INDEX.

Notice of Appeal.

(Filed May 12th, 1931.)

In Chancery of New Jersey

83-379.

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Between ATLAS FENCE COMPANY, Complainant-Respondent, *and* WEST RIDGELAWN CEMETERY, Defendant-Appellant, *and* KING SOLOMON CEMETERY, *et als.*, Defendants.	On Bill, &c. Notice of Appeal.

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To Messrs. Fast and Fast, Solicitors of Complainant-Respondent.

Gentlemen:

West Ridgelawn Cemetery, one of the defendants in the above-entitled cause, hereby appeals from the whole of the order made herein on May 5th, 1931, which orders that the motion to vacate or modify the order appointing the receiver and for injunction be dismissed, and that said order appointing the receiver and for injunction, entered herein on March 26th, 1931, be confirmed; and hereby appeals from that portion of the order adding parties and giving leave to file an amended bill of complaint, entered on May 5th, 1931, which orders that the receiver appointed herein upon the original bill and the proofs supporting it be

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continued upon the amended bill; to the Court of Errors and Appeals in the last resort in all causes; the aforesaid orders having been made by the Chancellor on the advice of Vice Chancellor Bigelow.

10 Dated: May 12th, 1931.

Yours, &c.,

DOUGAL HERR,
Solicitor for and of Counsel with
Defendant-Appellant.

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

DOUGAL HERR,
Of Counsel with Defendant-
Appellant.

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Petition of Appeal.

(Filed May 27th, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ATLAS FENCE COMPANY, Complainant-Respondent, *and* WEST RIDGELAWN CEMETERY, Defendant-Appellant, *and* KING SOLOMON CEMETERY, *et als.*, Defendants.	On Appeal from the Court of Chancery. Petition of Appeal.

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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:

Petitioner finds itself aggrieved by two interlocutory orders made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date May 5, 1931, in a certain cause in said Court of Chancery wherein the said Atlas Fence Company is complainant and the said West Ridgelawn Cemetery and others are defendants, in these respects, to wit: that as to the one order, the same orders that the motion to vacate or modify the order appointing the receiver and for injunction be dismissed, and the said order appointing the receiver and for injunction, entered March 26, 1931, he

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confirmed; and that as to the other order, the same orders that the receiver be continued on the amended bill.

And petitioner appeals from the whole of the order confirming the order of March 26, 1931, appointing the receiver and for injunction, and from that part of the order adding parties, &c., which orders that the receiver be continued on the amended bill; upon the ground that the Court of Chancery was without jurisdiction to appoint a receiver and enjoin this appellant in the exercise of its franchises, upon the original bill or upon the amended bill, that the facts before the Court were not such as to justify such an order; and that the subpoena was not issued prior to the return day of the injunctive order to show cause.

Petitioner therefore prays that the said orders of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

DOUGAL HERR,
Solicitor for and of Counsel
with Appellant.

Bill of Complaint.

In Chancery of New Jersey

To His Honor Edwin Robert Walker, Chancellor of the State of New Jersey.

Complainant, Atlas Fence Company, a Corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, a creditor of West Ridgelawn Cemetery, a Corporation of the State of New Jersey, the defendant in this cause, and all other creditors who may come in and contribute to this suit, respectfully shows:

1. West Ridgelawn Cemetery is a corporation organized for Cemetery purposes under "An Act to Authorize the Incorporation of Rural Cemetery Associations and Regulate Cemeteries." (P. L. 1849 p. 9 Revision 1877 p. 100). Certificate of Incorporation was duly filed in the office of the Clerk of the County of Passaic on the 3rd day of October, 1905.

2. The said West Ridgelawn Cemetery conducts its business at 36 West 44th Street, New York City and all of the business of the aforesaid cemetery is carried on at that place. The person in charge of the business of the said Cemetery Association is one Adam Frank.

3. The said West Ridgelawn Cemetery is the owner of extensive lands and premises in the County of Passaic and State of New Jersey. Various parcels of these lands have been sold to divers persons and corporations for burial purposes. The remaining lands are still owned by the said West Ridgelawn Cemetery and are not presently used for burial purposes.

4. On or about the 2nd day of April, 1906, one Herbert G. Groover, then owner of the aforesaid lands and premises now owned by the said West Ridgelawn Cemetery executed a mortgage in the sum of approximately $36,000.00 to one John W. Griggs. Said mortgage was recorded in the office of the Register of the County of Passaic. Thereafter, the said John W. Griggs assigned the aforesaid mortgage to one William Bittles. Subsequently, there having been nothing paid on account of principal or interest upon the aforesaid mortgage, the said William Bittles instituted a suit for the foreclosure of the aforesaid mortgage against the said West Ridgelawn Cemetery. On the 3rd day of July, 1930, a decree in the said foreclosure suit was entered in favor of the complainant William Bittles and against the defendant West Ridgelawn Cemetery in the sum of $39,706.39. By the terms of the aforesaid decree, the Passaic National Bank & Trust Company of Passaic was appointed receiver of the said West Ridgelawn Cemetery for the purpose of sequestering the assets of the said defendant cemetery corporation for the payment of the aforesaid sum due upon the aforesaid decree. By the further terms of the aforesaid decree, the defendant corporation was ordered to set aside a certain sum of money for the up-keep of the aforesaid cemetery.

5. On the 16th day of April, 1927, there was docketed in the Office of the Clerk of the County of Passaic, a judgment entered in behalf of Fred Schultz, Fred Schultz, Jr., Frank Schultz and Louis Schultz, partners trading as F. Schultz & Sons, against the said West Ridgelawn Cemetery, in the sum of $215.90. Said judgment was docketed in Book K of District Court Judgments for said County, page 74.

6. On the 16th day of April, 1927, there was docketed in the Office of the Clerk of the County of Passaic, a judgment entered in behalf of William Jacobs in the sum of $505.55. Said judgment was docketed in Book K of district court judgments for said County, page 75.

7. Thereafter, William Jacobs, judgment creditor aforesaid, acting under the aforesaid judgment, did cause a Sheriff's execution sale to be had of a portion of the lands and premises of the said West Ridgelawn Cemetery in order to pay and satisfy the aforesaid judgment. The sale was accordingly had and thereafter, on the 15th day of July, 1929, Thomas Carless, Sheriff of the County of Passaic, sold the said premises, being a parcel of land on the westerly side of Passaic Avenue, near Stonehouse Road, being approximately 225 feet by 608 feet for the sum of $150.00 to the said William Jacobs, highest bidder. Following this sale, the defendant corporation instituted proceedings in this Court for the purpose of setting aside the said Sheriff's sale, but the same was denied. Defendant corporation in the course of these proceedings admitted in their pleadings that the said lands were worth $24,000.00. The refusal of this Court to set aside such sale is now the subject of an appeal before the New Jersey Court of Errors and Appeals.

8. On the 4th day of March, 1930, there was docketed in the Office of the Clerk of the County of Passaic, a judgment entered in behalf of Campbell Morrell & Company against the said West Ridgelawn Cemetery in the sum of $161.24. Said judgment was docketed in Book M of District Court Judgments for said County, page 418.

9. On the 12th day of May, 1929, there was docketed in the Office of the Clerk of the County of Passaic, a judgment entered in behalf of Standard Oil Company of New Jersey against the said West Ridgelawn Cemetery, in the sum of $201.65. Said judgment was docketed in Book M of District Court Judgments for said County, page 12.

10. Thereafter, one Fred Snyder, secured a judgment in the district court of the City of Passaic against the said West Ridgelawn Cemetery, in the sum of $25.00.

11. Thereafter, one Albert Snyder, secured a judgment in the district court of the City of Passaic against the said West Ridgelawn Cemetery in the sum of $186.10.

12. Thereafter, one John Hollowood, secured a judgment in the district court of the City of Passaic against the said West Ridgelawn Cemetery in the sum of $235.00. Subsequently said judgment creditor, John Hollowood, made application to the Court of Chancery for the appointment of a receiver to sequester the assets of the said cemetery association for the payment of the aforesaid judgment by virtue of paragraph 16, Section 1 of "An Act to Authorize The Incorporation of Rural Cemetery Associations and Regulate Cemeteries (P. L. 1849, p. 9, Revision 1877, p. 100)." On the 3rd day of June, 1930, an order was entered in this Court appointing Sidney Alexander of Paterson, New Jersey, as such receiver.

13. On the 21st day of October, 1930, complainant Atlas Fence Company recovered two judgments in the district court of the City of Passaic against the said West Ridgelawn Cemetery in the

respective sums of $350.00 and $329.05, together with interest and costs thereon.

14. About September, 1930, one Abraham H. Gottlieb, assignee of a judgment recovered by one Shelley R. Safir against the said West Ridgelawn Cemetery in the New Jersey Supreme Court on the 26th day of October, 1929, in the sum of $4,053.67 and $67.76 costs, instituted suit in the Court of Chancery for the appointment of a receiver. Final decree upon the above proceedings was entered on the 27th day of October, 1930, in favor of the said Abraham H. Gottlieb, complainant. By the terms of the said final decree, Dougal Herr of Hoboken, New Jersey, was appointed receiver to sequester the assets of the said cemetery association and to assume full power in the management of the lands of the said association, for the purpose of marshalling sufficient assets to pay the aforesaid judgment. By the further terms of the aforesaid decree, the said cemetery association was restrained and enjoined from collecting or receiving rents, and was further restrained and enjoined from selling any lands or from paying out any monies without the leave of the Court of Chancery.

15. By virtue of the various appointments of receivers made by this Court, there are at present three acting receivers, namely, Passaic National Bank & Trust Company of Passaic, New Jersey, Sidney Alexander and Dougal Herr, all of whose duties prescribe the marshalling of sufficient assets of the said cemetery association to pay their three certain respective claims. The duties of said receivers are of necessity conflicting with one another and are duplicitous and are

greatly impeding and interfering with the proper operation of the defendant cemetery's business.

16. By virtue of the order of restraint made in the decree set forth in paragraph fourteen above, the cemetery cannot continue its operations without the consent of the Court of Chancery, which limitation on the right of the cemetery to do business makes it almost impossible for the cemetery association to continue in business.

17. Complainant alleges upon information and belief and charges the fact to be that the said Adam Frank is assuming full and independent control over the affairs of the said cemetery association and is usurping the duties and powers of the Board of Trustees of the said cemetery association which should rightfully be in charge of the said association. The said Adam Frank is collecting moneys on account of the cemetery land sales and is not paying the just obligations of the said cemetery association, as a result of which he is allowing numerous judgments to be recovered against the said West Ridgelawn Cemetery which judgments he has ignored and has refused to pay. Adam Frank's actions and management are prejudicial to the rights of lot owners of the said cemetery association.

18. Complainant further alleges upon information and belief and charges the fact to be true that there are, among others, three trustees named for the said cemetery association, Adam Frank, Abraham Herman and a Mr. Lambert, a New York attorney, but that the cemetery association is actually being run and managed by the said Adam Frank. Adam Frank and the aforementioned Mr. Lambert are residents of the State of New York. No notice of election of trustees has

been filed in the Passaic County Clerk's Office since 1920, at which time such notice was filed only after an order of this Court was made directing that the same be done. Complainant further alleges upon information and belief that certain other trustees of the said cemetery association are not residents of the State of New Jersey. 10

19. Complainant further alleges upon information and belief and charges the fact to be true that the said Adam Frank is diverting funds of the said West Ridgelawn Cemetery to his own use. Complainant further alleges upon information and belief and charges the fact to be true that the said defendant cemetery association is not maintaining an office of a registered agent within the State of New Jersey; that the books of the 20 said cemetery association are kept outside of the State; that the defendant corporation has not filed a yearly report with the Clerk of the County of Passaic as is required by Statute, since 1920 (the filing of which report was ordered by this Court); that the defendant corporation has not complied with the Statutory requirements of giving notice of its annual elections to its plot-owners and that as a result thereof the elections of the trustees if there have been any elections, are 30 invalid, and that the said trustees, if any, are holding office illegally; that Adam Frank and the other trustees, if any, are not lot owners and are therefore not eligible to act as trustees; that Adam Frank and the other trustees, if any, are not legal residents of the State of New Jersey in accordance with the Statutory requirements of the State of New Jersey, and that they therefore are holding office illegally; that the said cemetery association has not set aside certain monies for 40 the up-keep of the said cemetery, in accordance

with the requirements of the decree more particularly set out in paragraph fourteen above. Complainant further alleges upon information and belief and charges the fact to be true that the said cemetery association, through the defendant Adam Frank, has made further sales of the cemetery land since the date of the decree set forth in paragraph fourteen above, and that such sales of land have been made without the knowledge or authority of the Court of Chancery or of Mr. Dougal Herr, receiver, and that the said Adam Frank, by virtue of his action, has violated the orders of this Court and is in contempt thereof.

20. On the 30th day of March, 1926, the defendant West Ridgelawn Cemetery by agreement recorded in Book X32 of Deeds in the Office of the Register of the County of Passaic, page 512, recorded on August 21st, 1926, entered into a contract with the King Solomon Cemetery wherein the latter had with sole right to sell lots and plots of the said West Ridgelawn Cemetery to buyers for Jewish burials exclusively.

21. The said King Solomon Cemetery is made a party defendant for the purpose of ascertaining the state of accounts existing between the said King Solomon Cemetery and the said West Ridgelawn Cemetery and what monies if any, on account of sales of cemetery lands of the said West Ridgelawn Cemetery are due and owing to the latter.

22. Complainant further alleges upon information and belief and charges the fact to be true that the said defendant cemetery corporation has by virtue of the following deeds of transfer conveyed various parcels of cemetery lands to the following named persons and corporations, to wit: Work-

men's Circle Cemetery Association of Newark, Inc., by deed recorded in the Office of the Register of the County of Passaic in Book R31 of Deeds for said County, page 513; Knisher's Young Men's Benevolent Association by deed recorded in the Office of the Register of the County of Passaic in Book M32 of Deeds for said County, page 599; Samuel B. Dubrew by deed recorded in the Office of the Register of the County of Passaic in Book O32 of Deeds for said County, page 313; Rubin & Novak Sick & Benevolent Association by deed recorded in the Office of the Register of the County of Passaic in Book Q32 of Deeds for said County, page 143; B'Nai Jacob Fishman Lodge #77, I. O. B. S. by deed recorded in the Office of the Register of the County of Passaic in Book U32 of deeds for said County, page 1; New Sandizer Halberstam K. U. V. by deed recorded in the Office of the Register of the County of Passaic in Book U32 of Deeds for said County, page 154; Congregation A. A. A. of Orange by deed recorded in the Office of the Register of the County of Passaic in Book V32 of Deeds for said County, page 1. Complainant further alleges upon information and belief and charges that there have been divers other transfers of title to portions of the aforesaid cemetery lands, which said transfers of title are not a matter of record.

23. The attorney general of the State of New Jersey is made a party defendant herein for the purpose of answering that portion of this bill which relates to the public right.

24. Complainant further alleges upon information and belief and charges the fact to be that on account of the various orders and restraints made by this Court against the said defendant corpora-

tion, the latter cannot properly carry on its business and that it is futile to allow or permit the present trustees to carry on business of the said West Ridgelawn Cemetery.

25. Complainant further alleges upon information and belief and charges the fact to be that the defendant corporation is insolvent within the meaning of the Statute of the State of New Jersey in such case made and provided. That the assets of said corporation are being diverted and dissipated by the said Adam Frank and are not being used in payment of the just debts of the cemetery association, that the Statutes of the State of New Jersey do not permit execution to issue against the cemetery lands and that there is no way in which the judgment creditors can secure satisfaction of their judgments; complainant believes that unless this Court, in view of the facts aforesaid, will deal with the defendant corporation's property as a single trust fund, its assets will be so dissipated or dissembled in the hands of its trustees, or in the hands of the various receivers appointed under the several orders of this Court, that the creditors will receive nothing from such assets and as a result will be unable to collect their judgments; by reason of which, it is urged that the intervention of this Court is necessary for the protection of the said creditors of the defendant corporation.

Complainant is without adequate remedy at law and therefore prays:

1. That the said defendant corporation West Ridgelawn Cemetery, King Solomon Cemetery, Adam Frank, Abraham Herman, "John" Lambert (first name being fictitious, real name being

unknown), and such other trustees of the said West Ridgelawn Cemetery as may be holding office, Passaic National Bank & Trust Company of Passaic, Workmen's Circle Cemetery Association of Newark, Inc., Knisher's Young Men's Benevolent Association, Samuel B. Dubrow, Rubin & Novak Sick & Benevolent Association, B'nai Jacob Fishman Lodge No. 77, I. O. B. S., New Sandizer Halberstam K. U. S. and Congregation A. A. A. of Orange, William A. Stevens, Attorney General of the State of New Jersey, Dougal Herr and Sidney Alexander, and any other owners of plots in the said West Ridgelawn Cemetery, as may answer this bill of complaint without oath, and each statement therein made.

2. That the said defendant corporation may be decreed to be insolvent in that it is being mismanaged and cannot properly continue in business, its assets are being dissipated, and its funds are being diverted to channels other than for the payment of its just debts and obligations.

3. That a receiver be appointed for said defendant corporation and according to the Statutes of this State in this case made and provided.

4. That an injunction issue from this honorable Court restraining the said defendant corporation and its trustees, officers, servants and agents, from exercising any of its rights, privileges or franchises granted by the State of New Jersey to said corporation and from paying out, selling, assigning or transferring any of its assets, monies, funds, lands and tenements or effects except to a general receiver appointed by this Court, or by doing any acts in connection with the said corporation until the Court shall otherwise order.

5. That an injunction issue from this Honorable Court restraining the said Passaic National Bank & Trust Company of Passaic, Sidney Alexander and Dougal Herr from doing any acts or exercising any right or control in connection with or over any property or any assets of the said West Ridgelawn Cemetery until further order of this Court.

6. That the assets of the said defendant corporation and the rights of complainant and other creditors be ascertained.

7. That the Court fully administer the funds being the entire assets of the defendant corporation and for that purpose marshal and ascertain all of its assets, liens, legal or equitable, and priorities, rights and credits, if any, existing on all parts thereof and enforce the lawful liens and rights of all the creditors and the defendant corporation as they may be finally ascertained.

8. That a writ of subpoena may issue, commanding the said defendants to answer the bill of complaint and to abide by such decree as this Court may make in the premises.

9. That the complainant may have such other and further relief as the nature of the case may require.

MICHAEL HORROWITZ,
Solicitor for Complainant.

FAST & FAST,
of Counsel.

Affidavit of Frank C. Zuch.

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

Frank C. Zuch, President of Atlas Fence Company, a corporation of the State of New Jersey, complainant herein, being duly sworn upon his oath, according to law deposes and says: 10

1. I am the president of the Atlas Fence Company, complainant herein, and am familiar with the accounts of the complainant corporation and am particularly familiar with the account had with the West Ridgelawn Cemetery.

2. West Ridgelawn Cemetery is a corporation organized for cemetery purposes under "An Act To Authorize The Incorporation of Rural Cemetery Associations and Regulate Cemeteries" (P. L. 1849, p. 9, Revision 1877, p. 100). Certificate of Incorporation was duly filed in the Office of the Clerk of the County of Passaic on the 3rd day of October, 1905. 20

3. The said West Ridgelawn Cemetery conducts its business at 36 West 44th Street, New York City, and all of the business of the aforesaid cemetery is carried on at that place. The person in charge of the business of the said cemetery association is one Adam Frank. 30

4. The said West Ridgelawn Cemetery is the owner of extensive lands and premises in the County of Passaic and State of New Jersey. Various parcels of these lands and premises have been sold to divers persons and corporations for burial purposes. The remaining lands are still owned by the said West Ridgelawn Cemetery and are not presently used for burial purposes. 40

5. On or about the 2nd day of April, 1906, one Herbert G. Groover, then owner of the aforesaid lands and premises now owned by the said West Ridgelawn Cemetery, executed a mortgage in the sum of approximately $36,000.00 to one John W. Griggs. Said mortgage was recorded in the office of the Register of the County of Passaic. Thereafter the said John W. Griggs assigned the aforesaid mortgage to one William Bittles. Subsequently, there having been nothing paid on account of principal or interest upon the aforesaid mortgage, the said William Bittles instituted a suit for the foreclosure of the aforesaid mortgage against the said West Ridgelawn Cemetery. On the 3rd day of July, 1930, a decree in the said foreclosure suit was entered in favor of the complainant William Bittles and against the defendant West Ridgelawn Cemetery in the sum of $39,706.39. By the terms of the aforesaid decree, the Passaic National Bank & Trust Company of Passaic was appointed receiver of the said West Ridgelawn Cemetery for the purpose of sequestering the assets of the said defendant cemetery corporation for the payment of the aforesaid sum due upon the aforesaid decree. By the further terms of the aforesaid decree, the defendant corporation was ordered to set aside a certain sum of money for the up-keep of the aforesaid cemetery.

6. On the 16th day of April, 1927, there was docketed in the Office of the Clerk of the County of Passaic, a judgment entered in behalf of Fred Schultz, Fred Schultz, Jr., Frank Schultz and Louis Schultz, partners trading as F. Schultz & Sons against the said West Ridgelawn Cemetery in the sum of $215.00. Said judgment was dock-

eted in Book K of District Court Judgments for said County, page 74.

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8. Thereafter, William Jacobs, judgment creditor aforesaid, acting under the aforesaid judgment, did cause a Sheriff's execution sale to be had of a portion of the lands and premises of the said West Ridgelawn Cemetery in order to pay and satisfy the aforesaid judgment. The sale was accordingly had and thereafter, on the 15th day of July, 1929, Thomas Carless, Sheriff of the County of Passaic, sold the said premises, being a parcel of land on the westerly side of Passaic Avenue, near Stonehouse Road, being approximately 225 feet by 608 feet for the sum of $150.00 to the said William Jacobs, highest bidder. Following this sale, the defendant corporation instituted proceedings in this court for the purpose of setting aside the said Sheriff's sale but the same was denied. Defendant corporation in the course of these proceedings admitted in their pleadings that the said lands were worth $24,000.00. The refusal of the Court to set aside such sale is now the subject of an appeal before the New Jersey Court of Errors and Appeals.

9. On the 4th day of March, 1930, there was docketed in the Office of the Clerk of the County of Passaic, a judgment entered in behalf of Campbell Morrell & Company against the said West Ridgelawn Cemetery in the sum of $161.24. Said

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12. Thereafter, one Albert Snyder secured a judgment in the district court of the City of Passaic against the said West Ridgelawn Cemetery in the sum of $186.10.

13. Thereafter, one John Hollowood secured a judgment in the district court of the city of Passaic against the said West Ridgelawn Cemetery in the sum of $235.00. Subsequently said judgment creditor John Hollowood made application to the Court of Chancery for the appointment of a receiver to sequester the assets of the said cemetery association for the payment of the aforesaid judgment by virtue of paragraph 16 section 1 of "An Act To Authorize The Incorporation of Rural Cemetery Associations and Regulate Cemeteries. P. L. 1849 p. 9 Revision 1877 p. 100)." On the 3rd day of June, 1930, an order was entered in this Court appointing Sidney Alexander of Paterson, New Jersey as such receiver.

14. On the 21st day of October, 1930, complainant Atlas Fence Company recovered two judg-

ments in the district court of the city of Passaic against the said West Ridgelawn Cemetery in the respective sums of $350.00 and $329.05, together with interest and costs thereon.

15. About September 1930, one Abraham H. Gottlieb, assignee of a judgment recovered by one Shelley R. Safir against the said West Ridgelawn Cemetery in the New Jersey Supreme Court on the 26th day of October, 1929, in the sum of $4,053.67 and $67.76 costs, instituted suit in the Court of Chancery for the appointment of a Receiver. Final decree upon the above proceedings was entered on the 27th day of October, 1930, in favor of the said Abraham H. Gottlieb, complainant. By the terms of the said final decree, Dougal Herr of Hoboken, New Jersey was appointed receiver to sequester the assets of the said cemetery association and to assume full power in the management of the lands of the said association for the purpose of marshalling sufficient assets to pay the aforesaid judgment. By the further terms of the aforesaid decree, the said cemetery association was restrained and enjoined from collecting or receiving rents, and was further restrained and enjoined from selling any lands or from paying out any monies without the leave of the Court of Chancery.

16. By virtue of the various appointments of receivers made by this Court, there are at present three acting receivers, namely, Passaic National Bank & Trust Company of Passaic, New Jersey, Sidney Alexander, and Dougal Herr, all of whose duties prescribe the marshalling of sufficient assets of the said cemetery association to pay their three certain respective claims. The duties of said Receivers are of necessity conflicting with

one another and are duplicitous and are greatly impeding and interfering with the proper operation of the defendant cemetery's business.

17. By virtue of the order of restraint, made in the decree set forth in paragraph fourteen above, the cemetery cannot continue its operations without the consent of the Court of Chancery, which limitation on the right of the cemetery to do business, makes it almost impossible for the cemetery association to continue in business.

18. Deponent alleges upon information and belief and charges the fact to be that the said Adam Frank is assuming full and independent control over the affairs of the said cemetery association and is usurping the duties and powers of the Board of Trustees of the said cemetery association which should rightfully be in charge of the said association. The said Adam Frank is collecting monies on account of cemetery lands sales and is not paying the just obligations of the said cemetery association as a result of which he is allowing numerous judgments to be recovered against the said West Ridgelawn Cemetery which judgments he has ignored and has refused to pay. Adam Frank's actions and management are prejudicial to the rights of lot owners of the said cemetery association.

19. Deponent further alleges upon information and belief and charges the fact to be true that there are, among others, three trustees named for the said cemetery association, Adam Frank, Abraham Herman and a Mr. Lambert, a New York Attorney, but that the cemetery association is actually being run and managed by the said Adam Frank. Adam Frank and the aforementioned Mr. Lambert are residents of the State of New York.

No notice of election of trustees has been filed in the Passaic County Clerk's Office since 1920, at which time such notice was filed only after an order of this Court was made directing that the same be done. Complainant further alleges upon information and belief that certain other trustees of the said cemetery association are not residents of the State of New Jersey.

20. Deponent further alleges upon information and belief and charges the fact to be true that the said Adam Frank is diverting funds of the said West Ridgelawn Cemetery to his own use. Deponent further alleges upon information and belief and charges the fact to be true that the said defendant cemetery association is not maintaining an office of a registered agent within the State of New Jersey; that the books of the said cemetery association are kept outside of the State; that the defendant corporation has not filed a yearly report with the clerk of the County of Passaic as is required by Statute, since 1920 (the filing of which report was ordered by this court); that the defendant corporation has not complied with the Statutory requirements of giving notice of its annual elections to its plot owners and that as a result thereof the elections of the trustees, if there have been any elections, are invalid and that the said trustees, if any, are holding office illegally; that Adam Frank and the other trustees, if any, are not lot owners and are therefore not eligible to act as trustees, that Adam Frank and the other trustees, if any, are not legal residents of the State of New Jersey in accordance with the Statutory requirements of the State of New Jersey and that they therefore are holding office illegally; that the said cemetery association has not set aside certain monies for the up-keep of

the said cemetery in accordance with the requirements of the decree more particularly set out in paragraph fourteen above. Deponent further alleges, upon information and belief, and charges the fact to be true that the said cemetery association, through the defendant Adam Frank, has made further sales of cemetery lands since the date of the decree set forth in paragraph fourteen above, and that such sales of land have been made without the knowledge or authority of the Court of Chancery or of Mr. Dougal Herr, Receiver, and that the said Adam Frank, by virtue of his action has violated the orders of this Court, and is in contempt thereof.

21. On the 30th day of March, 1926, the defendant West Ridgelawn Cemetery, by agreement recorded in Book X 32 of deeds in the office of the Register of the County of Passaic, page 512, recorded on August 21st, 1926, entered into a contract with the King Solomon Cemetery wherein the latter had the sole right to sell lots and plots of the said West Ridgelawn Cemetery to buyers for Jewish burials exclusively.

22. The said King Solomon Cemetery is made a party defendant for the purpose of ascertaining the state of accounts existing between the said King Solomon Cemetery and the said West Ridgelawn Cemetery and what monies, if any, on account of sales of cemetery lands of the said West Ridgelawn Cemetery are due and owing to the latter.

