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George D. Finale

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THE ADMISSIBILITY OF DECLARATIONS OF THE ASSURED IN LIFE INSURANCE LITIGATION

THE question whether an insured's declarations or admissions are admissible against the beneficiary is one presented profusely in litigations between beneficiary and insured. It arises in an attempt by the defendant insurance company to prove either fraud in the inception of the contract, the breach of a condition precedent to the issuance of the policy or the breach of a condition subsequent to the issuance thereof—a type of defense which also gives rise to another question, namely, how far, if at all, confidential communications between physician and patient are admissible in evidence to prove this type of defense? Herein consideration will be given to the first question.

Although in the various jurisdictions there is a dearth of symphony, the prime reason for this seems to be due to a failure of the earlier reports to present all the crucial facts and the careless verbiage therein coupled with the usual plethora of generalities which seem to be the common heritage of the advocate.

At the outset it is feasible to define a "vested interest" as that phrase is applied to a beneficiary's property rights in a life insurance policy. A vested interest is an interest which a beneficiary of an insurance policy has, by virtue of which the insured cannot under the terms of the policy change the beneficiary, or if by the terms thereof he may be changed, a change has not been made by the insured during his lifetime.¹ From the very nature of things attention need not be focused on any vested interest a beneficiary may derive solely by virtue of the death of the insured without a change of beneficiary. Apparently, the earliest case in the reports of this state pertinent to the issue to which consideration is now being given is the case of *Rawls v. American Mutual Life Insurance Company*.² It is cited copiously in

¹ *Smith v. National Benefit Society*, 123 N. Y. 85, 25 N. E. 197 (1890); *Eltonhead v. Travelers Ins. Co.*, 177 App. Div. 170, 163 N. Y. Supp. 838 (1st Dept. 1917); *Ecker v. Myer*, 18 Misc. 356, 194 N. Y. Supp. 320 (1922); see also 37 C. J. §345.

² 27 N. Y. 282 (1863).

all the subsequent cases. In form the policy purported to have been procured by the insured. The court admitted this fact and said that the policy would nevertheless be treated as really being effected by the plaintiff-beneficiary assigning the following reasons: (1) The plaintiff applied for the policy and obtained it as the creditor of the alleged insured to protect his interests as such creditor. (2) The plaintiff, after taking the initial steps for the procural of the policy, paid the premiums (initial as well as all subsequent). (3) The application for the policy, as distinguished from the policy itself, stated it to be for the benefit of the plaintiff. (4) Finally, the policy was delivered to the creditor. The policy, in view of all these facts, could be treated as giving rise to a contract between insurer and creditor rather than between insurer and debtor. The company offered evidence of the declarations of the insured made after the issuance of the policy relative to his condition prior to its issuance, so as to prove fraud in the inception. The court said, per Wright, J., "Fish" (the debtor and insured) "was not after the issuing of the policy in suit, a party in interest in that contract, and could make no statement or admission that would *divest* the rights of the plaintiff. He was not in any manner the agent of the plaintiff, after the issuing of the policy and could not bind him." In so far as the court intimates in the last sentence that a possible ground of exclusion is the lack of agency we cannot concur, for declarations are often admitted as admissions or declarations against interest, even though no agency exists and, in the latter case or instance, even though no privity exists.³ It is to be noted that inasmuch as the insurance contract was deemed to have taken place between creditor and insurer, there was, *a fortiori*, no assignment of any contract rights or choses in action; thus, in this type of case, there is no abrogation of the familiar doctrine of *Paige v. Cagwin*⁴ and other cases⁵ to the effect

³ *Livingston v. Arnoux*, 56 N. Y. 50 (1874); *Martorella v. Prud. Life Ins. Co.*, 238 App. Div. 532, 264 N. Y. Supp. 751 (4th Dept. 1933); *Humes v. O'Bryan and Washington*, 74 Ala. 64 (1883); *German Ins. Co. v. Bartlet*, 188 Ill. 165, 58 N. E. 1075 (1900); *County of Mahashka v. Ingalls*, 16 Icw 81 (1864).

⁴ 7 Hill 361 (N. Y. 1843).

