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himself is responsible for any delay by intentionally failing to appear, he cannot expect to have his motion for dismissal granted.[16] It would seem, therefore, that the defendant is not always entitled to an *immediate* trial. However, the action should commence with as much dispatch as can be had from the circumstances.

It should be noted that in *Sigle v. Superior Court*[17] and in *Dearth v. Superior Court*[18] that some, but not all of the available departments, were handling criminal matters. Some of the departments of the court were occupied with civil cases. Will the defendant merit a dismissal where the delay is caused by *all* the departments being crowded with pending criminal matters?[19] It has been held that in such a case the defendant must wait until his turn comes in its regular order, since prior pending criminal cases would take precedence over his trial. Hence, under these facts there is "just cause" for the consequent delay.[20]

It is incumbent upon the defendant, if he desires to make a motion for dismissal, to make his motion in the court where the criminal action is pending. There is no duty upon the court to order a dismissal under section 1382 unless the defendant demands it. This right, like any statutory privilege, is subject to being waived by the defendant.[21] Upon the defendant's making this motion for dismissal, the prosecution then assumes the burden of showing just and reasonable cause for the delay. Prejudice to the defendant is presumed on the violation of his statutory privilege.[22]

In conclusion, it should be added that California has taken some steps forward in an attempt to interpret the elusive terms "speedy trial" and "just cause." Under circumstances where criminal cases are not given precedence over civil matters it would seem that counsel for the defendant may cite the two most recent cases on this matter[23] and ask for a dismissal. But where conditions are such that section 1050 cannot be used as a yardstick to determine what is a "speedy trial" or a "just cause," some confusion is unavoidable. Since it is improbable that the courts by themselves will arrive at any uniform rule, where the matter is left up to their discretion in each case, a strong argument can be made for providing a statutory standard. It seems reasonable, at least to this writer, that both the prosecution and the criminal defendant in these cases are entitled to know where they stand under the "speedy trial" provision of the state constitution.

David L. Allen

INSURANCE: CONSTRUING AN ASSAULT TO NEGATIVE RECOVERY UNDER AN INSURANCE POLICY.

In a recently decided case,[1] the Court of Appeals of Alabama, in denying relief from liability sought by the insurer, held that injuries which led to the insured's death were accidental within the meaning of a policy insuring against accidental death. The insured, a 16-year-old girl, upon learning that her boy friend,

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[16] People v. Duffy, 110 Cal.App. 631, 294 Pac. 496 (1930).
[17] *Supra* note 1.
[18] *Supra* note 2.
[19] Murphy v. Superior Court, 53 Cal.App. 6, 200 Pac. 483 (1921).
[20] People v. Vasalo, 120 Cal. 168, 52 Pac. 305 (1898).
[21] *Ex parte* Fennessy, 54 Cal. 101 (1880).
[22] People v. Angelopolos, 30 Cal.App.2d 538, 86 P.2d 873 (1939).
[23] *Supra* notes 1 and 2.

[1] American Life Insurance Company v. Morris, 72 So.2d 414 (Ala. 1952).

one Gilmore, had visited the room of another girl late at night, armed herself with a knife, which she at no time attempted to use, and confronted Gilmore. An argument ensued and the insured struck Gilmore, who in turn struck the insured with a knife, causing the insured to bleed to death. The case was submitted to the jury for determination of whether the insured's death arose as a result of accident or from participation in an assault within the meaning of the policy so as to relieve the insurer from liability The jury returned a verdict in favor of the insured's administrator.

On appeal, the court, in affirming the judgment of the lower court, took the view of the weight of authority in this country, to wit:

> "Moreover it has been held that the aggression or assault on the part of the insured which will relieve the insurer from liability under its policy must be such as would justify the person assaulted, acting as a reasonably prudent person, in injuring or taking the life of the insured."[2]

In cases such as the one under comment, a decided conflict of authority exists, arising solely from the construction placed upon the word assault as it is used in life and accident insurance policies. The term is found in policies insuring against the "result of bodily injury effected solely through violent, external and accidental means." The policies provide that: "This policy does not cover death caused from participation in an assault or felony "[3]

The conditions requisite for relieving the insurer of liability for injury or death to the insured, arising from an assault wrongfully committed by the insured upon another, are two-fold. The injury must not only be the natural and probable result of the insured's intentional acts, but must also have been reasonably foreseeable.[4] As to the degree of foreseeability required to relieve the insurer of liability, there is much conflict.

