# INDEX

## Bill of Complaint.

(Filed June 13, 1930.)

# In Chancery of New Jersey

To the Honorable EDWIN ROBERT WALKER, Chancellor of the State of New Jersey.

The complainant, Abraham H. Gottlieb, of the City of Jersey City, County of Hudson and State of New Jersey, respectfully shows:

1. The defendant corporation, West Ridgelawn Cemetery is a cemetery corporation of the State of New Jersey.

2. On October 26, 1929, Shelley R. Safir recovered a judgment in the New Jersey Supreme Court, Passaic County, against said defendant corporation, in the sum of Four thousand and fifty-three dollars and sixty-seven cents ($4,053.67), and Sixty-seven dollars and seventy-six cents ($67.76), costs of suit.

3. On the 1st day of May, 1930, the said Shelley R. Safir assigned and transferred the said judgment to complainant.

4. Defendant West Ridgelawn Cemetery has not paid any part of said judgment and said judgment still remains in full force and effect, and wholly unsatisfied and there remains due thereon the sum of Four thousand and fifty-three dollars and sixty-seven cents ($4,053.67), and Sixty-seven dollars and seventy-six cents ($67.76) costs.

5. Complainant cannot proceed to satisfy his judgment at law by reason of the fact that the defendant is a cemetery corporation and as such

execution at law cannot issue against it by virtue of the Cemetery Act, Section 8.

Complainant is without adequate remedy in the Courts of Law, and therefore prays:

1. That the West Ridgelawn Cemetery which is the defendant in this suit may answer this bill of complaint, and each statement made therein.

2. That the said defendant corporation, its servants and agents, set forth and discover the goods and chattels, rights and credits, moneys and effects and real estate of every kind and description, belonging to the said corporation, and that the complainant may be paid what is justly due him.

3. That a writ of injunction issue, enjoining the defendant, its servants and agents, officers, directors, stockholders and creditors from receiving any debts due to them, and from paying and transferring any of its moneys and effects.

4. That a receiver may be appointed according to the form and statute in such cases made and provided.

5. That a writ of subpoena issue out of this Court commanding the West Ridgelawn Cemetery to answer this bill of complaint, and to abide by such decree as this Court may make in the premises.

6. That the complainant may have such other further relief, as may be just.

And your complainant will ever pray, &c.

LEVITAN & LEVITAN,
Solicitors of Complainant.

ABRAHAM LEVITAN,
Of Counsel.

State of New Jersey, }
County of Hudson, } ss.:

ABRAHAM H. GOTTLIEB, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the petitioner in the foregoing petition named. I am familiar with the contents thereof, and the matters and things therein set forth are true.

2. That on the 26th day of October, 1929, Shelley R. Safir did recover a judgment in the New Jersey Supreme Court, Passaic County, against the said defendant corporation in the sum of Four thousand and fifty-three dollars and sixty-seven cents ($4,053.67), and Sixty-seven dollars and seventy-six cents ($67.76), costs of suit.

3. That on the 1st day of May, 1930, the said Shelley R. Safir assigned and transferred said judgment to myself.

4. Defendant West Ridgelawn Cemetery has not paid any part of said judgment and said judgment still remains in full force and effect, and wholly unsatisfied and there remains due thereon the sum of Four thousand and fifty-three dollars and sixty-seven cents ($4,053.67), and Sixty-seven dollars and seventy-six cents ($67.76) costs.

ABRAHAM H. GOTTLIEB.

Sworn and subscribed to before me this 13 day of June, 1930. }

MILTON LEIBOWITZ,
Atty. at Law of New Jersey.

## Order to Show Cause.

(Filed June 13, 1930.)

IN CHANCERY OF NEW JERSEY.

ABRAHAM H. GOTTLIEB,
*Complainant,*

and

WEST RIDGELAWN CEMETERY, a corporation of New Jersey,
*Defendant.*

On Bill, &c.

This matter being opened to the Court by Levitan & Levitan, Solicitors for complainant, Abraham Levitan of counsel, and upon reading and filing the verified bill of complaint herein.

It is thereupon, on this 13th day of June, 1930, ORDERED that the West Ridgelawn Cemetery, a corporation, show cause before the Chancellor on the 24th day of June, 1930, at ten o'clock in the forenoon, or as soon thereafter as the matter can be heard at the Chancery Chambers, 1060 Broad Street, Newark, N. J.

1. Why an injunction should not issue, pursuant to the prayer of said bill.

2. Why a receiver should not be appointed to take charge of all the property of the West Ridgelawn Cemetery, a corporation of this State, including all books, papers, accounts, etc., of the said defendant corporation, pursuant to the statute, in such cases made and provided.

3. Why the said receiver should not sell under the direction of this Court, so much of the cemetery real property which is not used for actual burial purposes, to satisfy complainant's judgment.

*Order to Show Cause.*

4. Why the said defendant West Ridgelawn Cemetery, a corporation, its officers, servants and agents, should not desist and refrain from contracting any debt or debts, and also from collecting and receiving any money owing to said defendant corporation, and from paying out any money or selling, assigning or transferring any of its property, real or personal, not actually used for burial purposes.

And it is further ORDERED that a copy of this order, together with a copy of said verified bill of complaint, certified as a true copy by the solicitors for the complainant, be served within five days from the date hereof, on Abraham M. Herman, Esq., attorney of record in the Supreme Court, wherein the complainant's judgment was obtained.

Respectfully Advised,

JOHN J. FALLON,
V. C.

## Order Denying Application.

(Filed June 24, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

ABRAHAM H. GOTTLIEB,
*Complainant,*

and

WEST RIDGELAWN CEMETERY,
*Defendant.*

} On Bill, &c.

This matter coming on to be heard on the return day of an order to show cause why a receiver should not be appointed, in the presence of Levitan & Levitan, solicitors of the complainant and Abraham M. Herman, solicitor of the defendant; and the court having considered the affidavits filed in this cause and the arguments of counsel, it is, on this 24th day of June, 1930,

ORDERED that the said application for the appointment of a receiver is hereby denied and that costs be taxed against the complainant, together with a counsel fee of $75.00, for which execution may issue in accordance with the practice of this court.

E. R. WALKER,
C.

Respectfully Advised,

MAJA LEON BERRY,
V. C.

## Answer.

(Filed September 17, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

ABRAHAM H. GOTTLIEB,
*Complainant,*

and

WEST RIDGELAWN CEMETERY, a corporation of New Jersey,
*Defendant.*

} On Bill, &c.

This defendant, West Ridgelawn Cemetery, a corporation of New Jersey, answering the bill of complaint, says that:

1. It admits the allegation contained in paragraph 1 of the bill of complaint.

2. It admits that Shelley R. Safir recovered a judgment against it, but has insufficient knowledge to form a belief as to the date and the amount of said judgment, and refers to the record thereof for the better proof of the allegation contained in paragraph 2 of the bill of complaint.

3. It has no knowledge or information sufficient to form a belief as to the statements contained in paragraphs 3, 4 and 5 of the bill of complaint.

This defendant by way of answer in lieu of plea, says that:

1. The said complainant, or his assignor, is now the title holder of certain lots on lands owned by the defendant cemetery corporation.

*Answer.*

2. The judgment recovered by him in the law courts was based upon an alleged contract which the plaintiff therein contended entitled him to the return of the purchase money of the aforesaid lots upon his delivery of a deed to said lots.

3. To date the complainant's assignor has failed to deliver title to the lots to the defendant herein, and he now retains title to the said lots and his assignee in this action is attempting to enforce collecion of the judgment nevertheless, contrary to equity and justice.

4. The said judgment in the law courts upon which claim the complainant herein bases his application for a receiver, was recovered less than one year ago and the defendant intends to appeal therefrom.

5. Defendant has assets that has been appraised at over One Million Dollars ($1,000,000) in cemetery lands and a receivership would work irreparable injury and harm to the lot owners thereof.

ABRAHAM M. HERMAN,
Solicitor for and of Counsel
with Defendant.

## Notice to Strike Out Answer.

(Filed October 21, 1930.)

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| ABRAHAM H. GOTTLIEB, *Complainant,* and WEST RIDGELAWN CEMETERY, *Defendant.* | On Bill, etc. 79-371. Notice to Strike Out Answer. |

To: ABRAHAM M. HERMAN, Solicitor for West Ridgelawn Cemetery, Defendant.

