New Jersey Court of Errors and Appeals

ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*, *Complainants,* *vs.* LINDEN CEMETERY ASSOCIATION, *et als.*, *Defendants.*	*On Appeal from Order Sustaining Exceptions to Master's Report.*

Statement of Case.

The matters at issue grow out of a sale by William F. Smith in 1901 to the Linden Cemetery Association, in which it was provided by the terms of the deed to the Association (covenant two) that William F. Smith and his assigns should receive one-tenth of the gross proceeds of the sale of all burial plots in the Cemetery, as part consideration for the conveyance.

The balance of the consideration was another covenant by which 50% of the proceeds additional was to be set aside and paid to William F. Smith as the holder of purchase money shares.

The Court of Chancery originally held that this covenant two was void because it was extra statutory, and because it was a secret promoters' profit. On appeal this Court held that it was void because extra statutory, but that it was not fraudulent.

This Court also held that the covenant could not be sustained and that the remedy as between the parties was a rescission of the contract; that because of the dedication, of the lands conveyed, to cemetery purposes the grantor was estopped

from claiming title to the land; but that rescission nevertheless must be the method by which the rights of the parties were to be determined, and as the Cemetery Association could not give back the land it must give to the grantor the value of the land, and a payment of a profit in the transaction, such profit to be measured by his services.

All of the value of the land was covered by the first covenant, which provided for purchase money shares, in which the respondents now have no interest. The profit was covered by the second covenant, in which the grantor and his immediate assigns, the respondents, now have an interest.

The master reports that the value of such services, and therefore the quantum of profit to which Smith was entitled, in the Linden Cemetery Association case, was $4,350; that interest on such amount is $4,219.50, making a total due to Smith and his assigns of $8,569.50. He also found that the Association had paid Smith and his assigns $12.956.76, which, with interest, made a total credit to the Association of $19,-449.95.

The master found in the Rosedale case that the value of the services was $4,000 and interest on that amount, $3,880, making a total debt against the Association of $7,880, and that they were entitled, by reason of payments, to a credit of $1,552.19 with interest, making a total credit of $2,332.84.

To these findings the respondents excepted, claiming that under the decree of the Court of Errors the master should have determined the total present value of the cemetery properties and should have found that Smith was entitled to 10% of that value.

The court below sustained the exceptions.

The exceptions are as follows in the Linden case:

First Exception: For that the master reported that the full fair value of the property was $37,500, whereas he should have reported the value was $911,000, as testified by the Receiver.

Second Exception: For that the master fails to report that the sum to be awarded to William F. Smith and his associates should be ten per cent. of the gross proceeds of sales as provided in second covenant in the deed.

Third Exception: For that the master instead of fixing the compensation as claimed in exception two, fixed an arbitrary sum as the value of the services of William F. Smith and his associates as follows: William F. Smith, $2,500; C. O. Smith, $500; Vernette E. Prentice, $500, and Roswell A. Benedict, $500. (See pp. 68 & 69 of State of Case.)

Argument on the Law.

The master was, of course, limited as to the scope of his inquiry and report, by the terms of the order of reference to him.

AS TO EXCEPTION ONE.

The reference directs him to

> "ascertain what will be a reasonable sum to be paid to the grantor in said deed and his assigns for services and profit on the purchase and sale of the said property in view of the services of the grantor and their value to the grantee, and also to ascertain the credits to which the grantee is entitled by reason of payments made on account of this covenant, or otherwise."
>
> (P. 6, ll. 12-21, State of Case.)

Nothing is said in regard to the ascertainment of the value of the land, and the master does not, in this report, ascertain nor report on the value of the land.

It is true that, in his report filed at the same time in conformity to a prior order of reference, he does ascertain the value of the land, but that is for the purpose of determining what the holders of the purchase money shares are entitled to, and has nothing to do with the interest of the exceptants.

Exception one, therefore, should not have been sustained, because (1) the master did not report as to the value of the land as the exceptant claims, and (2) an ascertainment of the value of the property was not within the scope of the reference and so not within the master's authority.

AS TO EXCEPTIONS TWO AND THREE.