⁵ *Wagner v. Grimm*, 169 N. Y. 421, 62 N. E. 569 (1902); *Kelly v. Bears*, 194 N. Y. 60, 86 N. E. 985 (1909); *Tierney v. Fitzpatrick*, 195 N. Y. 433,

that declarations of a donor, vendor, or assignor of a chattel or chose in action, whether made before or after the transfer, are inadmissible to effect the claim or title of the donee, vendee, assignee or any subsequent holder. Let us see, however, how this doctrine works out in other cases.

Chronologically, the next case is *Mulner v. Guardian Life Insurance Company*.⁶ As distinguished from the preceding, in the principal case the policy purported to be payable to Florence Mulner (the assured's wife) and to the assured's children. It does not specifically appear whether the assured reserved the right to change the beneficiary. However, that no right to change the beneficiary existed and that the beneficiary's interest was vested may be inferred for the court in the principal case based its decision solely upon the above passage from *Rawls v. Mutual Life Insurance Company (supra)*, as evidenced by the fact that the court quoted it and immediately preceding the quotation thereof said that it "seems to cover the question presented." The declarations of the assured sought to be introduced in evidence in the principal case were made after the issuance of the policy and the vesting of the beneficiary's interest.

The case of *Mulner v. Guardian Life Insurance Company* was followed by that of *Swift v. Mutual Life Insurance Company*.^{6a} Here, unlike the preceding two cases, we have declarations of the insured sought to be introduced in evidence made before the issuance of the policy and thus before the vesting of beneficiary's interest. Whether this interest was vested or contingent at the time of the issuance of the policy is immaterial; therefore no harm ensues in this instance from the fact that the case as reported does not reveal whether the insured had the right to change the beneficiary or not. In this case a witness was called by the defense, who testified that, prior to (that is not less than six months before) the application for the policy was made, he noticed that the insured was not looking very well, and that he walked lame, and inquired of him

88 N. E. 750 (1909); *Scheps v. Bowery Savings Bank*, 97 App. Div. 434, 90 N. Y. Supp. 26 (2d Dept. 1904); *Durnebeit v. Ringer*, 101 Misc. 658, 167 N. Y. Supp. 952 (1917).

⁶ 1 N. Y. S. C. (T. & C.) 448.

^{6a} 63 N. Y. 186 (1875).

what was the matter. The witness was thereupon asked to state what answers the assured gave him. This was objected to and the lower court sustained the objection. Similarly, another witness testified that nearly a year prior to the application he saw a sore on the right side of the insured. The witness was then asked if the insured told him what was the cause of it; what kind of sore he called it. This, too, was objected to as hearsay, and inadmissible. Upon appeal it was held that none of the objections were sustainable, since the declarations of one whose life has been insured for the benefit of another made (a) as to his state of health, and (b) at a time *prior* to and not *remote* from his application for insurance, and (c) in connection with facts or acts exhibiting his state of health, are receivable in evidence where the issue was as to his knowledge of his own bodily state at that time. The court, per Folger, *J.*, attempted to explain the underlying theory of the preceding cases in the following language: "There are decisions that declarations made after the contract of insurance has been effected, may not be put in evidence but they are upon the intelligible reason, that after the contract of insurance has been effected, the subject of insurance has no such relation to the holder of the policy as gives him power to destroy or affect it by unsworn statements. *Mulner v. Guardian Life Ins. Co.*, 1 N. Y. S. C. (T. & C.) 448; *Washington Life Ins. Co.*, 10 Kansas 525; *Ravls v. Mut. Life Ins. Co.*, 27 N. Y. 282." While in the initial part of the passage the court commits itself to the use of the "careless verbiage," to which reference has been made at the beginning of this article, by intimating that an insured's declarations after the issuance of the policy are ineffectual and inadmissible against a beneficiary;⁷ yet it is right in its intimation, in the latter part of the above passage, to the effect that the test is whether the beneficiary's rights can be destroyed by the insured.

It is to be noted that there is no invocation in the immediately preceding case of the doctrine that the declarations of a donor, vendor, or assignor of a chattel or a chose in action, whether made before or after the transfer, are inad-

⁷ See *post*; *Smith v. National Benefit Society*, *supra* note 1; *Ward v. New York Life Ins. Co.*, 225 N. Y. 314, 122 N. E. 207 (1919).

missible to affect the claim or title of the donee, vendee or assignee or of any subsequent holder. Nor is this doctrine invoked in the immediately succeeding cases, the exclusion of the insured's statements therein being upon other grounds to be discussed.