SIR:

PLEASE TAKE NOTICE that on the 21st day of October, 1930, at the Chancery Chambers at #1060 Broad Street, in the City of Newark, County of Essex and State of New Jersey, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, we shall apply to the Chancellor for an order to strike out the answer filed by you in the above entitled cause for the following reasons:

1. The said answer discloses no defense or defenses to the bill of complaint.

2. That the answer is sham and frivolous.

3. That the said answer has been filed for the purpose of delay.

Take further notice that at the same time and place, we shall apply to the Chancellor for the appointment of a receiver, according to the prayers of the bill of complaint filed herein, and

*Affidavit.*

Take further notice that at the time of the hearing, we shall read the annexed affidavit.

Dated October 14, 1930.

LEVITAN & LEVITAN,
Solicitors for Complainant.

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## Affidavit.

IN CHANCERY OF NEW JERSEY.

ABRAHAM H. GOTTLIEB,
*Complainant,*

and

WEST RIDGELAWN CEMETERY,
*Defendant.*

On Bill, etc.
79-371.

State of New Jersey, }
County of Hudson, } ss.:

ABRAHAM H. GOTTLIEB of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am the complainant in the above entitled cause.

2. That on the 26th day of October, 1929, Shelley R. Safir recovered a judgment in the New Jersey Supreme Court, Passaic County, against said defendant corporation, in the sum of Four thousand, fifty-three dollars and sixty-seven ($4,053.67) cents and Sixty-seven dollars and seventy-six ($67.76) cents costs of suit.

3. That on the first day of May, 1930, said

*Affidavit.*

Shelley R. Safir assigned and transferred the said judgment to complainant.

4. That the defendant West Ridgelawn Cemetery has not paid any part of said judgment, and said judgment still remains in full force and effect and wholly unsatisfied, and there remains due thereof the sum of $4,053.67 and $67.76 costs of suit.

5. There are no legal or equitable defenses to said judgment and that the whole amount is lawfully due and owing, and your deponent prays for the appointment of a receiver according to the prayers of the bill of complaint filed herein.

ABRAHAM H. GOTTLIEB.

Sworn and subscribed to before me this 16th day of October, 1930.

BERNARD PEARLMAN,
Atty. at Law of New Jersey.

## Order Striking Out Answer.

(Filed October 27, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

ABRAHAM H. GOTTLIEB,
*Complainant,*

and

WEST RIDGELAWN CEMETERY, a corporation of New Jersey,
*Defendant.*

On Bill, etc.
79-371.

This matter being opened to the Court by Levitan & Levitan, solicitors for the complainant in the presence of Abraham M. Herman, solicitor for the defendant, and the Court having read the pleadings herein, and heard the arguments of respective counsel, and having considered the same, and being of the opinion that the answer of the defendant filed herein, discloses no legal or equitable defense, and should be stricken out,

And it appearing that due notice of the said complainant's motion to strike out the answer for the cause aforesaid has been given to the said defendant,

It is thereupon on this 23rd day of October, 1930, ORDERED, ADJUDGED AND DECREED that the defendant's answer be and the same is hereby stricken out,

And it is further Ordered that the said defendant pay to the complainant a counsel fee of $25, and the costs of this motion to be taxed, and that

the complainant have execution therefor in accordance with the practice of this Court.

Respectfully advised,

JOHN H. BACKES,
V. C.

Certified to be a true copy.

LEVITAN & LEVITAN,
Solicitors for Complainant.

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## Decree *Pro Confesso.*

(Filed October 27, 1930.)

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| ABRAHAM H. GOTTLIEB, *Complainant,* and WEST RIDGELAWN CEMETERY, a corporation of New Jersey, *Defendant.* | On Bill, etc. 79-371. |

This matter being opened to the Court by Levitan & Levitan, solicitors of the complainant, and it appearing that process of subpoena calling upon the defendant to answer the complainant's bill of complaint has been duly issued and returned served upon the defendant West Ridgelawn Cemetery, a cemetery corporation, and that the said defendant West Ridgelawn Cemetery has filed an answer to the said bill of complaint within the time required by law, which answer has been stricken out by order of this court on the 23rd

day of October, 1930, and the Chancellor being of the opinion that the said complainant should substantiate and prove the allegations of his said bill of complaint.

It is thereupon, on this 27th day of October, 1930, on motion of Levitan & Levitan, solicitors of the complainant, ORDERED that the said complainant's bill of complaint be and the same is hereby taken as confessed against the defendant West Ridgelawn Cemetery, a cemetery corporation of this State.

And it is further ORDERED that the said complainant proceed to take depositions and other evidence to substantiate and prove the allegations of his said bill, and to bring on the hearing of the cause *ex parte.*

E. R. WALKER,
C.

Respectfully advised,

MALCOLM G. BUCHANAN,
V. C.

## Affidavit.

(Filed October 27, 1930.)

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| ABRAHAM H. GOTTLIEB, *Complainant,* and WEST RIDGELAWN CEMETERY, a corporation of New Jersey, *Defendant.* | On Bill, etc. 79-371. |

State of New Jersey, County of Hudson, } ss.:

ABRAHAM H. GOTTLIEB, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am the complainant in the above entitled cause.

2. I am the holder of the judgment mentioned in the bill of complaint, a certified copy of which judgment I annex hereto.

3. There is now due me under said judgment the full amount thereof, together with interest and costs to date, amounting to $4,368.71.

4. No part of said judgment or costs has been paid and the full amount amounting to $4,368.71 is due and owing.

ABRAHAM H. GOTTLIEB.

Sworn and subscribed to before me this 24th day of October, 1930.

DAVID B. FINKELSTEIN,
Attorney at Law of N. J.

## Final Decree.

(Filed October 27, 1930.)

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| ABRAHAM H. GOTTLIEB, *Complainant,* and WEST RIDGELAWN CEMETERY, a corporation of New Jersey, *Defendant.* | On Bill, etc. 79-371. |

This matter coming on to be heard in the presence of Levitan & Levitan, solicitors for the complainant, Abraham Levitan of counsel, and it appearing that the complainant's bill has heretofore been taken as confessed against the defendant West Ridgelawn Cemetery, whereupon upon reading and filing the affidavit of Abraham H. Gottlieb, the complainant, herein, from all of which it appears that there is due to the complainant on a judgment secured in the New Jersey Supreme Court at the Passaic Circuit, including interest and costs, amounting to the sum of $4,368.71,

And it further appearing that the bill of complaint in this cause alleges that complainant cannot proceed to satisfy his judgment at law, by reason of the fact that defendant is a cemetery corporation and as such, its lands are exempt from seizure on execution, by reason of Section 8 of the Cemetery Act, Volume 1, Compiled Statutes, page 375.

And it further appearing that the bill of complaint in this cause specifically prays that a receiver may be appointed according to the form of the statute in such case made and provided, in accordance with Section 16 of the Cemetery Act,

Volume 1, Compiled Statutes, page 377, wherein the statute provides for the appointment of a receiver of the rents, issues, profits, income and revenues derived from any cemetery land,

And it further appearing that notice of such relief as is sought by said bill of complaint, has been given to said defendant, according to law and the rules and practice of this Court, and no cause being shown or appearing to the contrary,

It is thereupon, on this 27th day of October, 1930, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor doth by virtue of the power and authority of this Court hereby ORDER, ADJUDGE and DECREE, that Dougal Herr, Esq., of the City of Hoboken, County of Hudson and State of New Jersey, be and he is hereby appointed receiver of the said rents, issues, profits, income and revenues, derived from any and all lands belonging to the West Ridgelawn Cemetery, the defendant in this suit, or used by or held in trust for the said West Ridgelawn Cemetery, a corporation, and to manage same with power to sue for, collect and receive the rents, issues, profits, income and revenues derived from the said cemetery lands, and to take and sequester same under and by virtue of the order of this court.

And it is further ORDERED that before entering upon his duties of such receiver, the said Dougal Herr enter into a bond to the Chancellor for the faithful performance of his duties in the sum of ($5,000.00) with sufficient sureties to be approved by any one of the Special Masters of this Court, which said bond shall be filed with the clerk of this Court.

And it is further ORDERED that the said defendant

West Ridgelawn Cemetery, a corporation, its servants, officers, attorneys, employees or agents be and they hereby are restrained and enjoined from collecting or receiving all or any part of the rents, issues, profits or revenue of any kind or description accruing to the benefit of the said cemetery corporation hereafter becoming due.