The direction to the master, as stated above, was to ascertain the value of the services and profits in view of the services and their value to the grantee. Such being the direction the master was obliged to consider the services and their value alone in making up his report. No mention is made, in the order of reference, to covenant two, nor to any agreement between the parties, but the sole direction is to ascertain the value of the services and the master therefore could not under the order consider anything except services. The wording of the reference conforms to the decree of the Court made in conformity with the remittitur from the Court of Errors, which remittitur, so far as it affects the present question, reads as follows:

> "And the case is remanded to the Court of Chancery to ascertain what will be a reasonable sum to be paid to the grantor

> and his assigns for services and profits on the purchase and sale of said property and their value to the grantee, less any credits to which the grantee is entitled, etc. * * * and the Court of Chancery is hereby directed to correct the said decree in accordance with the views of this Court as expressed in its opinion filed in this cause."
>
> (P. 2, ll. 15-31, State of Case.)

The opinion of this Court reported in 85 Eq., 501, so far as it bears on the present inquiry, is as follows (p. 501).

> "that Smith, who represents himself and his associates, was entitled to a fair profit as a recompense for the indispensable services that he rendered is clear, the only requirement demanded by the most rigorous rule being that such profit should bear a *reasonable relation to the value of the services, and that* it should be fully disclosed and agreed to by the other parties in interest."

And further (p. 505)

> "the Court of Chancery *properly* decided that the covenant to pay perpetually a percentage of the price obtained for each of its lots was one that an Association incorporated under the general Cemetery Act could not lawfully make."

And further (p. 506)

> "Normally the remedy would be a rescission of the contract notwithstanding the conveyance, the vendee being thereby absolved from its illicit covenant, and the vendor having his land restored to him. If for valid reasons this cannot be done, it still furnishes the criterion by which the rights and equities of the parties are to be worked

out. In the present case this normal remedy cannot be applied because of the burial uses to which this land has been put with the acquiescence of the grantor. None the less the conveyance as such must theoretically fail with the excission of its consideration, leaving the title of the grantee to rest upon the estoppel of the grantor to deny the perpetual dedication of the land to the uses for which it was conveyed as fully to all intents as if the deed of conveyance were valid and operative."

The obvious meaning to this last quotation is that *rescission* is to furnish the *criterion* by which the rights and equities of the parties are to be worked out. In case of rescission the party receiving the thing stipulated must restore it to the other party. The normal method in this case would be to restore the land. The Court says that the normal method cannot be followed in this case because of the use to which the property has been put, but it nevertheless furnishes the method of settling the rights and equities of the parties.

If the thing itself cannot be restored, the value of the thing given must be restored. Now the thing which Smith gave to the Association was the land and his services, and as that cannot be restored to him he must have the value of the land and of his services, *not as of the present time,* because he did not convey the land to the Association at its present valuation. That has been made by the expenditure of hundreds of thousands of dollars by the Association itself, but he must have the value as it was at the time when he made the conveyance. The value of the land itself, without calculating Smith's services as a part thereof, as of the date of pur-

chase, has been ascertained under another reference in connection with the amount to be paid to the holders of the purchase money shares, who are also assigns of Smith.

This Court pointed out in the opinion referred to that the parties themselves separated the two elements making up what was contracted for by Smith, (1) the land, (2) the profit. (See p. 503.)

> "Owing, however, to the fact that the Association had no money and no means of raising any, the conveyance to it was made by Smith without the payment of any money whatsoever *either for the land itself or for his profit in the transaction,* both of which were taken care of by two covenants in the deed, which, together with other covenants, constituted the sole consideration for the conveyance."

It is evident that the Court of Errors, in considering what must be given to Smith on the rescission of this contract, it being impossible to give him the land, contemplated that the value of the land should be paid *to those entitled thereto under covenant one,* and something in lieu of a profit to Smith should be paid *to those entitled thereto under covenant two.* Our present inquiry is concerned only with ascertaining what would be a reasonable amount to Smith.

The Court of Errors itself has indicated how this amount should be ascertained. On page 506 it says:

> "The excinded covenant provided for the profit that it was agreed the grantor should have, but what that profit should be the parties themselves never fixed at any particular sum; *hence inasmuch as such sum cannot be ascertained from the covenant itself it must be held by a court of equity to be a*

reasonable sum in view of the services of the grantor and their value to the grantee.''

The findings of this Court summarized amount to this:

(1) The covenant is void because it is *ultra vires.*

(2) The deed fails because the consideration cannot stand.

(3) The remedy of the parties is to rescind the whole transaction, each giving to the other what was received.

(4) This cannot be done because of the dedication of the premises to burial purposes.

