RECENT CASES

ATTORNEY AND CLIENT—ATTORNEY'S LIEN—The receiver of an insolvent corporation claimed as part of its assets money in the hands of an attorney who held it under an alleged attorney's lien. Prior to the insolvency, trustees conducted the business of the corporation and turned the money over to the attorney to be distributed to creditors. The attorney had rendered services prior to the appointment of the trustees and claimed a lien therefor. *Held,* that the money came into the attorney's hands for a special purpose and since such purpose was inconsistent with his claim to a lien, no lien arises. *Ideal Tile Corporation* v. *N. T. Investment Company,* 111 N. J. Eq. 241 (Ch. 1932).

Attorney's liens are of two kinds—(1) retaining and (2) charging liens. *In re Wilson* 12 Fed. 235. The retaining lien extends to any general balance due for professional services, either in connection with the particular matter in which he came into possession of the money and papers, or in any other matter. *Delaney v. Husband,* 64 N. J. L. 275, 45 Atl. 265 (E&A 1899). The charging lien is confined to costs and fees due in the particular suit in which a judgment is rendered. *Georgia Central etc. Co.* v. *Pettus,* 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915. The distinction between these liens is revealed in the respective modes of enforcement. *Radley* v. *Gaylor,* 98 App. Div. 158, 90 N.Y.S. 758; *Rose* v. *Whiteman,* 52 Misc. 210, 101 N.Y.S. 1024; *McPherson* v. *Cox,* 96 U.S. 404, 24 L.Ed. 746; *Seszynsky* v. *Merritt,* 9 Fed. 688; *Artale* v. *Columbia Insurance Co.,* 109 N.J.L. 463 (E&A 1932). An attorney's lien attaches to property or money which comes into his hands in the course of his professional employment. *Delaney* v. *Husband, supra; Bank* v. *Todd,* 52 N.Y. 489; *Marshall* v. *Romano,* 10 N.J. Misc. 113, 158 Atl. 751 (Sup. Ct. 1932). But no lien arises where the property is placed in his hands for a special purpose or under circumstances giving rise to a trust inconsistent with the claim of a lien. Thus no lien attaches to a will delivered by a client for safe-keeping only (*Bracher* v. *Olds,* 60 N.J. Eq. 499, 46 Atl. (E&A 1900); nor on money given to an attorney to secure bail (*State* v. *Lucas,* 33 Pac. 538, 24 Or. 168); nor on deeds delivered for exhibit to prospective purchasers (*Balch* v. *Symes,* 1 Turn. & R. 87); or to enable the attorney to draw a mortgage (*Lawson* v. *Dickinson,* 8 Mod. 306); nor on drafts delivered to prevent the fund they represented from being levied upon (*Watts* v. *Newberry,* 107 Va. 233, 57 S.E. 657). See also *Anderson* v. *Bosworth,* 8 Atl. 539, 15 R.I. 443. But if the attorney is permitted to retain the property after the object for which it was given is accomplished or fails, there is a general lien, possession being equivalent to a general deposit. *Ex parte Pemberton,* 18 Ves. 282; *Ex parte Stirling,* 16 Ves. 258; *State* v. *Lucas, supra.* The conclusion in the instant case that delivery was for a special purpose is supported by the authorities and the court's decision that no lien existed in favor of the attorney represents the application of a well defined rule.

ATTORNEYS—INVESTIGATION BY BAR ASSOCIATION—The Hudson County Bar Association filed a petition in the Supreme Court reciting ambulance chasing and other unethical practices of attorneys in that county. The Supreme Court ordered an investigation under Chapter 112 of the Laws of 1930. This act empowers the Supreme Court to issue process to compel the attendance of witnesses before the ethics committee of a duly recognized bar association. Subpoenas were issued under the seal of the clerk of the Supreme Court. The defendant, an attorney, received one. He obtained a rule to show cause why the subpoena should not be quashed. *Held,* witnesses who receive subpoenas issued by the Supreme Court in an investigation of attorneys must appear, produce records and testify in accordance with the terms thereof. *In re Investigation by Bar Association of Hudson County,* 109 N.J.L. 275, 160 Atl. 809. (Sup. Ct. 1932).

