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seems to have decided this case rightly, because death was an accidental result and not a result of accidental means.[6] If, however, in construing the terms of an accident insurance policy the interpretation should be that of the average man,[7] and if the rule that ambiguities and uncertainties in an insurance policy must be construed against the insurer should apply,[8] then the decision seems to be wrong, because the insured's death was accidental in the popular sense.

J. P. R.

ATTORNEY AND CLIENT — CONTINGENT FEE AGREEMENT AS EQUITABLE ASSIGNMENT—ATTORNEY'S INTEREST IN CLAIM UNDER SUCH AGREEMENT.—*C*, the payee of a note of which *B* was the payor delivered the note to *A*, an attorney, and entered into an agreement with *A* whereby *A* was to have fifty *per centum* of the amount collected on the note. *A* notified *B* of the terms of his contract with *C*. While *A* was making investigations preliminary to instituting suit, *B* and *C*, without consulting *A*, completed a secret and collusive compromise of the note for less than its face value, to the exclusion of *A*. *A* intervened in a creditors' suit begun by *X* against *C* for an alleged fraudulent conveyance and filed a petition praying for protection of his interest in the note. *Held*, one judge dissenting, that the agreement between *A* and *C* created an immediate equitable assignment *pro tanto* to *A* of the portion specified and that *A's* interest could not be extinguished by a collusive settlement between *B* and *C*. *Mirasola v. Rodgers*.[1]

The doctrine of equitable assignment, as defined by courts and writers, is applicable where there is an unequivocal intent to transfer immediate interest in an existing or potential fund. This intent may be manifested either orally or in writing and may be expressed or arise by necessary implication from an agreement construed with

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[6] The West Virginia court considered and rejected the argument that the death was by accidental means, even under the strict construction of the phrase, because the surgeon did not intend to inject the novocaine into a body which was hypersensitive to the drug.

[7] "The term 'accidental' was used in the policy in its ordinary, popular sense, and in that sense it means 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected'." United States Mut. Accident Ass'n v. Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60 (1889).

[8] Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, 44 S. Ct. 90, 68 L. Ed. 235, 31 A. L. R. 102 (1923); United States Mut. Accident Ass'n v. Newman, 84 Va. 52, 3 S. E. 805 (1887). Especially true as to accident policies, VANCE, INSURANCE (1930) § 257.

[1] 200 S. E. 30 (W. Va. 1938), Kenna, J., dissenting.

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reference to the parties and the attendant circumstances.[2] Once the necessary intent is present the interest becomes irrevocably vested in the transferee,[3] even though the fund to which it is meant to attach is contingent or unliquidated.[4] In contrast, an equitable assignment must be distinguished from a mere promise to pay out of a stipulated fund or claim, the promisor pledging his personal credit.[5]

As a specific application of this general doctrine to a contingent fee agreement, our court in a prior case[6] where the attorney was "to retain out of any recovery . . . one-fourth value . . . as compensation . . ." held, as an alternate ground for decision, that an immediate equitable assignment had been made which would prevail over an attempted later assignment by the client. In a New York case,[7] similar on facts to the principal case, the court held that there was an equitable assignment. Other holdings in New York have been uniformly in accord.[8] A like interpretation of contingent fee agreements has been adopted in many other states.[9] A number of courts, however, while giving full approval to the doctrine of equitable assignment, in reaching results opposite to the holding of the instant case have applied a more strict rule of construction than that employed by New York.[10] In general, never-

[2] McConaughey v. Bennett's Ex'rs, 50 W. Va. 172, 40 S. E. 540 (1901); Hicks v. Roanoke Brick Co., 94 Va. 741, 27 S. E. 596 (1897); Davis & Goggen v. State National Bank, 156 S. W. 321 (Tex. Civ. App. 1913); Ingersoll v. Coram, 211 U. S. 335, 29 S. Ct. 92, 53 L. Ed. 208 (1908); 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1280; 1 LAWRENCE, EQUITY JURISPRUDENCE (1929) § 235.

[3] Christmas v. Russell, 81 U. S. 69, 20 L. Ed. 762 (1871); Rinehart & Dennis Co. v. McArthur, 123 Va. 556, 96 S. E. 829 (1918).

[4] Christmas v. Russell, 81 U. S. 69, 20 L. Ed. 762 (1871); Brooks v. Hatch, 6 Leigh 534 (Va. 1835).