And it is further ORDERED that the said defendant, West Ridgelawn Cemetery, a corporation, its servants, officers, attorneys, employees or agents, be and they hereby are restrained and enjoined from entering into any contract or sale for any part or all of the cemetery premises aforesaid, or from paying any money or moneys on account of obligations, debts or other encumbrances due by the cemetery corporation to any person or corporation whatsoever, without the leave of this court first had and obtained.

And it further appearing that, a greater part of the said cemetery land owned by the defendant is not actually being used for burial purposes,

It is thereupon further ORDERED that it be referred to the said Dougal Herr as one of the Masters of this Court, to ascertain and report the boundaries of the land which is in use for burial purposes, as well as such land now owned by the defendant West Ridgelawn Cemetery, which is not used for actual burial purposes, and in which no bodies have been interred, and whether the whole or part of said land not used for burial purposes, if any, should be determined to be found, should be sold to satisfy complainant's judgment, and that said Master otherwise assist the receiver in determining the land or other assets lawfully available for the satisfaction of complainant's decree or

judgment, and that said Master make his report with all convenient speed.

And it is further ORDERED that true copies of this decree, certified by the solicitors for the complainant to be true copies, be served on West Ridgelawn Cemetery, by serving a copy upon Abraham M. Herman, solicitor for the cemetery corporation, and Adam Frank, its President, within ten days from date hereof.

E. R. WALKER,
C.

Respectfully advised,

MALCOM G. BUCHANAN,
V. C.

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## Notice of Appeal.

(Filed November 6, 1930.)

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| Between<br>ABRAHAM H. GOTTLIEB,<br>*Complainant,*<br>and<br>WEST RIDGELAWN CEMETERY, a corporation of New Jersey,<br>*Defendant.* | On Bill, etc.<br>79-371. |

The defendant, West Ridgelawn Cemetery, a corporation of the State of New Jersey, appeals from the final decree made by the Chancellor in the above entitled cause on October 27, 1930, on

the advice of Vice Chancellor Malcom G. Buchanan; and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

November 5, 1930.

ABRAHAM M. HERMAN,
Solicitor for and of Counsel
with Defendant.

I conceive there is good cause for appeal in the above entitled cause.

ABRAHAM M. HERMAN,
Of Counsel with Defendant.

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## Petition of Appeal.

(Filed November 24, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

| | |
|---|---|
| ABRAHAM H. GOTTLIEB, *Complainant-Appellee,* *v.* WEST RIDGELAWN CEMETERY, a corporation of New Jersey, *Defendant-Appellant.* | On Appeal from the Court of Chancery. |

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of West Ridgelawn Cemetery, the appellant in the above entitled cause respectfully shows that:

*Petition of Appeal.*

1. Petitioner finds itself aggrieved by an interlocutory order made in the Court of Chancery by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 23rd day of October, 1930, on the advice of Vice Chancellor John H. Backes, in a certain cause in said Court of Chancery wherein the said Abraham H. Gottlieb was complainant and the West Ridgelawn Cemetery was defendant in this respect to wit: that the said order adjudges that the answer filed by defendant in the above stated matter be stricken out,

And petitioner appeals from said order of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that:

1st. The answer discloses an equitable defense, and should not have been stricken out.

2nd. The answer discloses a legal defense.

3rd. The answer raised questions of fact, which could only be determined on final hearing.

4th. The answer discloses sufficient facts upon which the Chancellor, in the proper exercise of his discretion, should not have granted the relief prayed for by the complainant.

5th. The statutory time for filing a replication to the answer of the defendant having expired (within ten days after the expiration of the time limited for filing the answer) the complainant was not entitled to be heard on his motion to strike out the answer.

And the petitioner finds itself aggrieved by a decree *pro confesso* made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, dated October

27, 1930, and a final decree, dated October 27, 1930, advised by Vice Chancellor Malcolm G. Buchanan, at Trenton, New Jersey, in the aforementioned causes, in this respect to wit: that the said decree adjudges that:

1. Dougal Herr, Esq. be appointed receiver of the rents, profits and income of the lands belonging to the West Ridgelawn Cemetery, with power to sue and sequester same.

2. That an injunction issue restraining the West Ridgelawn Cemetery from collecting or receiving all or any part of the rents, issues, profits and revenues of any kind and description accruing to the benefit of said cemetery.

3. That West Ridgelawn Cemetery, a corporation, its servants, officers, attorneys, employees or agents, be and they hereby are restrained and enjoined from entering into any contract of sale for any part or all of the cemetery premises aforesaid, or from paying any money or moneys on account of obligations, debts or other encumbrances due by cemetery corporation to any person or corporation whatsoever without leave of this court first had and obtained.

4. That it be referred to the said Dougal Herr, as one of the Masters of this Court, to ascertain and report the boundaries of the land which is in use for burial purposes, as well as such land now owned by the defendant West Ridgelawn Cemetery, which is not used for actual burial purposes, and in which no bodies have been interred, and whether the whole or part of said land not used for burial purposes, if any, should not be determined to be found, should be sold to satisfy complainant's judgment, and that said Master

otherwise assist the receiver in determining the land or other assets lawfully available for the satisfaction of the complainant's decree or judgment, and that said Master make his report with all convenient speed.

And petitioner appeals from the said decree *pro confesso* and from the final decree, which decrees as aforesaid, upon the ground that the same is erroneous in that:

1. The learned Vice Chancellor, Malcolm G. Buchanan, under the Chancery rules, was without jurisdiction to hear the application for a decree *pro confesso* and for a final decree. (rule 130-5)

2. The situs of the property for which a receiver was appointed, being in Passaic County application for a decree *pro confesso* should have properly been made to a member of the court who regularly sits at Chambers in or near the locality in which the cause of action arises. (rule 130-5a.)

3. The motion to strike the answer was heard before the learned Vice Chancellor John H. Backes, at Newark, application for the decree *pro confesso* and final decree was before Vice Chancellor Malcolm G. Buchanan, without a special reference, and without notice to the defendant, contrary to the rules and practice of the Court of Chancery.

4. Final decree is erroneous in that it grants relief to complainant not allowed by statute under which complainant filed his bill.

5. Final decree is erroneous in that it extends relief to complainant not prayed for in the complaint filed in said cause.

6. Final decree erroneously restrains defendant, a cemetery corporation, from selling or entering into contract for sale, or any other contract whatsoever, contrary to the statutes.

7. Final decree erroneously refers to a master designated in said decree the question whether certain cemetery lands are actually used for burial purposes. Such reference is improper and illegal in that lands dedicated to cemetery purposes are exempt from levy or sale under execution, decree or otherwise.

8. Final decree is improper in that it designates one, Dougal Herr, Esq., as receiver, and appoints the same Dougal Herr, Esq. as Master and directs the Master to advise and assist the receiver in the performance of his duties.

9. Final decree is erroneous in that the purpose of the receivership is not fully set forth, in that it does not provide for the termination thereof, upon the payment of the judgment set forth in the Bill of Complaint, or the deposit of sufficient security to pay said judgment in the event the appeal from said Circuit Court judgment now before this Court, be not successful.

ABRAHAM M. HERMAN,
Solicitor for and of Counsel
with Appellant.

## Answer to Petition of Appeal.

(Filed December 6, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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|---|---|
| ABRAHAM H. GOTTLIEB, *Complainant-Respondent,* *v.* WEST RIDGELAWN CEMETERY, a corporation of New Jersey, *Defendant-Appellant.* | On Appeal from the Court of Chancery. |

The answer of Abraham H. Gottlieb, the above named respondent to the petition of appeal of West Ridgelawn Cemetery, the above named appellant.

This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was on the 27th day of October, 1930, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed with costs to be taxed in favor of this respondent.

LEVITAN & LEVITAN,
Solicitors for and of Counsel
with Respondent.

December 4, 1930.

# New Jersey Court of Errors and Appeals

Between

ABRAHAM H. GOTTLIEB,
*Complainant-Respondent,*

and

WEST RIDGELAWN CEMETERY, a corporation of New Jersey,
*Defendant-Appellant.*

## BRIEF FOR DEFENDANT-APPELLANT.

### Facts.

The complainant-respondent is the alleged assignee of one, Shelley R. Safir, who obtained a judgment in the New Jersey Supreme Court, Passaic Circuit, against the defendant-appellant corporation, in the amount of $4,053.67 and costs. Defendant-appellant corporation is a cemetery association, organized under the State of New Jersey (Revision of 1877). Complainant-respondent filed a bill of complaint (see p. 1, State of Case) alleging that the defendant-appellant has not paid any part of said judgment and said judgment still remains in full force and effect; and further alleging that he (complainant-respondent) cannot proceed to satisfy his judgment at law, by reason of the fact that defendant is a cemetery corporation, and as such execution at law could not issue against it, by virtue of the Cemetery Act, Section 8, and further alleging that complainant is without

adequate remedy in the Courts of Law, and therefore prays:

1. That the West Ridgelawn Cemetery which is the defendant in this suit may answer this bill of complaint and each statement made therein.