23. Deponent further alleges upon information and belief and charges the fact to be true that the said defendant cemetery corporation has by virtue of the following deeds of transfer conveyed various parcels of cemetery lands to the follow-

ing named persons and corporations, to wit: Workmen's Circle Cemetery Association of Newark, Inc., by deed recorded in the office of the Register of the County of Passaic in Book R 31 of Deeds for said County, page 513; Knisher's Young Men's Benevolent Association by deed recorded in the office of the Register of the County of Passaic in Book M 32 of Deeds for said County, page 599; Samuel B. Dubrow by deed recorded in the office of the Register of the County of Passaic in Book O 32 of Deeds for said County, page 315; Rubin & Novak Sick and Benevolent Association by deed recorded in the Office of the Register of the County of Passaic in Book Q 32 of Deeds for said County, page 143. B'Nai Jacob Fishman Lodge #77, I. O. B. S., by deed recorded in the Office of the Register of the County of Passaic in Book U 32 of deeds for said County, page 1; New Sandizer Halberstam K. U. V. by deed recorded in the Office of the Register of the County of Passaic in Book U 32 of Deeds for said County, page 154, Congregation A. A. A. of Orange by deed recorded in the Office of the Register of the County of Passaic in Book V 32 of deeds for said County, page 1. Deponent further alleges upon information and belief and charges that there has been divers other transfers of title to portions of the aforesaid cemetery lands, which said transfers of title are not a matter of record.

24. Deponent further alleges upon information and belief and charges the fact to be that on account of the various orders and restraints made by this Court against the said defendant corporation, the latter cannot properly carry on its business and that it is futile to allow or per-

mit the present trustees to carry on business of the West Ridgelawn Cemetery.

25. Deponent further alleges upon information and belief and charges the fact to be true that the defendant corporation is insolvent within the meaning of the Statute of the State of New Jersey in such case made of the cemetery association, that the Statutes of the State of New Jersey do not permit execution to issue against the cemetery lands and that there is no way in which the judgment-creditors can secure satisfaction of their judgments; deponent believes that unless this Court, in view of the facts aforesaid, will deal with the defendant corporation's property as a single trust fund, its assets will be so dissipated of dissembled in the hands of its trustees, or in the hands of the various receivers appointed under the several orders of this Court, that the creditors will receive nothing from such assets and as a result will be unable to collect their judgments; by reason of which it is urged that intervention of this Court is necessary for the protection of the said creditors of the defendant corporation.

FRANK C. ZUCH.

Sworn and subscribed to before me
this 5th day of March, 1931.

CHARLES BLUME
An Attorney at Law
of New Jersey.

Order to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between ATLAS FENCE COMPANY, a New Jersey Corporation, Complainant, *and* WEST RIDGELAWN CEMETERY, a New Jersey Corporation *et als.*, Defendants.	On Bill, &c. Order to Show Cause.

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This matter being opened to the Court by Michael Horrowitz, solicitor for complainant, and upon reading the bill of complaint and affidavit thereto annexed, and it appearing to this Court from the said bill of complaint and affidavit that there is just and sufficient cause for the appointment of a receiver herein, it is thereupon on this 5th day of March, 1931, ORDERED, ADJUDGED AND DECREED:

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1. That the trustees, officers, agents, employees and creditors of the above named defendant corporation, West Ridgelawn Cemetery and Adam Frank, show cause before the Chancellor at the Chancery Chambers, in the City of Jersey City, on Monday, the 16th day of March, 1931, at ten o'clock in the forenoon or as soon thereafter as counsel may be heard, why a receiver should not be appointed for the said West Ridgelawn Cemetery, for the purpose of taking into his possession all of the assets of the said defendant corporation of every character and description wheresoever

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situate, with full power and authority to demand, issue for, collect and receive the said assets and to do and perform all the duties imposed upon him and required by law, and especially by an act entitled "An Act Concerning Corporations (Revision of 1896)" and the acts supplementary thereto and amendatory thereof.

2. And it is further ORDERED, that pending the further order of this Court that the said defendant corporation, its trustees, officers, agents, employees and all persons claiming under it, Adam Frank, and its receiver Passaic National Bank & Trust Company of Passaic, New Jersey, Sidney Alexander and Dougal Herr, be and they are hereby restrained and enjoined from exercising any of its rights and franchises, and further, that all of the creditors of the said defendant corporation, together with all of the persons above named, shall be, and they are hereby restrained from bringing any action or proceeding at law or otherwise against the said corporation, and from taking any further proceedings in any action or proceeding heretofore commenced.

3. And it is further ORDERED that a copy of the bill of complaint and affidavits annexed hereto and of this order, which need not be certified, be served on the defendants and a copy of this order be mailed to each of the creditors, lot owners and trustees, as far as they may be ascertainable of the said defendant corporation at his or its last known post office address, within five days from the date hereof.

E. R. WALKER,
C.

Respectfully advised.

J. O. BIGELOW,
V. C.

Affidavit of Adam Frank.

(Filed March 16, 1931.)

IN CHANCERY OF NEW JERSEY

ATLAS FENCE COMPANY, a New Jersey Corporation, Compt., *and* WEST RIDGELAWN CEMETERY.	Affidavit.

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STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } SS.:

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ADAM FRANK, being duly sworn, says: I am and for years past have been president of the West Ridgelawn Cemetery. Its trustees have all been duly elected at meetings of lot owners, which have been duly held annually, and due notice of such meetings has been given as by statute provided. The election of 1920 has only differed from those held since in that it was presided over by a Master pursuant to a decree of the Court of Chancery of New Jersey.

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I have read the affidavit of Frank C. Zuch hereon. I do not know him, nor know that I have ever met him. He neither knows nor can know anything whatever of the business of this company, except as found in public records, and he certainly knows nothing of its internal affairs.

Naturally, most of the executive work of the company is handled by or through me, subject to the approval of the trustees, and of the lot owners in meeting. I and all other trustees are lot owners, most of us having been such since 1912.

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Affidavit of Adam Frank.

The Cemetery owns about 92 acres of burial ground, of an average value of $10,000 or more per acre. About nine acres have been sold, and the thousands of graves represented are scattered over about one-half the total area. Thousands of families are dependent upon our cemetery for the burial of their dead; and the cemetery must be at all times prepared for funerals upon a few hours' notice, and its development and *embellishment* looked after.

Mr. Zuch seems unable to achieve even a moderate degree of accuracy when swearing to open matters of record.

The mortgage of Gruber to Griggs was for $25,000, not $35,000. Instead of nothing having been paid thereon, it was bought, after mesne assignments, by Britles for about $16,000. To this, there were alleged Equitable accretions. The decree was not as stated by Mr. Zuch, but at any rate is now on appeal to the Court of Appeals through Lum, Tamblyn & Colyer, Esqs., of Newark.

The matter of William Jacobs is not in the Court of Appeals. It is, on the contrary, in the Court of Chancery, in which a final hearing was recently had. The disposition thereof referred to by Mr. Zuch was submitted to the Chancellor who re-opened the case and then referred it to a Vice-Chancellor at Newark.

I do not know what is meant by the reference to a judgment for John Hollowood. Mr. Sidney Alexander did for a time represent a judgment creditor, but his attitude was both honorable and constructive and I understand he has been contented.

The judgment recovered by Saphir (spelt by Mr. Zuch, Safir) and assigned to Gottlieb arose

out of a dispute over a lot purchased. Both the judgment and the subsequent decree in Chancery, following a suit pursuant to Section 16 of the Cemetery Act are now before the Court of Appeals of New Jersey.

I have been for many years a member of the New York Bar. Naturally, quite a little cemetery business has been handled at my office in the Bar Building, 364-44th Street, New York City. There is, however, a chapel and administration building on the cemetery grounds, and our lot owners, whether resident at Newark, the Oranges, Hoboken or elsewhere in New Jersey, or in New York, have appeared satisfied with the care and attention given their interests. There is, of course, no basis whatever for the mass of scurrilous matter in Zuch's affidavit. It has obviously been put therein for dissemination among the lot owners and others mentioned in the bill and affidavit, and in the hope of bringing about the breakdown of business referred to by the affiant.

The sales contract referred to in paragraph 21 was cancelled years ago.

Including the claim of complainant, and excluding the matters now before the Court of Errors and Appeals, and that undisposed of in the Court of Chancery at Newark, all of the claims dug up by the complainant and the affiant Zuch, total $1,468.04. The personal property of the cemetery, consisting of its necessary machinery, tools, &c., exceed that value.

ADAM FRANK.

Sworn to before me this 16th day of March, 1931.

CHARLES KANTER,
Master in Chancery of N. J.

Petition of Defendant West Ridgelawn Cemetery.

(Filed March 25, 1931.)

IN CHANCERY OF NEW JERSEY.

Between ATLAS FENCE COMPANY, Complainant, *and* WEST RIDGELAWN CEMETERY, *et als.*, Defendants.	On Bill, Etc. Petition.

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To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

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The petition of West Ridgelawn Cemetery, one of the defendants in the above entitled cause, respectfully shows:

1. That it is the principal defendant in the above entitled cause and that the complainant has applied for a receiver to be appointed in this Court of the assets of the petitioner.

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2. That this matter came on to be heard before Vice Chancellor Bigelow who indicated in a memorandum opinion that a receiver would be appointed.

3. Petitioner has offered to pay to the complainant the amount of money due it and has offered to pay and is now offering to pay the claims of all judgment-creditors that are not now

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under appeal if given a reasonable opportunity to do so.

4. Petitioner further shows that if a receiver be appointed the Cemetery Association and all the lot owners thereof will suffer irreparable damage and harm.

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PETITIONER THEREFORE PRAYS, that the order appointing receiver be not decreed and that the petitioner be given a reasonable opportunity to pay the complainant and all other creditors.

AND YOUR PETITIONER WILL EVER PRAY.

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

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Affidavit of Adam Frank.

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

Adam Frank, being duly sworn according to law on his oath deposes and says:

That I am the President and one of the Trustees of the West Ridgelawn Cemetery and have been in active charge of the cemetery for the past ten years. That at the present time there is approximately $1,600.00 judgments due and owing. The assets of the cemetery are well worth over Nine hundred thousand dollars. If a receiver is appointed the cemetery will be unable to function as a Jewish cemetery and the lot owners therein will suffer irreparable damage. I have made arrangements to pay off the judgments open of record with the exception of the judgments that are being taken up on appeal and with those judgments am in a position to place bonds if necessary.

Adam Frank.

Sworn and subscribed to before me }
this 25 day of March, 1931. }

L. D. Stern
A Notary Public of N. J.

Order Appointing Receiver.

IN CHANCERY OF NEW JERSEY.

83-379.

Between ATLAS FENCE COMPANY, Complainant, *and* WEST RIDGELAWN CEMETERY, *et als.*, Defendants.	On Bill, &c. Order Appointing Receiver.

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This matter being opened to the Court by Louis A. Fast, of the firm of Fast & Fast, of counsel with the complainant, and the Court having read and filed the bill of complaint, and the affidavit annexed thereto, and after considering the arguments of counsel for the complainant, and of Abraham M. Herman, appearing for the defendant, West Ridgelawn Cemetery, of Alexander Kobalkin for Sidney Alexander, Receiver, of Messrs. Corbin & Harty, for Passaic National Bank & Trust Co., Receiver, of Abraham Levitan, for Dougal Herr, Receiver, of Harry Lane, for Mortgagee William Bittles and several lot owners, of Henry Carless for Workingmen's Circle, lot owner, of John Platoff, for several lot owners, and being satisfied of the sufficiency of the application made in this cause;

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It is, on this 25th day of March, 1931, ORDERED, that Alfred L. Kirby of the City of Newark be and he is hereby appointed as Custodial Receiver, with power and authority immediately to take possession of the lands and premises, goods and chattels, books, papers and records of the West Ridge-

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lawn Cemetery, and to hold the same as such Custodial Receiver until the further order of this Court; and that before entering upon his duties as such receiver, he shall take oath prescribed by law and give a bond to the Chancellor of the State of New Jersey in the sum of $1,000.00 conditioned for the faithful performance of his duties, which bond is to be approved as to form and security thereof by any one of the Special Masters of this Court.

And it is further ordered that until the further order of this Court, the said West Ridgelawn Cemetery, its officers, trustees, servants and agents, absolutely desist and refrain from exercising any of the rights and franchises of the said company, and are hereby enjoined and restrained from contracting any debts, receiving or paying out any money, and selling, assignment, transferring any of the property, estate or effects of the said corporation.

And it is further ORDERED that the said receiver be and he is authorized and directed to petition to be admitted as a party in any cause now pending against the West Ridgelawn Cemetery, to take into possession all of the assets of the association, real and personal and to institute suits for the recovery of the same or for the enforcement of the rights of the association against any parties.

And it is further ORDERED that the said Receiver heretofore named, be and he is hereby authorized and directed to exercise the rights and franchises of the corporation.

And it is further ORDERED that the said Receiver be and he is hereby authorized to sell lots of the defendant corporation for burial purposes,

And it is further ORDERED that the said Receiver shall within two months from the date hereof,

make report to the Court, setting forth his receipts and disbursements, as well as the assets which have come into his hands or which he is seeking to recover, as well as any plan for the rehabilitation of the said defendant corporation, as well as any other matter that he may think proper to bring to the attention of the courts;

And it is further ORDERED that until the further order of this Court, the West Ridgelawn Cemetery, the defendants, its trustees and agents, be and they are hereby restrained and enjoined from interfering with the Receiver in the exercise of his trust.

And it is further ORDERED, that Sidney Alexander, Passaic National Bank & Trust Co. and Dougal Herr, as Receivers, heretofore appointed in causes pending in this Court, be and they are hereby restrained from interfering with the receiver in the exercise of his trust, until the further order of this Court.

And it is further ORDERED that a copy of this Order, which copies may be marked as true copies by Fast & Fast, of counsel with the complainant, be mailed to each of the defendants and to all of the lot owners and creditors, whose names and addresses may be ascertained by the Receiver within five days from the date of this order.

E. R. WALKER,
Chancellor.

Respectfully advised,

J. O. BIGELOW,
V. C.

Notice.

IN CHANCERY OF NEW JERSEY.

83-379.

Between ATLAS FENCE COMPANY, Complainant, *and* WEST RIDGELAWN CEMETERY, *et als.*, Defendants.	On Bill, &c. Notice.

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To: Messrs. Louis Fast and Irving J. Rosenberg, Esqs., Solicitors for Complainant;
Alexander Kobalkin, Esq., Solicitor for Sidney Alexander, Receiver;
Corbin & Harty, Esqs., Solicitors for Passaic National Bank & Trust Co., Receiver;
Harry Lane, Esq., Solicitor for Mortgagee Wm. Bittles, etc.;
Henry Carless, Solicitor for Workingmen's Circle;
Samuel Heller, Esq., Solicitor for William Jacobs;
John Platoff, Esq., Solicitor for Several Lot Owners.

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Gentlemen:

PLEASE TAKE NOTICE, that on Wednesday next, April 8th, 1931, at the Chancery Chambers in the City of Jersey City, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, I shall make application to the Chancellor (the date and time fixed for said motion having been especially directed by Vice-Chancellor Bigelow):

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Notice.

1. For an order dissolving and vacating the order to show cause and the order appointing the receiver, heretofore made and entered herein, on the ground that the Court of Chancery was without jurisdiction or legal authority to make such orders or either of them, and on the ground that the evidence before the Court was insufficient to warrant the making of said orders or either of them, and on the ground that there was no competent evidence before the Court on which such orders or either of them could properly be made, and on the ground that the relief granted by the Court in said orders was unnecessary and unwarranted, and on the ground that no subpoenas in the suit were issued prior to the return of the said order to show cause, and on the ground that the Court should in the proper exercise of its discretion have refused to make said orders or either of them, and that the Court in the reasonable exercise of its discretion should now vacate said orders.

2. In the alternative, for an order modifying the said order appointing the receiver, by eliminating therefrom the power and authority granted to the receiver to take possession of the lands and premises, goods and chattels, books, papers and records of the defendant corporation, and by striking therefrom the restraint therein contained against the exercise by the corporation of its rights and franchises and its other powers, and by striking therefrom the direction to the receiver to apply for admission as a party in suits now pending for and against the defendant corporation, and to institute suits for said corporation, and by striking therefrom the authority and direction to the receiver to exercise the rights and franchises of the corporation, or any of them, and the authorization to said receiver to sell lots of

the defendant corporation for burial purposes, and the authority of the receiver to incur indebtedness of any sort which said corporation might at some future time be called upon directly or indirectly to pay, and by striking therefrom the restraint against Sidney Alexander, Passaic National Bank & Trust Co. and Dougal Herr as receivers on the same grounds heretofore enumerated herein as grounds for vacating said orders. 10

3. In the alternative, for an order staying the operation and effect in all respects of said order appointing the receiver pending an appeal from said order to the Court of Errors and Appeals.

4. For such other relief against said orders or either of them as may be proper. 20

Dated: April 2, 1931.

Respectfully yours,

Abraham M. Herman,
Solicitor for the Defendant,
West Ridgelawn Cemetery.

Abraham Levitan,
Solicitor for Defendant,
Dougal Herr, Receiver. 30

Service of the attached Notice is hereby acknowledged this 2nd day of April, A. D. 1931.

Irving J. Rosenberg,
Louis A. Fast,
Solicitors for Complainant.

Alexander Kobalkin,
Solicitor for Sidney Alexander,
Receiver. 40

Carey & Lane,
Solicitor for Mortgagee, Wm.
Bittles, etc.

Affidavit of Emerson A. Tschupp.

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

Emerson A. Tschupp, being duly sworn according to law, upon his oath deposes and says:

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On April 2nd, 1931, at 1.40 P. M., I served the attached Notice on John Platoff, solicitor for several lot owners, by exhibiting the original, explaining the contents and leaving a copy of the same with Miss Elizabeth Turnania, the person in charge of the office; on April 2nd, 1931, at 2.20 P. M., I served the attached Notice on Samuel Heller, solicitor for William Jacobs, by exhibiting the original, explaining the contents and leaving a copy of the same with Miss J. Snoop, the person in charge of the office; on April 2nd, 1931, at 2.35 P. M., I served the attached Notice on Corbin & Harty, solicitors for Passaic National Bank & Trust Co., by exhibiting the original, explaining the contents and leaving a copy of the same with Miss Elizabeth Dittrich, the person in charge of the office; on April 2nd, 1931, at 4.00 P. M., I served the attached Notice on Henry Carless, solicitor for defendant, Workingmen's Circle, by exhibiting the original, explaining the contents and leaving a copy of the same with Miss Geraldine C. Rice, the person in charge of the office.

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Emerson A. Tschupp.

Sworn to and subscribed before me
this 6th day of April, A. D. 1931.

William A. Kaufmann
An Attorney at Law of New Jersey.

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Memorandum.

IN CHANCERY OF NEW JERSEY.

Between ATLAS FENCE COMPANY, Complainant, and WEST RIDGELAWN CEMETERY, *et als.*, Defendants.	On Bill, &c. 83/379.

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May 11, 1931.

Messrs. MERRITT LANE and LOUIS FAST, for the Complainant.

Messrs. DOUGAL HERR and ABRAHAM H. HERMAN, for the Defendant, West Ridgelawn Cemetery.

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Mr. HARRY LANE, for Albert W. Bonynge, lot owner.

Mr. IRVING WERKSMAN, for Albert Snyder, judgment creditor.

(This memorandum is not to be published in the official or unofficial reports.)

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MEMORANDUM.

BIGELOW, V. C.

Complainant is a judgment creditor of the West Ridgelawn Cemetery, an association incorporated under the rural cemeteries act, Rev. 1877, page

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100, C. S. 372. It brings suit not only for itself but for all other creditors who may join it. The prayer of the bill is that the association may be adjudged insolvent and enjoined from exercising any of its privileges or franchises, that the rights of the complainant and other creditors be ascertained and enforced, that the assets of the defendant be marshalled and administered by the Court, and that a receiver be appointed. When the bill was filed, the defendants were ordered to show cause why a receiver should not be appointed and upon the return of that order, argument was had and a receiver appointed *pendente lite.* The association now moves (by leave of the Court) to vacate or modify the order appointing the receiver on grounds which are considered below.

The affidavits submitted present the following situation: The association was incorporated in 1905 and some time thereafter acquired a large tract of land in Passaic County for burial purposes. It has sold a number of cemetery plots and retains a large part of its cemetery still unsold. This cemetery land which it still owns, is estimated to be worth about $1,000.000. Between April, 1927, and October, 1930, nine judgments were entered against the association, all still open of record and none apparently paid. The amounts are generally small—$215.90, $505.55, $201.65, $25, $186.10, $235, $350, $359.05, $4,000. A decree for $39,706.29 has been made in a foreclosure suit.

Upon the judgment for $505.55, execution issued and on July 15, 1929, the Sheriff sold thereunder part of the association's lands for $150. The association brought suit in this Court to set aside the Sheriff's sale, alleging that the lands sold were worth $24,000. *West Ridgelawn Cem.* v. *Jacobs,* 105 N. J. E. 579, 148 A. 771. The bill

was dismissed and an appeal taken by the association, which is now pending before the Court of Errors and Appeals. On June 3, 1930, an order was entered in this Court pursuant to a supplement to the Cemetery Act, P. L. 1881, page 158, C. S. 377, appointing Sidney Alexander receiver to sequester the rents, issues and profits of the association in order to satisfy the judgment for $235. The foreclosure decree which was entered on July 3, 1930, appointed the Passaic National Bank & Trust Company receiver to sequester the income for the purpose of satisfying the decree. On October 27, 1930, Dougal Herr was appointed sequestration receiver for the purpose of paying the judgment of $4,000. By the terms of the decree appointing him, the association was restrained from collecting or receiving rents and from selling any lands or paying out any moneys without the leave of this Court. The foreclosure decree as well as the decree appointing Mr. Herr receiver, are now pending on appeal in the Court of Errors and Appeals.

The bill of complaint seems to have been framed for the purpose of obtaining the appointment of a receiver pursuant to Section 65 of an Act concerning corporations, P. L. 1896, p. 277, C. S. 1640. The provisions of that act relating to the appointment of receivers and the winding up of corporations, do not apply to associations formed under the rural cemeteries act and do not support the present suit. *Bliss* v. *Linden Cemetery,* 81 N. J. E. 394, 87 A. 224. If, however, the bill of complaint presents a case within the general equity jurisdiction of the Court, the suit may be maintained; if the circumstances require the services of a receiver pending the litigation, the motion to discharge the receiver must be denied.

Counsel for the association relies primarily on Sections 8 and 9 of the cemetery act and on the supplement of 1881 above mentioned. He says that these sections contain a complete plan for protecting the cemetery and at the same time affording judgment creditors ample means of obtaining payment and that they can have no other relief in this Court than sequestration pursuant to the supplement. Section 9 applies only to cemeteries of religious societies and not to the cemetery of the defendant association. This section was originally enacted in 1848, P. L. 1848, p. 9.

Section 8 provides "that the cemetery lands and property * * * shall not be liable to be sold on execution or be applied in payment of debts due from any individual proprietors; but the proprietors of lots or plots in such cemeteries, their heirs or devisees, may hold the same exempt therefrom so long as the same shall remain dedicated to the purpose of a cemetery." The effect of this section would be doubtful in my opinion but it has been construed to protect the cemetery lands from sale on execution against the association. *Spear* v. *Locust Wood Cemetery,* 72 N. J. E. 821, 66 A. 1068. It does not prohibit execution sales of chattels. *Rosedale Cem. Asso.* v. *Linden,* 73 N. J. L. 421, 63 A. 904.

Section 8 is substantially the same as Section 10 of the rural cemeteries act of 1851, P. L. 1851, p. 254. Thirty years later, the supplement of 1881 was passed empowering the Court of Chancery to sequester the rents, issues, profits, incomes and revenues of cemetery lands in order to satisfy judgment debts. This supplement was not intended to restrict the jurisdiction of the Court of Chancery (assuming that the Legislature had

power to do so) but to provide an additional remedy. Whatever equitable remedies were available to creditors and whatever authority this Court had from 1851 to 1881 to protect and relieve creditors of cemetery associations, still remain unimpaired.

This Court has long enforced legal rights, when the processes of the courts of law have been insufficient to afford adequate relief. Without statutory authority, Chancery aids a creditor to obtain satisfaction of his judgment when some legal obstacle interposes to prevent seizure on legal process of the debtor's property. *Hardenburg* v. *Blair,* 30 N. J. E. 645. The issuance of execution is not a prerequisite if the property which complainant seeks to reach is realty. *Vanderveer* v. *Stryker,* 8 N. J. E. 175. A legal obstacle which is present in the instant case is Section 8 of the cemetery act, exempting the cemetery lands from sale on execution. This exemption does not include all the lands of a cemetery association but only those brought actually into use as a cemetery. *Spear* v. *Locust Wood Cemetery, supra.* The courts of law provide no means of determining what lands may be sold on execution. If the creditor makes the decision himself and the sheriff sells pursuant to his direction, there will be no bidders at the sale, for who can know whether or not the title will be good. Only in this Court may the creditor have relief.

The number of judgment creditors; the presence of three sequestration receivers, each with equal and conflicting powers, are added grounds for this Court to assume jurisdiction and in one suit to determine their priorities and their rights in the premises.

The bill of complaint further alleges that the defendant, Adam Frank, is a trustee of the asso-

ciation; that he dominates the other trustees; and that he is diverting to his own uses, funds of the association which ought to be applied to the payment of its debts. The complainant has a standing in this Court to prevent such fraudulent conduct, if he can prove it. This allegation, while it helps to support the bill, is not proved by the affidavits, and has not been considered by me on the present motion.

In my opinion, the bill discloses a cause of action. I turn to the question whether the appointment of a receiver *pendente lite* was justified. Independent of statute, this Court has frequently appointed receivers of corporations with very broad powers, where such action has been necessary to preserve the corporate property against the fraudulent acts of the directors or of a majority of the stockholders, or where there was no properly constituted governing body or internal dissension made impossible the successful conduct of the enterprise. Most of the cases are reviewed in *Morse* v. *Metropolitan S. S. Co.,* 87 N. J. E. 217, 100 A. 217, 88 N. J. E. 325, 102 A. 524; *In re N. J. Refrigerating Co.,* 95 N. J. E. 215, 122 A. 832; and *Hill* v. *Dealers Credit Corp.,* 102 N. J. E. 310, 140 A. 569. It was said by Vice Chancellor Church in the Hill case, "The inherent jurisdiction of the Court of Chancery is as broad as that of a United States court sitting in equity because each derives that jurisdiction from the same source,—the jurisdiction of the high Court of Chancery of England." The jurisdiction of the Federal courts in equity to appoint receivers of insolvent corporations has been long established, especially in the case of corporations, such as railroad companies, affected by a public interest. *Union Trust Co.* v. *Illinois Midland,* 117

U. S. 434, 6 S. Ct. 809, 821. Vice Chancellor Backes in *Bliss* v. *Linden Cemetery*, 90 N. J. E. 404, 107 A. 594, said that "cemetery corporations are, in a sense, quasi public service corporations." The public interest is obvious and is recognized by the Legislature both by the grant of the power of eminent domain and by exemption from taxation. In another aspect, a cemetery is a quasi charity. *Bliss* v. *Linden Cemetery*, 81 N. J. E. 394, 87 A. 224. This Court has an extensive jurisdiction over charities to uphold and enforce them. Vice Chancellor Howell quoted Perry on Trusts as follows:

> "In suits for establishing, regulating, controlling or correcting charitable trusts, courts disregard all technicalities; if the case is brought before the court by bill or information, it takes jurisdiction over the administration of the charity, and makes the proper orders and decrees for the right administration of the fund, whether the pleadings are formal or informal, and whether the proper relief is prayed for or not. In charity cases, the most expeditious and least expensive methods should be adopted; and a proper decree for relief will be made, although relief of an entirely different character is prayed for. Courts are not bound by the strict rules of practice in granting injunctions or stay of proceedings at law in such cases."

This discussion of the authority of this Court to appoint a receiver for a cemetery is probably unnecessary in view of the fact that Vice Chancellor Howell did appoint one for the Linden Cemetery. Counsel for the association says that this precedent should be disregarded because the appointment was made upon the consent of all parties. Consent, however, cannot enlarge the

jurisdiction of the Court. The Linden receivership in various phases was before the Court of Errors and Appeals on more than one occasion and the authority of Chancery to appoint a receiver was never questioned.

A receivership, however, is not an end in itself. It is merely a tool which the Court uses to preserve the subject-matter of the suit and to protect the rights of litigants. The facts present in this case justified, in my opinion, the immediate appointment of a receiver. Either the company is hopelessly insolvent or its management is attempting to defraud its creditors. There are ten judgments outstanding against the company, two of which have been of record for almost four years; one of the judgments is for only $25. If I assume that the company, throughout these years, has been unable to pay these judgments either by its cash resources or by the use of credit, then obviously it is insolvent. On the other hand, if I accept as true the deposition of the president of the association, in which he states that its owns lands worth a million dollars, then it is equally clear that the management lacks that elemental honesty which requires a debtor to pay his debts when he has the means to do so. It is difficult to believe that the association could not have sold a lot and applied a part of the purchase price to the judgment of $25. I surmise that it failed to do so because it thought that the exemption of its lands from execution made the judgment creditor helpless. Mismanagement of the corporation also appears. It has permitted lands which it says are worth $24,000 to be sold for $150. Such mismanagement not only injures the lot-holders but also the creditors.