The case of *Edington v. Mutual Life Insurance Company*⁸ was decided after the case just discussed and distinguishes it. The facts were as follows: The insured took out a policy on his own life, payable to himself and later assigned it to the plaintiff. The declarations sought to be introduced in evidence were of three kinds, to wit: (a) those made in a prior application to another insurance company; (b) those made to some physicians who treated the insured; (c) and those made to some laymen. All these declarations were made prior to the issuance of the policy and application. The declarations made in the application to the said other insurance company were made two months prior to the issuance of the policy upon which the plaintiff brought his action. Although made before the application for the policy principally in issue, it does not appear exactly how many months before, the other two kinds of declarations were made. It was held that none of these three kinds of declarations were admissible because, unlike those declarations in issue in the case of *Swift v. Mutual Life Insurance Company* (*supra*), they did not accompany some act or fact exhibiting the insured's state of health. For examples of such "act" or "fact" in the latter case we had a limping by the insured and also the sore on the right side of the insured. The declarations of the insured sought to be introduced in evidence characterized this limping and the sore or soreness. The court expresses itself thus, in laying down the rule: "When declarations are made not too long before the application and examination and when a part of the *res gestae* of some act or fact exhibiting a condition of health which they legitimately tend to explain, they are admissible to show knowledge in the insured of his physical condition." Unfortunately, the court uses the term "*res gestae*" in a very loose sense. By the term "*res gestae*" here the court does not mean a spontaneous uncontrolled exclamation occurring

⁸ 67 N. Y. 185 (1876).

simultaneously with or immediately after the infliction of an injury, as that term is used in decisions⁹ involving negligence actions and when so conceived or used the appellation "verbal acts" given the exclamation. In the sense in which the court uses the term, declarations of pain and suffering, as for example those declarations sought to be divulged in the principal case, would be admissible even though they do not constitute "verbal acts," provided these declarations of pain and suffering—which are distinguishable from groans, moans, shrieks, etc.; the latter being denominated "expressions" of pain and suffering—accompany some "act" or "fact," such as the limping or soreness of the side referred to above in connection with the case of *Swift v. Mutual Life Insurance Company* (*supra*).¹⁰ This is always the rule in life insurance litigations between beneficiary and insurer, since at the time they come up for trial the insured will always be found to have made his demise.¹¹ But because in litigations involving accident insurance the insured is not always dead at the time of trial the above rule is not always the one applied. Thus, in the latter type of litigations, if the declarant (the insured) is alive, his declarations of pain and suffering are not admissible except:

A—when they are made to a physician for the purpose of treatment, even though they do not constitute "verbal acts,"¹² provided they are of present pain and suffering;¹³

B—when made at the time of the injury so as to be "verbal acts."¹⁴

⁹ For examples of how the term "*res gestae*" is used in negligence cases see: *Waldele v. N. Y. Cent. R. R.*, 95 N. Y. 274 (1884); *Butler v. Manhattan R. R.*, 143 N. Y. 417, 38 N. E. 454 (1894); *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908); *Greener v. Gen. Electric*, 209 N. Y. 135, 102 N. E. 527 (1913).

¹⁰ See *Tromblee v. North Amer. Acc. Ins. Co.*, 173 App. Div. 174, 158 N. Y. Supp. 1014 (3rd Dept. 1916).

¹¹ *Ibid.*

¹² *Matteson v. N. Y. Cent. R. R.*, 35 N. Y. 487 (1866); *Roche v. Brooklyn City etc. R. R.*, 105 N. Y. 294, 11 N. E. 630 (1887); *Barber v. Merriam*, 11 Allen 322 (Mass. 1865); *Fay v. Harlan*, 128 Mass. 244 (1880).

¹³ *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573 (1892); *Towle v. Blake*, 48 N. H. 92 (1868).

