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Attorney and Client--Contingent Fee

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munity? On this question, the courts have not been able to agree. For example, some courts hold valid conditions against alienation to Negroes as reasonable restrictions which the grantor may place on the property. *Queensborough Land Co.* v. *Cazeaux,* 136 La. 724, 67 So. 641 (1915); *Koehler v. Rowland,* 275 Mo. 573, 205 S. W. 217 (1918); *Torrey et al.* v. *Wolfes et al.,* 6 F. (2nd) 702 (D. C. 1925); and in *Russell et al., v. Wallace et al.,* 30 F. (2d.) 981 (D. C. 1929), it was held that a contract between property owners forbidding sale to Negroes, or persons of any race other than the white or Caucasian race, was valid. Other courts, however, had held invalid such conditions, basing their decisions on the ground that such conditions tend to prevent free alienation of real property and are therefore undesirable. *Title Guarantee and Trust Company* v. *Garrott,* 42 Cal. App. 152, 183 Pac. 470 (1919); *Los Angeles Inv. Co.* v. *Gary,* 181 Cal. 680, 186 Pac. 596 (1920).

It is to be noted that in the principal case the court only passed on the question of restraint on alienation and left open the question of the validity of restraints as to occupancy.

On the question of restraints as to occupancy most courts hold valid such restrictions. *Parmalee et al.* v. *Morris,* 218 Mich. 625, 188 N. W. 330 (1922); *Wayt et al.* v. *Patee et al.,* 269 Pac. 660 (Cal. 1928). Some of the courts which hold invalid restraints as to alienation, hold restraints as to occupancy valid.

What our court would have held if presented with a question as to occupancy is a matter of conjecture, but it is submitted as the opinion of the writer that it would, as other courts have done, segregate title and occupancy.

—Carl A. McComas.

Attorney and Client—Contingent Fee.—The syllabus of *Clayton* v. *Martin,* 151 S. E. 855 (W. Va. 1930) reaffirms the rule originally laid down in *Polsey* v. *Anderson,* 7 W. Va. 202 (1874) that the amount to be recovered in an action on a contingent fee where the contract was broken by the client is to be measured by a *quantum meruit* only. Between these dates have come several cases concerning contingent fees, none of which, however, directly hold on the question as to the measure of recovery. *Tomlinson* v. *Polsey,* 31 W. Va. 108, 5 S. E. 457, was a suit between attorneys, formerly partners, as to the proceeds of a successfully prosecuted suit on a contingent fee after one of them had

been dismissed and paid by the client. In *Fisher* v. *Mylius,* 42 W. Va. 638, 26 S. E. 309, the stipulation was for a percentage of the damages recovered and it was held the attorney could get nothing until the judgment was paid. And where the stipulation was for five per cent in excess of a certain amount the contract is good. *Camden* v. *McCoy,* 48 W. Va. 377, 37 S. E. 637. Likewise the attorney must take no unfair advantage of the client in making such a contract. *Dorr* v. *Camden,* 55 W Va. 226, 46 S. E. 1014.

The dicta in these cases confirm the rule in *Polsey* v. *Anderson, supra.* In *Clayton* v. *Martin, supra,* only the praecipe had been filed and the client upon being informed that the attorney had brought a wrong action sought to dismiss him and compromise the fee, which offer was refused. While the report of *Polsey* v. *Anderson, supra,* does not disclose to what stage the suit had proceeded yet it is distinctly alleged that the client had prevented the successful prosecution of it. In discussing the measure of recovery the opinion says: "That whether the engagement was broken through inability or design, the amount of remuneration is the same."

Although the facts of the latest case are not as strong as those of the first holding on the question the problem is raised as to whether under any circumstances more than a *quantum meruit* might be recovered. Where the client compromises the suit the attorney may recover the same percentage of the recovery as if the suit had been fully prosecuted. 3 A. L. R. 473, and cases cited. The rule in the West Virginia cases is not universal. In some jurisdictions when the client prevents the successful prosecution of the suit the attorney may recover the full amount provided by the contract in event of success. *Brodie* v. *Watkins,* 33 Ark. 545; *Hill* v. *Cunningham,* 25 Texas 25, 6 C. J. 724, 2 R. C. L. 1048, 3 A. L. R. 491. Likewise in brokerage transactions for the sale of real estate, although the vendor has the right to revoke the agency, yet he may not do so to avoid payment of commissions and in such case the broker may recover the full amount. *Peters* v. *Riley,* 73 W. Va. 785, 81 S. E. 530, 9 C. J. 563. In dealings between attorney and client, if the attorney withdraws without cause he may recover nothing. *Matheny v. Farley,* 66 W. Va. 680, 66 S. E. 1060.

In view of the disadvantage in which the rule reaffirmed in *Clayton* v. *Martin, supra,* may put the attorney, and in addition the practical difficulty of proving the worth of the services on a *quantum meruit* for which *Clayton* v. *Martin* was reversed, it seems that under the circumstances set out above the attorney should be allowed a larger measure for the damages springing

from the wrongful act of the client. But under the *quantum meruit* rule, why should not the contingent fee be taken into consideration in finding the value of the services? In *Pratt* v. *Kerns,* 123 Ill. App. 86, it was held that the entire *contingent* fee might be recovered if the services were worth that much.

—ROBERT E. STEALEY.

TORTS—CONTRIBUTORY NEGLIGENCE OF AN AUTOMOBILE PASSENGER.—The son of the deceased drove an automobile onto a railroad crossing at a low rate of speed, and due to the fact that the boards along the tracks were not as wide as the highway, the right front wheel of the car dropped over the first rail beyond the ends of the boards and the car was stalled. The deceased was sitting on the front seat. While unable to move, the car was hit by a fast moving train and the father and two other passengers were killed, the driver escaping by jumping. It was mid-day. *Held,* an automobile passenger must use such reasonable care for his own safety as an ordinarily prudent person would exercise; and a passenger failing to warn the driver that the boards between the railroad tracks did not extend the full width of the highway, was contributorily negligent as a matter of law. *Waller* v. *Norfolk & Western Railway Company,* 152 S. E. 13 (W. Va. 1930).

In previous cases the court has said that the negligence of the driver cannot be imputed to a passenger. It is also said that the passenger must use such care for his own safety as an ordinarily prudent person would exercise in like circumstances. *Young* v. *Railroad Company,* 96 W. Va. 534, 123 S. E. 433; *Jameson* v. *Railway Company,* 97 W. Va. 119, 124 S. E. 491; *Pierce* v. *Railroad Company,* 99 W. Va. 313, 128 S. E. 832; 18 A. L. R., note p. 309, and cases there cited and reviewed.

It has been said by our court that the duty of the passenger is less than that of the driver. *Young* v. *Railroad Company, supra,* at p. 537. How much less, one is not able to determine.

As to whether the question of contributory negligence of an automobile driver is a matter for the jury or a matter for the court seems to depend upon the facts in each particular case. "Where the facts which control are not disputed and are such that reasonable minds can draw but one conclusion from them, the question of contributory negligence barring recovery is one of law for the court." *Krodel* v. *B. & O. R. R. Company,* 99 W. Va. 374, 128 S. E. 824.

Four cases have been decided by our court which involved the contributory negligence of a passenger in a car hit by a railroad