The Supreme Court has the authority to conduct a general investigation into the conduct of the members of the bar not only where specific charges are made against a named attorney, but wherever it has reasonable cause to believe that there has been professional misconduct either by one or by a class. *In re Hahn,* 84 N.J. E. 523, 94 Atl. 953, *aff'd* 85 N.J.E. 510, 96 Atl. 589. *People ex rel Karlin* v. *Culkin, Sheriff,* 248 N.Y. 265, 162 N.E. 487; 60 A.L.R. 851; *In re Simpson,* 21 N.J.L.J. 109; *Anonymous* 7 N.J.L. 162; *In re Randall* 93 Mass. 473; *In re Durant* 80 Conn. 140, 67 Atl. 497. Although attorneys and solicitors are appointed by the governor of New Jersey they are not officers of the state, and are not removable by impeachment. They are officers of the court and are removable by the court. *In re Raisch,* 83 N.J.E. 82, 90 Atl. 12; *In re Hahn, supra.* Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Whenever this condition is broken the privilege is lost. If the test of fitness is not satisfied any time after admission to the bar, the lawyer can be stricken from the roll. Disbarment cannot, therefore, properly nor technically be considered as punishment within the meaning of criminal law. The purpose is not to punish but to purify the bar. *In re Rouss* 221 N.Y. 81, 116 N.E. 782; *In re Breidt* 84 N.J.E. 222, 94 Atl. 214; *Ex parte Wall* 107 U.S. 265. But where the offense charged is indictable and is committed outside of the attorney's professional employment or character, and is denied by him, it is an unsettled question whether he can be disbarred before he is convicted by a jury. For decisions on both sides see *Ex parte Wall, supra.* Attorneys can be disbarred for moral turpitude. *In re Hahn, supra.* For malpractice he can be censured when it is due to ignorance, disciplined when it is caused by neglect, and disbarred when willful. *In re Rosenkrantz* 84 N.J.E. 232, 94 Atl. 42. He will be disbarred for deception of a court or the obstruction of the administration of justice. *In re Rosenkrantz, supra.* In the light of the standards governing the conduct of members of the bar the petition in the principal case alleged proper matters for investi-

gation and the court's action in sustaining the subpoena was in accord with the authorities. See Feller and Jaffe, *The Current Chancery Investigation,* 1 MERCER BEASLEY L. REV. No. 2, p. 30 (1932).

DEATH ACT—EFFECT OF SETTLEMENT AND RELEASE BY GENERAL ADMINISTRATOR—A release was given by the general administrator, father of deceased infant, and money paid thereunder to him in settlement of all claims arising out of death of intestate caused by defendant's negligence. Subsequently, the plaintiff, mother of deceased, brought an action for the wrongful death as *adminstratrix ad prosequendum,* under the "Death Act." The trial court charged the jury that if the defendant was liable, credit should be given for the amount paid under the release, but if the pecuniary loss should not exceed the money thus paid the jury should find "no cause of action." Jury found "no cause of action" and plaintiff appeals. *Held,* the instructions of the trial court were erroneous, since the only person who can release such claim is the one vested with the right to prosecute an action to enforce it. *Sakos* v. *Byers,* 109 N. J. L. 302 (E. & A. 1932).

Prior to 1917 the personal representative of the deceased was vested with the right to maintain an action for wrongful death of his decedent as well as to receive payment of the money realized therefrom. Such action was brought for the sole benefit of the next-of-kin and the amount collected had to be distributed by the personal representative as provided by law in relation to the distribution of personal property left by persons dying intestate. (P. L. 1848, p. 151, Rev. 1877 p. 294, 2 C. S. 1908). Under this statute the general adminstrator could settle the claim for wrongful death without instituting suit and give a valid release. *Manns, Adm'r.* v. *Sanford Co.* 82 N. J. L. 124 (Sup. Ct. 1911). The amendment of 1917 provides that such action be brought in the name of an administrator *ad prosequendum* of the decedent, but that no money paid in release of such claim or in satisfaction of a judgment obtained shall be paid to such administrator *ad prosequendum* but shall be paid to the general administrator. The amendment further provides that no release by the adminstrator *ad prosequendum* shall release the person making such payment from any liability to the widow or next-of-kin. (P. L. 1917 p. 531, Cum. Supp. C. S. p. 928). This provision together with the holding in the instant case that a general administrator cannot release a claim for wrongful death before action is brought by an administrator *ad prosequendum* will have the effect of preventing settlements of such cases. Certainly the legislature in passing the 1917 act did not intend that a cause of action for wrongful death could not be settled and the party charged released. It is suggested that an agreement of settlement by the administrator *ad prosequendum* plus a release from the general administrator might satisfy both the statute and the case cited. Otherwise it would appear necessary to reduce all claims for wrongful death to judgment. This is hardly desirable.