¹⁴ *Caldwell v. Murphy*, 11 N. Y. 416 (1854); *Werely v. Person's*, 28 N. Y. 344 (1863); *Matteson v. N. Y. Cent. R. R.*, 35 N. Y. 487 (1866); *Hagenlacker v. Coney Island & Brooklyn R. R.*, 99 N. Y. 136, 1 N. E. 536 (1885).

In other words, in life insurance litigations since from the very nature of life-insurance contracts, death of the insured (the declarant must always ensue before a cause of action arises, consideration need never be given to the question whether these declarations of pain and suffering were made under the circumstances related in the above captions "A" and "B". Conversely, since from the very nature of accident insurance policies death need not always ensue before a cause of action accrues against the insurance company. Sometimes, when the insured has not passed on, consideration must be given to the question whether the insured's declarations were made under the circumstances indicated in the aforementioned captions.

Casting aside for the moment the many other restrictions referred to or to be referred to, it is apparent from what has been said that in every life or accident insurance litigation he who seeks to introduce the insured's declarations in evidence must always ask himself, among the many other questions which the introduction of such evidence calls for, the following two: Are the declarations admissible at all against the beneficiary? If they are, of what type must they, in addition, be before they are admitted? In answering the last question the inquirer must determine whether the declarant has died. If he has—which is always the case in these life insurance litigations—it need not be shown they were made as a part of the "*res gestae*" in the strict and orthodox sense or made to a physician. If he has not—which is often the case in accident insurance litigations—then the conditions indicated under the above captions (A and B) must be present.¹⁵

As intimated, a distinction should always be kept in mind between "declarations" of pain and suffering and "expressions" of pain and suffering, such as groans, shrieks, etc. As to the latter, consideration will not be given in this article, for in the vast majority of litigations between beneficiary and insured, if not in all, the defendant insurance company seeks to introduce evidence of the former only.

From the case of *Swift v. Mutual Life Insurance Company* (*supra*) and the case of *Mulner v. Guardian Life Insur-*

¹⁵ See *Tromblee v. North Amer. Acc. Ins. Co.*, *supra* note 10.

ance Company (*supra*) we gather that the declarations of the insured, in addition to other requisites, must not be too remote. We have seen thus far that declarations made nearly a year prior to the issuance of the policy have been held not too remote.¹⁶ In the case of *Edington v. Mutual Life Insurance Company* there was a primary reason herein referred to (*ante.*), for excluding all the declarations of the insured and this reason was, as indicated, recognized and applied as to all of them. A secondary ground, for the preclusion of the insured's declarations, was enunciated by the court therein. This, however, was applied only to the statements made by the insured to his physicians and the laymen heretofore mentioned, the court saying that they were too remote. However correct this deduction may be on the part of the court, as to these statements, the period of remoteness by day, month or year is not indicated in the case as reported.

In the case of *Dilleber v. Home Life Insurance Company*,^{16a} as in the immediate succeeding case,¹⁷ the policy provided for alternate beneficiaries, their right to the proceeds thereof being contingent upon the survival of one or more of them at the time set for the accrual of the policy. In the former case the plaintiff took out a policy in the defendant insurance company, upon the life of her husband, payable to him on the fourteenth day of August, 1902, if he then should be living, but, in case of death before that time, payable to her. It does not appear whether a right to change the beneficiary was reserved—or, in other words, whether the beneficiary's interest was vested or not. But this is immaterial since the declarations of the plaintiff's husband, one of the beneficiaries, was made prior to the issuance of the policy.¹⁸ It was held that the declarations of the plaintiff's husband were admissible to show that he had knowledge of the existence of a pulmonary disease prior to the making of the application for the policy, "*the fact being otherwise proved.*"

By the immediately preceding and italicized phrase,

¹⁶ *Swift v. Mut. Life Ins. Co.*, 63 N. Y. 186 (1875).

^{16a} 69 N. Y. 264 (1877).

¹⁷ *Smith v. Mut. Benefit Society*, *supra* note 1.