[5] Feamster v. Withrow, 9 W. Va. 296 (1876); Clayton v. Fawcett's Adm'rs, 2 Leigh 19 (Va. 1830); Trist v. Child, 88 U. S. 441, 22 L. Ed. 623 (1874); Eib v. Martin, 5 Leigh 132 (Va. 1834).

[6] Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907 (1898).

[7] Fairbanks v. Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475 (1889).

[8] Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233 (1891); La Fetra v. Hudson Trust Co., 203 App. Div. 729, 197 N. Y. Supp. 332 (1922); *In re* Merrill's Estate, 165 Misc. 295, 300 N. Y. Supp. 1142 (1937).

[9] Conrad v. Johnston, 1 Va. Dec. 111 (1878); Bell v. Board of Com'rs, 26 Colo. App. 192, 141 Pac. 861 (1914); Northern Texas Traction Co. v. Clark & Sweeton, 272 S. W. 564 (Tex. Civ. App. 1925); Canty v. Latternar, 31 Minn. 239, 17 N. W. 385 (1883); Lashley v. Moore, 112 Okla. 198, 240 Pac. 704 (1925); Patten v. Wilson, 34 Pa. 299 (1859); Blakey v. N. Y. Life Ins. Co., 28 Ind. App. 428, 63 N. E. 47 (1902).

[10] Newell v. West, 149 Mass. 520, 21 N. E. 954 (1889); Hargett v. McCadden, 107 Ga. 773, 33 S. E. 666 (1899); Weller v. Jersey City Street Railway Co., 66 N. J. Eq. 11, 57 Atl. 730 (1904); De Winter v. Thomas, 34 App. D. C. 80, 27 L. R. A. (N. S.) 634 (1909).

theless, the objective criteria used as a test for an equitable assignment arising from a contingent fee agreement—the intent to effect an immediate transfer of title *pro tanto* with the client giving up control of that portion and the attorney ceasing to look to the client for payment[11]—seem to be the same in all pertinent cases examined, irrespective of the result reached. Only the rigor of the testing process has been varied.

The holding of the instant case does not seem to be in conflict with the well-established principle that a client may dismiss an attorney at any time, with or without cause,[12] or may complete a good-faith compromise out of court without the attorney's assent.[13] In every instance the court will protect the attorney's interests as they appear upon the facts of the particular case.[14] Where the attorney, having obtained no vested interest in the litigated claim through his compensation agreement and being able and willing at all times to proceed with the case, is dismissed without sufficient cause, or is prevented from performing by fault of the client, the remedy is by suit *quantum meruit* and for any special damages suffered.[15] However, where the attorney-client agreement, in the form of a promised contingent fee arrangement, has been abrogated by a collusive settlement to prevent the attorney from obtaining a lien on the proceeds of the litigation,[16] the court will set aside the bad-faith settlement and will permit the attorney to prosecute the case to a conclusion for determining the fee due.[17] But an equitable assignment created by necessary contractual intent immediately and irrevocably attaches to the litigated claim and must be enforced, not as a mere inchoate right but as a vested interest.

W. E. N.

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[11] *Cf.* Fairbanks v. Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475 (1889); Davis & Goggen v. State National Bank, 156 S. W. 321 (Tex. Civ. App. 1913); DeWinter v. Thomas; Hargett v. McCadden, both *supra* n. 10.

[12] Matheny v. Farley, 66 W. Va. 680, 66 S. E. 1060 (1909).

[13] Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828 (1889); North Chicago St. Ry. Co. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177 (1897); MECHEM, AGENCY (2d ed. 1914) § 2279.

[14] Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361 (1889); Corson v. Lewis, 77 Neb. 446, 109 N. W. 735 (1906); Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701 (1907).

[15] Matheny v. Farley, 66 W. Va. 680, 66 S. E. 1060 (1909); Tomlinson v. Polsley, 31 W. Va. 108, 5 S. E. 457 (1888); Polsley v. Anderson, 7 W. Va. 202 (1874); Peck v. Marling's Adm'r, 22 W. Va. 708 (1883).

[16] If no equitable assignment has been made, an attorney, in the absence of a regulatory statute, has no lien before judgment. Averill v. Longfellow, 66 Me. 237 (1876); *Ex parte* Lehman, Durr & Co., 59 Ala. 631 (1879).

[17] Burkhart v. Scott, 69 W. Va. 694, 72 S. E. 784 (1911); State v. O'Brien, 89 W. Va. 634, 109 S. E. 830 (1921).

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