INSURANCE—MURDER OF ASSURED BY BENEFICIARY—A and B, husband and wife, were insured by the defendant company under a joint life insurance policy. The survivor was named sole beneficiary with no right reserved to change the beneficiary. A murdered B, and was convicted. B's personal representatives claim payment under the policy. *Held* that the insurance company is totally discharged. *Merrity* v. *Prudential Ins. Co. of America,* 10 Misc. 925 (Sup. Ct. 1932).

That a beneficiary who wilfully murders the insured cannot recover, is settled law. *Swavely* v. *Prudential Ins. Co.,* 10 Misc. 1, 157 Atl. 394 (Sup. Ct. 1931), and cases there cited. In such a case, however, the insurance company's liability is not cancelled, but a resulting trust is created in favor of the insured's estate. See authorities collected in 37 C. J. 576, and see the discussion in JOYCE ON INSURANCE, Vol. 2, pp. 1827-28, and RICHARDS ON INSURANCE LAW (3rd Ed.) at page 81. This question has never been decided in this state, but it is probable that the general rule allowing the insured's personal representatives to recover would be followed. See *Merrity* v. *Prudential etc., supra.* The precise question involved in the principal case has been decided only twice. It first arose in *Equitable Life Ins. Soc.* v. *Weightman Admr.,* 61 Okla. 106, 160 Pac. 629, L.R.A. (1917B) 1210 (1916), where the court construed the policy as two separate policies, and applied the general rule as to single policies, allowing the insured's personal representatives to recover. In *Spicer* v. *N. Y. Life Ins. Co.,* 263 Fed. 764, (D. Ala. 1919), 268 Fed. 500 (C.C.A. 5th, 1920) *cert.* denied, 255 U.S. 572, the court discharged the insurer stating that the policy was enforceable only in accordance with its terms. The court in the principal case adopts the reasoning of the *Spicer* case and expressly distinguishes a joint policy from a single policy. While of the opinion that a resulting trust may ordinarily be created in favor of the estate of the insured, the court eliminates this possibility when the policy is a joint one. The reliance in the case of a single policy upon the resulting trust doctrine is sound. A fund has been created; the beneficiary has destroyed his right to that fund; but he has not destroyed the fund itself. *Cleaver* v. *Mutual Reserve Fund Life Association,* 1 Q. B. 147, 3 L. R. A. (N.S.) 727 note (1892). Should not, however, the same result follow where a fund has been created jointly, or two funds have been created by two persons in favor of each other? There is no inherent difference between a single policy and a joint policy. They are both contracts which are enforceable only in accordance with their terms. The great weight of authority accepts the desirable view that in the case of a single policy, a resulting trust is created in favor of the insured's estate and it is submitted that the same result should be reached where the policy is joint.

RESTRICTIVE COVENANTS — ASSIGNABILITY OF BENEFITS WITH BUSINESS — Defendant operated a barber shop. He sold to C the

fixtures "together with the barber business and the good will thereof". Defendant covenanted that he would not, either directly or indirectly, as owner, partner, or stockholder in a corporation, engage in a barber business within a radius of 10 blocks, nor manage such a business or be employed therein in any capacity within such radius. C carried on such business for four months, and sold it to M, who in turn sold it to complainant. Defendant then opened a barber shop within a block and a half of complainant's shop. The covenant given by defendant ran to C alone and not to C, his heirs or assigns. The sales of the business by C to M and by M to complainant did not refer to the covenant. *Held,* that an injunction should issue restraining defendant from violating the covenant. *Sandullo* v. *Labrunna,* 111 N. J. Eq. 4, (Ch. 1932).