¹⁸ *Ibid.*

the court in *Delliber v. Home Life Insurance Company*^{18a} does not suggest, indicate or create a new restriction upon the admissibility of the declarations of an insured against a beneficiary. That it is necessary that a foundation for the declarations be laid by the introduction of evidence apart from the declarations of the insured, showing that the insured actually had the disease in question, is also made patent by prior cases.¹⁹

By the terms of the policy upon which suit was brought in the case of *Smith v. National Benefit Society*²⁰ the defendant insurance company constituted the insured "a benefit member" of the "society," and agreed "to pay Fred. H. Smith, if living, if not to the heirs at law of said member," the sum insured. Prior to the issuance of the policy the insured (the debtor) had made many declarations evincing an intent to defraud the insurer by committing suicide. The court said: "These acts and declarations all occurred before the plaintiff took his policy as collateral." Although the laws of 1883, section 18, applicable only to mutual-benefit-society contracts of insurance, gave the insured the right to change the beneficiary, the statute did not prevent a contract between the parties by force of which a vested interest passed to the beneficiary, such being the situation in the principal case. But said the court: "Granting, however, that such was the relation between the parties, we are still of the opinion that no material errors were shown by the record, since all the evidence to which objection was made came fairly within the *res gestae* and the rule permitting proof of the actual transaction involved in the issue. * * * The declarations must be made at the time of the act done which they are supposed to characterize; they must be calculated to unfold the nature and quality of the facts which they intend to explain, and they must so harmonize with the facts so as to form one transaction."

The New York Life Insurance Company, in a subsequent case,²¹ issued a policy on the life of one Ward in the

^{18a} *Supra* note 16a.

¹⁹ *Edington v. Mut. Life Ins. Co.*, 5 Hun 1 (N. Y. 1876), *rev'd*, 67 N. Y. 185 (1876); *Swift v. Mut. Life Ins. Co.*, *supra* note 16. (In the latter case not so clearly.)

²⁰ *Supra* note 1.

²¹ *Ward v. N. Y. Life Ins. Co.*, *supra* note 7.

sum of \$5,000, payable on the death of the insured to his "executors, administrations or assigns." The policy contained the now popular provision that the insured might at any time change the beneficiary under the said policy by a written notice and endorsement of the change on the policy by the company. After the insured's death we have opposing claimants to the proceeds of the policy, as beneficiaries—a situation not appearing in any of the aforementioned cases. This being so, the court was called upon to decide an additional question, not involved in the preceding cases. This was whether the insured's sons, whose claims as beneficiaries were opposed by the insured's wife, and whose claims the company recognized as the only legitimate ones, derived their "title and interest from, through or under" the insured, as that phrase is used in section 347 of the Civil Practice Act. It is to be noted that neither of the opposing claimants were originally designated beneficiaries and that one of them (the insured's wife) claimed that her designation was prior in point of time. The court confined itself, however, almost entirely to the aforementioned question, it assuming that no other objection lay against the insured's declarations and holding that the declarations of the insured made *after* the issuance of the policy and antedating the designation of either of the alleged beneficiaries were admissible. The reasons assigned were that the situation is the same as that which exists where a grant or devise is made of a power, for, whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it; yet with very few exceptions it is the rule that the title of a grantee under a power of appointment comes from the donor of the power rather than from the one who exercises it. This commentary was accompanied by the following language, per Hiscock, *Ch. J.*: "The great body of authority makes it plain, by inference at least, that when Section 829,²² speaks of deriving title or interest 'from, through or under' a deceased person it contemplates property or an interest which

²² Now §347, N. Y. C. P. A.

belonged to the deceased in his lifetime,²³ and the title to which passed by assignment or otherwise through him to the party who is protected by the section. These authorities do not contemplate a case where a party claims property from a third person which never belonged to the deceased and in fact did not come into existence until his death."

It is submitted that when the insured takes out a policy payable originally to himself or his estate, as in the principal case, and then assigns the policy to a beneficiary, the latter takes "through, under or from" the insured. Confessedly, the converse is the situation, which was not the one in the principal case, where the beneficiary takes a vested interest, he being the original beneficiary and there being no power to change him. In such case, it is submitted, he is not identified in interest with the insured. The beneficiary obtains no title to anything "from or under" the insured, nor is the insured the agent of the beneficiary. The beneficiary by the creation of the contract obtains a separate and individual right, in such a case, as a third party entitled to sue upon the contract in his own name. That right comes directly from the insurance company and not from the insured. The insured may have purchased and paid for the insurance, but the beneficiary does not obtain it from him. He may be a charitable stranger, but he, nevertheless, is a stranger.