Memorandum.

The present litigation may be long drawn out. The complainant and the other creditors on whose behalf it sues, need not await final decree before an effort is made to accumulate a fund which may eventually satisfy their claims. Whatever funds accrue during the litigation should not be dissipated by the trustees but should be applied in accordance with the rights of the parties as established by the final decree. The receiver has been appointed, not as a step toward dissolution of the cemetery, but as a means of preserving the project.

As noted above, three different sequestration receivers have been appointed in order to raise funds for the payment of several judgments. The association suggests that an ample remedy for the complainant is the appointment of a fourth sequestration receiver, thus adding to the present confusion. It seems obvious that such a procedure would be entirely ineffective and would not be of any benefit to the complainant and would be much more burdensome to the lot holders than the appointment of one general receiver who might conserve the property for the benefit of all parties interested, both creditors and lot holders.

The order appointing the receiver authorized him to sell lots in the cemetery for burial purposes. The association contends that this provision violates the exemption against sale by execution contained in Section 8 of the Statute. The receiver in the Linden Cemetery case was given like power of sale and did sell a number of lots; the disposition of the proceeds was one of the subjects of controversy before Vice Chancellor Backes. 90 N. J. E. 404, 107 A. 594. Even without this precedent, I should consider that the Court could vest such power in the receiver. The

purpose of the statutory exemption was to preserve the cemetery for burial purposes; to prohibit sales free from the dedication as a burying ground; to prevent the incongruous use of any part of the cemetery,—with graves, perhaps, surrounding it. It can make little difference to the lot holders whether other lots are sold by the trustees or by a receiver so long as they are sold for burial purposes only, and subject to the same restrictions that apply to lots heretofore sold. If the association desires that some such provisions be inserted in the order appointing the receiver, I will advise the amendment. Whether or not the order is so amended, sales by the receiver should not be confirmed unless the purchasers are subjected to the same restrictions as are the present lot holders.

It might also be urged that the lot holders have an interest that the proceeds of sales of lots shall be used for the beautification of the cemetery or invested to establish a fund for perpetual care. At the hearing of the motion, counsel appeared for the Passaic National Bank and Trust Company and stated that his company was trustee for such a fund under an agreement executed many years ago. He added that no money had actually been paid into the fund. No objection was made to this statement and no claim advanced by the association that it had ever set aside a dollar for perpetual care. As all the income of the company which, I take it, includes profits from the sale of lots, has already been sequestered in three suits, the lot holders are not put in a more disadvantageous position by the appointment of a receiver in the present suit than they have heretofore occupied. Lastly, it is urged that the trustees elected by the lot holders may pick and

choose the persons to whom they shall sell lots and that a receiver might sell to one whom the trustees might not consider a desirable lot holder. Such an objection is fanciful in view of the fact that by agreement dated March 30, 1926, the association delegated to another association, the King Solomon Cemetery, the exclusive right to sell lots and plots in the West Ridgelawn Cemetery. Furthermore, this particular objection cannot be heard until the association discloses other sources for the payment of its debts.

The ordinary business of the West Ridgelawn Cemetery is the sale of lots for burial purposes. In such sales is its only source of income for current expenses, its only hope of deriving money with which to pay its debts or beautify its grounds or to establish a fund for perpetual care. The trustees apparently stopped selling lots some time ago, perhaps to prevent funds from coming into the hands of the sequestration receivers. If the receiver is not given this power, the failure of the cemetery project seems certain, the purpose of the state in creating the defendant will be frustrated, and the present lot-holders will find their lots untended in the midst of rough, neglected fields. The power of sale does not, in my view, violate the statutory exemption and, since it is a necessity of the case, it will not be withdrawn.

A receiver *pendente lite* usually has no power to sell real estate, and for this reason, his function is to preserve the corpus; real estate ordinarily is not a current asset but is a fixed asset, the sale of which is a long step toward winding up and liquidation. Such is not the present case; here the sale of lots is necessary to keep the enterprise alive.

Memorandum.

It may be that prospective lot purchasers will question whether the receiver can give good title, and so will not buy from him. That difficulty, if it arises, may be met by requiring the association, by its officers, to join as a grantor.

It was stated in argument that within the bounds of the cemetery are large plots which have not yet been devoted to cemetery uses and which can be sold free from the dedication in the manner pointed out in *Spear* v. *Locust Wood Cemetery, supra.* It also appeared that land as a part of a cemetery is worth, for burial purposes, several thousand dollars an acre, while it is only worth a few hundred dollars an acre if sold for other uses; as part of the cemetery, its value is greatly enhanced by the franchise. The sale of land for ordinary purposes would result in a great and unnecessary loss not only to creditors but to lot-holders; it would be a ruinous policy and will not be approved if it can be avoided.

The order appointing the receiver enjoined the association from exercising any of its privileges or franchises. No objection has been made to this part of the order. It is probably too broad; if counsel for the association desires modification so as expressly to permit the association to carry on the litigation in which it is involved, to hold its corporate meetings, etc., it may be so modified.

The motion to discharge the receiver or to strike from the order appointing him the authority to sell lots, will be denied.

Order.

IN CHANCERY OF NEW JERSEY.

83-379.

Between ATLAS FENCE COMPANY, Complainant, *and* WEST RIDGELAWN CEMETERY, *et als.,* Defendants.	On Bill, &c. Order.

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This matter coming on to be heard on notice of re-argument of the motion for the appointment of the receiver and for the vacation or modification of the order appointing said receiver, pursuant to the direction of the Court providing for such re-argument, and the Court having heard the argument of counsel;

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IT IS, THEREUPON, on this 5th day of May, 1931, in the presence of Irving J. Rosenberg, Louis A. Fast, of Fast & Fast, and Merritt Lane, for the complainant, Abraham M. Herman and Dougal Herr, for the defendant West Ridgelawn Cemetery, Alexander Kobalkin, for defendant Sidney Alexander, Receiver, Messrs. Corbin & Harty, for defendant Passaic National Bank & Trust Co., Receiver, Dougal Herr, Receiver *pro se,* Harry Lane, for the defendant mortgagee William Bittles, and Alfred L. Kirby, Receiver, ORDERED that the motion to vacate or modify (by striking out

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the power of sale) be and the same is hereby dismissed, and that the order appointing the receiver and for injunction, entered herein on the 26th day of March, 1931, be and the same is hereby confirmed.

10 Respectfully advised,

JOHN O. BIGELOW, V. C.

E. R. WALKER, C.

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Notice.

(Filed April 8, 1931.)

IN CHANCERY OF NEW JERSEY.

83-379.

Between ATLAS FENCE COMPANY, Complainant, *and* WEST RIDGELAWN CEMETERY, *et als.*, Defendants.	On Bill, &c. Notice.

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To Messrs. Louis Fast and Irving J. Rosenberg,
Solicitors for Complainant;

Alexander Kobalkin, Esq.,
Solicitor for Sidney Alexander, Receiver;

Corbin & Harty, Esqs.,
Solicitors for Passaic National Bank & Trust Co., Receiver;

Henry Carless, Esq.,
Solicitor for Workingmen's Circle;

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Samuel Heller, Esq.,
Solicitor for William Jacobs;

John Platoff, Esq.,
Solicitor for several lot owners;

Abraham M. Herman, Esq.,
Solicitor for Defendant West Ridgelawn Cemetery;

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Abraham Levitan, Esq.,
Solicitor for Dougal Herr, Receiver.

Notice.

Gentlemen:

PLEASE TAKE NOTICE, that on the return of the notice given by the defendants West Ridgelawn Cemetery and Dougal Herr to vacate the order appointing a receiver herein and for other relief, on Wednesday, the 8th day of April, 1931, at Chancery Chambers in the City of Jersey City, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, I shall make application to join Albert W. Bonynge, certificate holder and lot owner of West Ridgelawn Cemetery, as a party complainant herein, and upon such application I shall use affidavits, copies of which are herewith served upon you, and I shall also apply for leave to amend the bill of complaint to insert the allegations contained in the affidavits not now appearing in the bill of complaint and for such other and further relief as may be proper.

Dated: April 6, 1931.

CAREY & LANE,
Solicitor for Albert W. Bonynge.

Notice.

(Filed April 8th, 1931.)

IN CHANCERY OF NEW JERSEY.

83-379

Between ATLAS FENCE COMPANY, Complainant, *and* WEST RIDGELAWN CEMETERY, *et als.*, Defendants.	On Bill, etc. Notice.

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To: Messrs. Louis Fast and Irving J. Rosenberg, Esqs.,
Solicitors of Complainant;

Corbin & Harty, Esqs.,
Solicitors for Passaic National Bank & Trust Co., Receiver;

Harry Lane, Esq.,
Solicitor for Mortgagee, Wm. Wittles, etc.

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Henry Carless,
Solicitor for Workingmen's Circle;

Samuel Heller, Esq.,
Solicitor for William Jacobs;

Abe. M. Herman, Esq.,
Solicitor for Defendant, West Ridgelawn Cemetery;

John Platoff, Esq.,
Solicitor for several lot owners;

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Abe. Levitan, Esq.,
Solicitor for Dougal Herr, Receiver.

Notice.

Gentlemen:

PLEASE TAKE NOTICE, that on Wednesday next, April 8th, 1931, at the Chancery Chambers in the City of Jersey City, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, I shall make application to the Chancellor:

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1. For an order permitting Albert Snyder, a judgment creditor, to file the bill of complaint in his cause of action against the defendant company and consolidate his said cause of action with the Atlas Fence Company, the complainant herein.

2. For an order permitting the filing of the bill of complaint of Albert Snyder against the defendant West Ridgelawn Cemetery, in the event that the present bill of complaint be dismissed, dissolved and vacated; and for such other relief as may be equitable and just.

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Dated: April 2nd, 1931.

Respectfully yours,

IRVING WERKSMAN,
Solicitor for Albert Snyder.

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Affidavit of John Hollowood.

(Filed March 16, 1931.)

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

John Hollowood, of full age, being duly sworn, upon his oath deposes and says: 10

1. I reside on Dwas Line Road, Clifton, New Jersey, on a farm which I rent and have resided thereon continuously for the last eight years.

2. This farm is within five hundred feet of the property of the West Ridgelawn Cemetery.

3. During the summer of 1929 I was employed by Mr. Adam Frank of the West Ridgelawn Cemetery as a workman on the grounds and property of the cemetery. At the present time, I am the holder of a note of the West Ridgelawn Cemetery signed by Adam Frank as president and Walter Frank as treasurer on which there is due and owing the sum of $165, in addition to that the West Ridgelawn Cemetery owes me $70 for labor performed in the year 1930, making a total of $235 due and owing to me at this date. I have asked Adam Frank repeatedly to pay me the money due me, but he always gives me various excuses. Said sum of $235 is due and owing to me at this date. 20 30

4. One Sunday during the later part of the summer in the year 1930, a funeral procession came to the cemetery. The undertaker looked around the premises for the grave that was supposed to have been dug, but could not find same. 40

He inquired from two men working on the cemetery as to why the grave was not dug. The two men answered the undertaker that they had not received any orders to dig the grave and would not dig any grave unless they received orders from Mr. Adam Frank. The relatives and friends of the deceased were compelled to wait on the cemetery grounds for about three hours until Mr. Adam Frank arrived from New York. He then gave orders for a grave to be dug and the people attending the funeral had to wait further until the grave was dug. Mr. Adam Frank explained that he was late and could not get in touch with the men on the grounds because there was no telephone on the cemetery which he could call up.

5. In the fall of 1929, I came home one day from work about 4:30, my wife informed me that they were looking for me to dig a grave on the West Ridgelawn Cemetery. I walked down to the chapel of the cemetery and found one of the windows of the chapel open and various digging tools strewn all over the floor. I called Mr. Adam Frank in New York and asked him when he wanted me to dig the grave. He answered that the grave already had been dug. He told me that since the people attending the funeral could not find any one to dig the grave, that the son of the deceased was compelled to dig the grave himself.

6. In the summer of 1929, I noticed a hearse drive up on the cemetery premises. The undertaker and chauffeur got out and they themselves immediately started to dig a grave and buried an infant in the said grave. There was no one who had any authority on the cemetery to receive and inspect the burial permit which the undertaker is

supposed to turn over to the cemetery officials. In this case there was no one on the cemetery to inspect or even see if there was a permit for the burial. After the infant was buried, the undertaker drove away, and to this day I do not know whether or not there ever was a burial permit for such burial. 10

7. One day last week, a funeral procession came on the grounds of the cemetery. There was absolutely no one in charge of the grounds or even anyone on the grounds to dig a grave. The undertaker conducting said funeral started looking around the grounds for some one to dig the grave among the neighbors of the cemetery. He finally found one, Martin Munch, a neighbor of mine, who dug the grave while the relatives and 20 friends of the deceased waited and stood by.

8. If an undertaker or anyone conducting a burial or funeral desires to get in touch with the cemetery, the only way they could do so is by calling Adam Frank at his New York office. There is no one at all on the cemetery grounds today. There is no supervisor in charge of the cemetery at the present time. There are no men employed on the cemetery today and when a funeral comes 30 out, it is necessary for the undertaker to start looking around among my neighbors for a person to dig the grave. The relatives and friends of the deceased have to wait around until the undertaker finds someone to dig the grave. Inasmuch as most of my neighbors have money coming to them from the cemetery association already for labor performed on the cemetery, it is quite difficult to find someone to dig the grave. After the undertaker finds someone willing to dig the grave, then it is 40

necessary for the friends and relatives of the deceased to stand by and wait and watch the grave dug and then to bury the deceased after that ordeal. Usually, the person digging the grave insists on cash immediately for his labor.

10 9. There has been no telephone on the cemetery premises for about four months and there is no way to get in communication by telephone at all.

10. The cemetery grounds are in a wild condition and are not taken care of properly. The grounds are practically the same as they were when bought from the farmers. There has been no grading done at all. This cemetery is a gen-
20 eral eyesore to the entire neighborhood.

11. About a month ago a serious brush-fire started on the premises and swept over quite an area of ground including graves.

JOHN HOLLOWOOD.

Sworn to and subscribed before me
this 30th day of December, 1930.

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JOSEPH H. BAKER
An Attorney at Law of N. J.

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Affidavit of Joseph Tabaka.

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

Joseph Tabaka, of full age, being duly sworn, upon his oath deposes and says: 10

1. I reside on Dwas Line Road, Clifton, New Jersey, directly adjacent to the property of the West Ridgelawn Cemetery, and have lived there continuously for the past twelve years.

2. In 1929, Mr. George M. Komar, who was then the superintendent of the West Ridgelawn Cemetery, asked me to go to work for the cemetery as a laborer on the grounds. I thereupon went to work until my claim ran up to $128.50. I asked Adam Frank, personally, on many occasions, for my money and was informed by him that he could not pay me as neither he nor the cemetery had any money and that I would have to wait until the cemetery sold enough ground to pay the claims of myself and three or four other workmen. Adam Frank came to the cemetery on many different occasions, and every time I had the chance, I asked him for my money and received the same answer. I know that the other workmen also asked for their money and were told the same thing, in my presence. I have not received any payment whatever on this claim and the sum of $128.50 with interest is still due and owing. 20 30

3. In July or August of 1929, a funeral procession came to the cemetery for the purpose of interring the body of a child and there being no grave-diggers or any other care-takers to supervise or to dig this grave, it was dug by the 40

chauffeur who drove the hearse bearing the body of this child. I witnessed this and saw that the grave, which is within three hundred feet of my home was dug very hastily and not more than a foot and one-half in depth. The grave was then filled in and the procession departed. This grave still remains in the same condition and depth as at the time of the interment.

4. During the summer of 1929, I was asked, upon several occasions, to dig graves, just before the funeral procession arrived, by various undertakers who conducted these funerals. The undertakers informed me that they could not find any one to dig the grave as there was no one on the property to do so, and they came to me because I was the nearest person to be had. After digging these graves, I received the sum of $10 for each grave from the undertakers themselves. I informed the undertakers that I would not dig any graves unless I received my money immediately as all of my former work for the cemetery had not been paid for and that I would not work unless I received cash.

5. During June, 1929, acting under orders of Mr. Komar, the superintendent, I personally opened and removed a casket to another grave being informed by Mr. Komar that this casket had been buried in the wrong plot. Subsequently, I was again ordered to re-open the second grave and again remove the same casket to a new plot as Mr. Komar said that the second location had also been incorrect. Later, a woman came to the cemetery and asked Adam Frank in my presence where the body of her husband was buried and Adam Frank replied that he would not tell her unless she paid him the sum of $9.00 for doing so. She

paid him the sum of $9.00 in my presence and in the presence of another man, a neighbor, and Adam Frank thereupon showed her the location of the woman's husband's grave. It was this man's body that was removed twice from various graves, as above described.

6. On other occasions I overheard Adam Frank talking to Mr. Komar about moving various bodies that had been buried in the wrong burial plots.

7. Several times undertakers informed me that they were forced to look for local help as they could not telephone any one on the grounds as the telephone service was disconnected, also that it would be useless anyway even if they could do so as there was no caretaker on the grounds.

8. During the winter of 1929-30, there was no caretaker or any other person in charge of the cemetery and at the present time there still is no caretaker or any other person in charge of the cemetery. The telephone has been and still is disconnected so that the cemetery is absolutely a wild and uncared for tract of land.

9. The property looks terribly neglected. During the summer, the grass grows over the graves without any attempt being made to keep them free from weeds and vegetation. The greater portion of the cemetery is unfenced and open to all trespassers and passers-by. This summer a fire blazed over a great part of the cemetery for several days without anyone on the cemetery to fight the flames. Finally, after burning for several days, I called the Clifton Fire Department and they sent out firemen who succeeded in putting out the fire. While the fire burned the flames

reached my property and almost set fire to my buildings.

10. In mid-summer of 1929, a funeral procession came from New York and after the undertaker searched the premises for a caretaker or grave digger and, being unwilling to dig the grave, the undertaker and chauffeur brought the casket containing the body to the tool shed of the cemetery and left the coffin in this tool shed for about four or five hours. Later someone was found to dig the grave and the coffin was then removed from the tool shed and interred.

11. The building of a chapel on the premises was begun about four years ago. This is a small building of wood and stucco, two stories high. This building remains unfinished to this day. The inside of this chapel is entirely bare and unfinished.

12. This cemetery is a blight and an eye-sore, to our neighborhood and all the residents of this vicinity are continuously discussing all the terrible conditions of the mismanagement and neglect of this large tract of land. It is a disgrace to be called in at the last minute to dig graves and shameful that almost every one of my neighbors has an unpaid claim against the cemetery and Adam Frank, either for general labor or for digging graves at the last minute tearful request of the undertakers or families of the deceased.

His Mark.
JOSEPH X TABAKA.
Witnessed by John Tabaka.

Sworn to and subscribed before me
this 30th day of December, 1930.

JOSEPH H. BAKER,
An Attorney at Law of N. J.

Affidavit of Albert Snyder.

State of New Jersey, }
County of Passaic, } ss:

Albert Snyder, of full age, being duly sworn, upon his oath deposes and says:

1. I reside on Stone House Plains Road, Clifton, New Jersey, on a farm which I rent and have resided thereon continuously for the last six years.

2. This farm is directly adjacent to the property of the West Ridgelawn Cemetery.

3. During February, 1925, I was employed by the superintendent of the West Ridgelawn Cemetery as a workman on the grounds and property of the cemetery and was employed steadily during February, March and April until there is due and owing to me the sum of $186.10.

4. When I demanded payment of this sum from Mr. Adam Frank who was and still is the person in absolute charge of the West Ridgelawn Cemetery, Mr. Frank promised to pay me on many occasions forcing me to wait and delaying me as much as possible.

5. In 1930 I instituted suit in the Passaic District Court and recovered judgment on September 24th against the West Ridgelawn Cemetery in the sum of $186.10. I know that Adam Frank who was always referred to by all my neighbors residing in the vicinity of the West Ridgelawn Cemetery as the manager and boss of the cemetery and has been engaging labor and contracting debts without making any attempt to pay them, delay-

ing and stalling his creditors in every possible fashion.

6. In 1926 my neighbor William Jacobs recovered a judgment against the West Ridgelawn Cemetery for $505.44 and since then has purchased under execution of his judgment approximately two acres of some of the most valuable land of the cemetery, lying on Passaic Avenue, the main highway between Passaic and Essex County. In my opinion the value of this property is far out of proportion to the amount of the judgment, being worth at the present market price more than $20,000.

7. Mr. Jacobs has told me several times that this property is his and that no one could take it away from him.

8. I know that the cemetery is in a terribly rundown and neglected condition; that grave-stones are permitted to fall and lie horizontally upon the ground; that from the neglected appearance of the cemetery there have not been sufficient workmen to maintain them properly; that during the past there have been serious and wide-spread brush fires during which the fires have burned for hours over graves and burial plots without anything being on the ground to fight the flames.

In general the cemetery is a terrible eye-sore and disgrace to the entire section.

ALBERT W. SNYDER.

Sworn to and subscribed to before me this 29th day of December, 1930.

JOSEPH H. BAKER,
An Attorney at Law of N. J.

Order.

(Filed May 5, 1931.)

IN CHANCERY OF NEW JERSEY.

83/379.

Between ATLAS FENCE COMPANY, Complainant, *and* WEST RIDGELAWN CEMETERY, *et als.*, Defendants.	Order. On Bill, &c.

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This matter coming on to be heard on notice of Albert W. Bonynge, a certificate holder and lot owner, and Albert Snyder, a judgment creditor, of an application to be made parties complainant and to file an amended bill and after hearing Harry Lane, of counsel with Albert W. Bonynge, certificate holder and lot owner, and Irving L. Werksman, of counsel with Albert Snyder, and after considering the entire record herein, including the affidavits presented on this application and an affidavit of Harry Braverman verified April 29, 1931, which takes the place of a copy of an affidavit made by the said Harry Braverman submitted to the Court at the time the application was originally heard, said Harry Braverman being then out of the country, and which affidavit of said Harry Braverman is ordered filed, and after considering the proposed amended bill presented herewith;

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Order.

It is, on this 5th day of May, 1931, ORDERED:

That the said Albert W. Bonynge and Albert Snyder be and the same are hereby made parties complainant and the said parties complainant are given leave to file the amended bill of complaint herewith presented and said bill is ordered filed.

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And it is further ORDERED that the receiver appointed herein upon the original bill and the proofs supporting it be and he is hereby continued upon the amended bill and with all the powers heretofore conferred upon him by any order of the Court.

Respectfully advised,

20 JOHN O. BIGELOW, V. C. E. R. WALKER, C.

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Order Consolidating Causes.

(Filed May 5, 1931.)

IN CHANCERY OF NEW JERSEY.

Between ATLAS FENCE COMPANY, Complainant, *and* WEST RIDGELAWN CEMETERY, *et als.*, Defendants.	On Bill, &c. Order Consolidating Causes.
Between ALBERT SNYDER, Complainant, *and* WEST RIDGELAWN CEMETERY, Defendant.	

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This matter being brought to the attention of the Court by Michael Horowitz, solicitor for the complainant, Atlas Fence Company, and it appearing that a bill had been filed by the complainant, Albert Snyder in the cause secondly mentioned above, and it further appearing that the said bills of complaint seek the same remedies, and that the said causes should be consolidated,

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It is therefore, on this 5th day of May, 1931, ORDERED, that the causes set out above be and they are hereby consolidated, and that all papers in the future should be filed and all proceedings had under the cause firstly set out above.

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Respectfully advised,

JOHN O. BIGELOW, V. C.

E. R. WALKER, C.

Amended Bill of Complaint.

(Filed on or About May 5, 1931.)

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

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Complainant, Atlas Fence Company, a corporation of the State of New Jersey, having its principal place of business in the City of Newark, County of Essex and State of New Jersey, a creditor of West Ridgelawn Cemetery, and Albert Snyder a judgment creditor of West Ridgelawn Cemetery, and Albert W. Bonynge, certificate holder and lot owner of the West Ridgelawn Cemetery the defendant herein, who have been joined as parties complainant herein, in behalf of themselves or all other creditors, certificate owners, certificate holders, or lot owners of the West Ridgelawn Cemetery, who may come in and contribute to this suit, respectfully show:

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1. The defendant, West Ridgelawn Cemetery is a corporation organized for cemetery purposes under "An Act To Authorize The Incorporation of Rural Cemetery Associations and Regulate Cemeteries" (P. L. 1849, p. 9; Revision 1877, p. 100). Certificate of Incorporation was duly filed in the office of the Clerk of the County of Passaic on the 3d day of October, 1905.

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2. Pursuant to the said certificate of incorporation which was duly filed in the County Clerk's Office in and for the County of Passaic, said corporation did organize and elect trustees and acquire said premises, and did hold itself out as a duly incorporated cemetery association, and did further sell plots to divers persons for interring

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purposes. That divers plot owners did pursuant to a deed issued by the defendant inter the bodies entitled thereto. The remaining lands are not presently used for burial purposes. Complainant Albert W. Bonynge is the owner of a lot in said cemetery and is also the owner of certain certificates issued by said defendant in payment for lands which certificates are unpaid and under the terms of which said defendant is required to pay to the trustee Passaic National Bank & Trust Co. for the benefit of the certificate holders one-half of the proceeds of sale of plots after certain deductions, which payments defendant has not made.

3. The said corporation held meetings pursuant to the statute in such case made and provided in the year 1913, and each and every year thereafter until the year 1920, since which time the said defendant has failed to comply with the statute concerning the election and qualification of the trustees by having failed to file with the County Clerk of the County of Passaic a certificate duly setting forth the election of trustees and the fact that they had duly qualified.

4. The defendant, West Ridgelawn Cemetery Association, has not held and conducted meetings for the election of trustees since 1920.

5. The said West Ridgelawn Cemetery conducts its business at 36 West 44th Street, New York City and all of the business of the aforesaid cemetery is carried on at that place. The person in charge of the business of the said Cemetery association is one Adam Frank.

6. On or about the 2d day of April, 1906, one Herbert G. Gruber, then owner of the aforesaid

lands and premises now owned by the said West Ridgelawn Cemetery executed a mortgage in the sum of approximately $25,000.00 to one John W. Griggs. Said mortgage was recorded in the Office of the Register of the County of Passaic. Thereafter, the said John W. Griggs assigned the aforesaid mortgage to one William Bittles. Subsequently, there having been nothing paid on account of principal or interest upon the aforesaid mortgage; the said William Bittles instituted a suit for the foreclosure of the aforesaid mortgage against the said West Ridgelawn Cemetery. On the 3rd day of July, 1930, a decree in the said foreclosure suit was entered in favor of the complainant William Bittles and against the defendant West Ridgelawn Cemetery in the sum of $39,706.39. By the terms of the aforesaid decree, the Passaic National Bank & Trust Company of Passaic was appointed sequestrator for the purpose of sequestering certain of the assets of the said defendant cemetery for the payment of the aforesaid sum due upon the aforesaid decree. By the further terms of the aforesaid decree, the defendant corporation was ordered to set aside a certain sum of money for the upkeep of the aforesaid cemetery.

7. On the 16th day of April, 1927, there was docketed in the office of the Clerk of the County of Passaic, a judgment entered in behalf of Fred Schultz, Fred Schultz, Jr., Frank Schultz and Louis Schultz, partners trading as F. Schultz & Sons, against the said West Ridgelawn Cemetery, in the sum of $215.90. Said judgment was docketed in Book K of District Court Judgments for said County, page 74.

8. On the 16th day of April, 1927, there was docketed in the office of the Clerk of the County of Passaic a judgment entered in behalf of William Jacobs in the sum of $505.55. Said judgment was docketed in Book K of District Court Judgments for said County, page 75.

9. Thereafter, William Jacobs, judgment creditor aforesaid, acting under the aforesaid judgment, did cause a Sheriff's execution sale to be had of a portion of the lands and premises of the said West Ridgelawn Cemetery in order to pay and satisfy the aforesaid judgment. The sale was accordingly had and thereafter, on the 15th day of July, 1929, Thomas Carless, Sheriff of the County of Passaic, sold the said premises, being a parcel of land on the westerly side of Passaic Avenue, near Stonehouse Road, being approximately 225 feet by 608 feet for the sum of $150.00 to the said William Jacobs, highest bidder. Following this sale, the defendant corporation instituted proceedings in this court for the purpose of setting aside the said Sheriff's sale but the same was denied. Defendant corporation in the course of these proceedings admitted in its pleadings that the said lands were worth $24,000.00. The refusal of this Court to set aside such sale is now the subject of an appeal before the New Jersey Court of Errors and Appeals.

10. On the 4th day of March, 1930, there was docketed in the office of the Clerk of the County of Passaic, a judgment entered in behalf of Campbell, Morrell & Company against the said West Ridgelawn Cemetery in the sum of $161.24. Said judgment was docketed in Book M of District Court judgments for said County, page 418.