The covenant not to compete is intended to protect the business and its good will. Such covenants are not primarily personal, but a valuable and integral part of the property conveyed (*Sickles* v. *Lauman,* 169 N. W. 760 (Iowa 1918)), and being a part of the business will pass to a subsequent purchaser thereof. *Webster* v. *Buss,* 61 N. H. 40, 60 Am. Rep. 317 (1881). Though the covenant did not specifically run to the assigns of the covenantee, yet since it is a property right, where the business itself is transferred, the benefits of the covenant are also transferred with the business. *Trowbridge* v. *Denning,* 80 N. J. L. 236 (Sup. Ct. 1909). The same result should obtain even though the covenant is not expressly mentioned in the subsequent instruments of transfer. *A. Fink & Sons* v. *Goldberg,* 101 N. J. Eq. 644 (Ch. 1927); *Haugen* v. *Sundseth,* 106 Minn. 129; *Scotton* v. *Wright,* 117 Atl. 131, (Del. 1922); *aff'd* 121 Atl. 69 (1923). It should follow also that the right to relief in this class of case need not necessarily be limited to the immediate and original parties to the covenant, but may be enforced by the assignee or purchaser from the covenantee. *A. Fink & Sons* v. *Goldberg, supra;* See *Cowan* v. *Fairbrotter,* 32 L. R. A. 829 (N. C. 1896). The principal case squarely presented this question. Our Chancery Court has by this decision adopted the better view, involving a proper extension of the doctrine of equitable servitudes upon property.

RULING ON MOTION—CONCLUSIVENESS—LAW OF THE CASE—Plaintiff obtained judgment in an automobile accident case, and after execution had been returned unsatisfied, instituted suit against defendant on its policy covering the judgment debtor. Defendant's answer set forth that the policy covered the car as a funeral car and that at the time of the accident it was being used for a wedding. Plaintiff moved to strike the answer. The motion was denied. At trial judgment was directed for plaintiff, the use of the car being admittedly that alleged in the answer. Defendant appealed, alleging that the answer having been found sufficient on direct attack, the trial judge could not there-

after direct a verdict against defendant except for failure of proof. *Held,* that the law of the case as between the parties was settled by the ruling on the motion, but that that circumstance did not control the final disposition of the case by the trial judge. *Heritier* v. *Century Indemnity Co.,* 109 N. J. L., 313, 162 Atl. 573 (E. & A. 1932).

It is recognized generally and by the better reasoned authorities that a ruling on a motion to strike or demurrer settles the law of the case (*Citizens Trust Co. of Utica* v. *Prescott & Son,* 223 N. Y. S. 184, 186, 221 App. Div. 420 (1927); *Schickler* v. *Penrod,* 227 N. Y. S. 331, 335, 221 App. Div. 627 (1928); *Story* v. *First National Bank of Thomson, supra; Wakelee* v. *Davis,* 44 Fed. 532 (C. C. D. N. Y. 1891), *aff'd* in 156 U. S. 680, 39 L. Ed. 578 (1895); *Commercial Union of America* v. *Anglo American Bank,* 10 F.(2d) 937 (C. C. A. 2d, 1925); *Jordan* v. *Faircloth,* 34 Ga. 47 (1864); *Bowdoin College* v. *Merritt,* 63 Fed. 213 (1895); *Brown* v. *Fletcher,* 203 Fed. 70 (1912)), although a few courts have reached a contrary result. *Norton* v. *Merard Holding Co.,* 106 Conn. 475, 138 Atl. 483, 54 A. L. R. 361 (1927). See also 13 A. L. R. 1122. If the proofs do not support the pleading then the ruling on a motion or demurrer does not control the case. *Watson* v. *Appleton,* 62 Wis. 267, 22 N. W. 475 (1885); *Walker v. Doane,* 131 Ill. 27, 22 N. E. 1006 (1889); *Lundin* v. *Post Publishing Co.,* 217 Mass. 213, 104 N. E. 480 (1914); *Probate Court* v. *Potter,* 26 R. I., 202, 58 Atl. 661 (1904). If, however, the defendant puts in any supporting evidence, even though contradicted, it is error to direct a verdict against him. *Story* v. *First Nat'l Bank of Thomson,* 34 Ga. App. 27, 128 S. E. 12 (1925); *Pierpont Mfg. Co.* v. *Mayor, etc., of Savannah,* 153 Ga. 455, 112 S. E. 462 (1921) and cases cited 153 Ga. at pp. 457 and 458. In *Fidelity Union Trust Co.* v. *Galm,* 109 N. J. L. 111, 118 (E. & A. 1932) the Court of Errors and Appeals seemed to have adopted the view that a ruling on motion or demurrer does not become the law of the case. In the principal case, however, the court does not refer to the *Galm* case and uses the meaningless language that the ruling on the motion became the law of the case but was not binding on the trial judge. It is indeed unfortunate that despite the opportunities presented for a clear holding the Court of Errors and Appeals has permitted the New Jersey law on the important question presented, to remain in doubt.