2. That the said defendant corporation, its servants and agents, set forth and discover the goods and chattels, rights and credits, moneys and effects and real estate of every kind and description, belonging to the said corporation, and that the complainant may be paid what is justly due him.

3. That a writ of injunction issue, enjoining the defendant, its servants and agents, officers, directors, stockholders and creditors from receiving any debts due to them, and from paying and transferring any of its moneys and effects.

4. That a receiver may be appointed according to the form and statute in such cases made and provided.

5. That a writ of subpoena issue out of this Court commanding the West Ridgelawn Cemetery to answer this bill of complaint, and to abide by such decree as this Court may make in the premises.

6. That the complainant may have such other further relief, as may be just.

And your complainant will ever pray, &c.

This bill is verified by complainant by a short affidavit stating that he is the assignee of the judgment and that the same remains unpaid.

Upon the filing of such bill, Vice-Chancellor FALLON advised an order to show cause why an injunction as prayed for should not issue, pursuant to the prayer of the bill, why a receiver should not be appointed, etc. (see State of Case, p. 4).

On the return day the Chancellor, respectfully advised by Vice-Chancellor BERRY, signed an order denying the application, on affidavits of defendant, substantially in effect to the answer filed.

The answer filed by defendant-appellant admits the judgment, setting up that it had no knowledge or information sufficient to form a belief as to statements contained in paragraphs 3, 4 and 5 of bill of complaint; that the complainant or his assignor is now title holder of certain lots on land owned by defendant cemetery corporation, belonging to defendant, and that the judgment recovered by the complainant in the law courts was based upon an alleged contract which the plaintiff therein contended entitled him to the return of the purchase money of the aforesaid lots upon his delivery of a deed to said lots; and that to date the complainant's assignor has failed to deliver title to the lots to the defendant herein and he now retains title to the said lots and the assignee is attempting to enforce collection of the judgment nevertheless, contrary to equity and justice. The answer further states that the judgment in the law courts was obtained less than a year ago and that the defendant intended to appeal therefrom and, as a matter of fact, the appeal is now pending before this Court. Defendant further alleges in this answer that it has assets of over One Million Dollars ($1,000,000) in cemetery lands and that a receivership would work irreparable injury and harm to the lot owners thereof.

Upon the filing of the answer and about seven days after the expiration of the statutory time limited for filing a replication, the defendant was served with notice to strike the answer, upon the ground that the answer disclosed no defense or defenses to the bill of complaint and, secondly, that the answer is sham and frivolous, and, thirdly,

that the said answer was filed for the purpose of delay. This motion was supported by an affidavit substantially the same as the affidavit supporting the original bill of complaint, to wit:—That the judgment remains unpaid.

Upon the return day of the motion before Vice-Chancellor BACKES, the Vice-Chancellor reserved decision and subsequently filed a memorandum: "This answer discloses no legal or equitable defense and will be stricken out." The above opinion was in the form of a memorandum with instructions to send a copy to the opponent. No copy of the Vice-Chancellor's memorandum or of the order striking out the answer, or any notice thereof was sent to the defendant. On the contrary, the complainant immediately entered an order, without notice to the defendant, striking out the answer and subsequently a decree *pro confesso* was signed by the Chancellor, advised by Vice-Chancellor BUCHANAN, and the final decree (as set forth in State of Case, p. 16), at the same time and place, was signed by the Chancellor, advised by Vice-Chancellor BUCHANAN.

## LAW.

Defendant-appellant, West Ridgelawn Cemetery, appeals:

That the order of the Chancellor, advised by Vice-Chancellor JOHN H. BACKES, striking out the answer filed by the defendant is erroneous, in that:

## POINT I.

### The answer discloses an equitable defense and should not have been stricken out.

Relief sought by respondent is collection through the aid of the Court of Chancery of New Jersey of a judgment recovered at law against appellant, a

cemetery association, under Section 16 of Cemetery Act, Compiled Statutes, page 377:

> "That the rents, issues, profits, income and revenues, derived from any and all lands lying within the bounds of any cemetery or burying-ground belonging to, or used by, or held in trust for, any incorporated cemetery company in this state, may be taken and sequestered under and by virtue of the orders and decrees of the Court of Chancery of this state, according to the rules and practice of that court, and applied by said court of chancery to the payment of any judgment recovered in any of the courts of this state against such cemetery company owning or using said lands; and that for that purpose the said court of chancery may, *if necessary,* appoint a receiver or receivers of the said rents, issues, profits, income and revenues (and take such order regarding the same as may be just and equitable), but nothing in this act contained shall make the said lands liable to be seized, taken or sold, by virtue of any judgment, decree, order, execution or other process made or rendered by, or issued out of, any court in this state."

Section 8 of Cemetery Act specifically provides that cemetery lands and property shall not be liable to be sold on execution, etc.

Section 9 of Cemetery Act provides:

> "That all lands lying within the bounds of any cemetery or burying-ground, belonging to or used by any religious society in this state, shall be reserved, for the use of the owners thereof, against all causes in action heretofore or hereafter arising, *excepting upon mortgage thereof, and shall not be liable to be seized, taken or sold by virtue of any judgment,* decree, order, execution or other process made or rendered by or issued out of any court in this state; provided, that all liens existing upon land, before the same is converted into

> burying-grounds, shall be exempt from the operation of this act."

It must be clearly apparent that the intent of legislature is to protect land of cemetery from seizure as suggested in *Rosedale Cemetery Association* v. *Linden Township,* 73 N. J. L. 421—63 Atl. Rep. 904—The purpose of this legislation is the protection and preservation of the places where the dead are buried.

> "It is in accordance with the common wish of mankind that the place where the dead are buried should be protected and preserved against the interference of possible sales for unpaid taxes or under execution of debts, and be kept free from molestation."

It is significant to note that Section 16 does not make an appointment of receiver mandatory, but, on the contrary, makes it entirely discretionary with the Court of Chancery—"and for that purpose the said Court of Chancery, *may,* IF NECESSARY, appoint a receiver, etc."

Has the complainant-respondent in the bill of complaint, or in the affidavits annexed thereto, shown any *such necessity?*

The motion to strike is in nature of a demurrer, admitting for the purpose of the motion as true all material allegations set forth in the answer.

The defense alleges that the judgment in the law court is appealed from. This defense in itself, with no allegation or proof wherein the complainant would be damaged by failure to grant the relief prayed for, should be sufficient for the Chancellor to hold the bill, until the determination of the appeal of the Supreme Court decision, either by affirmance or dismissal if not prosecuted. It must be manifest that upon reversal of Supreme Court judgment, the bill in chancery would necessarily fall.

The answer alleged (and this is not denied either in affidavit or pleading) that the complainant or his assignor held certain land belonging to defendant-appellant and that the judgment by the complainant in the law court was based upon an alleged contract which plaintiff (in law court) contended entitled him to return of purchase money, upon his delivery of a deed of said lots and that complainant has failed to deliver title to said lots, contrary to equity and justice. If this is so, is that not a good defense in a court of equity? "He who seeks equity must do equity."

Defendant further alleges, and this is not denied, that it has assets of over One Million Dollars.

It is not shown or alleged that complainant would suffer an irreparable damage if the relief prayed for were not granted; on the contrary, it is admitted that defendant has sufficient assets to pay judgment if appeal in law court action is not successful.

Answer then alleges that a receivership would work irreparable injury and damage to the defendant and lot owners.

It is manifest that these facts raise an issue that could not be decided until final hearing. One must come irresistibly to the conclusion that the learned Vice-Chancellor must have felt that Section 16 made it *mandatory* upon him to advise a decree.

See *Aldrich, et al.* v. *Union Bag & Paper Co.*, 81 N. J. E. 244.