11. On the 12th day of May, 1929, there was docketed in the office of the Clerk of the County of Passaic, a judgment entered in behalf of Standard Oil Company of New Jersey against the said West Ridgelawn Cemetery, in the sum of $201.65. Said judgment was docketed in Book M of District Court Judgments for said County, page 12.

12. Thereafter, one Fred Snyder, secured a judgment in the District Court of the City of Passaic against the said West Ridgelawn Cemetery, in the sum of $25.00.

13. Thereafter, complainant Albert Snyder secured a judgment in the District Court of the City of Passaic against the said West Ridgelawn Cemetery in the sum of $186.10.

14. Thereafter, one John Hollowood secured a judgment in the District Court of the City of Passaic against the said West Ridgelawn Cemetery in the sum of $235.00. Subsequently said judgment creditor John Hollowood made application to the Court of Chancery for the appointment of a receiver to sequester the assets of the said cemetery association for the payment of the aforesaid judgment by virtue of paragraph 16, section 1 of "An Act to Authorize the Incorporation of Rural Cemetery Associations and Regulate Cemeteries (P. L. 1849, p. 9, Revision 1877, p. 100)". On the 3d day of June, 1930, an order was entered in this Court appointing Sidney Alexander of Paterson, New Jersey, as such receiver.

15. On the 21st day of October, 1930, complainant Atlas Fence Company recovered two judgments in the District Court of the City of Passaic against the said West Ridgelawn Cemetery in the respective sums of $350.00 and $329.05, together with interest and costs thereon.

16. About September, 1930, one Abraham H. Gottlieb, assignee of a judgment recovered by one Shelly R. Safir against the said West Ridgelawn Cemetery in the New Jersey Supreme Court on the 26th day of October, 1929, in the sum of $4,053.67 and $67.76 costs, instituted suit in the Court of Chancery for the appointment of a Receiver. Final decree upon the above proceedings was entered on the 27th day of October, 1930, in favor of the said Abraham H. Gottlieb, complainant. By the terms of the said final decree, Dougal Herr of Hoboken, New Jersey, was appointed receiver to sequester the assets of the said cemetery association and to assume full power in the management of the lands of the said association, for the purpose of marshalling sufficient assets to pay the aforesaid judgment.

17. Your complainants further charge that the defendant has suffered and permitted, with injury to the complainants herein, certain judgments to be rendered against it, one in particular in the sum of $61,965.00, which was recovered against the said defendant association by one Arthur C. Ackerman on January 29th, 1930, which judgment your complainants verily believe was not contested, and that, pursuant to said judgment, execution was had thereon and sale was made of approximately 38 acres of the ground used for burial purposes of the defendant association wherein deeds have been issued by the said defendant association to respective plot owners for part of the premises sold under the Sheriff's deed under the above judgment, contrary to the statute which prohibits the sale of land dedicated and used for burial purposes.

18. The judgment hereinabove referred to if permitted to stand will divest title to a vital and important part of the defendant association's property and the said judgment was permitted to be entered through the negligence or collusion of one Adam Frank, who is and has been the controlling factor and person in charge of the defendant association's properties.

19. On March 22d, 1913, said defendant association did permit a certain judgment to be entered against it in the sum of $1,039.04, wherein Carlyle Garrison was plaintiff and defendant association was the defendant, and the said judgment is still open of record and unpaid.

20. One Anton L. Pettersen obtained a judgment against the defendant association in the sum of $378.40 on June 11th, 1930, and said judgment is open of record and unpaid, and a sequestrator was appointed by this Honorable Court, and said sequestrator is functioning under an order of this Honorable Court.

21. The Passaic National Bank & Trust Co., a banking organization organized under the laws of the State of New Jersey has been duly appointed sequestrator by this Honorable Court to take into its possession the proceeds of all sales of any of the land and premises of West Ridgelawn Cemetery and to apply not more than one-half thereof toward the proper maintenance of said cemetery, the remainder to be applied on account of the decree in foreclosure of a mortgage held by William Bittles, upon which mortgage the said defendant association had defaulted and had wholly failed to make the payments provided thereunder, all to the detriment, hurt and

injury of your complainants herein as well as to other creditors, plot owners, mortgagees and certificate holders of the several plots of ground relating to the said defendant association.

22. The said defendant association issued warranty deeds to the divers plot owners and received a consideration therefor, without informing the said plot owners of the existence of the mortgage and the said several judgments affecting title to the said premises.

23. The said defendant did under the terms of the several deeds issued to the several plot owners, agree to retain fifty per cent. of the purchase money paid by the said plot owners for the embellishment, maintenance and care of the grounds. The defendant association did not perform its obligation and the moneys received by said defendant were used for other than cemetery purposes, and the grounds have been permitted to run into disrepair and the defendant association did not maintain the grounds, graves and plots and the monies realized from the sale of the above said grounds were not devoted by the defendant for the purposes above enumerated contrary to the statute in such case made and provided, which requires the defendant association to retain fifty per cent. of all monies realized from the sale of plots of grounds for maintenance and embellishment purposes.

24. At divers periods covering a number of years, there has been no person in charge of the cemetery grounds, on frequent occasions funeral processions would come in and upon the premises, and there would be no person to dig the grave and three hours would elapse without inter-

ring the remains of the deceased person and it often was necessary for the funeral director to look in and about the vicinity for some person to dig the grave so that the body could be interred. Persons in the neighborhood have been called by the funeral directors frequently to dig graves and no compensation has been made therefor by said defendant, although repeated demands have been made upon the said Adam Frank who received all the monies of said defendant for payment. There was no telephone for a long period of time on said premises. The said Adam Frank is not a resident of the State of New Jersey, but resides in the City of New York, and he has not been devoting his time or energy to the said cemetery and has placed no person in charge to do this for him.

25. At times persons have been buried in said cemetery in the wrong plots because there was no person in charge to direct the plot owners to the plots owned by said plot owners, and the bodies have been re-interred subsequently and removed to their proper places.

26. The said Adam Frank sold divers plots in the said cemetery grounds and failed to wholly account to the said Cemetery Association for the moneys realized out of the sale of the said plots and in particular on November 6th, 1926, said Adam Frank did receive $500.00 for a plot in said cemetery and the said check was payable to the account of Adam Frank, Attorney, and deposited to the account of Adam Frank, Attorney, in the Equitable Trust Co. of New York City.

27. The said Cemetery Association has been in arrears for taxes to the said City of Clifton for

the years 1918, 1919, 1921, 1922 and 1923, and tax sales were conducted by the said City of Clifton, and the said property has been bought in by the said Harrington Co. Sales of plots were made by the defendant subsequent to the said taxes sales and warranty deeds were issued for said plots free and clear of any and all encumbrances of every kind and character. 10

28. Although the defendant organization was organized for cemetery purposes, the premises owned by said defendant or part thereof was deeded to Adam Frank, individually, by the defendant under the control of said Adam Frank on April 20th, 1916, which deed is recorded in the Register's office of Passaic County in Book Q-25 of Deeds for said County on page 318, and the said premises were held by the said Adam Frank in his individual name to December 16, 1924, when the same were reconveyed to the West Ridgelawn Cemetery Association defendant herein by deed recorded in the Register's office for Passaic County in Book R-31 of Deeds for said County, page 505. 20

29. The uses for which said defendant association was incorporated were not in fact carried out, lived up to or adhered to by the defendant primarily because of the efforts, directions and management of the said Adam Frank. It is imperative for the protection of complainants and the remaining persons interested in said Cemetery Association that the said Adam Frank be removed as President and Trustee, and that persons be designated by this Honorable Court to manage, direct and maintain said cemetery for the benefit of all persons having an interest therein. The reputation, efficiency and utility of the said de- 30 40

fendant association has been impaired by reason of all that has transpired concerning its activity, management and service to plot owners.

30. The said Adam Frank and the West Ridgelawn Cemetery Association and its trustees should be made to account for all the moneys received by him, it or them or for which he, it or them are responsible, and to properly disburse said monies in accordance with the by-laws and statute, and the said defendant association should be compelled by this Honorable Court to deposit, retain and expend 50% of all moneys realized from the sale of plots of ground for the embellishment and maintenance of said property and a proper person or persons should be designated by this Honorable Court to protect the remaining property from being sold under judgments and to investigate the conditions surrounding the transactions of the said defendant association to the end that all plot owners and creditors receive the equitable protection that this Honorable Court can afford.

31. No notices of any kind have been forwarded by the defendant association to the plot owners concerning the time and place for the holding of meetings or for the election of trustees and all the work pertaining to the said business has been conducted by the said Adam Frank for his own individual aggrandizement and purposes.

32. For a number of years Adam Frank has been involved in litigation in this Honorable Court and has tried to obtain the control of the said association and the certificates, and in his many endeavors has brought the said association into disrepute, and to carry out the purposes for which this cemetery has been organized and to perpetu-

ate the graves and cemetery grounds, it is imperative that some person or persons other than the present trustees be authorized by this Honorable Court to safeguard the rights of the divers persons interested in the well-being, care and control of the said cemetery grounds.

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33. The said defendant association through its officers failed to keep books of account in a proper and legal manner and failed to credit to the account of the defendant association the moneys received for the sale of the plots in the cemetery and failed to deposit said moneys to the credit of the said defendant association and the said Adam Frank and other trustees of the said defendant association did benefit personally by reason of the sale of said plots and did in divers other respects wholly fail to account to the certificate holders and stockholders of the said association for the proceeds so received, by them, and did further fail to expend the moneys so received in accordance with the by-laws and statute governing the administration of cemetery associations.

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34. The said Adam Frank is diverting funds of the said West Ridgelawn Cemetery to his own use. The said defendant cemetery association is not maintaining an office of a registered agent within the State of New Jersey; the books of the said cemetery association are kept outside of the State; the defendant corporation has not filed a yearly report with the Clerk of the County of Passaic as is required by Statute, since 1920, (the filing of which report was ordered by this Court); the defendant corporation has not complied with the statutory requirements of giving notice of its annual elections to its plot-owners and as a result thereof the elections of the trustees, if there have

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been any elections, are invalid; the said trustees, if any, are holding office illegally; Adam Frank and the other trustees, if any, are not lot owners and are therefore not eligible to act as trustees; Adam Frank and the other trustees, if any, are not legal residents of the State of New Jersey as required by the statutory requirements of the State of New Jersey; and they therefore are holding office illegally; the said cemetery association has not set aside certain moneys for the upkeep of the said cemetery, in accordance with the requirements of the decree more particularly set out in paragraph 16 above. The defendant, Adam Frank, has made further sales of the cemetery lands since the date of the decree set forth in paragraph 16 above, and such sales of land have been made without the knowledge or authority of this Court or of Dougal Herr, Esq., receiver, and the said Adam Frank, by virtue of his action has violated the orders of this Court and is in contempt thereof.

35. On the 30th day of March, 1926, the defendant West Ridgelawn Cemetery by agreement recorded in Book X-32 of Deeds in the office of the Register of the County of Passaic, page 512, recorded on August 21st, 1926, entered into a contract with the King Solomon Cemetery granting the latter the sole right to sell lots and plots of the said West Ridgelawn Cemetery to buyers for Jewish burials exclusively.

36. The said King Solomon Cemetery is made a party defendant for the purpose of ascertaining the state of accounts existing between the said King Solomon Cemetery and the said West Ridgelawn Cemetery, and what moneys, if any, on account of sales of cemetery lands of the said West

Ridgelawn Cemetery are due and owing to the latter.

37. The said defendant cemetery corporation has by virtue of the following deeds of transfer conveyed various parcels of cemetery lands to the following named persons and corporation, to wit: Workman's Circle Cemetery Association of Newark, Inc., by deed recorded in the office of the Register of the County of Passaic in Book R 31 of Deeds for said County, page 513; Knisher's Young Men's Benevolent Association by deed recorded in the office of the Register of the County of Passaic in Book M 32 of Deeds for said County, page 599; Samuel B. Dubrow by deed recorded in the office of the Register of the County of Passaic in Book O 32 of Deeds for said County, page 315; Rubin & Noval Sick & Benevolent Association by deed recorded in the office of the Register of the County of Passaic in Book Q 32 of Deeds for said County page 143; B'nai Jacob Fishman Lodge #77, I. O. B. S. by deed recorded in the office of the Register of the County of Passaic in Book U 32 of Deeds for said County, page ; New Sandizer Halberstam K. U. V. by deed recorded in the office of the Register of the County of Passaic in Book U 32 of Deeds for said county, page 154; Congregation A. A. A. of Orange by deed recorded in the office of the Register of the County of Passaic in Book V 32 of Deeds for said County, page 1. There have been divers other transfers of title to portions of the aforesaid cemetery lands, which said transfers of title are not a matter of record and the names of the persons to whom said properties have been transferred are unknown to complainant.

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38. William O. Stevens, the Attorney General of the State of New Jersey, is made a party defendant herein for the purpose of answering that portion of this bill which relates to the public right.

10 39. Because of the various orders and restraints made by this Court against the said defendant corporation and for the other reasons aforesaid, the latter cannot properly carry on its business and it is futile to allow or permit the present trustees to carry on the business of the said West Ridgelawn Cemetery.

40. The defendant corporation is insolvent; the assets of the said corporation are being diverted and dissipated by the said Adam Frank and are 20 not being used in payment of the just debts of the cemetery association; the Statutes of the State of New Jersey do not permit execution to issue against the cemetery lands and there is no way in which the judgment creditors can secure satisfaction of their judgments; complainants charge that unless this Court, in view of the facts aforementioned, will deal with the defendant corporation's property as a single trust fund, its assets will be so dissipated or dissembled in the hands 30 of its trustees, or in the hands of the various receivers appointed under the several orders of this Court, that the creditors will receive nothing from such assets and as a result will be unable to collect their judgments and lot owners and certificate holders will be deprived of their property.

41. Checks have been issued to creditors of the said West Ridgelawn Cemetery on a bank account in the Equitable Trust Co. in the name of "Adam 40 Frank, Attorney", which checks have been re-

turned for insufficient funds and the complainants charge the said account is overdrawn.

42. On the 15th day of April, 1929, at a purported meeting of lot owners of the defendant corporation, the following were elected as trustees: Adam Frank, Ralph Cerreta, Walter L. Frank, Irving H. Lambert, George V. N. Baldwin, Jr., Henry M. Drucker, and those or some of them have been and are acting as the only trustees of said defendant. The said Henry M. Drucker has since died. The said Adam Frank, Walter L. Frank, Irving H. Lambert and Ralph Cerreta are non-residents of the State of New Jersey. Complainants charge that no due notice of the meeting of said lot owners was sent out and that the persons above mentioned were not legally elected trustees.

Complainants are without adequate remedy at law and therefore pray:

1. That the defendants who are: West Ridgelawn Cemetery, Adam Frank, Ralph Cerreta, Walter L. Frank, Irving H. Lambert, George V. B. Baldwin, Jr., Passaic National Bank & Trust Company of Passaic, as trustee for the certificate holders of West Ridgelawn Cemetery, Passaic National Bank & Trust Co., as sequestrator appointed by the Court of Chancery, in a cause in foreclosure, entitled "William Bittles *vs.* West Ridgelawn Cemetery", William A. Stevens, Attorney General of the State of New Jersey, Fred Schultz, Fred Schultz, Jr., Frank Schultz and Louis Schultz, partners trading as F. Schultz & Sons, William Jacobs, Campbell Morrell & Company, Standard Oil Company of New Jersey, Fred Snyder, John Hollowood, Sidney Alexander,

receiver or sequestrator, Abraham H. Gottlieb, Dougal Herr, receiver or sequestrator, Arthur C. Ackerman, Carlisle Garrison, Anton L. Pettersen, King Solomon Cemetery, Workmen's Circle Cemetery Association of Newark, Inc., Knisher's Young Men's Benevolent Association, Samuel B. Dubrow, Rubin & Noval Sick & Benevolent Association, B'nai Jacob Fishman Lodge #77, I. O. B. S., New Sandizer Halberstam, K. U. V., Congregation A. A. A. of Orange, and any other owners of plots in the said West Ridgelawn Cemetery, the other owners of plots being unknown to complainants, may answer this bill of complaint without oath and each statement therein made.

2. That it be decreed that the affairs of West Ridgelawn Cemetery have been and are being grossly mismanaged by the present trustees and that the present trustees have abused their trust and that the assets of the defendant corporation have been dissipated and lost and that the cemetery corporation cannot continue under the management of its trustees and that it is necessary to preserve the rights of all parties concerned and the public purpose that this Court take over the administration of the affairs of the said defendant.

3. That this Court take over the administration of the affairs of the defendant corporation, and that a receiver or receivers be appointed to take possession of the property and business of the said defendant, with such powers as this Court may direct, and that the defendant and its officers and agents and trustees be enjoined and restrained from exercising any of the privileges or franchises of the defendant corporation and from collecting or receiving any debts due to the said

defendant corporation and from paying out, selling, assigning and transferring any of the assets, money, funds, lands, tenements or effects of the said corporation, and from interfering in anywise with the administration of the affairs of the said defendant corporation by the receiver or receivers to be appointed by this Court. 10

4. That the said West Ridgelawn Cemetery Association, and the Passaic National Bank & Trust Co. be decreed to be trustees of the funds, property, issues and effects of whatsoever nature and kind the same may be of the said defendant association for the benefit of the said complainants and other creditors or persons who may be interested or claim against said corporation and who may hereafter join as a party to the within proceedings, and that the said persons aforenamed be compelled to account for all the moneys by them received. 20

5. That all the parties hereto made defendants hereto be enjoined and restrained from interfering in anywise with the assets of the defendant corporation and with performing any act which would interfere with the administration by this Court of the affairs of the defendant corporation through the receiver or receivers appointed by this Court. 30

6. That the rights of all persons in the assets of the defendant corporation be ascertained and settled.

7. That the Court fully administer the funds being the entire assets of the defendant corporation and for that purpose marshal and ascertain all of its assets, liens, legal or equitable, and priorities, rights and credits, if any, existing on all 40

parts thereof and enforce the lawful liens and rights of all the creditors and the defendant corporation as they may be finally ascertained.

8. That complainants have such temporary relief by the appointment of a receiver or receivers, or by injunction, as may be proper.

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9. That complainants may have such other and further relief as may be proper.

10. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such order or decree as this Court may make in the premises.

Louis A. Fast,
Solicitor for Complainants.

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Carey & Lane,
Of Counsel with Albert W. Bonynge.

Irving L. Werksman,
Of Counsel with Albert Snyder,
Complainant.

Louis A. Fast,
Of Counsel with Atlas Fence Company,
Complainant.

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Affidavit of Albert W. Bonynge.

(Filed April 8, 1931.)

IN CHANCERY OF NEW JERSEY.

83-379.

Between ATLAS FENCE COMPANY, Complainant, *and* WEST RIDGELAWN CEMETERY, *et als.*, Defendants.	On Bill, &c. Affidavit.

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STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

ALBERT W. BONYNGE, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a shareholder of West Ridgelawn Cemetery, holding in excess of 300 shares; and I am also a lot owner of said cemetery.

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2. By deed bearing date September 21, 1906 and recorded in the office of the Register of Passaic County on July 15, 1908, in Book 819, Page 464, Herbert B. Gruber conveyed the lands subsequently conveyed to West Ridgelawn Cemetery to Passaic National Bank & Trust Co., a corporation of the State of New Jersey. Said conveyance was made "subject, nevertheless, to certain uses and purposes fully set out in a certain Declara-

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tion of Trust made by the said Passaic National Bank & Trust Co. this 21st day of December, 1906."

3. Simultaneously on the 21st day of December, 1906, the Passaic National Bank & Trust Co. executed a Declaration of Trust respecting said lands referred to in said deed hereinbefore mentioned. Said Declaration of Trust was duly recorded in the office of the Register of Passaic County on July 15, 1908, in Book 819, page 472.

4. By deed bearing date January 3, 1907, the Passaic National Bank & Trust Co., a corporation of the State of New Jersey, conveyed to West Ridgelawn Cemetery the lands referred to in the deed mentioned in Paragraph #2 and in the Declaration of Trust mentioned in Paragraph #3. The said deed was duly recorded in the office of the Register of Passaic County on July 15, 1908, in Book 819, page 482.

5. The said lands were conveyed to West Ridgelawn Cemetery by said deed under certain terms and conditions set forth in detail in said deed, and the grantee, West Ridgelawn Cemetery, expressly covenanted to carry out the said terms and conditions. Included in the said terms and conditions and covenants are the following:

"(1) That the said land is to be used by the grantee for cemetery purposes.

"(2) That the grantee shall pay as consideration therefor such amount as it may receive from time to time as the proceeds of sale of said lots or plots in the following manner, viz.:

That the said grantee shall first deduct from the proceeds of sale of said lots or

plots, such sum as the said grantee shall deem necessary to set aside for the perpetual care fund, which sum, however, shall not be less than six cents per square foot of land sold for burial purposes. Said perpetual care fund shall be paid over by the grantee to the grantor and shall be invested together with the income therefrom by the said grantor.

One-half of the balance of the proceeds of the sale of said lots and plots shall be paid by the grantee to the grantor and out of the remainder of the proceeds of said sales, the said grantee shall pay to the said grantor as the further consideration for said conveyances, all moneys remaining after the deducting of the expenses of preserving, improving and embellishing the said cemetery grounds and avenues and roads leading thereto and for buildings thereon and the debts contracted for said cemetery and for salaries, wages and expenses incurred by the said cemetery in carrying on its business, and such an amount in addition thereto as the said cemetery may deem proper to retain from time to time for the future embellishing of said cemetery. It, however, being understood that the way with which said money shall be expended shall be entirely under the control of said Cemetery Company, the grantor being in no manner liable therefor. The proceeds of said sale herein referred to shall be paid over to the grantor, its successors or assigns monthly.

"(3) That the price for the sub-lots or plots in said Cemetery shall be fixed by the grantee.

"(4) That the said proceeds of sale of said sub-lots or plots paid by the grantee to the grantor is hereby appropriated and is to be divided by the grantee into thirteen thousand five hundred (13,500) shares to represent which the said grantee shall issue a certificate or certificates to the said grantor in such form as shall be hereinafter recited.

"(5) That the said certificates when issued and delivered as herein provided, shall be negotiable and assignable by the holder thereof, his executors, administrators, successors or assigns and on the surrender up or cancellation of any certificates first issued under this agreement, new certificates in place thereof shall be issued by the said grantee to the person lawfully entitled to receive the same, and the same shall be endorsed as hereinafter provided by the said Trust Company, its successors and assigns."

6. Under the provisions of the final decree entered in the Court of Chancery of New Jersey on the 29th day of March, 1920, in a suit instituted by William Bittles and against West Ridgelawn Cemetery, and others, defendants, an election was held by the lot owners of West Ridgelawn Cemetery for the election of trustees. At said election trustees nominated and controlled by Adam Frank were elected. Since said time trustees nominated and controlled by the said Adam Frank have been and are in control of the management of said West Ridgelawn Cemetery.

7. At the present time the members of the Board of Trustees of the West Ridgelawn Cemetery are non-residents of the State of New Jersey, and are the following:

Adam Frank,
Walter L. Frank,
Irving Lambert,
Ralph Ceretta,
Henry M. Drucker.

8. The affairs of the West Ridgelawn Cemetery since the election held under the final decree of the Court of Chancery hereinbefore mentioned have been in the control of Adam Frank. I have

examined a search that was made of the records of the County of Passaic by the Register of Passaic County and from this search it appears that there have been approximately twenty sales of large plots, and to the best of my information and belief I believe over $100,000 of sales of West Ridgelawn Cemetery have been made. 10

9. I was present in the Court of Chancery at the trial of the suit instituted by William Bittles as complainant and against West Ridgelawn Cemetery, *et al.,* and heard Mr. Adam Frank testify. I heard him admit on the stand that he had deposited proceeds of sales of the property of West Ridgelawn Cemetery in his own personal account in the Equitable Trust Company under the name of "Adam Frank, attorney". 20

10. To the best of my knowledge and belief, said Adam Frank or the Board of Trustees of West Ridgelawn Cemetery has never accounted to the Passaic National Bank & Trust Company for moneys received by him from proceeds of sales and other cemetery receipts. I have been informed by the officers of the Passaic National Bank & Trust Co. that no moneys have ever been paid by West Ridgelawn Cemetery to be credited to the dividend account, nor have any moneys been 30 deposited in the perpetual care fund, nor has any account been opened for the cemetery in the said bank.

11. In addition little or no improvement or embellishment of cemetery lands have been made. There have been judgments entered against said cemetery which are unpaid, and I have been informed that certain of the lands of said cemetery have been sold under execution issued under 40 a judgment.

Affidavit of Albert W. Bonynge.

12. All lot owners, including myself, are interested in the payment of moneys from the proceeds of sale of property to the said bank for perpetual care fund.

13. Every lot owner, including myself, is entitled to have the one-half of the proceeds of the sale of land of said Cemetery which under the said deed of conveyance of said Declaration of Trust were to be used in the payment of the running expenses of the said cemetery and the embellishment of its lands, paid and used for those purposes.

14. The trustees of the West Ridgelawn Cemetery have not accounted for all moneys received from the sale of lands of the West Ridgelawn Cemetery. They have permitted the said Adam Frank to completely control the affairs of West Ridgelawn Cemetery. They have permitted the diversion of moneys realized from the sales of lands of West Ridgelawn Cemetery from the purposes of the trust imposed upon them by the deed of conveyance and the Declaration of Trust hereinbefore mentioned. None of the moneys received from said sales of lands of West Ridgelawn Cemetery has been paid to Passaic National Bank to be applied toward the dividend account or perpetual care fund, nor has the proportion of said moneys which should have been used in the payment of running expenses and embellishment of the cemetery lands been used for that purpose. No suit for accounting has been instituted by Passaic National Bank & Trust Co. against West Ridgelawn Cemetery or its Board of Trustees, nor has any suit been instituted by the Board of Trustees against the said Adam Frank for an accounting of the moneys realized from the sale of lands of said cemetery.

Affidavit of Albert W. Bonynge.

15. There are lands of West Ridgelawn Cemetery which border on a public street or highway and which are not at the present time used for cemetery purposes. Said lands are of high value and under the provisions of an act adopted by the Legislature of 1929 and approved April 22, 1929 could be sold for purposes other than cemetery purposes for a large price unless such sale is restrained and enjoined.

16. As stated before, there has never been any accounting by the said Adam Frank or the Board of Trustees of said West Ridgelawn Cemetery to show the manner of the disposition of cemetery moneys and that in order to protect the lot owners of the West Ridgelawn Cemetery, a receiver or receivers or trustees for West Ridgelawn Cemetery should be appointed, and that a sale or disposition or encumbrance of any of the lands of West Ridgelawn Cemetery should be restrained and enjoined except made under an order of the Court of Chancery.

17. During the course of proceedings pending in this Court an attempt was made to audit the accounts of West Ridgelawn Cemetery and an affidavit was prepared and sworn to by an accountant upon the 31st day of January, 1930. The accountant, Harry Braverman, is now out of the country and I present herewith a copy of an affidavit which was signed by him and verified on the 31st day of January, 1930.

ALBERT W. BONYNGE.

Subscribed and sworn to before me
this 6th day of April, 1931.

HERMAN W. KLANOVER,
An Attorney at Law of N. J.

Affidavit of Harry Braverman, Annexed to Affidavit of Albert W. Bonynge.

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

Harry Braverman, of full age, being duly sworn
10 according to law, on his oath deposes and says:

1. I am a certified public accountant and a member of the firm of H. Braverman & Co., certified public accountants having an office at 1060 Broad Street, Newark, New Jersey. In pursuance with directions of Mr. Robert Carey, I made an audit and examination of the records of the West Ridgelawn Cemetery, which included certain personal records of Adam Frank that were
20 delivered to me for the period commencing August 1, 1923, to May 31, 1929. The examination was particularly made for the purpose of ascertaining the sales made by the cemetery, the amount of cash received from such sales, and the disposition of the cash received.

2. Among the records delivered to me were certain books purported to be books of the Cemetery covering the period 1905 to May 31, 1926. I am of the opinion from my examination of
30 these books that they were written up at one writing and that the entries were not placed in these books periodically during the period of years which they represented, and so far as I could ascertain were not based on any written information on file in the records of the cemetery. The cash receipts were entered in the records through a journel entry in one bulk amount. A charge for discount at the rate of 20% of all sales was included in the entry. There were not delivered to
40 me any subsidiary records with purchases show-

ing the charges, collections, discounts, etc. The cash collected on account of these sales is not segregated as to amounts applicable to each. The entry for the sales does not appear to be accurate as the names of two purchasers are listed without any amount of purchase price stated, although our investigations disclosed that both of these purchasers made subsequent payments.