WILLS—EXECUTION—SUBSCRIBING WITNESSES—Probate of the alleged will was attacked upon the ground that it was not executed in accordance with the statutory requirements. The alleged will bore no attestation clause, but was subscribed by two witnesses. The two subscribing witnesses disagreed as to whether there was due compliance with the requisite statutory formalities. The lower court denied probate, preferring the adverse testimony of the one subscribing witness to the testimony of the other witness, who had an apparent pecuniary

interest in the controversy. *Held,* that the will should be admitted to probate as having been properly executed on the corroborating testimony of one witness. *In re Halton,* 111 N. J. Eq. 143, 161 Atl. 809 (Pr. 1932).

It is a well settled rule that a complete attestation clause, reciting an observance of all statutory requirements, gives rise to a presumption of the due execution of a will. *Mundy* v. *Mundy,* 15 N.J. Eq. 290 (Pr. 1858); *Re Sutterlin,* 99 N.J. Eq. 363, 132 Atl. 115 (Ch. 1926). Such a presumption exists despite a failure of memory as to the facts relative to execution, *Allaire* v. *Allaire,* 37 N.J.L. 312 (Sup. Ct. 1875), *aff'd* 39 N.J.L. 113 (1876); and has even overcome the testimony of one hostile witness where the testimony of the other subscribing witness was credible, and the circumstances persuasive to its truth. *Den* v. *Mitton,* 12 N.J.L. 70 (Sup. Ct. 1827); *In re Seymour's Will,* 114 Atl. 799 (Pr. 1921); *McCurdy* v. *Neall,* 42 N.J. Eq. 333 (Pr. 1886). The *prima facie* proof of regularity arising from the words of the attestation clause, however, is rebuttable by affirmative evidence to the contrary. *Re Berdan,* 65 N.J. Eq. 681, 55 Atl. 728 (Pr. 1903); *Bioren* v. *Neslar,* 77 N.J. Eq. 560, 78 Atl. 201 (E. & A. 1910). Further, it has been held that an attestation clause which is imperfect raises a presumption of compliance with the requirements for execution, so far as the facts recited by the clause are concerned, but not as to those facts not stated. *Re Beggans,* 68 N.J. Eq. 572, 59 Atl. 874 (Pr. 1905). Where, however, there is no attestation clause, the New Jersey Courts have laid down the rule that the burden falls upon the proponent affirmatively to prove that all the requirements of the statute have been met. *Swain* v. *Edmunds,* 53 N.J. Eq. 142 (Pr. 1894), *aff'd* 54 N.J. Eq. 438, 37 Atl. 1117 (E. & A. 1896); *Stewart* v. *Stewart,* 56 N.J. Eq. 761 (Pr. 1898). In the principal case, the court discredited the adverse testimony of the one subscribing witness, and deemed that proper execution of the will had been established by the testimony of the other witness. The Court was primarily influenced by the view which casts suspicion on the testimony, and attacks the credibility, of attesting witnesses who attempt to impeach a will. *Garrison v. Garrison's Executors,* 15 N.J. Eq. 266 (Pr. 1858); *Ward* v. *Brown,* 53 W. Va. 227, 44 S.E. 488 (1903); *Stevens* v. *Leonard,* 154 Ind. 67. Many jurisdictions have held that by subscribing the will even without an attestation clause, witnesses impliedly vouch for its due execution as fully as they would do expressly if it contained a complete attestation clause, though perhaps with less force and emphasis. *German Evangelical Bethel Church* v. *Reith,* 39 S.W. (2nd) 1057 (Mo. 1931); *Mead* v. *Presbyterian Church,* 229 Ill. 526, 82 N.E. 371, 11 Ann. Cas. 426 (1907); *Re Ellery,* 139 App. Div. 244, 123 N.Y. Supp. 1015 (1910); *Re Rosenthal,* 100 Misc. 84, 164 N.Y. Supp. 1060 (1917); *Carpenter* v. *Denoon,* 29 Ohio St. 379 (1876); Thomas' Goods, 1 Swabey & T. 255, 164 Eng. Reprint 717 (1859); *Re Peverett,* Prob. (Eng.) 205 (1902); *Scarff* v. *Scarff,* 1 Ir. R. 13 (1927). The principal case marks the first expression in