> "A preliminary injunction and the appointment of a receiver *pendente lite* should not be awarded except upon necessity where the injury to be prevented pending final hearing will be irreparable."
>
> "It has been decided again and again that a preliminary injunction should not be awarded unless from the pressure of urgent necessity

and unless also the injury to be prevented *pendente lite* will be irreparable. This court was recently admonished by the Court of Errors and Appeals in McMillan *v.* Kuehnle, 78 N. J. Eq. (8 Buch.) 251, 78 Atl. 185, not to award preliminary injunctions except to prevent irreparable injury. This cause, in its present posture, does not call for extraordinary relief. For the same reason that a preliminary injunction will not issue in this case a receiver *pendente lite* ought not be appointed."

"Another thing: To grant a preliminary injunction and appoint a receiver *pendente lite* in this cause would practically amount to giving the complainants the full measure of relief to which they may be entitled on final hearing, and, as I understand it, courts do not grant such relief. See *Nat. Docks Ry. Co.* v. *Penna. R. R. Co.*, 54 N. J. Eq. (9 Dick.) 10, 33 Atl. 219; *Penna. R. R. Co.* v. *National Docks Ry. Co.*, 53 N. J. Eq. (8 Dick.) 178, 194, 32 Atl. 220."

The powers conferred upon the Court in the granting of injunctions are extraordinary powers and are to be exercised with caution, and only when circumstances of the case and ends of justice require it.

*Rawnsley, et al.* v. *Trenton Mutual Life Ins. Co.*, N. J. Eq. 6, page 347; also *The New Foundland Railway Construction Company* v. *Schack*, 40 N. J. Eq. 222, Court of Errors and Appeals case; also *Hager* v. *Stevens, et al.*, 6 N. J. Eq. 445:

"The complainant is in no more danger now in reference to the title of this property than he has been for years, and no apprehension of danger is alleged as to the responsibility of the person in whom the title is."

In the case at bar, complainant has failed to show nor does he allege that the failure to appoint

a receiver would place him in a position of irreparable damage.

In the case of *Wagoner* v. *Warne,* 14 Atl. Rep., page 215:

> "Where the assets of a company consists of outstanding accounts of a few thousand dollars in all, and the complainant, who has the right to control them, is able to respond to defendant for any money which may be due him, a receiver will not be appointed on application of defendant."

The allegation in the answer clearly indicates that the complainant, should the Supreme Court appeal be unsuccessful, would be able to respond to the complainant for any money which may be due him under the judgment.

In *McMillan, et al.* v. *Kuehnle, et al.,* Court of Errors and Appeals of New Jersey, 78 N. J. Eq. 251:

> "A preliminary injunction ought not to be ordered unless from the pressure of an urgent necessity, and unless the injury or damage to be prevented, during the pendency of the suit, is in an equitable point of view of a character to cause irreparable injury."
>
> See *McCarter* v. *Clavin,* 72 N. J. Eq., page 642.
>
> "The course which I am adopting is justified, in my judgment, by *Flagler* v. *Blunt,* 32 N. J. Eq. 518, in which the learned Chancellor on page 523, speaking of this very question, quoted from *High on Receivers,* 9, 11, as follows:
>
> "The principal ground upon which courts of equity grant their extraordinary aid by the appointment of receivers *pendente lite* are that the person seeking the relief has shown at least a probable interest in the property, and that there is danger of its being lost unless a receiver is allowed."

## POINT II.

### The answer discloses a legal defense.

The answer denies the allegation in bill of complaint which states:

> "Complainant cannot proceed to satisfy his judgment at law by reason of the fact that the defendant is a cemetery corporation and as such execution at law cannot issue against it by virtue of the Cemetery Act, Section 8."

The complainant is acting under the assumption that under said section execution cannot issue against the real estate or personal property of a cemetery association. The complainant does not allege that he made any attempt to collect the money due under the judgment, *nor was execution issued.*

Section 8 of the Cemetery Act states that the cemetery land and property of any association, etc., shall be exempt from all public taxes, rates or assessments, and shall not be liable to be sold on execution, etc.

> *Rosedale Cemetery Assn., et al.* v. *Linden Township,* 73 N. J. L. 421.

The word "property" as used in Section 8 has been defined to refer only to real estate and held that personal property of cemetery association, consisting of horses, hearses, carriages, agricultural implements, tools and other articles used exclusively in and about their cemeteries and for burial in their cemeteries, are subject to taxation, *and therefore subject to sale by execution.*

If this be so, it is a necessary element to sustain the bill of complaint that the said bill allege issuance of execution against the personal property

of the cemetery corporation and the return of the execution unsatisfied by the Sheriff. The Vice-Chancellor erred in advising a decree to strike the answer and should have permitted the issue to a final hearing.

## POINT III.

**The answer raised questions of fact, which could only be determined on final hearing.**

## POINT IV.

**The answer discloses sufficient facts upon which the Chancellor, in the proper exercise of his discretion, should not have granted the relief prayed for by the complainant.**

Both these points can well be considered in the argument on Points I and II.

## POINT V.

**The statutory time for filing a replication to the answer of the defendant having expired (within ten days after the expiration of the time limited for filing the answer) the complainant was not entitled to be heard on his motion to strike out the answer.**

Defendant-appellant objected on return day of motion to strike answer, under Chancery Rule 77.

The defendant appeals from the decree *pro confesso* and from the final decree upon the ground that the same are erroneous in that:

## POINT VI.

(P-1, S. C. p. 23.)

**The learned Vice-Chancellor, Malcolm G. Buchanan, under the Chancery Rules, was without jurisdiction to hear the application for a decree *pro confesso* and for a final decree (Chancery Rule 130-5).**

Of general reference to Vice-Chancellor:

> "Applications in the following cases may be made by any Vice-Chancellor, and such applications are hereby referred to such Vice-Chancellor to hear and advise orders and decrees therein without special order of reference."
>
> "5. Applications in any cause or proceedings for orders or decrees, *excepting decrees pro confesso and final decrees,* and excepting orders of reference to a Vice-Chancellor or to an Advisory Master, or to a special master in divorce proceedings."

## POINT VII.

(P-3, S. C. p. 23.)

**The motion to strike the answer was heard before the learned Vice-Chancellor John J. Backes, at Newark. Application for the decree *pro confesso* and final decree was before Vice-Chancellor Malcolm G. Buchanan, without a special reference, and without notice to the defendant, contrary to the rules and practice of the Court of Chancery.**

The above point may well be argued together with Point VI.

## POINT VIII.

**Final decree is erroneous in that it grants relief to complainant not allowed by statute under which complainant filed his bill.**

Section 16 of the Cemetery Act upon which the final decree apparently rests provides, first, that the rents, issues, profits, income or revenues derived from any and all lands lying within the bounds of any cemetery or burying ground may be taken and sequestered under and by virtue of the decree of the Court of Chancery according to the rules and practice of that court and applied by said Court of Chancery to the payment of any judgment recovered in any courts in this State, etc., and may, if necessary, appoint a receiver of the said rents, issues, income and revenues.

The final decree first appoints a receiver of the rents, issues, income and revenues derived from any and all lands belonging to the West Ridgelawn Cemetery, the defendant in this suit, or used by or held in trust for the said West Ridgelawn Cemetery and *to manage* the same with power to sue for, collect and receive the rents, issues, profits, income and revenues derived from the said cemetery lands, and to take and sequester same under and by virtue of the order of this Court.

The statute is very clear in that the income may be sequestered and that a receiver may be appointed for that purpose. The implication to manage the same with power, etc., gives the receiver a far greater power than was contemplated by the statute (see State of Case, lines 30 to 40, p. 18 of the final decree).

This is wholly without warrant or authority and expressly in conflict with the direct provisions contained in Section 16:

> "but nothing in this act contained shall make the said lands liable to be seized, taken or sold by virtue of any judgment, decree, order, direction or other process made or rendered by or issued out of any court in this state."

It must be obvious that that part of the decree restraining the Board of Trustees of the said cemetery corporation from entering into any contract or sale for any part or all of the cemetery premises, etc. (State of Case, lines 10 to 20, p. 18), is wholly against the statutory provisions, practically taking the control of the cemetery out of the duly elected Board of Trustees and as a practical matter putting the cemetery association entirely out of business, creating a condition that defeats its own purpose, to wit, the payment of the judgment obtained by complainant.

It is obvious if the cemetery cannot sell its lands or is restricted by the decree, and a receivership of the kind complained of granted, making it difficult and almost impossible to sell any lands, that the judgment could not be satisfied.

It was never intended by the statute to take the control or the operation of the cemetery out of the hands of the duly elected trustees. A cemetery is a quasi public corporation, owned and controlled by numerous lot owners and must be in constant and continous operation. Interments must be made on short notice and it is inconceivable that a receiver with power to manage a cemetery would or could operate a cemetery for the best benefit or interest of the cemetery association.