3. Because of the condition of the records it was necessary for me to go through a mass of loose data, such as check book stubs, cancelled checks, available contracts, letters, and other memoranda, both of Adam Frank personally and the Cemetery, and records which were delivered to me.

4. It appeared from the papers and records that were delivered to me and examined by me that no efforts were made by Adam Frank to keep books of account to properly record the business of the Cemetery. As I previously stated, books were made up as of May 31, 1926, to cover transactions prior to that date. In my opinion these entries do not correctly set forth the operations of the Cemetery. Subsequent to that write-up, not a single entry appears in any of the general books given to us for inspection, although it is apparent that numerous sales were made and considerable moneys were received and disbursed after May 31, 1926.

5. Considerable data was included in the records. Information was kept on loose sheets of paper and no efforts were made to summarize and transcribe the transactions to books usually kept by corporations. As far as I could ascertain, and from statements made to me by Mr.

Adam Frank, no balance sheets or profit and loss statements were ever prepared and submitted to certificate holders. The transactions were so carelessly and loosely kept that it would be impossible for me personally to make a proper accounting of the Cemetery from the records before me; that the mingling of personal transactions of Adam Frank with Cemetery transactions without proper identification of the respective items was inconsistent with proper business proceedings. In my opinion the only proper accounting to be made under the lax methods used would be to examine the records of each purchaser or obtain certified statements therefrom and to have Mr. Frank account for the proceeds so collected.

6. It is apparent from an examination of the bank accounts of the Cemetery and of Adam Frank, attorney, that Mr. Frank deposited a large portion of the moneys received from sales and other Cemetery moneys in his own personal account. The great bulk of the Cemetery moneys were deposited by Adam Frank in an account in the Equitable Trust Company, a banking institution of New York, in an account under the name of "Adam Frank, attorney." An examination of that account shows that a good many of the drawings and disbursements from that account were personal disbursements in nowise connected with any Cemetery purpose.

7. As near as I could ascertain from the records before me, the items to be accounted for by Adam Frank aggregate $88,969.73 which, from the data before me, I was unable to properly allocate. It was impossible for me from the records before me to determine just exactly how much

moneys were received from sales of land of West Ridgelawn Cemetery. For that reason I circularized all the purchasers of plots or lots whose names were disclosed from my examination of the records. The replies received up to December 24, 1929, show a total of sales of $43,203.19 as per the books, against a total of $49,832.52 as per replies of purchasers, a difference of $6,629.33. I did not receive replies from all of the supposed purchasers.

8. From the data received there was a total amount of cash of $137,857.96 received. This money had all been disbursed except $277.05. Most of the disbursements consisted of checks drawn to the order of Adam Frank or personal items which, in my opinion, could not be identified in any way from the records available as Cemetery disbursements. I did not find any payments made to the Passaic Trust & Safe Deposit Company or to the Passaic National Bank and Trust Company for dividend account or perpetual care fund.

9. In conclusion, it is my opinion that an apparent gross negligence prevailed in the operation of the business as no books were kept. In all my experience of some twenty years, I have not found a more deplorable condition in so far as the wholesale absence of regular books is concerned. As stated before, it is apparent that moneys were deposited in personal accounts of Adam Frank and disbursements made from such accounts for apparently personal purposes without any authority for such deposits or withdrawals, and it is impossible for me to state that all moneys received for Cemetery purposes were disbursed for

Affidavit of Harry Braverman, Annexed to Affidavit of Albert W. Bonynge.

Cemetery purposes, and as a matter of fact so far as the records go, it would disclose that thousands of dollars had been disbursed for apparent personal purposes, or at least cannot be accounted for, which should be accounted for by Mr. Frank. I am, of course, unable to state how much other Cemetery moneys have been received by Mr. Frank and not included in the receipts shown on the records presented for inspection to me.

HARRY BRAVERMAN.

Subscribed and sworn to before me this 31st day of January, 1930.

ROY W. SNYDER
Notary Public New Jersey.

Affidavit of Harry Braverman.

(Filed May 5, 1931.)

IN CHANCERY OF NEW JERSEY.

83/379.

Between ATLAS FENCE COMPANY, Complainant, *and* WEST RIDGELAWN CEMETERY, *et als.*, Defendants.	Affidavit.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

HARRY BRAVERMAN, of full age, being duly sworn according to law on his oath, deposes and says:

1. I am a certified public accountant and a member of the firm of H. Braverman & Co., certified public accountants, having an office at 1060 Broad Street, Newark, New Jersey. In pursuance with directions of Mr. Robert Carey, I made an audit and examination of the records of the West Ridgelawn Cemetery, which included certain personal records of Adam Frank, that were delivered to me for the period commencing August 1, 1923, to May 31, 1929. The examination was particularly made for the purpose of ascertaining the sales made by the cemetery, the amount of cash received from such sales, and the disposition of the cash received.

2. Among the records delivered to me were certain books purported to be books of the Cemetery covering the period 1905 to May 31, 1926. I am of the opinion from my examination of these books that they were written up at one writing and that the entries were not placed in these books periodically during the period of years which they represented, and so far as I could ascertain were not based on any written information on file in the records of the cemetery. The cash receipts were entered in the records through a journal entry in one bulk amount. A charge for discount at the rate of 20% of all sales was included in the entry. There were not delivered to me any subsidiary records with purchasers showing the charges, collections, discounts, etc. The cash collected on account of these sales is not segregated as to amounts applicable to each. The entry for the sales does not appear to be accurate as the names of two purchasers are listed without any amount of purchase price stated, although our investigations disclosed that both of these purchasers made subsequent payments.

3. Because of the conditions of the records it was necessary for me to go through a mass of loose data, such as check book stubs, cancelled checks, available contracts, letters, and other memoranda, both of Adam Frank personally and the Cemetery, and records which were delivered to me.

4. It appeared from the papers and records that were delivered to me and examined by me that no efforts were made by Adam Frank to keep books of account to properly record the business of the Cemetery. As I have previously stated, books were made up as of May 31, 1926, to cover

transactions prior to that date. In my opinion these entries do not correctly set forth the operations of the Cemetery. Subsequent to that write-up, not a single entry appears in any of the general books given to us for inspection, although it is apparent that numerous sales were made and considerable moneys were received and disbursed after May 31, 1926.

5. Considerable data was included in the records. Information was kept on loose sheets of paper and no efforts were made to summarize and transcribe the transactions to books usually kept by corporations. As far as I could ascertain, and from statements made to me by Mr. Adam Frank, no balance sheets or profit and loss statements were ever prepared and submitted to certificate holders. The transactions were so carelessly and loosely kept that it would be impossible for me personally to make a proper accounting of the Cemetery from the records before me; that the mingling of the personal transactions of Adam Frank with Cemetery transactions without proper identification of the respective items was inconsistent with proper business proceedings. In my opinion the only proper accounting to be made under the lax methods used would be to examine the records of each purchaser or obtain certified statement therefrom and to have Mr. Frank account for the proceeds so collected.

6. It is apparent from an examination of the bank accounts of the Cemetery and of Adam Frank, attorney, that Mr. Frank deposited a large portion of the moneys received from sales and other Cemetery moneys in his own personal account. The great bulk of the Cemetery moneys were deposited by Adam Frank in an account in

the Equitable Trust Company, a banking institution of New York, in an account under the name of "Adam Frank, attorney". An examination of that account shows that a good many of the drawings and disbursements from that account were personal disbursements in no wise connected with any Cemetery purpose.

7. As near as I could ascertain from the records before me, the items to be accounted for by Adam Frank aggregate $88,969.73 which, from the data before me, I was unable to properly allocate. It was impossible for me from the records before me to determine just exactly how much moneys were received from sales of land of West Ridgelawn Cemetery. For that reason I circularized all the purchasers of plots or lots whose names were disclosed from my examination of the records. The replies received up to December 24, 1929, show a total of sales of $43,203.19 as per the books, against a total of $49,832.52 as per replies of purchasers, a difference of $6,629.33. I did not receive replies from all of the supposed purchasers.

8. From the data received there was a total amount of cash of $137,857.96 received. This money had all been disbursed except $277.05. Most of the disbursements consisted of checks drawn to the order of Adam Frank or personal items which, in my opinion, could not be identified in any way from the records available as Cemetery disbursements. I did not find any payments made to the Passaic Trust & Safe Deposit Company or to the Passaic National Bank and Trust Company for dividend account or perpetual care fund.

Affidavit of Harry Braverman.

9. In conclusion, it is my opinion that an apparent gross negligence prevailed in the operation of the business as no books were kept. In all my experience of some twenty years, I have not found a more deplorable condition in so far as the wholesale absence of regular books is concerned. As stated before, it is apparent that moneys were deposited in personal accounts of Adam Frank and disbursements made from such accounts for apparently personal purposes without any authority for such deposits or withdrawals, and it is impossible for me to state that all moneys received for Cemetery purposes were disbursed for Cemetery purposes, and as a matter of fact, so far as the records go, it would disclose that thousands of dollars had been disbursed for apparent personal purposes, or at least cannot be accounted for, which should be accounted for by Mr. Frank. I am, of course, unable to state how much other Cemetery moneys have been received by Mr. Frank and not included in the receipts shown on the records presented for inspection to me.

HARRY BRAVERMAN.

Subscribed and sworn to before me
this 27th day of April, 1931.

ELIZABETH A. COONS,
Notary Public of N. J.

New Jersey Court of Errors and Appeals

Between ATLAS FENCE COMPANY, Complainant-Respondent, *and* WEST RIDGELAWN CEMETERY (*et als.*), Defendant-Appellant.	On Appeal from Order of the Court of Chancery.

APPELLANT'S BRIEF.

(Italics ours, except when otherwise noted.)

This is an appeal by the defendant West Ridgelawn Cemetery (a cemetery association incorporated and existing by virtue of the act entitled "An Act to authorize the incorporation of rural cemetery associations and regulate cemeteries") (Comp. Stat., Vol. I, p. 372, *et seq.*), from an order of the Court of Chancery, entered May 5, 1931 (Case, p. 47), denying appellant's motion to modify or vacate a previous order, entered March 26, 1931 (Case, p. 28), appointing a receiver of the West Ridgelawn Cemetery and enjoining its officers, trustees, &c., from the exercise of all corporate functions. The appeal brings up also that part of another order of the same date (Case, p. 63) which continues the receiver under an amended bill, but on the basis of the original proofs.

The Vice-Chancellor (Hon. John O. Bigelow) who advised the original order directed a rehear-

ing of the issues before him, designating April 8, 1931, and the matter was re-argued before him on that date. He signed an order on May 5, declining to vacate or modify the earlier order, but did not file his memorandum until May 11.

On the same date on which the Vice-Chancellor signed the order declining to vacate the order appointing the receiver, which is the principal subject of this appeal, he signed another order at the instance of one Albert W. Bonynge, claiming to be a lot owner and certificate holder of the West Ridgelawn Cemetery, and of one Albert Snyder, a judgment creditor of the cemetery, admitting them as parties complainant in the suit, and allowing the filing of an amended bill; and a third order consolidating the original bill and the amended bill, which amended bill was filed on the same day as the order allowing it, May 5, 1931.

These two orders (the order admitting parties and permitting the filing of the amended bill, and the order consolidating) were entered *ex parte,* except for the effect of two notices, one by Bonynge and one by Snyder, served on the appellant prior to the reargument on April 8. The Snyder notice (Case, p. 51) was to the effect that on April 8th application would be made for permission to file an amended bill and for consolidation. The Bonynge notice (Case, p. 49) was to the effect that on April 8th application would be made to admit Bonynge as a party complainant, and to amend the original bill to insert the allegations of some new affidavits.

No affidavits were served with these notices, although the Bonynge notice recites that affidavits are attached.

On April 8th, Bonynge and Snyder both produced and sought to read affidavits. The Vice-

Chancellor refused to hear them on the motion for reargument, holding that the original proofs were all that could be properly before him on a *rehearing*. The affidavits sought to be read were affidavits of Snyder (p. 61), Hollowood (p. 53) and Tabaka (p. 57), offered under the Snyder notice; and of Bonynge (p. 85) offered under the Bonynge notice. No objection was made at the reargument to the granting of both the Bonynge and Snyder applications, to-wit, the joining of new parties complainant, the filing of an amended bill and the consolidation; and the reargument was made, and decided by the Vice-Chancellor, on the basis of the original bill and proofs, and without reference to any of the new affidavits produced on April 8th.

Our notice of appeal includes the portion of the order adding parties (p. 63) which continues the receiver on the basis of the original proofs. This part of the order should not have been made. It was not in furtherance of the applications of April 8th and was not included in the notices. It should not be permitted to enlarge the effect of the original order appointing the receiver, for it excludes the new proofs and does not mention the injunction.

> *Shaw* vs. *Standard Piano Co.*, 87 N. J. E. 350.

Of course, the effort was, by the inclusion of the affidavits filed on April 8th, to bolster up the original proofs by introducing for the first time charges of fraud. No opportunity was afforded appellant to meet any such charges, nor was such opportunity necessary because the Vice-Chancellor properly disregarded them. If the order declining to vacate the appointment be reversed on this appeal, it follows that that portion of the order

admitting parties, which orders the continuing of the receiver, should also be reversed. The argument which follows is therefore confined to the order declining to vacate, and this is treated, for the sake of clearness, as though it were the only order brought up.

But it will be understood that both orders are included in the appeal and the argument.

It may be well to observe in passing that there was no competent proof of fraud shown in the affidavits filed on April 8th. The copy of the Braverman affidavit which was attached as an exhibit to the Bonynge affidavit, was not executed by Braverman, and was hearsay. The other affidavits tended to show merely that the cemetery was financially embarrassed. Not until May 5th was any proof of fraud produced, and that is contained in a later affidavit of Braverman attached to the amended bill, and filed *ex parte.*

An examination of the original order appointing the receiver and for injunction discloses that although the receiver is designated a "custodial" receiver, he is given the following special powers and directions, which appertain not to a custodial officer, but to an officer charged with the duty of administering and winding up a business, to-wit,

To exercise the rights and franchises of the corporation.

To sell lots of the defendant corporation for burial purposes.

The injunctive portion of the order prevents the cemetery association and its officers, &c., from exercising any of the corporate rights and franchises.

In effect, therefore, the order is not a custodial order. If it were simply a custodial order it would

be ineffective, and entirely improper, because not in furtherance of any relief prayed for or possible for the Court to grant under the bill.

The order is in form and effect an order to administer the affairs of this corporation, to the exclusion of its trustees and officers, and to sell its assets to the extent, if necessary, of winding up its affairs in aid of its creditors.

Now, as the Vice Chancellor rightly says in his opinion, the general corporation act does not apply in the case of cemetery associations, and the jurisdiction (if any) of the Court to make the order must be found in the general equity jurisdiction of the Court of Chancery. The Vice Chancellor maintains that the Court has such jurisdiction and that it was properly exercised in this case. In this we think he was wrong, for the following reasons:

POINT I.

The order appealed from constitutes an unconstitutional usurpation by the Court of the exclusive function of the Legislature.

1. In enacting the statute incorporating cemetery associations, the legislature, as a matter of public policy, limited the creditors' remedy to a sequestration of the *rents, issues, profits, income and revenues* from any and all lands lying within the bounds of the cemetery (Sect. 16), and provided that "*no cemetery lands shall 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*" (Sect. 16, and see sect. 8).

The first general statute for the incorporation of rural cemetery associations is P. L. 1851, p. 254. By this act the association might acquire

not more than 20 acres "to be held and occupied exclusively for a cemetery for the burial of the dead," and personal property not exceeding $5000.00 in value, besides proceeds of sale of lots.

At least one-half of the proceeds of sale of lots were directed to be appropriated to the payment of the purchase price of "lands acquired by the association, until the whole purchase money shall be paid, and the residue to upkeep," &c., "*and to no other purpose or object.*"

"Cemetery lands and property of any association," &c., "shall be exempt from all public taxes, rates and assessments, and shall not be liable to be sold on execution, or be applied in payment of debts due from any individual proprietors," &c. (Sect. 10).

By P. L. 1868, page 832, Section 10 of the earlier act was amended by adding to the exemption from taxation bonds and mortgages on cemetery lands.

The Revision of 1877 repealed the act of 1851 and its amendments, and substituted a revised general act. By this repealer, P. L. 1868, p. 832, went into the discard, as well as Sect. 10 of the Act of 1851, and the revisers substituted in place of this Section 10 and of the amendment, the provisions contained in Section 8 of the Revision, which is a re-enactment of the act of 1868, p. 832, and reads:

> "The cemetery lands and property of any association formed pursuant to this act, or otherwise incorporated, as well as bonds and mortgages given to secure the purchase money of such cemetery lands, shall be exempt from all public taxes, rates or assessments, and shall not be liable to be sold on execution, or be applied in payment of debts due from any individual proprietors, &c."

This section remains in the present act as Sect. 8.

By P. L. 1879, p. 318, the legislature passed what purported to be a supplement to the repealed act Sect. 10, as amended. This supplement appears as Sect. 44 of the present act, and attempts to limit the exemption from taxation and execution of cemetery lands to those "actually used for cemetery purposes."

It is this supplement which has given rise to all of the uncertainty shown in the cases with respect to the exact degree of exemption. There was no uncertainty under the original act and amendment, or under the Revision Sect. 8, still in effect.

This Court in *Newark* v. *Mt. Pleasant Cem. Co.,* 58 N. J. L. 168, held that this supplement of 1879 did not cut down the exemption where religious associations owned the cemetery lands, and strong *dicta* were made that there can be no valid supplement to an act which has been repealed, and that the supplement is bad as creating an unreasonable distinction for tax exemption.

In re Harleigh Cem. Ass'n, 35 N. J. L. J. 371, the State Board of Equalization of Taxes in 1912 (Mr. Jess) held that under the Tax Act cemeteries are exempt from taxation for their *entire area,* citing *Hoboken* v. *Township of North Bergen,* 43 N. J. L. 146, in which the Supreme Court held that the entire lands of a cemetery are exempt, whether used for burials or not, under the general tax act. This was a cemetery under special charter, and the cemetery act was not involved. It seems that it was involved in the Harleigh case, but was not mentioned.

Of course, as to tax exemptions, the tax act would apply, being a more recent enactment.

In *Rosedale Cemetery* v. *Linden,* 73 N. J. L. 421, the Court speaks of the amendment of 1879

as having been enacted, but the question of its validity and effect was in no way involved.

Leaming, V. C. in *Spear* v. *Locust Wood Cemetery,* 72 N. J. E. 821 (1907), says that this Court in *Newark* v. *Mt. Pleasant,* 58 N. J. L. 168, 173, "finds no legislative intent to apply its provisions to cemetery corporations other than those incorporated under the act of 1851", which is quite true, but the Vice Chancellor was considering a corporation formed under the Corporation act and refused to consider the supplement of 1879 as affecting it, thereby holding in effect, as expressed in the second head note, that the act of 1879 *did not repeal the act of 1875.*

He held that under Sect. 8 the "cemetery lands and property" of the association included only those *not actually used for burial purposes.* His reason was that when Sect. 8 was enacted there was no limitation on the quantity of land a cemetery association might hold, and it could therefore not reasonably be held that the legislature extended the exemption without limit. But the Vice Chancellor was clearly mistaken about the limitation: when the original Sect. 10 was enacted in 1851, 20 acres was the limitation. By P. L. 1853, p. 399, the limitation was extended to 75 acres. By P. L. 1883, p. 123, the further limitation was enacted that the land should not be worth more than $75,000. Finally by P. L. 1889, p. 418, the limitation was fixed at 125 acres without reference to value.

The Vice-Chancellor in the Spear case cited *Rosedale* vs. *Linden,* 73 N. J. L. 421 as authority, but that case turned on the tax act, not the cemetery act, and is not in point. He evidently did not see *Hoboken* v. *North Bergen,* 43 N. J. L. 146.

By P. L. 1881, p. 158, the legislature passed a supplement to the cemetery act which is now contained in Section 16 and which reads as follows:

> "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.*"

If Section 44 was a valid enactment, it was superseded by the Act of 1881, a later enactment. By the terms of the Act of 1881, which we will hereafter refer to in this brief as Section 16 of the statute, *all lands lying within the bounds of the cemetery* are exempt, no matter whether the same are actually used for burial purposes or not. This is made doubly certain by the phrase "*belonging to, or used by* * * * any incorporated cemetery company in this state", and the phrase "such cemetery company *owning or using* said lands". Since Section 16 is clear in its inclusion of all lands owned by the cemetery, and since it is a later enactment than the Act of 1879, which is Section 44, it would seem that the courts should never have been in doubt on this subject.

If the Spear case is carefully read, it will be seen that the decision is not out of line, in spite

of the dicta. The defendant was incorporated under the General Corporation Act, and gave a purchase money mortgage for the land. There was no evidence of dedication, and the Court properly declined to exempt all of the land merely because it had been afterward conveyed to a cemetery association. Vice-Chancellor Backes, in *Fidelity Union* vs. *Union Cem.,* 102 N. J. E. 100, cites the Spear case as having decided the manner in which the decree should be executed, and the same Vice-Chancellor in *Attorney General* vs. *Linden,* 90 N. J. E. 404, also citing the Spear case as having held that lands not allotted to cemetery purposes were not immune to levy and sale, held that the mortgagee had waived this right so that his opinion as to the effect of the Spear case was merely dictum. The same Vice-Chancellor in *Fidelity Union Trust Co.* vs. *Union Cemetery Association,* 145 Atl. 537, again speaks of the Spear case and says that it turned on the point of *dedication.*

So far as the adjudicated cases are concerned, therefore, this Court will not do violence to them if it now holds that Section 44 has been superseded by Section 16, or if it holds, on the reasoning and authority of its decision in *Newark* vs. *Mt. Pleasant Cemetery Co.,* 58 N. J. L. 168, that Section 44 of the act (the supplement of 1879) is unconstitutional and void, because there can be no valid supplement to an act which has been repealed.

But Section 44 contains the only statutory modification of the provisions of Sections 8 and 16, and if it be disregarded, creditors cannot reach any of the real estate, whether actually used for cemetery purposes or not, but are limited to the issues and profits thereof.

If Section 44 be valid it seems to us that the phrase "lands and property * * * actually used for cemetery purposes" must be read in connec-

tion with the subsequent phrase "dedicated to the purpose of a cemetery," for it is contemplated by Section 31 (P. L. 1886, p. 148) that the filing of the maps laying out the cemetery grounds constitutes a dedication of the land for cemetery purposes (see Section 10), and every purchaser of a lot obviously has an interest in seeing to it that the cemetery as a whole is developed substantially in accordance with the lay-out shown on the map. The whole of the mapped lands of the cemetery (and in this case all of the cemetery lands are mapped) are therefore dedicated to cemetery uses, whether actually presently used for burial purposes or not. Vice Chancellor Fielder in *Van Buskirk* vs. *Standard Oil Co.,* 94 N. J. E. 686, 689, held that in the case of an unincorporated family cemetery "setting apart land for burial purposes, permitting burials therein and enclosing the land by fence amounts to a dedication", a proposition which this Court did not dispute on the appeal in 100 N. J. E. 301. If this were not the proper construction, few if any cemeteries could get a start, for practically all of their lands would inevitably be taken for debt before they could make a fair beginning, contrary to the whole spirit and purpose of the act.

For these reasons we urge that Section 44 is invalid, but that if it be valid it does not limit the exemption from execution for debt to those lands actually used for burial purposes, unless they have never been dedicated to cemetery uses, and that in this as in practically all cases such dedication has been made.

It is therefore respectfully submitted that under the protection afforded to cemeteries by Section 16 of the act, the Court of Chancery has by its order attempted to do what the statute expressly forbids. At the instance of judgment creditors, on evidence merely showing that their

debts are unpaid, it has ordered its receiver to sell cemetery lands to pay the creditors' claims, and to administer corporate affairs which the statute vests in the duly elected trustees.

Nor is the situation altered by the filing of the amended bill in which Bonynge appears as a complainant *lot owner*. If it is contrary to the statute for the Court, at the instance of creditors, to order an equitable execution against cemetery lands to pay debts, it is just as contrary to the statute to make a similar order at the instance of a lot owner.

For it is clear from the Vice Chancellor's opinion that he considered the only competent evidence before him to be evidence that the debts of complainants and others had not been paid. In this he was correct. But he was wrong in imputing mismanagement to the trustees from the mere fact that debts were unpaid, the statute providing that they could not be paid except from income, and there being no evidence that the trustees were lax in endeavoring to sell lands. He speaks of neglect by the trustees to protect a valuable parcel of land from sale under a judgment execution. The exemption being as it is, it can hardly be said that the trustees were negligent in not relying upon its protection. They would not naturally have expected such an execution sale to be made. Further, this Court will take judicial notice of the fact that the Court of Chancery has set aside this sale, after the order appealed from herein was entered.

2. *The legislature had exclusive jurisdiction to enact the exemption, and the Court of Chancery was without constitutional authority to disregard and overrule it.*

Under the American system of written constitutional law, the powers entrusted to the government, whether state or national, are divided into

three departments—the executive, the legislative, and the judicial.

The relevant section of the New Jersey Constitution, Article III, Section 1, reads as follows:

> "The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the power properly belonging to either of the others, except as herein expressly provided."

By Article IV, Section 1, paragraph 1, "the legislative power is vested in a senate and general assembly"; by Article V, Section 1, "the executive power is vested in a 'governor' ", and by Article VI, Section 1, "the judicial power is vested in" the courts.

In *Ross* vs. *Freeholders of Essex,* 69 N. J. L. 291, 294, Justice Dixon, speaking for this Court, stated that the force of the prohibitive clause of the Constitution was to forbid each department to encroach upon the powers properly belonging to another.

As the U. S. Supreme Court stated in *Kelbourn* v. *Thompson,* 103 U. S. 191, 26 L. Ed. 377, 383, "it is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other . . . it also remains true, as a general rule, that the powers confined by the Constitution to one of these departments cannot be exercised by another."

The only limitations upon the legislature in the exercise of the legislative power vested in it are those expressly established by the Constitution.

In *McCray* vs. *U. S.*, 195 U. S. 53, 49 L. Ed. 78, the Court said:

> "Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation."

And in *Northern Securities Co.* vs. *U. S.*, 193 U. S. 350, 48 L. Ed. 629, the Court declared that "so long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all."

In *Story* vs. *Jersey City, etc. Co.*, 16 N. J. E. 13, 21, Chancellor Green said:

> "The proper office of courts of justice is to adjudicate upon and to protect and enforce the legal and equitable rights of parties litigant, as they are established by existing laws.

> It is no part of this appropriate function to determine in advance whether a proposed law may or may not be enacted consistently with the rights of parties, or to interfere directly or indirectly with the course of legislation."
>
> "Once the legislative intent is ascertained, the duty of the court is plain. To refuse to enforce statutes in accordance with the true intent of the legislature is an inexcusable breach of judicial duty, because an unwarranted interference with the exercise of lawful, legislative authority."
>
> *Love* v. *Wilcox* (Texas Sup. Ct., May 17, 1930), 28 S. W. (2nd) 515, 70 A. L. R. 1484, 1498.

It follows that not only has no Court the right to ignore existing legislation, but that every Court is under a duty to apply the statutes in appropriate situations.

To ignore existing legislation and refuse to apply it to a case *sub judice,* because such application would not in the court's judgment afford adequate relief, is equivalent to a declaration that such legislation is void.

In his opinion in this case, the Vice Chancellor said:

> "This Court has long enforced legal rights, when the processes of the courts of law have been insufficient to afford adequate relief. Without statutory authority, Chancery aids a creditor to obtain satisfaction of his judgment when some legal obstacle interposes to prevent seizure on legal process of the debtor's property. Hardenburg *vs.* Blair, 30 N. J. E. 645. The issuance of execution is not a prerequisite if the property which complainant seeks to reach is realty. Vanderveer *vs.* Stryker, 8 N. J. E. 175. A legal obstacle which is present in the instant case is Section 8 of the Cemetery Act, exempting the cemetery lands from sale on execution. . . ."

Referring to Section 16 of the Cemetery Act empowering the Court of Chancery to sequester the rents, issues, profits, income and revenues of cemetery lands in order to satisfy judgment debts (which section contains the following proviso, "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"), the Vice Chancellor said:

> "Section 8 is substantially the same as Section 10 of the rural cemeteries act of 1851, P. L. 1851, p. 254. Thirty years later, the supplement of 1881 was passed empowering the Court of Chancery to sequester the rents, issues, profits, income and revenues of cemetery lands in order to satisfy judgment debts. This supplement was not intended to restrict the jurisdiction of the Court of Chancery (assuming that the legislature had power to do so) but to provide an additional remedy. Whatever equitable remedies were available to creditors and whatever authority this Court had from 1851 to 1881 to protect and relieve creditors of cemetery associations, still remain unimpaired."