Again, the holding that the beneficiaries whom the company recognized did not take title "from, through or under" the insured was one that was not strictly necessary, for the court itself admits that even had the evidence, sought to be introduced on behalf of the insured's wife (the appellant) as to her transactions and communications with the deceased insured, been admitted by the court below, still, as a matter of law, she would have to establish that she was an assignee of the policy in question.

Furthermore, in so far as the *Ward* case holds that the beneficiaries whom the company recognized did not take title or interest, "through, under or from" the insured, upon prin-

²³ There is no doubt that the insured did possess a chose in action against the insurer, prior to his designation of the opposing claimants as beneficiaries. The statute does not make a discrimination between kinds of interest that are derived "through, under or from" the deceased. * * * that is, between money and choses in action, both of which are property.

ciple it is hard to reconcile, or, rather, to discover, what additional ingredients are found in the following cases, which prompts a different holding, bearing in mind that the mere fact that in the principal case a contract of insurance was involved, is not of itself sufficient to warrant it. In the cases cited below,²⁴ it was held that the holder of a note suing the maker or another liable for its payment is a person deriving title or interest from the payee or an intermediate holder since deceased, and is protected against testimony as to transactions or communications with such deceased tending to establish a defense to such an action. Again, in the following cases,²⁵ where a mortgage on real property was assigned, the assignor having died, it was held that the assignee of the mortgage (a mere chose in action, something which the insured in the principal case possessed before the purported designation of the conflicting claimants or beneficiaries) derives title both from his immediate assignor and a prior assignor of the instrument. In fact, in such mortgage cases, it has even been held that where the controversy involves the right of title to the instrument, the assignee of the mortgage does not derive title to the instrument from the mortgagor.²⁶

It is feasible to state here, that, though a holding relative thereto was not strictly necessary, the case of *Ward v. New York Life Insurance Company* (*supra*) apparently is the first in this state to interpret and decide upon the aforementioned phrase in the Civil Practice Act, as applied to opposing claimants to the proceeds of life insurance policies, the insured being the deceased. Below ²⁷ are some cases

²⁴ *Sallade v. Gerlack*, 54 Hun 635, 7 N. Y. Supp. 181 (N. Y. 1889), *aff'd*, 132 N. Y. 548, 30 N. E. 372 (1892); *Wagner v. Grimm*, 169 N. Y. 421, 430, 62 N. E. 569 (1902); *Benedict v. Driggs*, 34 Hun 94 (N. Y. 1884); *Becker v. Hart*, 135 App. Div. 785, 791, 120 N. Y. Supp. 270 (2d Dept. 1909) (proposition in dissenting opinion but not contrary to prevailing opinion); see also GREENFIELD, TESTIMONY UNDER SECTION 347 C. P. A.—§§143, 144.

²⁵ *Smith v. Cross*, 90 N. Y. 549 (1882); *Auburn Savings Bank v. Brinkenhoff*, 44 Hun 142 (N. Y. 1887); *Squire v. Green*, 38 App. Div. 431, 56 N. Y. Supp. 551 (2d Dept. 1899).

²⁶ *Holcomb v. Campbell*, 118 N. Y. 46, 22 N. E. 1107 (1889); *Schlitz v. Koch*, 138 App. Div. 535, 123 N. Y. Supp. 302 (2d Dept. 1910).

²⁷ *Baker v. Met. Life Ins. Co.*, 111 App. Div. 500, 97 N. Y. Supp. 1088 (1st Dept. 1906), *aff'd*, 187 N. Y. 562, 80 N. E. 1105 (1907); *Sabin v. Grand Lodge*, 43 Hun 634 (N. Y. 1887); *Eltonhead v. Travelers Ins. Co.*, *supra* note 1.

involving opposing claimants to life insurance proceeds, but these do not touch upon the question of admissibility under section 347, C. P. A., either because it was not raised or, being raised, was nevertheless not decided, a decision having been arrived at on other grounds.