In the case of *Kalahan v. Prudential Insurance Company of America*, the court, in denying recovery to the beneficiary for injury suffered by the insured as the result of his wrongful assault upon another, clearly states the position of the minority of the courts:

> "Too great weight given to the intent of the aggressor or to theorizing on the question of what he did foresee or should have been foreseen as the consequences of his aggression may well produce a result contrary to the dictates of public policy. One who voluntarily embarks upon a course of violence, criminal in nature, should be held to be aware that he may not be able to control the circumstances sufficiently to avoid untoward consequences."[5]

The New York Court of Appeals, in *Gaines v. Fidelity and Casualty Company of New York*, denied recovery where insured called one Connors vile names and struck him a blow, in retaliation for which Connors shot and killed insured. The court states:

> "The testimony is quite sufficient to justify the conclusion that the deceased came to his death as a result of an assault commited by him upon the person of Connors, and that the shooting which followed it was the direct result of the assault, and that

[2] 29 AM. JUR., INSURANCE, § 981, pp. 737, 738.
[3] American Life Insurance Company v. Morris, 72 So.2d 414, 415 (Ala. 1952).
[4] Gilman v. New York Life Insurance Company, 190 Ark. 379, 79 S.W.2d 78 (1935).
[5] 194 Misc. 87, 84 N.Y.Supp.2d 433, 435 (1948).

> the injuries inflicted upon the deceased, and which caused his death, were intentional and not accidental."[6]

Further, in *Appel v. Aetna Life Insurance Company,*[7] the court held that death or injury resulting from the voluntary act of the insured, every detail of which was intended, so that nothing was unforeseen except the resulting injury, was not caused by accidental means.

In the case of *Harrison v. Prudential Insurance Company of America,* the court denied recovery under a policy providing for double indemnity for death resulting from accidental causes because insured died as a result of injuries sustained in a fight in which he voluntarily engaged. The court reasoned:

> "Where a life insurance policy provides for the payment of an additional amount equal to the face of the policy in the event that the death of the insured should result directly and independently of all other causes of bodily injuries effected solely through external, violent and accidental causes, and in which the insured engaged voluntarily, there can be no recovery under the double indemnity clause. While the death was accidental and not intended, the means and cause of death were deliberate and premeditated and not accidental."[8]

And in *Sweeney v. Metropolitan Life Insurance Company,*[9] the court held, in a fact situation similar to that recited in the preceding case, that where the insured is not merely a participant in the assault but the instigator, "the hostilities being wantonly provided by the insured and of such serious nature that he might reasonably have expected that indignation would be aroused and that injury might result," the insurer is relieved of liability.

An Arkansas case[10] followed the weight of authority and denied relief to the insurer in a situation where an unarmed insured assaulted a person who he didn't know was armed. The insured was shot and killed as a result; the court held that if the insured is killed by another when that other is acting in his necessary self-defense, the insurer has a complete defense in an action on the policy for accidental death. The court did not, however, feel that on the facts of the case the assaulted party took the life of the insured in his necessary self-defense and hence ruled the death accidental.

The principal case clearly follows the reasoning employed by the decided weight of authority in holding that the injury suffered by the insured as a result of her affirmative act of assault should be deemed accidental if the injury received is of a more serious degree than that anticipated by the insured or foreseen by him before commencing the assault. Such a result places upon the insurer a burden for which he did not contract. In fact, a burden for which he expressly provided in the contract that he would not be liable. By its holding, the court is altering the policy of insurance to provide protection against injuries which are the unforeseen consequences of a deliberate assault, rather than insuring against injuries incurred as a result of accidental means. The majority view provides the insured with the traditional loop-hole sought by all, who, after breaching their contract, seek still to benefit from its provisions. While the minority, though possibly harsh in certain isolated cases, requires fulfillment of the terms of the contract in order to reap the benefits for which the insured paid premiums.

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[6] 88 N.Y. 411, 81 N.E. 169 (1907).
[7] 83 N.Y.Supp. 238, *aff'd,* 180 N.Y. 514, 72 N.E. 1138 (1904).
[8] 54 Ohio App. 279, 6 N.E.2d 991, 992 (1936).
[9] 30 Cal.App.2d 767, 92 P.2d 1045 (1936).
[10] Gilman v. New York Life Insurance Company, 190 Ark. 379, 79 S.W.2d 78 (1935).