What equitable remedies does the Court mean when it states: "Whatever equitable remedies were available to creditors"? What authority does the Court mean when it states, "whatever authority this Court had from 1851 to 1881 to protect and relieve creditors of cemetery associations, still remain unimpaired"? In his reaching out to assume jurisdiction, the Vice Chancellor neglected to inquire whether he was encroaching upon the right of the legislature to fix the method by which creditors of a corporation organized under the Rural Cemeteries Act, are to be paid.

In support of the proposition that "This Court has long enforced legal rights, when the processes

of the courts of law have been insufficient to afford adequate relief. Without statutory authority, Chancery aids a creditor to obtain satisfaction of his judgment when some legal obstacle interferes to prevent seizure on legal process of the debtor's property'', the Vice Chancellor cites *Hardenburg* vs. *Blair,* 30 N. J. E. 645, but that case is not authority for the Vice Chancellor's proposition.

To the bill in that case, which was for the construction of a will setting up a fund, the net income of which was for the testator's son, answers in the nature of a creditor's bill were filed by the *cestui's* judgment creditors who claimed that the accumulated interest in the executor's hands belonging to the judgment creditors, was chargeable with the payment of their judgments. In reply to the contention of the *cestui* that the statutes expressly except out of the jurisdiction of Chancery, money or property held in trust for the judgment debtor ''when such trust has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself'', the judgment creditors argued that independently of statutes, Chancery has jurisdiction which would enable it to reach the moneys in question and apply them in payment of the judgment debts of the *cestui que trust.* The Court refused to uphold the judgment creditors' position, stating (p. 658):

> ''An examination of the decisions of the English Courts will show it to be there settled that an original jurisdiction of this kind did not pertain to its courts of equity. The powers of the court were simply in aid of the judgment creditor, where a trust had been interposed which obstructed the operation of the process of a court of law, and extended only to such property as, save for the interposition of the legal obstacle, might have been reached by such process.

Speaking on this subject, Lord Cottenham said: 'What gives a judgment creditor a right against the estate is only the act of parliament, for, independently of that, he has no such right. The act of parliament gives him, if he pleases, the option by the writ of *elegit*. . . . The effect of the proceeding under the writ, is to give the creditor a legal title, which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into the court, not to obtain a greater benefit than the law (that is, the act of parliament) has given him, but to have the same benefit which he would have had at law if no legal impediment had intervened.' (Neate *v.* Duke of Marlborough, 3 Myl. & Cr. 416).

Mr. Lewin, after an examination of the cases, uses this language: 'As equity only follows, and does not enlarge the law, the judgment creditor has no title to relief where the chattel, of which the trust has been created, is not, in itself, amenable to any legal process.' Lewin on Trusts, 648.''

At page 664 the Court said:

''. . . The statute must be regarded as defining the jurisdiction of the court over trust funds in their application to the payment of debts, exclusive of any other authority in the court; otherwise the language excepting funds held on a trust created by another will be abrogated.''

At page 667:

''Whether, upon considerations of public policy, property to so large an amount as that involved in this suit, should be enjoyed by a debtor without liability for the payment of his debts, is not a matter of judicial cognizance. That subject must be left within the discretion of the legislature for its regulation, if it seems politic or judicious to do so. It is sufficient for present purposes to say

> that, in the existing state of legislation, jurisdiction to that end has been withheld from the courts."

It has always been the law that the authority of the legislature over corporations, public and private, both in their formation and in their powers, is complete and exclusive. Judge Dillon, 1 Mun. Corp. (3rd ed.), Section 37, says: "The proposition which lies at the foundation of the law of corporations in this country is, that here all corporations, public and private, exist and can exist only by virtue of express legislative enactment." See in this State *In re Ridgefield Park* (Opinion by Justice Dixon), 54 N. J. L. 288, 290, in which, on page 292, he says: "The better conclusion is that the power of deciding questions of public policy which relate to the organization and extent of municipalities is one properly belonging to the legislative department, and, therefore, not exercisable by either the executive or the judicial department." The reasoning of Mr. Justice Dixon, upon which he bases this conclusion, is as cogent in its application to private corporations.

Cemeteries are peculiarly within the province of the legislature to regulate, in the interest of public health and the proprieties, as well as because they are corporate creatures of the legislature. This Court in *McCarter, Attorney General* vs. *Hudson County Water Co.,* 70 N. J. E. 695, held that the first section of the bill of rights contained in our constitution, which declares that all men have certain unalienable rights, among which are those of acquiring, possessing and protecting property, etc., does not guarantee to any man the right of acquiring property in anything that is not the subject of private property by law, etc. In that case, the question involved an alleged right to transport water out of

the State of New Jersey by diversion from streams and of storing and selling the water thus diverted. The common law recognizes no right in the riparian owner to divert water.

The Supreme Court, in *Ribnik* v. *McBride,* 133 Atl. 870, speaking of a statute which regulated employment agencies and whose constitutionality was involved, reported with approval the text of 6 R. C. L. 273, in this language:

> "The power of the legislature to regulate a business for the protection of the public carries with it the power to control and regulate the right to contract in relation to it * * *."

The text from which this quotation is taken, goes on to say that the power may be exercised by any State for the protection of the health, safety and welfare of those subject to its jurisdiction, and that the Fourteenth Amendment does not guarantee to the citizens the right to make within a State, either directly or indirectly, any contract, the making of which is constitutionally forbidden by such State.

It is pointed out in *State* vs. *DeLorenzo,* 81 N. J. L. 613, 621, by this Court, that when the framers of the Constitution intended that a subject should be placed beyond legislative control, they said so, and that the existence of a constitutional limitation upon the legislative power is to be established and defined by words that are found written in that instrument, and not by reference to some spirit that is supposed to pervade it or to underlie it or to overshadow the purposes and provisions expressed in its written language.

There is certainly nothing in the Constitution expressly forbidding the legislature to do what it has done in the cemetery act. Our courts have frequently held that under the Constitution the legislature has jurisdiction to provide for the reg-

ulation of private business in the interest of the public. Employment agencies, barber shops, public utilities, intoxicating liquors, and various other forms of activity, are held to be properly licensed and regulated because of the existence of the public interest in, and the public necessity for such regulation.

If it were proper for the court to inquire into the motives of the legislature and whether the legislative prohibition is wise or not (and there is no such power in the court), the wisdom and propriety of the legislative policy enacted by the Rural Cemetery Act can be justified on several grounds: the intention that the sacred precincts of the dead shall not be violated by unseemly controversies with respect to mundane and secular matters; that every person who purchases a lot for burial purposes may inter the mortal remains of his loved ones therein with the assurance that the cemetery as a whole will be developed and embellished so as to carry out the plan which was in contemplation at the time he purchased his lot and buried his dead therein, and (since the legislature has seen fit to deny private profit from cemetery development) that persons may be more readily induced to undertake the organization of such associations in the public interest.

A prospective lot owner selects his cemetery with reference to the entire plan or lay-out. It was never contemplated by a lot owner or by the legislature that after a man should have bought a burial plot, shown him as part of a plan capable of wide and elaborate embellishment, on which the price to him was predicated, that his cemetery surroundings might be radically changed by the acts of outsiders.

The legislature has by the Cemetery Act created a class of corporations designed to operate without a treasury. It has provided that at least fifty

(50%) percent of the sale price of lots should be applied to the purchase price of the land, and that the balance of the purchase price of the lots should be applied to the embellishment and upkeep of the grounds, and to no other purposes whatsoever. It intended that such corporations should be protected from creditors as well as from taxation, and that creditors should not be permitted to enforce their debts against the land, to the detriment of the cemetery development, but should be required to wait until the land was fully paid for, the grounds fully embellished and a fund created, from the income of which they might be paid. Hence, every cemetery association incorporated under that act, so far as we are informed, has been financially in such condition during the first twenty or thirty years of its existence as would amount to insolvency if it were a business corporation.

If this seems a hardship on creditors, it should be enough to observe that they are supposed to know the law and should not advance credit to a cemetery association unless they are content to wait for their money.

In *Brown* vs. *Maplewood Cemetery Ass'n.*, 85 Minn. 498, 510, the Court says:

> "One further test of the character of the rights which the incorporators of the Maplewood Cemetery Association possessed is suggested by the consequences that would follow from the levy of an execution thereon for their debts. Could such execution be made out of such property, or would a court appoint a receiver to operate it in a creditor's suit to apply the income to liquidate claims against members thereof, and in what way in the meantime would the receiver's right to control the property affect the lot owners? We find in a quite recent decision of the Supreme Court of Nebraska very pertinent answers to these inquiries. That court, * * * says:

> 'The only question involved is whether, under the facts as narrated, a court is authorized to sequester the property by equitable execution, and sell the same in satisfaction of the debts of the owner of the legal title. We do not think this can be done. It is beyond cavil that the property has been duly and legally platted and dedicated to cemetery purposes, and is now, and was at the time of the institution of the suit, a public burying ground, * * *. It is not the policy of the law nor the intention of the legislature * * * to invade the silent precincts of the dead, and there hold high carnival in an unseemly contest as to which of contesting litigants shall profit by the sale of the necessary part of mother earth to enfold in its peaceful embrace the last that is mortal of man.' First National *vs.* Hazel (Neb.), 89 N. W. 378."

The dominant motive in all modern cemetery legislation in this country is to allow acreage sufficient to permit embellishment of the property on an adequate scale, to give the cemetery such aesthetic features as may make it as little repulsive as possible, and increase the sense of reverence; above and beyond all to insure permanence to the resting place of the dead.

But it is not for the Court to pass upon the wisdom of the legislative policy; its duty is to carry that policy into effect.

> *State* v. *Branin,* 23 N. J. L. 484;
> *State, Doyle* v. *Newark,* 34 N. J. L. 237, 243;
> *Greenville* v. *Seymour,* 22 N. J. E. 458.

This the Court has failed to do: on the contrary the vice chancellor weighs the policy of the legislature and finds it bad, considers the judgment of the legislature and finds it unwise, sits on appeal upon a legislative act and reverses it. If such power lies in the Court, why have a legislature?

POINT II.

The order is legally wrong, because the proper parties were not before the Court.

The order appointing the receiver and restraining the exercise of corporate functions should not have been made because most of the trustees, certificate holders and lot owners, who are all necessary parties, were not joined.

Where the Court cannot, with the parties present, make a decree which will finally and properly dispose of the property involved, it will not do so until the parties required for such disposition are before the Court.

> *McLaughlin* vs. *Van Keuren and Schultz* (E. & A.), 21 N. J. E. 379.

In that case Justice Van Syckel said:

> "It is the aim of Courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit, so that the performance of the decree may be perfectly safe to those who are compelled to obey it, and also, that future litigation may be prevented. Story's Eq. Pl., Sec. 72.
>
> The rule requiring the presence before the Court of all parties interested, being essential to enable the Court to make that complete and final disposition of the subject matter of the controversy, at which Courts of equity always aim, will not be overlooked, if the objection is taken at any stage of the cause, unless for cogent reasons. Cutler *v.* Tuttle, 4 C. E. Green 549.
>
> It is not intended to intimate any opinion as to the rights of the assignee in the subject matter of this controversy, but it is clear that this Court should not proceed to a final decree

disposing of that subject matter, without the presence of the assignee as a party to this suit. The defendants having failed to make the objection at an earlier stage of the cause, it is not for their protection that this question will now be entertained, but because the Court cannot, with the parties here present, make a decree which will finally and properly dispose of the property it is called upon to deal with in this case. If the decree of the Chancellor should be affirmed, an innocent purchaser at the sale under that decree might suffer great loss, and this Court might be greatly embarrassed by it in the future litigation, which will almost certainly arise out of the transaction disclosed by this case."

In *Hare* vs. *Headly,* 52 N. J. E. 496, Vice-Chancellor Green sustained a demurrer to the bill with leave to complainant to bring in the parties whose interests would be affected by the disposition of certain surplus moneys.

In the leading case on this subject, *Cutler* v. *Tuttle* (E. & A.), 19 N. J. E. 549, Justice Depue stated:

". . . The reason of the rule requiring all persons interested in the subject of the controversy, to be made parties to the suit, grows out of the constitution of a court of equity, which aims not so much to decide the issues between the litigating parties, as to embrace the whole subject and determine upon the rights of all parties interested, to make the determination complete and quiet all questions, so that the performance of the decree may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented. Calvert on Parties, 5; Story's Eq. Pleadings, Sects. 72, 76; Caldwell *v.* Taggart, 4 Pet. 190.

It is not, however, an insuperable obstacle in the way of proceeding to a final decree, that all persons who should be parties to en-

> able the court to adjust and determine all conflicting interests in the subject matter, have not been made parties to the suit. Where the defendant neglects to make the objection by plea, answer or demurrer, of the want of parties who are only necessary to protect him from further litigation, the court, in its discretion, may refuse to sustain the objection at the hearing, or to require the complainant to add new parties in that stage of the suit. Dias *v.* Bouchaud, 10 Paige 447.
>
> But the rule requiring the presence before the court of all parties interested, being essential to enable the court to make that complete and final disposition of the subject matter of the controversy, at which courts of equity always aim, will not be overlooked, if the objection is taken at any stage of the cause, unless for cogent reasons . . ."

The order appointing the receiver, &c., was in the nature of a final adjudication. So far as the direction to the receiver to sell lands is concerned, it is in effect a final adjudication. Had there been proof of fraud (which there was not) and imminent danger of loss (which there was not) the Court might have appointed a conservator to prevent dissipation of assets until the proper parties could be brought in, but that is not this case. Here the Court, on evidence showing only the existence of debts, and on the application of a creditor alone, has attempted to make an adjudication substantially affecting the rights of many persons not before the Court.

This order does not, of course, bind such absent persons. It is a nullity as to them. They can disregard it, or they may at any time apply to the appropriate tribunal to undo what has been done without due process of law. Should the receiver undertake to sell land or borrow money (both of which things he has already attempted to do) innocent purchasers or lenders may suffer

great loss, as this Court pointed out in the *McLaughlin* case.

Vice-Chancellor Howell in *Bliss* vs. *Linden Cemetery Association,* in 81 N. J. E. 394, refused to appoint a receiver of a rural cemetery association, even on consent of the association, because all of the parties in interest, including the trustees and certificate holders, were not in court. A new bill was thereupon filed, and the Court, *with all parties before it,* made the appointment (83 N. J. E. 494), and this Court in 85 N. J. E. 501 (*sub nom, Attorney General* v. *Linden Cemetery Association*), finding the equity jurisdiction in a trust relationship disclosed by the proofs rather than in the notion that the association was a charity, approved and sustained the jurisdiction of the Court "*when all the necessary parties are before it*" (p. 507). The order appointing the receiver was not appealed. Apparently it was based upon the consent of all parties in interest. But had it been appealed it is difficult to see how this Court could have sustained the order without holding the cemetery to be a charity. There was nothing in the bill which disclosed a case within the primary jurisdiction of equity, and consent alone could hardly have created jurisdiction over the subject matter.

As authority for holding the cemetery to be a charity, Vice Chancellor Howell (81 N. J. E. 394, 396) cites *Stockton* vs. *Newark,* 42 N. J. E. 531, and *Newark* v. *Stockton,* 44 N. J. E. 179. But in those cases there had been a conveyance to *the City of Newark* for public uses, forever. All of the citizens were the *cestuis que trustent,* so that these cases are not authority for holding a private cemetery corporation to be a charity. While its lands are dedicated to cemetery uses, its trustees may discriminate as they will as to who may purchase lots, as to prices, &c.

It would seem to us that the appellant is *not a* charity, as was intimated by this Court in the Linden case (85 N. J. E. 507). See p. 35, *post*.

In any event, the Court should not have attempted to appoint a receiver in the absence of the proper and necessary parties in interest.

POINT III.

The Court was not legally justified in making the order appointing the receiver and enjoining the appellant.

The case presented to the Vice Chancellor depended on the affidavit of Frank C. Zuch (Case, pp. 13-22). This affidavit follows almost word for word the allegations of the bill. Most of the allegations of the affidavit are incompetent because hearsay. So far as the affidavit contains competent evidence, it states the following facts: That the appellant, West Ridgelawn Cemetery, is a corporation organized under the act to authorize the incorporation of Rural Cemetery Associations and regulate cemeteries; that its certificate of incorporation was filed October 3rd, 1905; that its business is conducted at 36 West 44th Street, New York City, and is in charge of one Adam Frank; that the cemetery association owns extensive lands and premises in Passaic County, New Jersey, various parcels of which have been sold for burial purposes, and that the remaining lands are not presently used for burial purposes.

That on or about April 2nd, 1926, one Herbert G. Groover, then the owner of the lands afterwards acquired by the cemetery, executed a mortgage of $36,000.00 to one John W. Griggs, which was assigned to one William Bittles, who foreclosed the same, and that on July 3, 1930, a decree

was entered in Chancery in this foreclosure suit in the sum of $39,706.39 (Case, p. 14, l. 22). The affidavit of Adam Frank (Case, p. 24b, l. 20) says that the amount was $16,000.00 with some equitable accretions. A receiver was appointed in this foreclosure suit for the purpose of sequestering the assets of the cemetery corporation for the payment of the decree, and the cemetery was ordered to set aside a certain sum of money for the upkeep of the cemetery. By the affidavit of Mr. Frank it appears that this decree is now before this Court on appeal. This decree, in effect, directed one-half of the proceeds of sales to be made by the cemetery of any of the lands included in the foreclosure decree to be applied on account of the mortgage debt, and the other half to be set aside for operations and upkeep.

That there are judgments of record entered from 1927 to 1930 inclusive, in favor of various persons against the cemetery association.

That one of the judgment creditors, William Jacobs, issued execution on his judgment and caused a sale of certain of the cemetery lands to be made, and purchased the same at sheriff's sale; that these lands were worth $24,000.00 and that all Jacobs paid was $150.00. The affidavit of Mr. Zuch says that the refusal of the Court to set aside the sale is now the subject of an appeal before this Court. But he is mistaken in this matter. The application to set aside the sale was at first denied by the Vice Chancellor to whom it was referred. It was then re-referred to another Vice Chancellor, and on this reference the sale was set aside. The matter never came to this Court.

Among these judgments was the judgment of one Abraham H. Gottlieb, upon which on October 27th, 1930, a decree in Chancery was entered appointing Dougal Herr receiver to sequester the income, under Section 16 of the act. This decree also pro-

vided for the sale by the receiver, in aid of the judgment, of land not actually used for burials. The decree is now on appeal in this Court. No sales were attempted to be made under it by the receiver, who is enjoined from acting by the injunctive order of Vice Chancellor Bigelow in the instant case. That on two other judgments receivers were appointed under Section 16 of the Act; and the charge is that the duties of these receivers are necessarily conflicting and are greatly impeding and interfering with the proper operation of the defendant cemetery business. Paragraphs 18, 19 and 20 are on information and belief and were properly disregarded by the Vice Chancellor. The same is true of paragraphs 23, 24 and 25 (the paragraphs above referred to are not only the paragraphs of Zuch's affidavit, but the corresponding paragraphs of the bill which are similarly numbered). The Zuch affidavit follows almost the identical language used in the bill.

Mr. Frank's affidavit sets forth that the lands owned by the cemetery amount to 92 acres, with the average value of $10,000 or more per acre; that 9 acres have been sold and that thousands of graves are now scattered over about one-half the total area, and thousands of families are dependent upon the cemetery association for the burial of their dead, and that the association must be prepared for funerals upon a few hours' notice, and that its development and embellishment must be looked after. The affidavit explains the Griggs mortgage foreclosure, the proceedings on the Jacobs' judgment and the proceedings on the Gottlieb judgment, and sets forth the fact, which is not disputed, *that all of the claims mentioned in the moving papers, including the claim of the complainant, but excluding claims now before this Court and the claim undisposed of in the Court of Chancery at Newark (which has since been dis-*

posed of in favor of the cemetery) total the sum of only $1,468.04, and that the personal property of the cemetery, consisting of its necessary machinery, tools, etc., exceed in value that amount.

There was presented to the Court below, before the order appointing the receiver was made, a verified petition on behalf of the defendant, setting forth that the West Ridgelawn Cemetery had offered to pay the complainant the amount of money due to it and that it had offered to pay and was then offering to pay the claims of all judgment creditors not then under appeal if given a reasonable opportunity to do so. The affidavit attached to the petition (Case, p. 27) sets up that the assets of the cemetery are well worth over $900,000.00, and that if a receiver be appointed the cemetery will be unable to function and that lot owners will suffer irreparable damage, and further that the affiant had made arrangements to pay off the judgments open of record, with the exception of the judgments on appeal, and that he was in a position to place bonds, if necessary, to cover also the judgments on appeal.

Paragraph 25 of the bill of complaint charges that the defendant corporation is insolvent, that the assets of the corporation are being dissipated by Adam Frank (there is no proof of this whatsoever), and that there is no way in which judgment creditors can secure satisfaction of their judgments, because the statutes of this state do not permit execution to issue against the cemetery lands and that unless the Court appoints a receiver the assets will be dissipated and the creditors will be unable to collect their judgments, and that the complainant is without adequate remedy at law, and that the intervention of the Court of Chancery is necessary for the protection of the creditors of the defendant corporation.

The prayer is that the defendant be decreed to be insolvent, its assets in process of dissipation and its funds being diverted to improper purposes, and that a receiver be appointed and an injunction issued; that the assets of the corporation and the rights of the complainant and other creditors be ascertained, and that the Court of Chancery administer the assets of the cemetery and enforce all lawful liens and rights of the creditors as they may be finally ascertained.

The Vice Chancellor properly held that the bill could not lie under the General Corporation Act of 1896, following the decision of V. C. Howell in *Bliss* vs. *Linden,* 81 N. J. Eq. 391, but he assumed jurisdiction on the theory that the bill is a creditors' bill, that the creditors who have secured judgments cannot execute them at law because of the statutory protection given to the cemetery, and that this statutory protection amounts to a legal obstacle, against which the Court of Chancery, under its general equity jurisdiction, can and should give relief.

The power to marshal and conserve is not a branch of equity jurisdiction. It is merely an incident in the exercise of some well recognized primary jurisdiction and is based upon the maxim "equality is equity". It can be applied only when the Court of Equity acquires jurisdiction to wind up, distribute or settle an estate, property or fund against which there are a number of claimants. *1 Pomeroy Eq. Jur.* (*4th Ed.*) par. 410. Before there can be a marshalling and conservation of the assets by the Court, the Court must first acquire jurisdiction upon some principle which can be spelled out of the facts competently proved. Insolvency alone does not warrant the appointment of a receiver unless (as in the General Corporation Act of 1896) insolvency has been made itself a ground by statute. In the absence of ex-

press statutory authority, the Court of Equity has no power to dissolve a corporation or to wind up its affairs and sequestrate its property, except in cases of fraud or mismanagement. *4 Pomeroy Eq. Jur.,* Pars. 1537 and 1540.

There is no competent proof in this case of any fraud or mismanagement.

Pomeroy sums up the conditions upon which the appointment of a receiver outside of the statute is warranted, as follows:

1. It must appear that the appointment of a receiver will protect all persons interested in the subject matter.

2. It must appear that there is no other adequate remedy or means of accomplishing the desired objects of the proceeding.

3. It must be shown that the complainant has a clear right to the property itself, or that he has some lien upon it or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim.

4. He must show that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant. There must be a well-grounded apprehension of immediate injury, great and imminent, demanding immediate relief. See on this point, *Morse* vs. *Metropolitan Steamship Co.,* 87 N. J. E. 217.

5. It must appear that the complainant will probably succeed in the suit to which the appointment is ancillary.

6. The court should exercise great caution and circumspection before making such an appointment.

7. The remedy is ancillary only. There must be a suit pending, not merely for the appointment, but for some relief on equitable principles with respect to the property.

> 4 *Pomeroy Eq. Jur.*, pars. 1484, 1485, 1487, 1488, 1492.

In the class of cases mentioned in paragraph 4 above, of which the case of *Morse* vs. *Metropolitan Steamship Co.*, 87 N. J. E. 217, is an example, the jurisdiction of the court is limited to the appointment of a conservator or a receiver *pendente lite* for the management of the affairs of the corporation, until a lawfully constituted and competent governing body can be installed. In the *Morse* case, the court cited with approval *Edison* v. *Edison United Phonograph Co.*, 52 N. J. Eq. 620, in which V. C. Van Fleet said at page 625:

> "This power (power to appoint a receiver where there is no properly constituted governing body or because there are dissensions in the governing body) is subject to certain limitations, namely, it must always be exercised with great caution and only for such time and to such an extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders. As soon as a lawfully constituted and competent governing body comes into existence, whether it is brought into existence by an adjustment of the dissensions or by the election of a new body, and such body is ready to take possession of the property of the corporation and proceed in the proper discharge of its duties, the court must lift its hand and retire."

In the case *sub judice,* no emergency, fraud, mismanagement or necessity for the Court's protecting intervention are shown. The property of the cemetery sought to be reached by the com-

plainant is real estate which cannot be dissipated. It was shown to the Court below that the complainant had an adequate remedy by taking an execution against the personal property of the cemetery, which was greater in value than the total amount of the undisputed claims against it. Mr. Frank offered to pay outright all of the claims not in dispute, and to bond against the claims on appeal.

In his opinion, the Vice-Chancellor states that "this Court has long enforced legal rights, when the processes of the courts of law have been insufficient to afford adequate relief * * *" With reference to creditors' suits, a noted authority on principles of equity jurisprudence declares that "it is a necessary result from the whole theory of creditors' suits that jurisdiction in equity will not be entertained when there is a remedy at law" *4 Pomeroy 3356* (2nd Ed.).

The undisputed proofs show that the debts not in litigation total about $1,400, and that the personal property of the cemetery, consisting of its necessary machinery, tools, etc., exceed that in value. The respondent does not allege that a writ of execution had been issued against the personalty.

The bill should have been dismissed because the uncontradicted proofs indicated an adequate remedy at law.

Before the Vice Chancellor entered the order of March 25th, 1931, appointing the receiver, the appellant offered to pay off all judgments against the appellant, open of record, with the exception of the judgments on appeal, and as to those judgments, appellant offered to place bonds pending the appeal. *This offer was disregarded.*

If the appellant had been permitted to pay these judgments, there would have been no possible basis for the bill filed for intervention by the Court. The Vice Chancellor states that "a re-

ceivership, however, is not an end in itself. It is merely a tool which the Court uses to preserve the subject matter of the suit and to protect the rights of litigants. The facts present in this case justified, in my opinion, the immediate appointment of a receiver. Either the company is hopelessly insolvent, or its management is attempting to defraud its creditors.'' Then he goes on to infer mismanagement from the fact that there are ten judgments outstanding against the appellant (two of record for almost four years and one for only $25.).

If the offer of the appellant had been accepted, a receivership would not have been necessary. No *inference* of mismanagement could properly have been drawn. There would have been no reason ''to protect the rights of litigants''.

The appointment of the receiver does not protect all persons interested in the subject matter. These persons are the lot owners, the certificate holders, the trustees, and perhaps other unascertained persons who may succeed to the title of the cemetery lots in private ownership under the provisions of the statute. Far from protecting these persons, the action of the Court has been such as to impair and destroy their rights.

The complainant has failed to show that it has any lien upon the property or that it is a special fund to which it had a right to resort. There is no evidence that the defendant obtained the property by fraud or that the property or its income is in danger of loss. There is certainly nothing upon which the Court could justify any apprehension ''of immediate injury, great and imminent'', demanding immediate relief. There is no equitable jurisdiction to which the application for the appointment of a receiver is ancillary, for no relief is possible on equitable principles with re-

spect to the property, except by Section 16 of the statute.

Even though such facts had appeared by competent proof before the vice chancellor and the jurisdiction of the Court could be justified on some clear principle of equity, the order should be limited to one conserving the property until a re-election of trustees, instead of ordering the receiver to sell the property in payment of debts.

The bill is in effect a bill to wind up and distribute the assets of the defendant corporation. The cemetery has no shareholders among whom to divide the surplus, and its property and funds must be preserved for pious uses, except to the extent that the statute gives creditors a remedy. *Bliss* v. *Linden Cemetery Association,* 81 N. J. E. 399. Although Vice Chancellor Howell in *Bliss* v. *Linden Cemetery Association,* 81 N. J. E. 399 and 83 N. J. E. 494, indicated that cemetery associations may be charitable uses, they are not so in a strict sense. In *Attorney General* vs. *Linden Cemetery Association,* 85 N. J. E. 501, this Court expressly refused to so hold and stated:

> "Nothing has been said as to the theory of the amended bill of complaint, which was that of an administration of a charitable use. The question whether or not lands held by cemetery associations, incorporated under our General Cemetery Act, are devoted to a charitable use, in the legal sense of that term, need not be decided as the basis of jurisdiction in this case."