Although an attempt has been made herein to present the decisions chronologically, a deviation will be made as to the case of *Martorella v. Prudential Life Insurance Company*,²⁸ a very recent case, because herein the court cites the case of *Ward v. New York Life Insurance Company* and interprets it with regard to the question what constitutes priority in the law of admissions, although in the former an interpretation of the terms "from, under or through," as used in section 347 was not involved. It will be noted that in relating briefly the facts in the *Ward* case specific mention was made of the fact that originally the conflicting claimants were not named as beneficiaries, the original beneficiary being "the administrators, executors and assigns," in other words, the estate of the insured. In the *Martorella v. Prudential Life Insurance Company* case, it does not clearly appear that the beneficiary, who claimed the proceeds, was the original one, although, perhaps, the following quotation from the court's opinion would be a help. "She" (the insured) "could have named her own estate as beneficiary * * *." As in the *Ward* case, however, the insured had a right to change the beneficiary. The rest of the facts were a plea of breach of condition subsequent to the issuance of the policy, in that the insured took bichloride of mercury with the intent to commit suicide. To sustain its defense the insurer was permitted to offer proof of an oral statement made by the insured after the issuance of the policy to the effect that she had taken the poison because she did not care to live any longer. In rebuttal of this proof the plaintiff was permitted to offer evidence of other oral statements alleged to have been made by the insured to the effect that she had taken the poison by mistake. It was held that all the declarations referred to were competent. The oral statements of the insured, however, to the effect that she had taken poison because she did not care to live, it was held, were not admis-

²⁸ *Supra* note 3.

sible as "admissions" because "the insured," said the court, citing the *Ward* case, "seems not to have been in privity in a legal sense with the plaintiff, the beneficiary." It is to be noted that in the *Ward* case the court did not even use the term "privity." Nor did it expressly state that the terms "from, under or through," as used in section 347, are synonymous with or mean privity. The important point, however, is that the *Ward* case should not have been cited for another reason, namely, that if the terms "from, under or through" mean or are synonymous with the term "privity," what may constitute privity under section 347 is not controlling as to what constitutes privity in the law of admissions. As is well known, the term "privity" is used in many different senses or ways, depending upon the nature of the situation to which a concept of it is sought to be invoked or put into play.

No case or citation is given by the *Martorella* case, which supports the proposition that the term "privity" as used when section 347 is involved is applicable to a situation in which it is not involved. Of significance, again, is the fact that throughout the series of cases discussed in this article which are the landmark cases in the field, at least in this state, nowhere is consideration given to the question whether the insured's declarations are "admissions" or "declarations against interest," and it seems that the *Martorella* case is the first to draw a line of demarcation. Again, conceding for the purposes of argument that the terms "from, under or through" as used in section 347, C. P. A., are synonymous with the term privity, and that there is justification in applying its connotation within that section to a situation for which that section was not enacted or meant to cover, still another criticism may be directed at the *Martorella* case, namely, that it does not unequivocally appear therein, whether, as in the prior case of *Ward v. New York Life Insurance Company* (*supra*) which it invokes for the aforementioned proposition in regard to privity, the beneficiary or beneficiaries were or were not originally named in the policy.²⁹ This being so, an additional

²⁹ See ante for a distinction between a case where policy is originally made by *A* (insured), payable to *B* (beneficiary), and a case where *A* (insured)

ground exists upon which to predicate the aforementioned statement to the effect that the *Ward* case was not justifiably cited.

But this is not all. There is yet a fourth. To wit, as stated, anything that had been said by the court in the last-mentioned case in regard to section 347, C. P. A., was not strictly necessary to the decision rendered therein.

Be this as it may, still another fact warrants specific mention. Although the court in *Martorella v. The Prudential Life Insurance Company* said that the aforementioned declarations were not admissible as "admissions" they, it said, were nevertheless admissible as "declarations against interest" because at the time when made the declarant (the insured) had an interest, she already having procured the policy and having reserved the right to change the beneficiary so as to enable her, if she wished, to at any time constitute her estate as beneficiary. It is to be noted that the court used the article "the" and not the indefinite article "a" or the term "all" or even just the word "statements" unqualifiedly, in referring to the declarations of the insured; for were the court to state or intimate that all declarations by an insured are "declarations against interest" and not "admissions," a necessary concomitant would be to exclude all declarations made by the insured before the issuance of the policy, thus abrogating the well-established rule that declarations made prior to acquiring an interest are not against interest because an interest did not exist at the time the declarations were made.³⁰ Admissions, it is conceded, need not be against the declarant's interest at the time the declarations were made.³¹ Were it the law that the declarations of an insured, without exception, are "declarations against interest" and not "admissions," those cases heretofore discussed in which it appears that the insured's declarations were made before the issuance of the policy and the

makes a policy originally payable to himself or his estate and subsequently changes the beneficiary in pursuance to provisions in the policy permitting same, so that *B* becomes the ultimate beneficiary.