(5) The Association must keep the land, but must give back the value of what it received.

(6) It received land and it received the services of Smith.

(7) Payments for the land and for services were, by the parties themselves, taken care of by different covenants, and divergent interests arose.

(8) Covenant one provided for payments for the land, and covenant two provides for payment of a profit to the grantor to take care of his services.

(9) It is equitable to pay something in lieu of this profit, but it must be reasonable in view of the services rendered.

(10) The value cannot be ascertained from the covenant, but must be held to be a reasonable sum in view of the services and their value to the grantee.

Some confusion has arisen by reason of this Court's having used interchangeably the word

"profit" and the word "services" when designating that for which the Association must pay William F. Smith and his assigns, but we take it that there is no real uncertainty as to what the Court intended and without wishing to appear presumptuous in stating to this Court what it had in mind, it seems to us clear that by such reference the Court intended to designate the thing Smith bargained for as "profit" and the thing which he gave as "services" and that bargaining for a profit was legitimate, but that this particular bargain, because of its form, was illegal and void, and that consequently Smith could not have profit in the measure bargained for in the covenant, but must have profits commensurate only with his services because he gave services and not profits.

No other meaning seems possible from the Court's opinion, nor does it seem possible that the Court could have intended otherwise in view of fundamental principles to be applied where a remedy is sought in cases of contracts *ultra vires* because immoral, illegal, forbidden by statute or contrary to public policy.

This Court in the case of

Strickland v. *National Salt Co.*, 79 Eq., p. 182, quotes and adopts from the case of *Camden & Atl. R. R.* v. *May's Landing & Egg Harbor R. R. Co.*, 48 N. J. L., p. 530, the following words:

"Transactions which are immoral, illegal, forbidden by statute or contrary to public policy * * * cannot furnish a legal cause of action"

The rule laid down in the books to be followed in such a case is that although an action cannot be founded upon a contract, the contract

being void, an action will lie for money had and received or for services rendered.

See the following:

Sec. 226:

"The same consequence, however, does not necessarily follow from a contract by a corporation which is merely *malum prohibitum. In such a case while the law will not enforce the prohibited contract,* it will take notice of the circumstances, and if equity and justice require a restoration of money or property received by either party thereunder, it will in many cases grant relief."

"If a contract by a corporation is merely forbidden by statute and is not immoral or otherwise illegal aside from the *prohibitum* and the corporation has received under it money which in equity it ought to repay, or property, or services for which in equity it ought to pay, the law will imply a promise to pay and an action *quasi ex contractu* may be maintained."

Clark & Marshall—Private Corporations, Vol. 1, p. 604.

Sec. 6002:

"From these decisions we may safely collect the principle that there is always a right of rescission where a continuing performance involves a continuation of violation of law."

Sec. 6003:

"It must be constantly kept in mind that this right of withdrawal or rescission, at least in every case where a court of equity obtains jurisdiction to deal with it, is predicated upon an obligation upon the rescinding party to restore what he has received

under the *ultra vires* contract and to put the other party in *statu quo* as nearly as may be."

Sec. 6004:

"If the contract of a corporation is *ultra vires,* but not immoral or otherwise *malum in se* and either party disaffirms it on the ground that it is *ultra vires* and refuses further execution of it, then, while the other party cannot sue to recover damages or compensation in respect to the unexecuted portion of the contract, yet the law will afford him remedies for procuring from the other party a restoration of what he has lost under it."

"The governing principle is that where money has been paid or property transferred to a corporation under a contract which is not *malum in se,* but merely *malum prohibitum,* the party receiving may be made to refund to the party from whom it has received, the value of that which it has actually received, and to this end he may maintain against the corporation the equitable common action of money had and received or a suit in equity to compel and accounting and restitution of what the corporation has received through the transaction."

Thompson on Corporation, Vol. 5.
To same effect, see 10 Cyc., p. 1151.

We think it beyond the scope of argument that the Court has held this contract to be void, and void because contrary to statute. To say that the contract is void and then to say that it may be enforced is to make a mockery of the Court itself. We take it that it is held to be

void for some sound reason affecting the public welfare and not to settle an academic question.

It is held void because to hold otherwise would be detrimental to the interests of the community. To hold it void and then to say that it may be enforced is to make the findings of the Court mere empty words and the litigation a waste of time and expense, and we cannot think that any such absurdity is intended.