New Jersey on the precise question involved, and is in accord with the general trend in other jurisdictions.

WITNESSES—COMPETENCY—RELIGIOUS BELIEFS—The defendant and five persons offered as witnesses in his behalf stated that they did not believe in God, and because of this disbelief were conscientiously scrupulous of taking an oath and requested to be affirmed. Their several requests were denied and all were excluded from testifying. *Held,* that the exclusion of the offered witnesses was proper, but the exclusion of the defendant was erroneous. *State* v. *Levine,* 109 N.J.L. 503 (Sup. Ct. 1932).

The belief in God and his imprecation of divine punishment upon him who gives false testimony was devolved under the common law as the essence and prerequisite of taking an oath to testify in a judicial proceeding. *Donnelly* v. *State,* 26 N. J. L. 601 (E. & A. 1857); *Onychund* v. *Barker,* 1 Atk. 21; 11 ENGLISH RULING CASES, 126; *Miller* v. *Miller,* 2 N. J. Eq. 139, (Ch. 1838); 29 CYC. 1298; *Den* v. *Vanleve,* 5 N. J. L. 765 (Sup. Ct. 1819). A solemn affirmation (3 Comp. Stat., p. 3772)), is equivalent to an oath in substance, though variant as to form. 5 *WORDS* AND PHRASES 4872; 1 SMITH'S L. CASE 381. However, the form of affirmation may not be invoked where there is no objection to being sworn. *Williamson* v. *Carroll,* 16 N. J. L. 217 (Sup. Ct. 1839); *Clark* v. *Collins,* 15 N. J. L. 473 (Sup. Ct. 1836); *Coxe* v. *Field,* 13 N. J. L. 215 (Sup. Ct. 1832). A witness's belief in God is to be presumed till the contrary appears. *Donnelly* v. *State, supra; Den* v. *Vanleve, supra;* 1 GREENL. ON EVIDENCE 370. In the instant case the five offered witnesses rendered themselves incompetent under the common law to being sworn or affirmed as witnesses by stating their disbelief in God. However, under the decision of *Percy* v. *Powers,* 51 N. J. L. 432 (Sup. Ct. 1889) the fact that a party does not believe God will punish perjury does not render such party incompetent as a witness in his own behalf. The Court in the *Percy* case based its decision on the fact that the defendant believed in a Supreme Being, though that Supreme Being did not punish perjury, thereby having religious principles necessary to invoke Article 1, Section 4 of our State Constitution which changes the common law on this subject. The court intimated that if a party, offered as a witness in his own behalf, were atheistic and believed in no God, he would be incompetent to testify. But in referring to that decision the court in the instant case said: "In declaring an end to the requirement that a party, to become competent as a witness, must believe in a God who could and would inflict punishment for false swearing, the decision wiped out the *sine qua non* of the common law on that subject and even a person who denied the existence of a Supreme Being, might be said to have religious principles in such fashion as to bring him within the protection of our State Constitution." The

common law rigidly excluding testimony of atheists and disbelievers in a divine punishment for perjury has been generally modified and relaxed. An understanding of the legal punishment following the violation of an oath to testify to the truth has in most jurisdictions been sufficient to qualify a party as a competent witness, whether he is a party to the suit or not. *Hunter* v. *State,* 137 Miss. 276, 102 So. 282; *State* v. *Reidell,* 96 Atl. 531; *Thomas* v. *State,* 73 Fla. 115, 74 So. 1; *Rocco* v. *Loziocco,* 134 Atl. 73. It seems unfortunate that the New Jersey Supreme Court declined to follow the decided trend away from the strict rules of the common law with respect to the competency of atheists as witnesses.