In *Conover* v. *Tansey,* 73 N. J. Eq. 562, the Court refused to appoint a receiver, citing a case decided by *Northinton, Rainer* v. *Stone,* 2 Eden 128, mainly because

> "the inconveniences attending the appointment of a receiver would be very great."

Even if the order striking the answer and the decree *pro confesso* were proper, the complainant has failed in his proof to sustain any reason why a receiver is necessary or should be appointed, and why the restraint in the final decree should be allowed, and the Chancellor erred in the making of the said decree, based upon the affidavit of proof, merely setting forth that the complainant was the holder of the judgment and that no part of the judgment had been paid.

A careful examination of the Cemetery Act, particularly Section 16, indicates unquestionably an intent to protect the cemetery lands from unnecessary seizure under execution or otherwise. One must draw the necessary conclusion that the learned Vice-Chancellor who advised the final decree fell in the same error that the learned Vice-Chancellor who advised the decree striking out the answer, to wit., that an order of sequestration was mandatory and that a receiver must, of necessity, be appointed. This is contrary to the entire spirit and intent of Section 16, which uses the expression:

> "*may be taken* and sequestered under and by virtue of the orders and decrees of the Court of Chancery according to the rules and practice of that court and applied by said Court of Chancery to the payment of any judgment recovered in any courts in this state against such cemetery company owning or using said lands; and that for that purpose the said Court of Chancery *may, if necessary,* appoint a receiver or receivers of the said rents, issues, profits, income and revenues, etc."

It is impossible to conceive how the Vice-Chancellor upon the bare affidavit filed in support of the final decree could declare or find any necessity or urgent need for the appointment of a receiver, or for the restraint in the final decree, or for that

part of the decree referring the matter to a master to ascertain and report the boundaries of the land which is in use for burial purposes, etc., and decreeing that the master assist the receiver in determining what lands can lawfully be sold.

To warrant a final decree of such drastic measure it became the duty of the Chancellor in the sound exercise of discretion and in equity and justice to the defendant, and more particularly in accordance with the decree *pro confesso:*

> "and it is further ordered that the said complainant proceed to substantiate and prove the allegations of his said bill and to bring on the hearing of the case *ex parte.*"

to take depositions and proof which would warrant the Court in finding it necessary under the general rules and practice of the Court of Chancery to enter such decree.

There was no testimony nor is it alleged in the bill of complaint that the complainant attempted or made any demand for the payment of the said judgment and there was no evidence of any sort that execution had issued against the personal property of the defendant and that the said execution had been returned unsatisfied.

It must be noted that an individual filing an appeal from a judgment in the law court may stay execution by the filing of a bond without any further order of the Court. That in the case at bar the cemetery corporation which the Legislature and the Courts have by statute endeavored to protect from execution is placed in a most precarious and embarrassing position, not contemplated by the statutes by the appointment of a receiver and an injunction against the continuance of business. The one and only question the complainant is interested in, and the question that the court below should have thoroughly examined before it was

justified in entering the final decree is whether the security for the payment of the law court judgment, in the event that the defendant was unsuccessful in its appeal in the above matter, is in any way impaired.

Even though it was decreed that this matter be heard *ex parte* it was incumbent upon the complainant to show facts and matters that would justify the appointment of a receiver and the order of sequestration.

It is significant that in the final decree (see State of Case, p. 16, lines 30-37) that the Vice-Chancellor was under the erroneous impression that the complainant cannot proceed to satisfy his judgment by reason of the fact that the defendant was a cemetery corporation and as such its lands are exempt from seizure on execution by reason of Section 8 of Cemetery Act, Vol. I, Compiled Statutes, page 375.

While it may be true that the complainant could not issue execution against the lands there is no proof that he could not recover the judgment by an execution against the personal property of the cemetery. It would be creating a dangerous precedent if this decree should be allowed to stand and would nullify the whole effect of the Cemetery Act, particularly Section 16, upon which this complainant relied for his decree. It would establish affirmatively that the filing of a bill merely setting forth an unpaid judgment against a cemetery corporation and nothing else would justify a Court of Chancery in appointing a receiver *pro tanto,* and would obviously negative the necessity of any final hearing and would place cemetery associations in a position of danger, which the statute surely did not intend.

In support of the argument I would respectfully refer back to the cases cited in the argument against the order striking the answer.

## POINT IX.

**Final decree is erroneous in that it extends relief to complainant not prayed for in the complaint filed in said cause.**

## POINT X.

**Final decree erroneously restrains defendant, a cemetery corporation, from selling or entering into contract for sale, or any other contract whatsoever, contrary to the statutes.**

The above points, together with the arguments used in Point IV, may well be argued together.

## POINT XI.

**Final decree erroneously refers to a Master designated in said decree the question whether certain cemetery lands are actually used for burial purposes. Such reference is improper and illegal in that lands dedicated to cemetery purposes are exempt from levy or sale under execution, decree or otherwise.**

The Chancellor entered the decree based on facts which do not appear in the pleadings or in the proofs (see State of Case, p. 18, lines 24-27):

> "and it further appearing that a greater part of the said cemetery land owned by the defendant is not actually being used for burial purposes."

There is no such allegation in the bill of complaint or in the affidavit filed substantiating the bill of complaint or the affidavit filed substantiat-

ing the proof upon which the final decree was entered that would indicate that the lands owned by the cemetery association are not entirely used for burial purposes, or that a greater part of said cemetery land owned by the defendant is not actually being used for burial purposes. Based upon the above stated premise, the court below erroneously decreed (see State of Case, p. 18, line 26), that:

> "It is thereupon further Ordered that it be referred to the said DOUGAL HERR as one of the Masters of this Court, to ascertain and report the boundaries of the land which is in use for burial purposes, as well as such land now owned by the defendant West Ridgelawn Cemetery, which is not used for actual burial purposes, and in which no bodies have been interred, and whether the whole or part of said land not used for burial purposes, if any, should be determined to be found, should be sold to satisfy complainant's judgment, and that said Master otherwise assist the receiver in determining the land or other assets lawfully available for the satisfaction of complainant's decree or judgment, and that said Master make his report with all convenient speed."

Neither the fact nor the law warrants such a decree placing, as it does, the cemetery association to a great deal of expense and embarrassment unnecessarily and arbitrarily, and contrary to law and equity.

*First.*—There is no evidence or proof to sustain the fact alleged.

*Second.*—It is entirely without legal or statutory sanction and directly against the statutory provision:

> "nothing in this act contained shall make the said lands liable to be seized, taken or sold,

by virtue of any judgment, decree, order, execution, or other process made or entered by, or issued out of, any court in this state."

It is manifest that this clear legislative statement, coupled with the statements in Sections 8 and 9, cannot and should not be ignored.

In the case of *Bliss* v. *Linden Cemetery Assn.*, 89 N. J. Eq. 404, and 107 Atl. Rep. 596:

> "Cemetery corporations are in a sense *quasi* public service corporations. They have been so recognized. Of them Wymans, in his work on Public Service Corporations, says:
>
> "The absolute necessity of public cemeteries is obvious. This necessity may be met either by cemeteries owned directly by the government or by chartered corporations. Such corporations are rarely empowered to take private profit from the conduct of the cemetery, but are obliged to devote their receipts to the purposes of the cemetery. Such being the case, the law concerning them is mostly that relating to public charities, which is outside the scope of this treatise. It may be noted, however, that it is common to exempt such cemeteries from taxation, and these exemptions are liberally construed in favor of the cemetery."

*Third.*—Even if the statute permitted such an order there is nothing in the proof that shows any necessity for an order of this kind, or any justification for it.

## POINT XII.

**Final decree is improper in that it designates one Dougal Herr, Esq., as receiver, and appoints the same Dougal Herr, Esq., as Master and directs the Master to advise and assist the receiver in the performance of his duties.**

## POINT XIII.

**Final decree is erroneous in that the purpose of the receivership is not fully set forth, in that it does not provide for the termination thereof, upon the payment of the judgment set forth in the bill of complaint, or the deposit of sufficient security to pay said judgment in the event the appeal from said Circuit Court judgment now before this Court, be not successful.**

The final decree sequestrating the rents, issues, profits, income and revenues derived from the sale of cemetery land and appointing a receiver does not indicate the extent or the purpose of the decree of sequestration, and the appointment of a receiver and as the decree now stands it is an unlimited decree without any provision in it for the satisfaction of the same except by inference, contrary to the statute under which the said decree is justified.