The cases cited by Vice-Chancellor Howell were instances of charities because of the method of their creation. There are, undoubtedly, rights in the public in the case of cemeteries formed under the act. But these are not property rights. *Newark* vs. *Stockton,* 44 N. J. E. 179. They are merely rights to protect and preserve the burial

grounds—pious uses. *Rosedale* vs. *Linden Township,* 73 N. J. L. 421. If they form any basis for equitable interference, it is to preserve the burial ground, at the instance of a creditor. *First National Bank of Pawnee City* vs. *Hazel* (Neb.), 89 N. W. 378, 56 L. R. A. 765, cited in *Brown* vs. *Maplewood Cemetery Association, supra* (holding that real estate plotted into lots and blocks and dedicated and used exclusively for burial purposes, cannot be reached by equitable proceeding in the nature of a creditors' bill).

Sections 8, 9 and 16 of the Rural Cemetery Act show a complete plan for (primarily) protecting the cemetery and at the same time affording judgment creditors means of obtaining payment from the cemetery's property. If A, B and C all have separate judgments, the Court may appoint a sequestrator to receive monies for each successively, or to apply the proceeds secured pro rata. It is clear, however, that a final hearing is contemplated at which the Court may determine how payment shall be made with reference to the pecuniary status of the association. This protection is obviously intended for cemeteries regardless of length of operation and with due regard to the effectuation of their legitimate plans. Large debts are more likely to be incurred while the cemetery lands are in process of development. During this period the cemetery is least in funds. Without the statutory protection the cemetery association could never reach the point of operating free of financial embarrassement.

In *Rosedale Cemetery Association* vs. *Linden Township,* 73 N. J. L. 421, 422, the Court succinctly stated what the legislative intent is in the following words:

> "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 for debts, and be kept free from molestation.*"

There can be no serious doubt that the statutory remedy of the creditor was intended to be exclusive, for it goes as far as possible in the creditor's interest, consistently with the ability of the association to function as a cemetery. Whatever a court of equity may do, if anything, beyond applying the statutory remedy, should be done in the interest of the continued functioning of the association, through its board of trustees.

The appointment of a receiver with powers to exercise the corporate functions and to sell cemetery lands necessarily terminates the operations of the association through its board, elected by its lot owners, contrary to the policy of the statute (1 C. S. 372, *et seq.*). See *Bonynge* vs. *Frank,* 89 N. J. L. 245, holding that only lot owners may vote for trustees, who must also be lot owners.

In any case the powers granted by the act belong to the association and its trustees until altered or amended by the legislature. These powers include the power to function as an association and to carry on its business in spite of any number of judgment creditors. The Court cannot take away the powers so granted. It necessarily follows that creditors may rely only upon the means of securing payment which is accorded to them under the Rural Cemetery Act.

The only cases of receiverships of cemetery associations in the books are cases where all parties consented. Even then Howell, V. C., in the Bliss case, refused to appoint, without the trustees and certificate holders being made parties (81 N. J. E. 394). *Cf.* 83 N. J. E. 494. See Griffin, V. C., in *Brown* vs. *East Ridgelawn,* 87 N. J. E. 173.

There is no precedent for the appointment of a receiver at this stage of any case in the books.

POINT IV.

The Court should have vacated the order appointing the receiver, because no subpoena had been issued in the suit prior to the return day of the injunctive order to show cause.

The injunctive order was returnable March 25th. The subpoena was not issued until May 5th.

This fact should have moved the Court to vacate the order of March 25th appointing the receiver and for injunction.

> *Altman* v. *United Brotherhood of Carpenters,* 79 N. J. E. 150, 641;
> *Forstman & Hoffman Co.* vs. *U. S. Etc. Co.,* 99 N. J. E. 696;
> *Reliable Cloak Co.* v. *Sorbella,* 98 N. J. E. 354, Ch. Rules 210, 217.

POINT V.

The orders appealed from should be reversed, and the Court of Chancery should be directed to vacate the injunctive order of March 25, 1931, to discharge the receiver, and to restore to the defendant corporation the possession of its property.

Respectfully submitted,

Dougal Herr,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

ATLAS FENCE COMPANY, Complainant-Respondent, *and* WEST RIDGELAWN CEMETERY, Defendant-Appellant.	On Appeal from Court of Chancery. Sat Below Bigelow, V. C. Appeal from Orders Appointing Receiver, Etc.

BRIEF OF RESPONDENT.

(Italics, etc., ours, except where otherwise noted.)

Statement of the Record and Facts.

The bill was filed March 5, 1931 (p. 1) by Atlas Fence Company, a judgment creditor of the Cemetery. It is a representative bill. It alleged: the Cemetery was incorporated in 1905; it conducts all of its business in the State of New York although its cemetery is in the State of New Jersey and it is incorporated under the Rural Cemetery Act; the person in charge is Adam Frank; certain lots in the cemetery in Passaic, New Jersey, have been sold for burial purposes; it has considerable lands not used for burial purposes; on April 2nd, 1926 a mortgage was executed by the then owner of the land to John W. Griggs for $36,000; it was assigned to William Bittles; nothing was paid on account; on July 3rd, 1920 a decree was made in a foreclosure suit directing the payment of the sum of $39,706.29 to the holder of the mortgage; Passaic National Bank & Trust Company of Passaic was appointed sequestrator for the purpose of sequestering the assets of the cemetery for the payment of the sum due upon the

decree; the decree, in effect, directed one-half of the proceeds of the sale of the lands foreclosed to be applied to the satisfaction of the decree and the other one-half to be set aside for operation and upkeep; on April 16, 1927 a judgment had been obtained against the cemetery for $215.90; on April 16, 1927 another judgment had been entered against the cemetery for $505.55; execution issued upon this latter judgment and, on the 15th day of July, 1929, the Sheriff had sold a piece of land approximately 225 feet by 680 feet for the sum of $150 to satisfy this judgment; the cemetery instituted proceedings in the Court of Chancery for the purpose of setting the Sheriff's sale aside but the application had been denied, 105 Eq. 579 (it was afterwards granted 108 Eq. 513); these lands were worth upwards of $24,000; the order of the Court of Chancery had been appealed; on March 4, 1930, Campbell Morrell & Company had obtained a judgment against the cemetery for $161.24; on May 12, 1929 Standard Oil Company of New Jersey had obtained a judgment against the Cemetery for $201.65; thereafter Fred Synder had obtained a judgment against the Cemetery for $25; thereafter Albert Snyder had obtained a judgment against the Cemetery for $186.10; thereafter John Hollowood had obtained a judgment against the Cemetery for the sum of $235 and on the 3rd day of June, 1930, an order had been made in the Court of Chancery appointing Sidney Alexander of Paterson as receiver to sequester the assets of the company to satisfy this latter judgment; on October 21, 1930, complainant had recovered two judgments against the Cemetery, one for $350 and the other for $359.05; about September, 1930, one Abraham H. Gottlieb, assignee of a judgment which had been obtained against the Cemetery on the 26th day of October, 1929 for upwards of $4,000 instituted suit in the Court of Chancery for a receiver, and on the 27th

day of October, 1930, Dougal Herr, Esquire, had been appointed receiver in sequestration; there were three acting receivers, one under the mortgage foreclosed, Passaic National Bank & Trust Company of Passaic, New Jersey, and two under judgments, Sidney Alexander and Dougal Herr, each directed to do substantially the same thing, that is to say, to sequester sufficient assets, available under the terms of the rural cemetery act, to satisfy their respective decrees or judgments; their duties were necessarily conflicting; because of the provisions of restraint contained in the order appointing Dougal Herr, receiver on the judgment of Gottlieb the Cemetery could not continue its operations without the consent of the Court of Chancery. All of the above, as charged in the original bill, was conceded below.

On this bill, disclosing this state of facts, an order to show cause was made (p. 23) on March 5, 1931, returnable on March 16, 1931, requiring West Ridgelawn Cemetery, present appellant, to show cause why a receiver should not be appointed. The matter was adjourned until March 25, 1931. Defendant, West Ridgelawn Cemetery, appeared, as did also Sidney Alexander, receiver, Passaic National Bank and Trust Company, receiver, Dougal Herr, receiver, the mortgagee William Bittles, and several lot owners. Proofs were submitted by defendant Cemetery (Affidavit of Frank, p. 24a). This was the only affidavit presented for the defense. It did not question any of the statements of any importance contained in the bill of complaint. Frank was the President of West Ridgelawn Cemetery and the statements in his affidavit are, in reality, *a concession that the Cemetery was in the condition depicted by the bill of complaint.* Frank also filed a petition on behalf of West Ridgelawn Cemetery (p. 25), to

the effect that he had offered to pay complainant the amount of money due it "and has offered to pay and is now offering to pay the claims of all judgment creditors that are not now under appeal if given a reasonable opportunity to do so."

There were also before the Court, on behalf of complainant, the affidavit of Hollowood, Tabaka and of Snyder, a judgment creditor, which affidavits were filed March 16, 1931 (p. 53), and supported complainant's charge of gross mismanagement.

The Court, on March 25, 1931, made an order appointing a receiver and giving the receiver certain powers. *From that order no appeal was taken.*

On April 2nd, West Ridgelawn Cemetery and Dougal Herr, receiver, gave notice of an application returnable on April 8, 1931—(1) for an order dissolving and vacating the order to show cause and the order appointing the receiver, and (2) in the alternative for an order modifying the order appointing the receiver by eliminating therefrom certain provisions with respect to powers; (3) in the alternative, for an order staying the operation and effect of the order appointing receiver pending appeal to this Court (p. 31).

No further proofs were tendered by defendant or by Dougal Herr, receiver.

On May 5, 1931, the Court made an order reciting the appearances of complainant and defendant, Alexander, receiver, Passaic National Bank and Trust Company, receiver, Dougal Herr, receiver *pro se,* Bittles, mortgagee and dismissing the application to modify or vacate and confirming the order (p. 47) of March 25th, 1931.

On April 6th notice was given by Bonynge, a certificate and lot owner, to defendant and all persons concerned "that on the return of the notice given by the defendants, West Ridgelawn Ceme-

tery and Dougal Herr, to vacate the order appointing receiver herein and for other relief I shall make application to join Albert W. Bonynge, certificate holder and lot owner of West Ridgelawn Cemetery, as a party complainant herein, and upon such application I shall use affidavits, copies of which are herewith served upon you, and I shall also apply for leave to amend the bill of complaint to insert the allegations contained in the affidavits not now appearing in the bill of complaint and for such other and further relief as may be proper'' (p. 49).

At the same time Albert Snyder, a judgment-creditor, also gave notice that he would apply for an order permitting him to file a bill of complaint against the defendant company and consolidating his cause of action with that of complainant herein.

It is stated in the brief of appellant (p. 2) that ''No affidavits were served with these notices, although the Bonynge notice recites that affidavits are attached.''

There is no proof that copies of the affidavits were not served, and the fact is that those affidavits were produced to the Court on April 8, 1931, and were marked ''filed'' (p. 85). They consisted of an affidavit of Bonynge (p. 85) and a copy of an affidavit of Braverman (p. 92). Braverman, the accountant, had made an affidavit in another case on January 31, 1930. He was out of the country at the time this matter came up, and a copy of his affidavit was annexed to the affidavit of Bonynge (par. 17, p. 91). Before the Court decided the matter Braverman had returned and an affidavit was made by him, verified April 27, 1931, which was marked by the Court ''filed'' on May 5, 1931, at the time the Court made its orders of that date.

While it is stated in the brief of appellant that on April 8th, among the affidavits sought to be read, were those of Snyder, Hollowood and Tabaka, and that they were offered under the Snyder notice, it appears that these affidavits were filed on March 16, 1931 (p. 53), preceding the making of the order appointing receiver on March 25, 1931. On May 5, 1931, the Court made an order reading as follows (p. 63):

> "This matter coming on to be heard on notice of Albert W. Bonynge, a certificate holder and lot owner, and Albert Snyder, a judgment creditor, of an application to be made parties complainant and to file an amended bill and after hearing Harry Lane, of counsel with Albert W. Bonynge, certificate holder and lot owner, and Irving L. Werksman, of counsel with Albert Snyder, and after considering the entire record herein, including the affidavits presented on this application *and an affidavit of Harry Braverman verified April 29, 1931, which takes the place of a copy of an affidavit made by the said Harry Braverman submitted to the Court at the time the application was originally heard,* said Harry Braverman being then out of the country, and *which affidavit of said Harry Braverman is ordered filed, and after considering the proposed amended bill presented herewith;*
>
> It is, on this 5th day of May, 1931, ORDERED:
>
> That the said Albert W. Bonynge and Albert Snyder be and the same are hereby made parties complainant and the said parties complainant are given leave to file the amended bill of complaint herewith presented and said bill is ordered filed.
>
> And it is further ordered that the receiver appointed herein upon the original bill and the proofs supporting *it be and he is hereby continued upon the amended bill and with all the powers heretofore conferred upon him by any order of the Court.*"

At the same time an order was made consolidating the causes (p. 65), and, thereupon, the amended bill was filed by complainant in the original cause, and Albert Snyder, a judgment creditor, and Albert W. Bonynge, a certificate and lot owner, were joined as parties complainants (p. 66).

A notice of appeal was given on May 12, 1931, by Dougal Herr, not as receiver, but as solicitor for and of counsel with the defendant Cemetery. The notice of appeal is from the order of May 5, 1931, which declines to vacate or modify the order appointing the receiver of March 25, 1931, and also from the other order of May 5, 1931, which orders "that the receiver appointed herein upon the original bill and the proofs supporting it be continued upon the amended bill" (p. 1a).

The memorandum of the Court is found on page 35.

The petition of appeal alleges error in both orders (p. 3a).

The appeal from the order of May 5, 1931, permitting the filing of the amended bill and continuing the receiver upon the amended bill and upon the proofs submitted to the Court upon the application for leave to file the amended bill was first abandoned by appellant and a brief filed formerly abandoning it. By a new brief appellant now seeks to revive it. (p. 3). It is obvious why that portion of the appeal was first abandoned. Appellant conceived that the allegations of the amended bill and the proofs supporting the amended bill were stronger than the allegations of the original bill and the proofs supporting it, and it thought that, by abandoning its appeal from the order of May 5th permitting the filing of the amended bill and continuing the receiver upon the amended bill, it could exclude from the consideration of this Court the allegations of the

amended bill and the proofs supporting it, and so thinking, it did not, in its original state of case, print any of these papers and, indeed, did not print its notice and petition of appeal. It is equally obvious why it *now* seeks to revive its appeal from this order. It will be of no avail to it if the order of March 25, 1931, establishing the receivership upon the original bill be set aside, if the order of May 5, 1931, continuing the receivership on the amended bill be left in force. Hence the change in front.

ARGUMENT.

POINT I.

A reversal of the order of May 5, 1931, declining to vacate the order of March 25, 1931, would result in no substanial change in the situation and the matter is moot.

The order of March 25th, which appointed the receiver and prescribed his powers was made after full hearing and appellant appeared in response to the order to show cause and presented proofs. *It did not appeal from that order.* Instead it adopted the course of moving to vacate or modify. That motion was not decided until May 5, 1931, when, as stated in appellant's brief, page 4, the time to appeal from the order of March 25, 1931 had expired. *But defendant had the election either to appeal from the order of March 25th or to attempt to move to modify it.* It deliberately refrained from appealing, relying upon its motion to vacate or modify and it is significant that, on that motion to vacate or modify, it *presented no proofs other than it had presented on the original application.*

Suppose this Court should reverse the order declining to modify or vacate and should direct the Court of Chancery to modify or vacate its order of March 25, 1931. The situation would then be this: The order of May 5, 1931, made upon the amended bill, after notice and hearing, continuing the receiver "upon the amended bill and with all the powers heretofore conferred upon him by any order of the court" would remain in full force and effect. The effect of the order of May 5, 1931, permitting the filing of the amended bill (p. 63) and of the order of May 5, 1931 (p. 65), consolidating the causes and in continuing the receiver upon the amended bill "with all the powers heretofore conferred upon him by any order of the court" *is to read into the order of May 5th, 1931 the provisions of the order of March 25th with respect to powers.* The order of May 5, 1931 is a separate, distinct and independent order resting for support not only on the proofs produced to the Court with the original bill, which resulted in the order of March 25th, 1931, but upon the proofs presented to the Court upon the application of Bonynge and Snyder and this order of May 5th, 1931 (p. 63) continuing the receiver was made after notice and argument.

Appellant, although *now* insisting that it be "understood that both orders (*i. e.,* those of March 25 and May 5) are included in the appeal and the argument" (p. 4), yet states that "the argument which follows is therefore confined to the order declining to vacate" (p. 4), apparently thinking that, if the order of March 25 is vacated, the order of May 5 falls, overlooking the fact that that order is a separate, independent order resting upon different proofs.

Appellant says that the order of May 5th, 1931, continuing the receiver upon the amended bill "ex-

cludes the new proofs and does not mention the injunction" (p. 3). It does *not* exclude the new proofs. Had it excluded the new proofs there would have been no sense in filing them and they are all marked "filed" as of the date of the argument, April 8, 1931 (p. 85, etc.). Appellant had full notice that these new proofs would be presented (p. 50). Not only did appellant not make any argument upon its appeal from the order of May 5, 1931 (p. 3) continuing the receivership in its brief as first filed, but it asked for a dismissal of that appeal. It cannot argue that appeal from the order of May 5th, 1931, because that appeal has never been perfected by the service of notice of appeal upon the proper parties. The order of May 5, 1931 continuing the receivership under the amended bill will remain in full force and effect, whatever is done with the order of May 5th, declining to vacate the order of March 25th, 1931 and of what avail will any reversal of the order of May 5, 1931, which declines to modify or vacate the order of March 25th, be to anybody?

The time to appeal from the order of May 5, 1931, continuing the receiver upon the amended bill and to perfect the appeal, has long since expired.

This Court will not determine a moot question nor will it reverse an order where the reversal will have no substantial effect.

This Court said, speaking by Mr. Justice Black in *Macklin* v. *Essex Park Realty Co.,* 101 N. J. Eq. 776, at page 777:

> "In this situation there is nothing for us to consider, except a moot or academic question and this we decline to entertain. It is

an elementary rule of law, long settled and firmly established, not only in this court but in other jurisdictions, that courts do not and will not consider moot questions. Hence, the appeal must be dismissed. As was stated by this court in the case of Coryell *v.* Holcombe, 9 N. J. E. 650. The appellant can derive no benefit from the judgment of this court. The object of the order has been attained. The order has been executed and its force spent. There is no redress which this court can give to the appellant, even if we thought the order appointing a receiver was erroneous. The purchaser is in possession of the mortgaged premises. The sale has been confirmed by the chancellor. We are powerless to change the existing status."

In *Black* v. *Delaware and Raritan Canal Co.,* 24 N. J. E. 489, this Court said:

"The court should refuse to do the act asked for, not because anybody is in fault, but because it does not seem becoming in a judicial tribunal, to do any act which must be, there is every reason to suppose, empty and profitless. In speaking to a similar point, the Court of Errors in New York, at a time when it was distinguished by the great ability and learning of Chancellor Kent, uses this emphatic language: 'There is nothing upon which the judgment of reversal can operate. To pronounce a nugatory and idle judgment, which we have not the power to enforce is incompatible with the dignity of judicial proceedings.' Trustees of Huntington *v.* Nicholl, 3 Johns. R. 578."

And in *Gloucester City* v. *Greene,* 45 N. J. E. 747, the Vice-Ordinary, McGill, said:

"And the court of errors and appeals applied and enforced this principle, in Camden and Atlantic R. R. Co. *v.* Elkins, 10 Stew. Eq. 273, just as I think it must be

applied and enforced in this case. Courts exercising appellate jurisdiction sit to administer justice in matters of *substantial interest,* not to gratify the passions of the litigants, nor to foster a spirit of vexatious litigation."

In *Mills* v. *Green,* 159 U. S. 651, 40 L. Ed. 293, the Supreme Court of the United States said:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. Lord *v.* Veazie, 49 U. S. 8 How. 251 (12:1067); California *v.* San Pablo & T. R. Co., 149 U. S. 308 (37:747)."

And see *Camden and Atlantic R. R. Co.* v. *Elkins,* 37 N. J. E. 273, at page 275, in this court.

Fisher v. *Baker,* 203 U. S. 174, 51 L. Ed. 142.

POINT II.

In answer to Point I of appellant's brief (p. 5).

The order appealed from does not constitute an unconstitutional usurpation by the Court of the exclusive functions of the legislature.

From page 5 to page 23 of its brief defendant considers in detail the various legislative enactments in this State having to do with rural cemeteries and questions the constitutionality of some of them. We submit that all that is said under this point is beside the mark for it rests upon a false premise, *i. e.,* that the Court will, when it comes to deal with these cemetery lands and the proceeds thereof, disregard legislative enactments which have to do with the rights of creditors and lot owners.

Succinctly, upon the proofs as have been heretofore and will be hereafter discussed, the Court of Chancery was confronted with a situation in which there was a trust without a competent trustee and a trust, which, in some respects, is charitable. The right of the Court of Chancery to conserve such a trust through the appointment of a receiver and that the appointment of such a receiver and the administration of a trust such as is here involved through a receivership is proper, has been so long established as not, we submit, to be the subject of debate. It has never been considered that the exercise by the Court of Chancery of such a right is in derogation of any legislative enactments which have to do either with the substantial rights of creditors or with the relief to which creditors would be entitled at law. Indeed, it would be beyond the legislative power to adopt any statute which would deprive the Court of Chan-

cery of its right to protect such a trust through the medium of injunction and receivership.

It would seem that defendant desires to argue that *Bliss* v. *Linden Cemetery Association* in the Court of Chancery, 81 N. J. E. 394, 83 N. J. E. 494, and in this court under the title of *Attorney General* v. *Linden Cemetery,* 85 N. J. E. 501, was incorrectly decided.

The power of the Court of Chancery over a cemetery corporation under its general equity jurisdiction is greater than its power over an ordinary business corporation.

And its power under its general equity jurisdiction over an ordinary business corporation is fairly extensive. *Morse* v. *Metropolitan S. S. Co.,* 87 N. J. E. 217 and cases cited, affirmed as modified 88 N. J. E. 325; *Hill* v. *Dealers Credit,* 102 N. J. E. 310; *Riggs* v. *Burnrite Coal Briquette Co.,* 274 U. S. 208, 71 L. Ed. 1002; *Atwater* v. *Baskerville,* 89 N. J. E. 121, affirmed 90 N. J. E. 275.

In *Bliss* v. *Linden Cemetery Asso.,* 81 N. J. E. 394, Vice Chancellor Howell held that the provisions of the General Corporation Act with respect to appointment of receivers of corporations on the ground of insolvency, etc., did not apply to a cemetery corporation because he said that the cemetery corporation was administering a "charitable use" (p. 399) and *therefore* he said that the scheme of the statute, which contemplates the winding up of all the concerns of an insolvent corporation and the distribution among its creditors and stockholders, of all its assets or the proceeds of sale thereof, could not be held to apply. *It is only for this reason, i. e.,* that a cemetery corporation is administering a charitable use, that it can be said that the provisions of the Corporation Act as to insolvency do not apply because the provisions of the Corporation Act, as to the appointment of receivers in cases of insolvency and the

like, apply to *all* corporations. The Vice Chancellor said however, at page 399:

> "It may be that in administering the affairs of an insolvent charitable corporation some of the procedure which applies to insolvent business corporations might profitably be used, but when the obligations are paid, and there remains a fund, such fund cannot be disposed of or used for any purpose except the purpose of the charity to which it was originally devoted. This makes the inapplicability of the Insolvent Corporation Act to the present situation quite obvious."

The moment it is conceded, however, that the corporation is administering a charitable use, then the power of the Court of Chancery to interfere in a proper case is settled, and Vice-Chancellor Howell so held on page 396 and page 397 of 81 N. J. E. As to who has the right to bring the suit the Vice-Chancellor said, page 397:

> "Having ascertained the forum in which proceedings to correct abuses may be exhibited, we may next inquire who has the right to bring a suit for the purpose. As was well said by Mr. Justice Depue in the case last quoted, such proceedings may be instituted either by the attorney general or by the parties in interest. In this case a proceeding is instituted by one lot holder and three creditors of the cemetery company on behalf of themselves and all other lot holders and creditors who shall come in and contribute to the expense of the suit. No serious question was made on the argument about the right of the complainants to institute proceedings as they have done; but, in my opinion, the attorney general ought to be brought into the suit, and, in case he should choose to do so, be given the right to take charge and control of that portion of the litigation which relates to the public right. Green *v.* Blackwell, 35 Atl. Rep. 375."

Note, here, that the Vice-Chancellor does not question the right of *creditors* to bring the suit. The Vice-Chancellor quoted from Perry on Trusts, sec. 746, as follows:

> "In suits for establishing, regulating, controlling, or correcting charitable trusts, courts disregard all technicalities; if the case is brought before the court by bill or information, it takes jurisdiction over the administration of the charity, and makes the proper orders and decrees for the right administration of the fund, whether the pleadings are formal or informal, and whether the proper relief is prayed for or not. In charity cases, the most expeditious and least expensive methods should be adopted; and a proper decree for relief will be made, although relief of an entirely different character is prayed for. Courts are not bound by the strict rules of practice in granting injunctions or stay of proceedings at law in such cases. It cannot be objected to a proceeding by the attorney general in equity, in the matter of a charity, that there is an adequate remedy at law. But if there are any such informalities in the record as will be prejudicial to the defendants, the court will not proceed until such informalities are corrected." Perry Trusts, sec. 746 (should be sec. 747, 7th ed).

The *only* reason that the Vice-Chancellor did not appoint a receiver on the application considered in 81 N. J. E. 394 was because he held that the proper parties were not before the Court.

The proper parties having been brought in he appointed a receiver. 83 N. J. E. 494, at page 509.

It is quite true that this Court in *Attorney General* (*Bliss*) v. *Linden Cemetery,* 85 N. J. E. 501, on appeal from Vice-Chancellor Howell's decision in 83 N. J. E. 494, declined to state whether lands of a cemetery are devoted to a charitable use "in the *legal sense* of that term", but it did *not* hold

the contrary, and, however that may be, this Court sustained the jurisdiction of this Court to appoint a receiver even though the lands might not be devoted to a charitable use "in the *legal* sense of that term".

It said (p. 507):

> "The estoppel of the grantor to deny the dedication of his land to the corporate purpose, and the severance of the legal and equitable titles involved in the doctrine thus invoked, exhibit a trust relation that amply justifies the exercise by a court of equity of that branch of its primary jurisdiction when the necessary parties are before it and the necessary facts are pleaded."

In *East Ridgelawn Cemetery* v. *Frank*, 77 N. J. E. 36, at page 39, Vice Chancellor Stevens says:

> "This much is clear. The certificate is the joint certificate of both companies, and purports to give to the vendor thirteen thousand five hundred shares in the proceeds of the sale of the land as the consideration of twice one hundred and thirty-five acres, or fifty shares per acre, the maximum amount which a cemetery company may hold being one hundred and thirty-five acres. Is such a scheme authorized or permitted by the Cemetery Act? 'A cemetery for the burial of the dead', says Mr. Justice Gray, in Close *v.* Glenwood Cemetery, 107 U. S. 474, 'if not a strictly charitable use, is, in some aspects, a public and pious use'. Our courts have taken a similar view (Newark *v.* Stockton, 44 N. J. E. (17 Stew.) 180; Toppin *v.* Moriarty, 59 N. J. E. (14 Dick.) 115), and so has the legislature. The Cemetery act gives the management of the cemetery to trustees elected by the lot owners. It exempts cemetery lands from taxation and assessment. Rosedale Cemetery Association *v.* Linden, 73 N. J. Law (44 Vr.) 421. It provides that lots, from the time of interment, shall, in general, be inalienable.

It confers a limited power of eminent domain. It allows the association to hold property, real and personal, upon trust to apply the income to the improvement and embellishment of the grounds. It authorizes the investment of money accruing from the sale of lots for the purpose of maintenance and improvement (section 67), and it expressly directs as follows (section 19):

> 'One-half at least of the proceeds of all sales of lots and plots shall be first appropriated to the payment of the purchase-money of the lands acquired by the association until the whole purchase-money shall be paid; and the residue thereof to preserving, improving and embellishing the said cemetery grounds and the avenues and roads leading thereto and to defray the incidental expenses of the cemetery establishment; and after the payment of the purchase-money and the debts contracted therefor and for surveying and laying out the ground, the proceeds of all future sales shall be applied to the improvement, embellishment and preservation of such cemetery and for incidental expenses and to no other purpose or object so long as such embellishment is incomplete'."

POINT III.

Answer to Point II of appellant's brief (p. 24).

The Court did not err in appointing the receiver and granting the injunction because the proper parties were not before the Court.

This point was not made below nor is it mentioned in the petition of appeal (p. 3-a). Not having been raised below or mentioned in the petition of appeal it cannot be argued here.