³⁰ *Hutchins v. Hutchins*, 98 N. Y. 56 (1885); RICHARDSON, EVIDENCE (3rd ed. 1931) 194.

³¹ *Mindlin v. Dorfmen*, 197 App. Div. 770, 189 N. Y. Supp. 265 (1st Dept. 1921); RICHARDSON, EVIDENCE, *supra* note 30, §§352, 295.

applications for the same, would have excluded them; provided, they held there was a lack of privity between the beneficiary and the insured, the presence or absence of privity being an element which they ignore.

By way of recapitulation, the law of this state in regard to the admissibility of the declarations of an insured against the beneficiary may be stated as follows:

I—The declarations of an insured as to his health made *before* the issuance of the policy are admissible, even though the mere issuance of the policy gives the beneficiary a vested interest, the rule being such because at the time the declarations were made the beneficiary did not have a vested interest.

II—The rule in regard to declarations made *before* the issuance of the policy, however, is subject to the following restrictions:

A—The declarations must not be too remote, a period of approximately one year being held not too remote.

B—The declarations must be in connection with “facts” or “acts” exhibiting the insured’s state of health; *viz.*, limping, soreness, inability to move parts of the body and other overt acts or manifestations of disease or sickness.

C—A foundation must precede an attempt to introduce the declarations in evidence, apart from the declarations of the insured, showing that the insured actually had the disease in question.

D—The relevancy of the declarations arises on the issue of knowledge by the insured of the state of his health.

E—If the suit is brought on a policy of accident insurance and the insured is not dead, it must either be shown that

a—the declarations were made to a physician for the purpose of treatment and that in such a case they were of *present* pain and suffering;

b—or that they were made simultaneously with the infliction of the injury so as to be characterized “verbal acts.”

III—Declarations made after the issuance of a policy are not admissible if the insured has not reserved the right to change the beneficiary.

IV—Declarations made *after* the issuance of a policy, the insured reserving the right to change the beneficiary, are admissible where they relate to either a state of health, physical or mental, or to an assignment of the policy or evince an intent to defraud the insurer.

V—If the declarations are made *after* the issuance of the policy, the remoteness of the declarations in point of time is not referred to by the courts but is ignored.

VI—*Semble*—If an insured has the policy originally so drawn that it is payable to his estate and, subsequently, by virtue of a reservation in the policy giving him the right to change the beneficiary and he does so, thereby constituting a third person the beneficiary, the latter does not take “from, under or through” the insured within the meaning of section 347 of the Civil Practice Act.

VII—*Semble*—Declarations of an insured made *after* the issuance of a policy originally so drawn that it is payable to the insured’s estate and, subsequently, by virtue of a reservation in the policy giving the insured the right to change the beneficiary, made payable to another, thereby constituting a third person beneficiary, are admissible as

“declarations against interest” and not as “admissions.”

VIII—Where declarations of an insured are made *before* the issuance of the policy the courts do not make a distinction between “declarations against interest” and “admissions.” Accordingly, they have been admitted even though at the time when made the declarant had no interest, because part of the “*res gestae*.”

IX—The well-known principle enunciated by the case of *Paige v. Cagwin*,³² and other decisions rendered in this state to the effect that the declarations of a donor, vendor or assignor of a chattel or chose in action whether made *before* or *after* the transfer are inadmissible to effect the claim or title of the donee, vendee, assignee or any subsequent holder is applied only where there is no provision in the policy permitting a change of beneficiary by the insured and the declarations by him are made after its issuance.

GEORGE D. FINALE.

April 10, 1934.

³²7 Hill 361 (N. Y.).