Defendant-appellant respectfully submits that the decree in the above matter be reversed for the reasons stated; that the matter be remanded to the Court below and that the respondent be taxed costs and counsel fee.

Respectfully submitted,

ABRAHAM M. HERMAN,
*Solicitor of Defendant-Appellant.*

ABRAHAM M. HERMAN,
*Of Counsel.*

# New Jersey Court of Errors and Appeals

Between
ABRAHAM H. GOTTLIEB,
Complainant-Respondent,

*and*

WEST RIDGELAWN CEMETERY, a corporation of New Jersey.
Defendant-Appellant.

## BRIEF FOR COMPLAINANT-RESPONDENT.

### Facts.

The facts in this case briefly are as follows: Respondent's assignor obtained a verdict in the

New Jersey Supreme Court for $4,368.71 in an action at law on breach of contract. The case was contested and is now being appealed to this Court. After the judgment was obtained, execution could not issue against the property of the defendant by reason of section 8 of the Cemetery Act, Compiled Statutes, Volume 1, page 375, which exempts from execution the lands and property of any cemetery association. The act, however, gives relief for the satisfaction of a judgment obtained against a cemetery corporation (same act, page 377), section 16, which provides as follows:

> "That the rents, issues, profits, etc. of any cemetery or burial ground, etc., may be taken and sequestered under and by virtue of the

> order and decree by order of Chancery in this State, according to the rules and practice of that court, and applied by said Court of Chancery to the payment of any judgment recovered in any of the courts of this State against such cemetery company, owning or using said lands, and for that purpose the said Court of Chancery may appoint a receiver for said rents, etc."

Not being able to satisfy the judgment, except as provided by Section 16 of the statute, respondent filed a bill in equity, praying for the appointment of a receiver for the rents, issues and profits, and also for the right to sell lands not actually used for burial purposes, in accordance with the practice under section 16, as construed by the Court of Chancery. To this bill of complaint an answer was interposed, and on motion to strike out, Vice Chancellor Backes struck it out, as disclosing no legal or equitable defense. The bill was then taken as confessed and the Chancellor being occupied at the time of the application, in the Court of Errors and Appeals, thereupon orally referred the matter to Vice-Chancellor Buchanan, who after examining the proofs submitted by respondent in substantiation of the allegations of the bill of complaint, advised a decree for the appointment of a receiver and also the Special Master, to determine what part of the lands of appellant cemetery corporation was not actually used for burial purposes. The receiver, who was also the Special Master, proceeded to take possession and function in accordance with the direction of the decree. This is an appeal from the final decree entered by the Chancellor (p. 16, Case).

## POINT I.

**The answer discloses no equitable defense and was properly stricken out.**

Appellant correctly quotes the rule which governs the appointment of a receiver for a cemetery corporation (page 6, Appellant's Brief, lines 16-21) but he seems to depart from this special phase of the law on receiverships for cemeteries (Volume I, Compiled Statutes, page 377) and devotes three pages of his brief to give his construction of the law on temporary and permanent receiverships in general. It is respectfully submitted that the law is different with respect to the appointment of a receiver of any business corporation and the appointment of a receiver for an association incorporated under the Cemetery Act. The procedure in the case *sub judice* is governed entirely by section 16 of the Cemetery Act I, page 377. It is not necessary under this provision that the complainant allege and prove irreparable damage or injury. A judgment recovered at law, alleged by complainant will be sufficient grounds upon which to ask the Court of Chancery to appoint a receiver of the rents, issues, profits, etc., where the judgment cannot be satisfied out of the personal property of the corporation or the sale of lands not used for cemetery purposes. Therefore, once these two prerequisites have been proved to the satisfaction of the Chancellor, he may lawfully enter a decree so that the complainant will not be without the means of satisfying his judgment. It may be well to add here that nowhere has respondent admitted that complainant has sufficient assets to pay the judgment if the appeal from the lower Court is not successful as is stated in appellant's brief (page 7, lines 17-20).

On the contrary, it was this very lack of assets which impelled respondent to ask for the appointment of a receiver and the designation of a master to ascertain exactly what part of the cemetery grounds were not actually used for burial purposes in order that such property might be sold to satisfy the judgment.

Section 8 of the Cemetery Act or the exempting section has been construed in the Court of Chancery in the case of *Spear* vs. *Locust Wood Cemetery Company,* 72 Equity, page 821. On page 824, the learned Vice-Chancellor says as follows:

> "The exempting section (section 8) defines as exempt from taxation and also from sale under execution (the cemetery lands and property) of the association. I think that the only reasonable construction of the language used is that the land intended by the legislature to be exempted from taxation and from sale under execution is the land actually brought into use for cemetery purposes. With no limitation at that time existing upon the quantity of land which a cemetery company could own, the legislative intent to exempt from taxation and from sale all lands which cemetery companies might acquire cannot be reasonably assumed from the language used. The natural significance of the words 'cemetery lands,' as well as the manifest purpose of the legislation, indicates an intention to extend the exemptions only to lands actually used for cemetery purposes. This view of the legislative purpose led the Supreme Court, in Rosedale Cemetery Association *v.* Linden Township, *supra,* to construe the word 'property', as used in this section, as inapplicable to personal property."

The same authority permits the appointment of a Special Master to ascertain which lands of the defendant, Cemetery Corporation, are not actually

used for burial purposes. The opinion of the learned Vice-Chancellor continues:

> "The view here taken renders necessary the ascertainment, by exact boundaries, of the lands which shall not be subject to the decree of sale. For that purpose a master will be appointed whose duty it will be to ascertain and report the boundaries of the land which is in use for burial purposes. Upon the confirmation of that report a decree will be made for the sale of the remainder of the land in satisfaction of the amount due on the mortgage held by complainant."

It was this identical procedure suggested by the learned Vice-Chancellor in the case of *Spear* vs. *Locust Wood Cemetery Company,* that was followed by the complainant in the application for a receiver to sequester the rents, issues and profits, and also for the appointment of a Special Master to determine which property of the defendant corporation was not actually used for burial purposes.

Appellant argues at great length the power of the Court of Chancery to appoint a receiver *pendente lite,* beginning at page 7 of his brief and continuing through page 9. This question never came up in this case and respondent therefore has ignored that phase of appellant's brief. When the answer was stricken out, the appointment of the receiver was permanent, not *pendente lite.*

## POINT II.

**Appellant's answer discloses no legal defense.**

In the answer of the appellant no legal defense can be found which would have been sufficient to present a question for the Chancellor to decide. In Point II of appellant's brief on page 10, a

question is raised that an execution against the personalty of the cemetery corporation should have first been issued and returned unsatisfied by the Sheriff. This is not well taken for two reasons. First, the question was not raised before the lower court on the motion to strike out the answer and is therefore waived on appeal. This is a proposition of law which is so well settled, that it requires no citation of authority that in order to take advantage of a question in the lower courts it must be raised there, otherwise, it is waived. Secondly, the bill in equity filed by the respondent was in the nature of a bill for discovery as limited by the cemetery act and all that appellant was obliged to do in the Court of Chancery was to offer to deposit in the court sufficient money to satisfy the judgment, out of personal property or offer other or additional security to satisfy respondent's claim, if it wished to save itself the sale of its lands not used for burial purposes under execution.

## POINT III.

**The answer did not raise questions of fact which could be determined at a final hearing.**

Some of the facts the answer did set up were sham and untrue. There is no question that a Court, on motion, can strike out any sham or improper pleadings so appearing to the satisfaction of the Court, if that is the case. In the case *sub judice* the appellant had ample opportunity to present to the Vice-Chancellor and substantiate the allegations of his answer by affidavits which he did. The learned Vice-Chancellor, however, considering those affidavits and the answer itself, exercised his discretion, and was satisfied with

complainant-respondent's contention, that the answer was sham and disclosed no defense was correct, and therefore struck it out.

This is apparent from an inspection of the answer. Paragraph 4 of the Bill of Complaint alleges that the defendant (appellant) has not paid any part of the judgment, and it is of full force and effect. Appellant very evasively and knowing the fact to be that the judgment is not paid, pleads in paragraph 3 of its answer, page 7, Case: "It has no knowledge or information sufficient to form a belief." Clearly, this pleading is sham or false, as appellant surely knows whether the judgment is paid or not, and should so plead the fact.