The contract itself is void. It never had being and the rights of the parties cannot be ascertained by reference to it, but must be ascertained by applying the rules referred to above.

As this Court has said, rescission is a criterion which must govern the rights of the parties and each must give to the other the value of the thing which he or it had.

The Court below in its opinion, referring to covenant two, says (State of Case, p. 71, ll. 25-28):

> "In its moral aspect it has the approval of the upper Court and percentage as a basis of calculation is not looked upon with disfavor."

We think that the Court was certainly in error in this and that it was this error which led the Court into the further error of approving the method of ascertaining the value of the services proposed by the respondents. We do not think that there is justification for the statement that this Court approved of the covenant in its moral aspect or in any other aspect. They disapproved of it because it was extra statutory and having disproved of it that is the end of it, and nothing is said in the opinion of this Court as to the propriety of percentage being used as a basis for calculation.

On the other hand, this Court has said that the calculation cannot be made from the covenant. On page 506 of the opinion is the following language:

> "The exscinded covenant provided for the profit that it was agreed the grantor should have, but what that profit should be the parties themselves never fixed at any particular sum; hence inasmuch as such sum cannot be ascertained from the covenant itself it must be held by a court of equity to be a reasonable sum in view of the services of the grantor and their value to the grantee."

It seems to us that this language of the Court precludes all further dispute as to the method of ascertaining what Smith is entitled to. This Court itself has here outlined the method. If it intended that the Court of Chancery should pay Smith ten per cent. of the value of the land, this Court undoubtedly was able to find appropriate language to express such opinion. If that was the method intended by this Court it certainly was not necessary to ascertain the value of Smith's services, because there is no casual relation between the value of the services and the value of the land in its present condition.

The value of the land in its present condition has been brought about by improvements costing hundreds of thousands of dollars made and paid for by the Association, and also by the advertising and the selling agencies of the company, which have cost the company thousands of dollars. These expenses, which have been in part converted into the value of the land, have been so great that each of the companies now finds itself indebted to the extent of more than $200,000 with no means of paying the same. The land is

worth what the Receiver testified, if it can be sold, but due to conditions surrounding this cemetery, mainly the lack of transportation facilities, there is almost no market, and in the five years that the Receiver has operated the cemetery he has been unable to sell enough lots to pay the operating expenses, and he has operated the cemetery at a loss running into thousands of dollars. It was undoubtedly that very thing that the legislature intended to prevent and that the courts have refused to permit, the bargaining away of a portion of the revenue of the Association without respect to the income of the Association and its ability to pay its operating expenses and so serve the purpose for which it was created.

This act was undoubtedly passed for the purpose of providing communities of this state with necessary cemeteries, and the restrictions of the statute must be regarded as restrictions intended to make it possible for the cemetery to operate and perform its functions successfully. It cannot do so by bargaining away its principal irrespective of its own needs.

The Court below in its opinion further says: (See State of Case, p. 71, ll. 29-39.)

> "A profit of ten per cent. of the gross proceeds of the sales of burial plots was agreed upon by the contracting parties and is to be presumed reasonable, and had they estimated the probable total income from sales and thereon accordingly fixed the amount of the profit, the vice in the covenant which caused its destruction would have been obviated."

Here again the Court below is in error in its logic in saying that a profit of ten per cent. of

the gross proceeds is presumed to be reasonable. Under the opinion of this Court the reasonableness of the profit is to be determined by the Court of Chancery *in view of the services and their value to the grantee.* No presumption of reasonableness or unreasonableness can be applied to the contracting parties, but the reasonableness must be ascertained from the evidence as to the services and their value to the grantee.

The respondents submitted no evidence as to the services, but the master considered the evidence as to the services and their value submitted by the appellants and from that evidence determined what would have been a reasonable sum to be paid to the grantee as a profit. To have ignored the evidence of the services and in its place have taken the agreement of the parties would have been, as the master himself says, to have substituted the fact and condition of the covenant, which this Court in declaring the covenant void sought to avoid and eliminate.

The Court below further says: (State of Case, p. 71, ll. 36-39.)

> "A substitute for this indispensable element of the covenant will be furnished by adopting the course the parties themselves could have lawfully pursued."

