Attorney and Client—Contingent Fee Contract as Partial Assignment of Claim—[Illinois].—An attorney contracted to prosecute a claim for a percentage of the amount to be recovered. The client having died, his administratrix refused to cooperate with the attorney in further prosecution of the claim. Joining the administratrix as defendant, the attorney sued the person against whom the client held the claim. Held, the attorney recover, the contingent fee contract amounting, apparently, to a partial assignment of the fund to be recovered. Lewis v. Braun, 356 Ill. 467, 191 N.E. 56 (1934).

The attorney-client relationship is, in general, subject to the same rules that govern other principal-agent relationships. See 2 Mechem, Agency (2d ed. 1914), 1726. Thus the authority of the attorney to proceed terminates with the death of the client, Campbell v. Maple, 105 Pa. 304 (1884); Stark v. Hart, 22 Tex. Civ. App. 543, 55 S.W. 378 (1900); and the attorney must thereafter secure the consent of the client's personal representative to proceed. Should the personal representative refuse, some courts allow the attorney to recover only on a quantum meruit basis on the theory that the contract is terminated by the death of the client. In re Robins, 61 Misc. 114, 112 N.Y.S. 1032 (1908). But the prevalent view is that, though death terminates the authority of the attorney, it does not excuse performance by the personal representative and hence the attorney may sue on the contract for its breach. Price v. Haeberle, 25 Mo. App. 201 (1887); Grapel v. Hodges, 112 N.Y. 419, 20 N.E. 542 (1889); 2 Mechem Agency (2d ed. 1914), 2260. The measure of damages should be, it seems, the contract price less a deduction for unperformed services, if the principle of mitigation of damages would so require. Goodin v. Hays, 28 Ky. Law Rep. 112, 88 S.W. 1101 (1905); Grapel v. Hodges, 112 N.Y. 419, 20 N.E. 542 (1889). Award has been made of the full contract price, however, the theory being that the attorney's relation to his client has disqualified him from engaging in any litigation involving the same case. Dupree v. Bridgers, 168 N.C. 424, 84 S.E. 696 (1915).

A contingent fee contract may resolve itself into one of four types of transactions:

1. A personal undertaking by the client to pay a sum conditional on recovery. Where the attorney is to receive a fee fixed but contingent upon success, determination of damages is difficult because he might not have recovered. To meet this difficulty it has been held that success will be presumed. McElhinney v. Kline, 6 Mo. App. 94 (1878). But this assumption seems improper where success would have been improbable. See Shank v. Groff, 45 W.Va. 543, 32 S.E. 248 (1898); Restatement of the Law of Agency (1933), § 449, comment d. Where the attorney is to receive a percentage of the amount he recovers there is the added difficulty in the determination of damages, in that, even assuming that he would have recovered, the amount of recovery is unknown. If the claim is prosecuted to success by another attorney, the amount so recovered may, perhaps, be used as a basis for computation. See Dennis v. Maxfield, 16 Allen (Mass.) 138 (1865); see Sedgwick, Damages (9th ed. 1912), 1356. Some courts refuse to grant damages, however, because of their conjectural nature. French v. Cunningham, 149 Ind. 632, 49 N.E. 797 (1898). The attorney should, in any event, be permitted to elect to
sue for the reasonable value of his services. See *Fitzgerald v. Allen*, 128 Mass. 232 (1880); *Edington v. Pickle*, i Sneed (Tenn.) 122 (1853).

(2) A partial assignment of the chose in action. *Powell v. Galveston Ry. Co.*, 78 S.W. 975 (Tex. Civ. App. 1904). In this case the attorney need not sue for damages for breach of contract but may sue in equity in his own name on the original claim joining his client as party defendant. See *Warren v. First National Bank*, 149 Ill. 9, 38 N.E. 122 (1893). In order to decide that there is a partial assignment, courts require definite evidence showing a present intention to pass ownership of part of the claim. *Hargett v. McCadden*, 107 Ga. 773, 33 S.E. 666 (1899). This theory is not available where the client's cause of action is for personal injuries. *Weller v. Jersey City H. & P. St. Ry. Co.*, 68 N.J. Eq. 659, 57 Atl. 730 (1904).

(3) Partial assignment of the fund to be recovered. Where the transaction is held to be of this type, the attorney may recover his portion of the proceeds which have been recovered without the intervention of the client. *Wylie v. Coxe*, 15 How. (U.S.) 415 (1853); *Canty v. Latterner*, 31 Minn. 239, 17 N.W. 385 (1883). This type of transaction is available even where the basis of the client's claim is personal injury. *Dreibund v. Cauder*, 166 Mich. 49, 131 N.W. 129 (1911). This theory, on which a claim for an equitable lien is usually founded, has raised difficult questions of construction. Some courts have been willing to hold that the fact of a contingent fee contract is alone adequate evidence of an intent to assign part of the fund. *Wylie v. Coxe*, 15 How. (U.S.) 415 (1853). Others hold this alone not to be sufficient evidence. *Tone v. Shankland*, 110 Ia. 525, 81 N.W. 789 (1900). Decisions in Illinois are especially illustrative of the general confusion on this point. *Smith v. Young*, 62 Ill. 210 (1871); *Cameron v. Boeger*, 200 Ill. 84, 65 N.E. 690 (1902).

(4) A promise to pay out of the proceeds when collected. This type of transaction does not create a lien on the fund. *Holmes v. Bell*, 139 App. Div. 455, 124 N.Y.S. 30 (1910); *Williston, Contracts* (1921), § 429; but see *Ingersoll v. Coram*, 211 U.S. 335 (1908).

In the present case, there being no evidence of a partial assignment of the client's chose in action, the decision of the court in allowing recovery would seem questionable. The court apparently decided the case on the theory that there was an assignment of the fund to be recovered. However, in fact, nothing had been recovered on the claim.

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Business Trusts—Contract Liability of Trustees—[Illinois].—A business trust declaration provided that trustees were to be "under no personal obligation or liability of any kind," and that in all contracts made by the trustees "specific mention shall be made therein of the trust to the end that any and all parties must look solely to the trust estate and the trust fund for any claim arising out of such trust." In a suit on a contract against the trustees personally, held, even if the plaintiff had knowledge of the terms of the trust instrument, the trustees are personally liable, not having expressly stipulated in the contract against personal liability. *Review Printing and Stationery Co. v. McCoy*, 276 Ill. App. 580 (1934).

Trustees of a business trust, like ordinary trustees, being principals and not agents, are personally liable on contracts made by them in the course of trust administration. *Betts v. Hackathorn*, 159 Ark. 621, 252 S.W. 602 (1923); *Goldwater v. Oltman*, 210 Cal. 408, 292 Pac. 624 (1930); *Darling v. Buddy*, 318 Mo. 784, 1 S.W. (2d) 163 (1927); but see *H. Kempner v. Welker*, 36 Ariz. 128, 283 Pac. 284 (1929). Moreover, trustees of a