the absence of restraining statutory provisions, such insurers have the right to limit their liability; and the judicial function of exposition is not to be extended to the imposition of terms not within the plain sense and meaning of the language employed to express the common intention. This interpretative authority must be kept within its legitimate bounds; its exercise is not to be a guise for the foisting of a new contract upon the parties. Such contracts are to be given a reasonable and sensible interpretation consonant with the apparent object of the parties.”

Gusaeff v. John Hancock Mutual Life Insurance Company, 118 N. J. L. 364 at 367.

This provision of the policy does not include all deaths due to accident but only such as were caused by means that were external, violent and accidental. *Lower v. Metropolitan Life Ins. Co.*, 111 N. J. L. 426; *Lawrence v. Massachusetts Bonding Co.*, 113 N. J. L. 265; *Kennedy vs. U. S. Fidelity Co.*, 113 N. J. L. 431; *Cramer v. John Hancock Mutual Life Ins. Co.*, 18 N. J. Misc. 367. Neither does it include in its coverage injuries or death by means that were deliberate, the results of which were not intended. *Wiley v. Travelers Insurance Co.*, 119 N. J. L. 22. Nor a death that was caused or contributed to by disease. *Runyon v. Monarch Accident Ins. Co.*, 108 N. J. L. 489; *Runyon vs. Commonwealth Casualty Co.*, 109 N. J. L. 238.

This court in *Walters v. Prudential Ins. Co.*, *supra*, held that there could be no recovery upon a policy containing a similar accidental death benefit clause but not the “assault” clause if insured’s death was the result of a criminal attack upon a person armed with a deadly weapon.

If the appellant's reasoning is sound and the "assault" clause is to be applied only when it appears that the fatal result was contemplated by the insured, and such contemplation is only reasonable when the encounter is obviously deadly, then this insurer accomplished nothing by including the "assault" exception in the policy. Such a conclusion is irresistible when we realize that such a death as is the result of an apparently deadly encounter would be an excluded risk by reason of the accidental death provision. This court should not permit an interpretation of this contract to stand, which has the effect of rendering the "assault" clause meaningless. The parties by including the "assault" clause in the policy intended some further limitation upon the liability undertaken by the "accidental death" provision. In the case of *O'Neill v. Metropolitan Life Ins. Co.*, 26 Atl. Rep. 2d, 898, the Supreme Court of the State of Pennsylvania considered the limiting effect of a similar policy exception. The policy excepted injuries or death "sustained while or as a result of participating in an attempt to commit an assault or felony." The court, at page 904 of the opinion, bottom, said:

"Nor can we agree that in order to adjudicate the insured as a violator of law within the meaning of the policies, he had to be so aggressively lawless as to make him 'reasonably foresee that as a result of his own actions it was likely he would be killed'. If he had foreseen the tragic consequences of his acts, it is reasonable to believe he would have desisted from them. No one contends that the insured intended to invite his own destruction. Persons who drive automobiles at a lawless and excessive rate of speed usually do not intend to kill themselves, but nevertheless if their death does result from such an action, it cannot be contended that they were not engaged in a lawless act. 'To avoid

liability (in a case like this) it must be established that the violation of law was the cause of, or had some causative connection with the accident.' Couch Encyclopedia of Ins. Law, Vol. 6, p. 4512, sec. 1736. *Wells v. New England M. L. Ins. Co.*, 191 Pa. 207, 43 A. 126, 53 L. R. A. 327, 71 Am. St. Rep. 763. *Travelers' Ins. Co. v. Seaver*, 19 Wall 531, 22 L. Ed. 155. In the instant case 'the Causative connection' of the insured's unlawful conduct 'with the accident' was a legitimate inference for the jury to draw."

In *Black v. Massachusetts Accident Co.*, 189 Atl. Rep., page 3, the Supreme Court of the State of Rhode Island considered an exception excluding from coverage death resulting from homicide. The court at page 5 of the opinion, said:

"Moreover, the construction urged by the plaintiff would render the exception 'homicide,' as used in paragraph S, practically nugatory, when considered in relation to death resulting from 'accidental' means, as set out earlier in the policy, because of the generally accepted meaning, hereinbefore referred to, placed upon the word 'accidental' as used in policies of this type. Generally speaking, a homicide brought upon the insured by his own acts or in which he actually participated, or which he naturally could have foreseen, would not, in any event, be covered by the policy as a death from 'accidental' means. It is not reasonable to assume that the parties to the contract contemplated or understood that the exclusion of 'homicide' from the coverage of the policy was to be considered merely as a partial duplication of the limitation of the coverage to 'bodily injury * * * caused solely through external, violent and accidental means,' and therefore largely superfluous. Such construction furnishes no apparent reason for the inclusion of 'homicide' in paragraph S, the noncoverage clause."

If this court sustains appellant's contention, the "assault" exception is reduced to a meaningless superfluity without legal import. All that could be accomplished by it would, under the cited cases, be brought about by the "accidental" means provision of the policy.

Finally, appellant argues that there was no plain causal connection between the assault and battery inflicted by the insured upon Kloby and the insured's death. Appellant would attempt to persuade this court that the assault and battery committed in the restaurant was separate and apart from that committed outside the restaurant, when the plain fact is that they were one and the same. The cause or causes, if there were any, the passion and temper of the insured, and his purpose to do bodily harm to Kloby, were all the same. The locale was but slightly removed. It appears plainly in the record that the insured was intent upon continuing the assault by following Kloby out of the restaurant and immediately setting upon him again.

The trial court having found what it conceived to be the true facts, then passed legal judgment upon these facts. It said: "the assault was not of such a character as would lead McNamara to reasonably contemplate that Kloby would be justified in taking his life in order to resist the same (Case, p. 59). This, the appellant argues, is not a finding or conclusion of law that could be reviewed by the Supreme Court, but a finding of fact which could not be reviewed by the Supreme Court. What the District Court did was to find all the facts and then, in the words above quoted, pass its judgment thereon. This judgment is not a finding of fact but a statement of what the trial court believed to be the controlling law. The Supreme Court accepted the facts as found by the District Court but disagreed with the District Court's

judgment. It said: "The insured not only was the aggressor, having started a fist fight, but he could have reasonably foreseen the fatal possibilities of its continuance" (Case, p. 2b).

We respectfully submit that for these reasons the order of the Supreme Court should be affirmed, with costs.

Respectfully submitted,

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