The fallacy of this, it seems to us, is that the Court *makes a new contract for the parties which they never intended.* It assumes that the parties at the time the contract was made calculated what the value of the land would be in 1914, and thereupon fixed ten per cent. of that value as the amount to be paid to Smith as his profit and that amount thereupon became a liqui-

dated sum and as such escaped the prohibition of the statute.

We know that this was not the case. The parties never so contracted nor intended to contract. They bargained for an unliquidated sum. Their bargain was void. It cannot be made the subject of an action by either party and they must be relegated to that right and liability which the law implies in every such transaction, that is, that a party receiving a benefit intends to and must pay for it.

We submit, therefore, that the Court below was in error in holding that the method proposed by the respondents was the method intended to be followed by this Court; and we further maintain that the method followed by the master is the method laid down by this Court in so many words, and that the meaning is so plain that it cannot be misunderstood.

One other matter in the opinion of the Court below ought to be considered. On page 72, lines 6 to 17, the Court says:

> "The testimony before the master disclosed that a fair and reasonable average price for lots is fifty cents per square foot; that the gross proceeds of the sale of all of the lots at this rate will exceed a million and a half dollars, and that the net income will be over a million dollars. Staggering as these figures are and large as the profit must be, if they are realized, they serve to emphasize the value of the grantor's services to the grantee—a controlling factor in the measure of profit which the master has wholly ignored."

It would seem from the above that the Court has in mind the present value of the property as

an element in ascertaining the value to the Association of the services rendered by Smith.

We think that this is wrong and that the value of the services must be ascertained as of the time they were rendered and that their value to the grantee is what they would have cost the grantee at that time to have them duplicated. If the value of the services is to be charged by the final result of the operation then we must take not an estimated value of the land, but what gain the Association has derived from the transaction.

We must then take cognizance of the fact that the Association has operated for nearly sixteen years, between eleven and twelve of those years under its Board of Trustees and the balance of the time under the Receiver, and that the annual expense of operation through all that time has been largely in excess of the income. That the debts arising out of this deficit are enormous and that the creditors are demanding payment and that no means of payment has been devised.

That while the value of the lots was said to be fifty cents per square foot, there are no purchasers, and that in all probability fifty years will not be long enough to realize on all of these lots, and that during that time the expenses of operation, so far as we can see, will continue to eat up the income. (See Stats of Case 59 to 62)

That when the lots are sold the source of income has gone and the expense of operation and maintenance continues. That an estimate of the value of the undeveloped land is of small use in this connection because no way is known now of selling it, and if it were sold at the estimated value the amount realized would not be sufficient to pay the debts of the Association.

All of these facts, most of which are set out in the bill of complaint, and sustained by proof, will have to be taken into account in adopting this last suggestion of the Court below, and it is respectfully contended that they are not elements of determining the value of the services to the grantee as of the date the transaction was closed.

Argument on the Facts.

It was stipulated by the parties that the testimony of Roswell A. Benedict and Clifton O. Smith, two of the parties who assisted William F. Smith in the purchase and sale of the property, and they two now owning a one-half interest in the value of the services in the Linden case and Clifton O. Smith owning two-fifths in the Rosedale case, and also the testimony of John P. Winans and Clarence Winans taken on the hearing before Vice-Chancellor Howell in this cause and printed in the state of the case on the former appeal should be accepted by the master. This was the only evidence offered as to the services performed by William F. Smith or on his behalf in this connection. The exceptants offered none. From this, the story of the parties themselves, it is easy to determine what they did on the purchase and sale of the premises. Prentice was the secretary of the Association.

Negotiations for the use of the premises for cemetery purposes had already been opened by the Association. Prentice went to the owners and said that he thought he had a man who could carry the thing through (State of Case, pp. 23 to 31). All that was needed was $5,500 in cash in the Linden case. William F. Smith put in none of his own money (p. 38, ll. 20 to 30). Prentice had been in touch with William F. Smith in regard to the matter and Smith sent

for Benedict to ask him to prepare a scheme by which he (Smith) could get shares that he could sell and raise money. Benedict had several conferences with Smith, examined the law with relation to associations of this sort and devised this plan of having the Association covenant to give a share of the proceeds from the sale of lots to Smith, this share of the proceeds being divided into two parts, 50 per cent. of the proceeds to go to the shareholders and 10 per cent. of the proceeds to go to Smith (pp. 31 to 40). Smith also sent for his son, Clifton O. Smith and told him about the proposition and asked him to interest some of his friends. Clifton O. Smith did interest two of his friends, Mr. Wilbur and Mr. Dyer, and they agreed to take 200 shares each, for which each paid $2,500. (pp. 40 to 46). Clifton O. Smith put up $2,500. and Benedict put up $2,500. for shares, making $10,000. in all which was turned over to the Association, and out of that the $5,500, was paid for the land (this is shown by the books of account).