## POINT IV.

**Appellant's argument in Point IV is practically repetition of Point III, and requires no answer.**

## POINT V.

**Appellant's contention that the statutory time for filing a replication to the answer expired, the complainant-respondent was not entitled to strike out the answer.**

Rule 77 of the Chancery Court provides as follows:

> "The replication shall be filed within ten days after the expiration of the time limited for filing the answer, or on failure thereof the bill may be dismissed. Further pleadings, when allowed, shall be filed within ten days each after the other."

This only applies to cases where a replication is necessary or when it is filed. In the case *sub*

*judice* a replication was not necessary, therefore none was filed. There is no rule of Court anywhere limiting the time when application to strike out a pleading may be made. This may be made at any time before the final hearing of the issue. Amendment to the Chancery Act of 1915, Chapter 160, Page 184, provides as follows:

> "Section 4, Sham Defense—Any frivolous or sham defense may be struck out on notice, and a decree *pro confesso* entered, or the defendant may be allowed to defend on terms, or such other order or decree may be made in the premises as may be just."

Respondent was, therefore, within his proper right to make the motion to strike out the answer as sham at any time he saw fit before the final hearing.

## POINT VI.

**Vice-Chancellor Malcolm G. Buchanan had jurisdiction to advise the decree *pro confesso* and also the order appointing the receiver and master.**

As has been argued in Point I, after the answer was struck out by Vice-Chancellor Backes, the case proceeded *ex parte*. Application was then made to the Chancellor for an order appointing a receiver and Special Master, and the Chancellor referred the application to Vice-Chancellor Buchanan, as the Chancellor was then occupied with some important matters in the Court of Appeals. The Chancellor had a perfect right under the rules of the Court of Chancery to refer this matter to Vice-Chancellor Buchanan. Rule 120 of the Chancery Rules, provides:

> "Any cause or other matter may be referred to a Vice Chancellor or Advisory Master, at the discretion of the Chancellor."

The application for the entering of the decree *pro confesso* and the appointment of the receiver was an *ex parte* application before the Chancellor, and required no notice to the appellant. The Chancellor in the proper exercise of his discretion referred the matter to Vice-Chancellor Buchanan, and the latter proceeded to act in accordance with the authority conferred by the Chancellor. There was, therefore, nothing irregular in the procedure and the so-called vicinage rule which appellant tries to invoke here, has no bearing on the case, because it does not apply. This was not a case where a defendant from one part of the state is taken before a Vice-Chancellor in another part of the State, which this rule tries to safeguard. Here was an *ex parte* application made under the customary practice and simply referred by the Chancellor who is in Trenton to Vice-Chancellor Buchanan, who is likewise in Trenton.

## POINT VII.

**Vice-Chancellor Backes under the practice had no authority to advise the decree *pro confesso* or the appointment of a receiver, after he struck out the answer.**

The contention of appellant raised in point 7 of his brief is entirely without merit. The application for the motion to strike out the answer properly came before Vice-Chancellor Backes, under the vicinage rule. After the answer was striken, Vice-Chancellor Backes had nothing further to do with the matter, and referred it to the Advisory Master in Trenton, or to the Chancellor, as an *ex parte* proceeding. Therefore, the proceedings after the answer was stricken, properly were taken before the Chancellor who referred

the matter to Vice-Chancellor Buchanan, as has been argued in Point 6.

## POINT VIII.

**The relief granted respondent in the final decree does not exceed that allowed by statute.**

Appellant's argument under this point has been answered under Point I in respondent's brief. Appellant loses sight of the fact that the provision for the appointment of a receiver is mandatory upon the Court of Chancery where the statutory requirements exist. The statute appoints the receiver or creates him, and, therefore, gives him the powers necessary to function without which his appointment would be an idle ceremony.

## POINT IX.

**The final decree does not extend any further relief other than that prayed for in the bill of complaint.**

Rule 60 of the Chancery Rules, Edition of 1930, provides as follows:

> "Relief other than that prayed for may be given (without a prayer for general relief) to the same extent as if general or other relief had been prayed for."

Besides this rule, the last paragraph of the Bill of Complaint, paragraph 6, page 2, Case, provides:

> "That the complainant may have such further relief as may be just",

answers this contention of the defendant-appellant in Point 9 fully.

## POINT X.

**The final decree does not erroneously restrain defendant, a cemetery corporation, from doing anything which it is lawfully entitled to do.**

The fact that the statute permits the appointment of a receiver of a cemetery corporation, *ipso facto,* implies that the functions of the corporation, as far as the receiver is concerned, will be transferred from the corporation to the receiver. In other words, the corporation continues to function, but instead of doing so through its duly authorized officers, it proceeds to do so through the receiver. In the case *sub judice,* the receiver has the authority to sell, or contract to sell, land for the corporation or do anything that the corporation might do, including the hire of employees, such as grave diggers, for example, just the same as if the corporation itself had done it, through its proper officers and agents, so that there is no curtailment whatsoever in the functioning of the corporation, and the contention of the appellant in Point 10 in his brief is without merit.

## POINT XI.

**The reference to a master in the final decree is lawful and proper, as is fully set forth in this brief, under Point I, *supra.***

The only object in referring the case to a Master was to determine what lands are not actually used for burial purposes, in order that they may be sold to satisfy respondent's judgment, as has been fully set forth by Vice-Chancellor Leaming, in the

case of *Spear* vs. *Locust Cemetery Corporation,* 72 Equity 821-824. The only function of the Master was to determine what, if any, lands were available for sale under execution, and as part of that duty the Master was to determine what, if any, lands were not actually used for burial purposes. There is nothing sacred about a cemetery corporation owning land, to make it exempt from execution. The only time when the land does become exempt from execution and sale, is when it is actually used for burial purposes, as for very obvious reasons it would be against public policy to permit the sale under execution of any part of cemetery lands that have interments, but if the cementery lands, as in the instant case, consist of many acres, some of which have no interments in them whatever, there is no valid reason in law or equity why that part of the cemetery property cannot be sold under execution, to satisfy a valid execution against the corporation. That was the sole function and reason of the appointment of the Master who was appointed in the final decree.

## POINT XII.

**The Chancellor properly appointed the same individual as receiver and master.**

There seems to be no question that if the Chancellor had authority to appoint the receiver, he likewise had authority to appoint a Master to assist the receiver, in determining the nature and extent of land available, for the satisfaction of the judgment. There is no principle of law prohibiting the appointment of the same individual for two offices, providing there is no conflict in their duties. Clearly in the case *sub judice* there was no conflict whatsoever between the Master's duties and those of the receiver. In

fact, there was perfect harmony and co-operation in the respective duties of both offices, and the same individual could properly fill them. The Chancellor was, therefore, acting lawfully in appointing the same individual as both Master and receiver. There are specific cases under the rules of the Court of Chancery, where the same individual is not permitted to act as Master in more than one instance, as for example, Rule 232 of the Chancery Rules, which says, "In cases of partition the Master who may make the report that partition cannot be made without great prejudice, shall in no case be appointed to make sale of the premises."

Thus, here the same individual is expressly prohibited from functioning in both instances.

Otherwise it is assumed that the same individual can act in more than one capacity.

## POINT XIII.

**The final decree fully sets forth the purpose of the receiver.**

Appellant raises the argument in point 13 of his brief that sequestration will go on indefinitely. Surely such a contention cannot be seriously made, as the decree of the Court of Chancery is always subject to modification or amendment on notice, inasmuch as it is a Court of Equity. Besides, in the case *sub judice,* the prayer in the Bill of Complaint only resquests the sequestration by the receiver, and to collect sufficient moneys, rents, issues and profits or other assets to satisfy the decree. This prayer is made in so many words. Case, page 2, end of the prayer in the bill of complaint, "and that the complainant may be paid what is justly due" * * *. It is, therefore, quite

obvious not only from the prayer in the bill of complaint, but from all the pleadings in the case, that all complainant desires is a satisfaction of the decree, or payment of the amount due him. The receiver at all times is subject to the order of the court, by virtue of his office, as receiver, and furthermore by the express language of the decree appointing him (p. 17, Case, l. 29), which provides * * * "and to take and sequester same under and by virtue of the order of this Court."

Thus, just as soon as the receiver has collected sufficient moneys from the rents, issues and profits to satisfy the decree and costs, he files his report and is discharged.

## CONCLUSION.

**It is therefore respectfully submitted that the decree of the Court of Chancery should be affirmed in all respects.**

Respectfully submitted,

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ABRAHAM LEVITAN,
of Counsel.