> *Engelhard* vs. *Schroeder,* 92 N. J. Eq. 663.

Appellant in its argument overlooks the doctrine of a court of equity, that where there are parties, either complainant or defendant, which are so numerous as to make it inconvenient to join each party a few may be joined as representative of a class. There is no question as to this doctrine nor is there any question but that it is applicable in the case at bar.

It is stated in 21 Corpus Juris, title "Equity", sec. 293, page 292, and in *Wallace* v. *Adams,* 204 U. S. 415, 51 L. Ed. 547, at page 552, Mr. Justice Brewer, speaking for the Supreme Court of the United States, said:

> "Now, it is undoubtedly within the power of a court of equity to name as defendants a few individuals who are in fact the representatives of a large class having a common interest or common right—a class too large to be all conveniently brought in to court,—and make the decree effective not merely upon those individuals but also upon the class repsented by them. Mandeville *v.* Riggs, 2 Pet. 482, 7 L. Ed. 493; Smith *v.* Swormstedt, 16 How. 288, 14 L. Ed. 942; Bacon *v.* Robertson, 18 How. 480, 489, 15 L. Ed. 499, 504; United States *v.* Old Settlers, 148 U. S. 427, 480, 37 L. Ed. 509, 529, 13 Sup. Ct. Rep. 650."

The rule is fully recognized in this State.

Butler v. *Farry,* 68 N. J. E. 760, in this Court as well as *Camden Safe Deposit Co.* v. *Dialogue,* 75 N. J. E. 600.

Whether the rule should be applied in any given case is a matter, as Corpus Juris states it, 21 C. J., title "Equity", sec. 293, at page 293:

> "The number required to bring a case within this exception would seem to be somewhat in the sound discretion of the court."

In the case at bar, the original bill made a number of lot owners parties and also provided that

any other lot owners might answer the bill (p. 11). It also made a number of the trustees parties and the only reason why the other trustees were not made parties was because it was impossible to ascertain who they were. The amended bill made all of the trustees parties (p. 81) and lot owners as representative of the class and specifically alleged that other lot owners were unknown to complainants.

Appellants concede that the Court might, notwithstanding the alleged absence of parties, "have appointed a conservator to prevent dissipation of assets until the proper parties could be brought in" (p. 26 of its brief), but it contends that the order brought up "was in the nature of a final adjudication." The order of March 25, 1921 (p. 28) was *not* in the nature of a final adjudication. And the order appealed from of May 5, 1931, which denied the application to vacate the order of March 25, 1931, and the order of May 5, 1931, made upon the amended bill, which continued the receiver "upon the amended bill, with all of the powers heretofore conferred upon him by any order of the court", which was likewise appealed from, but which appeal was once abandoned, and then attempted to be revived, and is now argued, was in no sense a final adjudication. The fact is that certain answers were filed to the bill and the case has, in the regular course, been referred to Vice Chancellor Bigelow for final hearing as any other cause.

The fact that certain powers to deal with property were conferred upon the receiver does not make the order one in the nature of a final adjudication, as appellants seem to think (p. 26 of the brief). *The business of the company was the selling of plots for burial purposes.* The receiver was authorized, in order to protect the *res pendente lite,* to continue the business. The Court

was obliged to authorize him to sell lots for burial purposes—else, instead of conserving, the Court would have destroyed. This power to sell lots for burial purposes does not any more result in making the order a final adjudication than a power conferred upon a receiver, appointed *pendente lite* to continue a grocery business, to sell goods, wares and merchandise in the usual course of business. Moreover, even had the Court authorized the receiver to sell the property as a whole, the order would not have amounted to a final adjudication because it may have been necessary to preserve the rights of all parties *pendente lite* to dispose of the property as a whole, and a court of equity once having taken control of property to conserve it, has the right, if it is necessary to conserve it or to conserve the interests of all parties pending the suit, to convert the property into cash.

> *4 Pomeroy's Equity Jurisprudence* (4th Ed.), Sec. 1630;
> *First Nat'l Bank* vs. *Shedd,* 121 U. S. 74, 30 L. Ed. 877;
> *Harned* vs. *Rowand,* 74 N. J. Eq. 264;
> *Long Dock Co.* vs. *Mallery,* 12 N. J. Eq. 93.

Appellant is mistaken when it says (p. 26) that the order does not of course "bind such absent persons". If this is a case, and we submit it is, in which it is proper that a limited number of persons be made parties representing a class, the rule is clear that the decree binds all of the class and that rule is firmly fixed in this State.

> *Willoughby* vs. *Chicago Junction Railways Co.,* 50 N. J. Eq. 656.

POINT IV.

Answer to Point III of appellant's brief. The Court was legally justified in making the order appointing a receiver and enjoining the appellant.

It would be a work of subrogation to examine critically the argument of appellant under its Point III. The facts have been fully set forth in the statement of the case and are likewise fully set forth in the memorandum of the Court (p. 35), and particularly at page 42.

It is a mistake for appellant to say (p. 28 of its brief) that the action of the Vice Chancellor depended *solely* upon the affidavit of Frank C. Zuch. Upon the return of the order to show cause, which was made upon the 5th day of March, 1931, upon the filing of the bill, there were before the Court the affidavits of John Hollywood filed March 16, 1931 (p. 53), the affidavit of Joseph Tobacco filed upon the same day (p. 57) and the affidavit of Albert Schneider filed the same day (p. 61) and, certainly when the order of March 25, 1931, which is the order appointing the receiver (p. 28), was made these affidavits, as well as the affidavit verifying the bill were before the Court and there was nothing in reply, except the affidavit of Adam Frank (p. 24a), and, as heretofore indicated, that affidavit is more or less of a confession. Here, again, it must be born in mind that there *is no appeal from the order of March 25, 1931,* which established the receivership and that the order appealed from is the order of May 5, 1931, refusing to modify or vacate the order of March 25, 1931, and when *that* application came on, not only were these papers heretofore mentioned before the Court but there was also before the Court the

application to file the amended bill (p. 49) and the amended bill (p. 66), and its accompanying affidavits (p. 85), and, on the same day that the order of May 5th declining to vacate or modify the order of March 25th was made (p. 47) the order was made consolidating the causes (p. 65), as well as the order directing the continuance of the receiver upon the amended bill (p. 63).

We repeat that we cannot possibly see how any benefit can accrue to appellant even if the order of May 5, 1931 (p. 47), which denies the motion to vacate or modify the order of March 25, 1931, should be reversed, for we cannot follow appellant in his argument (p. 3) that, if the order declining to vacate the order of March 25th be reversed on this appeal, it *follows* that the portion of the order admitting parties, which continues the receiver should also be reversed, for the order of May 5, 1931, admitting parties and directing the continuance of the receiver upon the amended bill (p. 63) *is a separate and distinct order, the merits of which appellant declines to argue although it states that it is "included in the appeal and the argument"* (p. 4).

The order of May 5, 1931, insofar as it permits the admission of parties is, of course, discretionary and, insofar as it continues the receiver upon the amended bill it rests upon the original bill and the affidavits accompanying it and the amended bill and the affidavits accompanying it.

It is said at page 34 of appellant's brief: "In the case *sub judice,* no emergency, fraud, mismanagement or necessity for the court's protecting intervention are shown".

If there ever was a situation in which there was fraud and mismanagement it is this, and if there ever was a situation which called for the intervention of the Court for the protection of all parties, this is it.

Appellant seems to treat this case as if it were a mere suit on behalf of a creditor to obtain satisfaction of its debt. It is *not* that kind of a suit. It is not even a representative suit. It is a suit in which somebody brings to the attention of the Court the fact that this property, which is dedicated to that which is in the nature of a charitable use, is in danger of dissipation to the detriment of all concerned, and the language of Vice-Chancellor Howell in *Bliss* v. *Linden Cemetery,* 81 N. J. E. 394, at page 397, is peculiarly applicable. If the condition that was in existence at the time the bill in this case was filed continued to exist there would be no one which would have any rights left, not even the dead.

POINT V.

In answer to appellant's point IV.

The Court should not have vacated the order appointing the receiver, because no subpoena had been issued in the suit prior to the return day of the injunctive order to show cause.

Appellant states in its brief that the injunctive order was returnable March 25th, "and that the subpoena was not issued until May 5th". It does not refer to the record to indicate at what point it appears that the subpoena was not issued until May 5th. Where appellant gets the idea that the subpoena was not issued until May 5th we do not know. It is not the fact nor is it necessary to issue a subpoena if the defendant appears. The appellant here not only appeared upon the return of the order of March 5th, 1931, and was heard upon the 25th day of March, 1931, at the time of the hearing, but, at the time the order appointing

receiver, which was appealed from, was made, page 47, he also moved to modify or vacate that order and was fully heard, which resulted in the order of May 5, 1931, page 47, and never raised the matter of the service of subpoena. Not having raised the point below it cannot raise it here.

> *Engelhard* v. *Schroeder*, 92 N. J. Eq. 663.

There is no contention that the cause has not been diligently prosecuted and, even if the subpoena had not been issued at the time of the making of the order to show cause March 5, 1931 (p. 23), the only result would have been a dismissal of the restraint contained in that order and the immediate granting of a new order with similar restraint for this Court said in *Reliable Cloak Co.* v. *Sorbella,* 98 N. J. E. 354, that the failure to issue the subpoena did not result in the dismissal of the bill. But the rule relied upon by appellant does not apply unless there is a formal injunction. It does not apply to such a restraint as was contained in the order to show cause of March 5, 1931.

> *Allman* vs. *United Brotherhood,* 79 N. J. Eq. 150;
> *Forstman & Hoffman Co.* vs. *United Front Committee,* 99 N. J. Eq. 696.

It is respectfully submitted that the orders brought up should be affirmed.

Louis A. Fast,
Harry Lane,
Merritt Lane,
Of Counsel for Respondents.

New Jersey Court of Errors and Appeals

Between ATLAS FENCE COMPANY, Complainant-Respondent, *and* WEST RIDGELAWN CEMETERY, (*et als*), Defendant-Appellant.	On Appeal from Order of the Court of Chancery.

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF.

(Italics, etc., ours, except where otherwise noted.)

On the middle of page 3, after reciting the charges in the bill, the respondent says: "All of the above, as charged in the original bill, was conceded below". In this assertion the respondent is entirely mistaken. The facts as stated in appellant's brief under Point III, at page 28, *et seq.*, are the facts as they were presented by the affidavits before the Vice-Chancellor, and differ in very substantial respects from the charges in the bill.

The Jacobs case referred to on page 29 of the appellant's brief as having been re-referred to another Vice-Chancellor, has been officially reported since that brief was written at 108 N. J. E. 513, with opinion by Vice-Chancellor Berry setting aside the sale.

The Bittles case, mentioned on page 28 of the appellant's brief and on page 1 of the respond-

ent's brief, has since the briefs were written been taken on appeal to this court. And the Gottlieb case, mentioned on page 29 of appellant's brief and on page 2 of respondent's brief, has been dealt with by this court (#76, May Term, 1931, not yet reported).

While the charges in the bill, and especially the charges in the amended bill of complaint, are broad, they are not substantiated by the proofs. Since this is an appeal from orders based upon proofs, it is misleading to state the case as the respondent has done, on the basis of the bill of complaint rather than on the basis of the proofs.

Respondent says at the bottom of page 3 of its brief, that Frank's affidavit is in reality a concession that the cemetery was in the condition depicted by the bill of complaint. Respondent's point seems to be that Frank should have specifically denied the charges of the bill. But Frank was not undertaking to meet the allegations of the bill of complaint but only to meet the proofs, as he specifically says in his affidavit. It is the proofs that the cemetery was called upon to meet on this application, not the bill. According to Mr. Frank's affidavit and the petition verified by him, filed before the order of March 25th was made, it is shown: (1) that the total amount of undisputed claims against the corporation was $1,468.04; (2) that the personal property of the corporation, consisting of its necessary machinery, tools, etc., exceed in value that amount; (3) that arrangements had been made for paying off the undisputed claims and for bonding those which were disputed, if the Court so ordered; and (4) that the corporation stood ready under the order of the Court to make such payments and furnish such security. Both the Vice-Chancellor in his memorandum, and the respondent in its brief, totally ignore this offer and totally ignore the undisputed fact ap-

pearing in the affidavit of Mr. Frank that the personal property of the corporation was more than sufficient in value to satisfy the undisputed debts.

Throughout the brief of the respondent it is said that the affidavits of Hollowood, Tabaka and Snyder were filed on March 16, 1931, before the original order appointing the receiver was made. This statement occurs on pages 4, 6 and 22 of the respondent's brief. This assertion is based upon an error occurring on page 53 of the State of the Case, where the affidavit of John Hollowood is said to have been filed on March 16, 1931. The record shows that these affidavits were intended to be presented on the application for the order to amend the bill of complaint, and that they were filed on the day that that application was made, April 8, 1931.

On pages 4 and 5 of the respondent's brief the notice given by Bonynge on April 6th, is quoted, and the notice by its terms refers to affidavits "copies of which are herewith served upon you." The point is made in the appellant's brief, bottom of page 2, that no affidavits were served with this notice in spite of the recital in the notice itself. The respondent on page 5 observes that "there is no proof that copies of the affidavits were not served". It is true that the State of the Case as printed does not show that the affidavits were not served, but that is the fact, and the record which is brought up by this appeal shows it. It is further to be observed that this notice of Bonynge does not state that he will apply for the appointment of a receiver or the continuance of the receiver already appointed. His notice merely was that he would apply for leave to amend the bill, to insert certain allegations and to let in certain parties complainant.

The point concerning these three affidavits of Hollowood, Tabaka and Snyder not having been served, is that on April 8th for the first time the appellant had copies of them and objected at that time to their being used, and the objection was sustained by the Vice-Chancellor. They were marked filed not on the argument for the vacation or modification of the order of March 25th, but on the application to amend the bill. Of course, the copy of the affidavit of Braverman, attached to Bonynge's affidavit, was hearsay and improper. It was not until May 5, 1931, the date on which all of the orders were made, that a new Braverman affidavit was filed, without notice to appellant and without any opportunity whatever for the appellant to meet it. It was not filed on the application of the appellant to vacate or modify the order appointing the receiver, but was filed on the application of Bonynge to amend the bill. Both because the notice of Bonynge's motion did not state that he was going to apply for a receiver or the continuance of a receiver, and because no opportunity was afforded to the appellant to meet the new proofs, these proofs could not be used and were not used on the appellant's application. The Vice-Chancellor expressly declined to consider them. (See his memorandum, p. 39, l. 40 to p. 40, l. 12 of the State of the Case).

On pages 7 and 8 of the respondent's brief, it is said that the appellant abandoned its appeal from that part of the order amending the bill which continues the receiver, by filing a brief formally abandoning it, and now changes its front by seeking to revive this appeal. No such brief was filed. There was no abandonment of the appeal at any time. If the point is important, the explanation is that by inadvertence, in preparation of the appeal the appellant lost sight of the fact that two orders were on appeal and not one,

and by mistake proceeded on that erroneous assumption. This was entirely the error of counsel for the appellant, and Mr. Lane very kindly called counsel's attention to the error as soon as it was made and it was immediately corrected. No objection was made by Mr. Lane at the time or until now. The correction consisted in adding to the State of the Case certain of the papers that were omitted at first. Mr. Lane was not misled by it. There was no intent to abandon, nor was there an actual abandonment.

Point I of the respondent's brief is answered by the fact that both the order declining to vacate the appointment of the receiver and that portion of the order to amend which continues the receiver are before this Court on this appeal.

It is true that the appellant might have appealed, and that it chose to reargue in the first instance. But this was not an election in the sense that the adoption of one method of procedure precluded recourse to the other. Surely the appellant cannot be blamed for seeking to secure relief in the court below before bringing an appeal. The motion was a re-argument under direction of the Court, and upon such a motion it would have been improper for the appellant to bring in further proofs. The motion was necessarily made on the proofs before the Court when the original order was made. The refusal to vacate or modify is appealable. *Read* vs. *Patterson,* 44 N. J. E. 211; and the portion of the order amending which continues the receiver is also appealable.

The respondent is mistaken in the last paragraph of page 9 of its brief, when it quotes from page 4 of appellant's brief to the effect that it is to be "understood that both orders (*i. e.,* those of March 25 and May 5) are included in the appeal and the argument". The language of the appel-

lant's brief is, "but it will be understood that both orders are included in the appeal and the argument" and the context shows that the reference is to the two orders of May 5th which are appealed, first, the order declining to vacate the order of March 25th, and, second, that portion of the order amending the bill which continues the receiver.

The respondent says on page 10 of its brief that the order amending is based upon the new proofs, because otherwise there would be no sense in filing them. The Braverman affidavit was filed *ex parte* on May 5th. The other affidavits were filed April 8th without being read. They should not have been filed; especially the Braverman affidavit should not have been filed.

The respondent continues on page 10 to say that appellant cannot argue the appeal from the order of May 5, 1931 (evidently meaning that portion of the order amending the bill, which continues the receiver), "because that appeal has never been perfected by the service of notice of appeal upon the proper parties". We are at a loss to know what basis there is for this statement. It is not explained by the respondent. The amended bill of complaint was filed by Mr. Louis A. Fast as solicitor for complainant, and the notice of appeal was served on his firm. The respondent's brief is signed by Mr. Fast, as well as by Mr. Harry Lane, who made the application for leave to file the amended bill.

Since both orders are properly before the Court on appeal, and since the result of the reversal of both orders would be to vacate the order of March 25th and definitely vacate the office of the receiver, the question is not a moot question but is properly before the Court.

In answer to Point II of respondent's brief, it is to be observed that it does not meet or attempt

to meet the constitutional point contained in Point I of the appellant's brief. It merely says of this whole argument that it is beside the point because it rests upon a false premise, in that the Court will, when it comes to deal with the cemetery lands and the proceeds thereof, disregard the legislative enactments, etc. In other words, the respondent's point is that the orders appealed from do not in themselves violate the constitutional enactment and that any appeal from them is premature if it be placed upon this ground. The respondent then proceeds to argue that the assets of a cemetery association are a trust, at least so far as authorizes the court of equity under its general equity jurisdiction to conserve the same by the appointment of a receiver and the administration thereof.

The answer is that the order appointing the receiver empowers him to sell lots, in spite of the legislative prohibition, although the lands are laid out into lots, mapped and dedicated. Since appellant's brief was written this Court in *Gottlieb* vs. *West Ridgelawn Cemetery* (#76 May Term, 1931), not yet reported, has held that cemetery lands laid out into lots cannot be sold to pay debts, and that the prohibition of the statute is as binding on the Court of Chancery as it is on the law courts.

The question whether a rural cemetery association is a trust or not has already been argued in appellant's brief, but it may be again observed that even if the Court decides that it is such a trust, this suit is not brought for the purpose of conserving the same, but for the purpose of making out of the property of the corporation the money with which to pay its debts. It is true that the bill as amended by the inclusion of an alleged lot owner among the complainants and allegations looking toward the administration of the cemetery

as a trust, is an entirely different bill from the bill as originally filed, but the proofs (omitting the *ex parte* affidavit of Braverman) do not show a case requiring the court of equity to conserve the trust for the benefit of lot owners or any other interests. The proofs, including the three affidavits filed on April 8th, if they were properly before the Court, show merely that the corporation is in straitened financial circumstances. The Vice-Chancellor in his memorandum says that from these proofs, either the corporation is "insolvent" or there has been mismanagement, but he infers the mismanagement from the fact that no lots were sold from the proceeds of which debts could be paid. This, of course, does not follow. In the first place, it does not appear that lots could have been sold, or if they had been sold that the proceeds would have been applicable to the payment of debts. The statute requires that 50% of the proceeds of sale be used to pay off the underlying mortgage and the balance for embellishment, etc. It is not shown that the debts were incurred for purposes for which any of the proceeds of sale of lots could have been applied. It does affirmatively appear that the creditors could have realized their debts out of personal property. It also affirmatively appears that the corporation could have secured the money to pay these debts (presumably by borrowing it), had the Court given it an opportunity to do so. The original bill was filed by a creditor on behalf of himself and all other creditors to realize their debts, not to conserve the property. It was and is a case of equitable execution in spite of section 16 of the act forbidding such an execution. It is not strengthened because of the filing of the amended bill, because the proofs do not show any other case than that made by the original bill. The mere inclusion of an alleged lot owner does not

strengthen the case, because so far as the proofs go the case is one of a creditors' bill still.

In answer to Point III of the respondent's brief, it is to be observed that it says that the point was not made below that the proper parties were not before the Court, nor is this point mentioned in the petition of appeal. The petition of appeal states one of the grounds of appeal to be that the Court was without jurisdiction to appoint a receiver and enjoin, etc., and the notice of appeal states that one of the grounds of appeal was that the Court of Chancery was without jurisdiction or legal authority to make the orders, and that the Court should, in the proper exercise of its discretion, have refused to make the orders or either of them.

On page 19 of its brief, respondent refers to the doctrine of representation, that is, that where there are parties, either complainant or defendant, who are so numerous as to make it inconvenient to join each party, a few may be joined as representative of a class. We agree with respondent when it states that *the question before the court is whether or not this doctrine is applicable in the case at bar.* In support of its contention, respondent cites excerpts from *Corpus Juris, Wallace* vs. *Adams,* 204 U. S. 415; *Butler* vs. *Farry,* 68 N. J. E. 760; and *Camden Safe Deposit Co.* vs. *Dialogue,* 75 N. J. E. 600.

As the Court stated in *Wallace* vs. *Adams* (*supra*), "it is undoubtedly within the power of a Court of Equity to name as defendants a few individuals *who are in fact the representatives* of a large class having a common interest. . . ." There is nothing in the original or amended bills to indicate whether the only certificate holder in the suit, Bonynge, is in fact a representative of the other certificate holders, how many other certifi-

cate holders are interested, whether they are known, and whether it would be practicable to join them. In 21 *Corpus Juris,* title "Equity", sec. 293, page 292 (cited by respondent), it is said:

> "In all cases governed by this exception it seems proper to allege in the bill, unless it is otherwise apparent upon its face, that the parties are too numerous to make it practicable, even if known, to prosecute the suit if all are made parties."

Butler vs. *Farry* (*supra*) and *Camden Safe Deposit Co.* vs. *Dialogue* (*supra*) are not applicable to the present set of facts. Both of these cases involved situations where a trustee filed a bill to foreclose a mortgage, and did not join all of his *cestuis que trustent.* But in each of these cases the Court made it clear that it is not necessary for the trustee to join his *cestuis* when they are unknown, and are so numerous as to make it impossible, or highly inconvenient, to include them as parties.

Certainly, it cannot be contended that Bonynge is in fact a representative of the other certificate holders. The amended bill joins Albert W. Bonynge as a complainant, setting forth that he is a lotowner and certificate holder, and undertaking to represent *all other lotowners and certificate holders.*

But this Court will judicially notice the fact that Bonynge and the East Ridgelawn Cemetery, with which Bonynge is identified as a trustee and whose lands abut those of the West Ridgelawn Cemetery, so that the two cemeteries are in direct competition in the sale of lots, have been involved in a number of litigations against the interests of the West Ridgelawn Cemetery. See

> *East Ridgelawn Cemetery* vs. *Frank,* 77 N. J. E. 36;

Bonynge vs. *Frank,* 90 Atl. Rep. 676 (not officially reported).

Bonynge vs. *Frank,* 89 N. J. L. 239 (same case on appeal in this Court) in which the Court says (page 240):

> "The real question is whether a group of nine trustees of a cemetery association, *who may be called the Frank party,* or a group of fifteen *who may be called the Bonynge party,* are entitled to the office."

East Ridgelawn Cemetery vs. *Frank,* 104 Atl. Rep. 594 (not officially reported);
Passaic Trust & Safe Deposit Co. vs. *East Ridgelawn Cemetery,* 101 Atl. Rep. 1026 (not officially reported);
Bittles vs. *West Ridgelawn Cemetery,* 108 N. J. E. 357;
Bittles vs. *West Ridgelawn Cemetery,* 94 N. J. E. 808.

From a reading of the opinions in these and other cases it will be seen that Bonynge's interest lies in embarrassing Frank, and if possible, in ousting him from the office of trustee of the West Ridgelawn Cemetery, an interest which is not necessarily consistent with the interests of the lotowners and certificate holders of the West Ridgelawn Cemetery as a class, whose votes have elected Frank and who could at any time displace him if the majority of them cared to do so. Bonynge saw an opportunity, when the Atlas Fence Co. filed the bill in this case, to join in and by an amended bill questioning Frank's activities as trustee and to so tie up and embarrass the cemetery as to gain control of it in the interest of the East Ridgelawn or at least to eliminate all competition by the West Ridgelawn.

Aside from the very apparent multifariousness of the bill as thus amended, it is submitted that

Bonynge is not a fit or proper person to be permitted to represent the interests of the other lot-owners or certificate holders, in this suit. None of the certificate holders have been made parties, except Bonynge. But they certainly are necessary parties, because their certificates represent ownership of the cemetery lands.

On page 20 of its brief, respondent mistakenly says that the case has been referred for final hearing: the fact is that no reference has as yet been made.

On page 23 of its brief, the respondent says that the appellant declines to argue the merits of the appeal from the order amending. This is a wrong impression of our statement that it will be understood that both orders are included in the appeal and the argument. It is submitted that the brief filed by us is intended to include and does in fact include arguments against the validity of both of the orders.

On page 24 of its brief, respondent says that this is a suit which shows that the trust fund is in danger of dissipation to the detriment of all concerned. It seems to us that it is a case not of dissipation but rather of the opposite. The proof is that the real estate of the corporation is worth upwards of $900,000.00. It cannot run away. It may be that in these times of depression it is difficult to sell, but until it is sold it certainly is not being dissipated. Insofar as the receiver sells it, he will be dissipating it. In other words, regarding the case as essentially a creditors' bill, as it is, on the proofs the Court should have waited until final hearing on the bill and until the proofs of the allegations of the bill were in, before determining that a receiver was necessary. There could be no danger in the meantime of the dissipation of the property.

Finally, the respondent in its brief entirely ignores our point that the offer of the corporation to pay its undisputed debts and to bond against the rest was entirely ignored by the Court, as well as the undisputed proof that the personal property of the corporation was sufficient in value to pay all of its debts not in process of judicial consideration.

Respectfully submitted,

Dougal Herr,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

Between ATLAS FENCE COMPANY, Complainant-Respondent, *and* WEST RIDGELAWN CEMETERY, *et als.*, Defendant-Appellant.	On Appeal from Order of the Court of Chancery.

(Italics, etc., ours, except where otherwise noted.)

RESPONDENT'S MEMORANDUM IN REPLY TO MEMORANDUM OF APPELLANT IN REPLY TO RESPONDENT'S BRIEF.

On page 4 of appellant's memorandum in reply to respondent's brief, we have the following:

> "On pages 7 and 8 of the respondent's brief, it is said that the appellant abandoned its appeal from that part of the order amending the bill which continues the receiver, by filing a brief formally abandoning it, and now changes its front by seeking to revive this appeal. No such brief was filed. There was no abandonment of the appeal at any time. If the point is important, the explanation is that by inadvertence, in preparation of the appeal the appellant lost sight of the fact that two orders were on appeal and not one, and by mistake proceeded on that erroneous assumption. This was entirely the error of counsel for the appellant, and Mr. Lane very kindly called counsel's attention to the error as soon as it was made and it was immediately corrected. No objection was made by Mr. Lane at the time or until now. The correction consisted in adding to the State of the Case certain of the papers that were omitted at first. Mr. Lane was not misled by it. There was no intent to abandon, nor was there an actual abandonment."

On page 3 of the brief of appellant, printed and served on respondents, we have the following:

> "Our notice of appeal includes that portion of the order adding parties (p. 63) which continues the receiver on the basis of the original proofs. This part of the order should not have been made. It was not in furtherance of the applications of April 8th and was not included in the notices. It was not intended to enlarge the effect of the original order appointing the receiver, for it excludes the new proofs and does not mention the injunction. Had it been omitted, the order appointing the receiver and for injunction would not have been affected. It is mere surplusage. For this reason, after consideration, this part of the appeal was abandoned. It was never perfected by notice to any of the parties except the original complainant, and we ask *that it now be dismissed.*
>
> "At the request of the respondent on this appeal we have included in the State of the Case all of the notices, affidavits and orders, but they are not relevant to this appeal as perfected, which now brings up only the order declining to vacate the order appointing the receiver."

Subsequent to the printing and serving of this printed brief, appellant reprinted the first three or four pages which appear in the present appellant's brief.

It is fair, we submit, that this situation be brought to the attention of the Court in the light of the statement contained on page 4 of appellant's memorandum in reply to respondent's brief which puts respondent in the position of having deliberately made a misstatement.

Respectfully submitted,

Louis A. Fast,
Merritt Lane,
Of Counsel with Respondent.

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