Each one of these four men received shares for his $2,500. They or their assigns are, under the former decree in this case, to be paid back the amount they put in, with interest. The amount has been ascertained under another reference. So the services performed consisted of raising the $5,500. necessary to complete the purchase of the property, and when we say "raising it" we mean to include all the details which were incident to that.

It is apparent from the evidence that the only person who spent any considerable time in the undertaking was Benedict, who devised the plan.

The Court of Errors has said that the services should be considered in view of their value to the grantee. It may be pertinent to inquire at

this time of what value it was to the grantee to be inflicted with this illegal covenant and plan of operation through the instrumentality of which it has run into debt to the extent of $225,000. and has become involved in this extensive litigation, but we think that the Court of Errors intended, in speaking of value, both as to Smith and to the grantee, to refer to the transaction then taking place, that is the purchase and sale. This must be viewed as simply raising for the Association sufficient money to enable it to pay the cash necessary to purchase the property.

By considering separately what was actually done by each of the parties we can arrive at a reasonable appraisement of the value of the services.

Benedict's work was purely legal and in view of the time spent on it and the difficulty of the problem, a fee of $850. is surely a liberal allowance, especially so in view of the fact that he was entirely wrong on his law.

The services of C. O. Smith consisted in selling six hundred shares for $7,500. and surely a brokerage and commission fee of $500. is a liberal allowance for such service.

Prentice did nothing except to act as a go-between between Smith and the owners, and $500. was more than a liberal allowance for such service.

William F. Smith, as the master said, provided the brains. He was the center of the combination, but as to actual service, it is not apparent that he did anything except interview Prentice, Benedict and C. O. Smith. He perhaps induced Benedict to put up $2,500. and take two hundred shares, but in view of the evidence an

allowance of $2,500. to him is certainly sufficient.

This makes a total of $4.350. which the Association paid for procuring $5,500., the remainder of the $10,000. not being needed for the purchase and sale. We do not see how it can be contended that this allowance was unfair to the Smith interests. The master has allowed interest on that sum from the date of the transaction to the present time, and has given the Association credit for the amount paid from time to time to the parties in interest, and allowed interest on the sums paid, which is certainly an equitable and fair adjustment.

We therefore submit that the method followed by the master in ascertaining the services of Smith and their value was the correct method, and was in accordance with the opinion of this Court; that in view of the evidence submitted his finding of the value of the services is just and fair; and that the order of the Court of Chancery sustaining the exceptions ought to be reversed.

ABRAM H. CORNISH,
Solicitor of Clark McK. Whittemore, Receiver, Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS

BETWEEN
Attorney General,
ex rel.,
William Bliss, *et als.*,
Complainants,
Appellants,
AND
Linden Cemetery
Association, *et als.*,
Defendants,
Respondents,
AND
BETWEEN
Attorney General,
ex rel.,
Emma W. Noll,
et als.,
Complainants,
Appellants,
AND
Rosedale Cemetery
Association, *et als.*,
Defendants,
Respondents

On appeal from Court of Chancery from order sustaining exceptions.

BRIEF OF
RESPONDENTS

This matter was before the Vice Chancellor on exceptions to the Master's report on a reference to ascertain the sum which should be paid to William F. Smith and his assignees as a reasonable sum in view of the services of the said William F. Smith, who was the grantor of the property conveyed to the Linden and Rosedale Cemeteries, and for the value of those services to the grantees.

The two cases were considered as one because they were so treated in the Court of Appeals, 85 E. 501, and before the Master. These defendants base their claim for recovery solely upon the following covenant in each deed:

> "To pay semi-annually in cash to said William F. Smith, his heirs, administrators, executors and assigns, one-tenth part of the gross proceeds of the sale, lease or loan of each burial plot or of any use thereof or interest therein, made by the said Cemetery Association, party of the second part, from the land hereinafter conveyed to said Association by this indenture."
>
> 85-E, p. 503.

The Court of Appeals held that this covenant was extra-statutory, "solely because the amount to be paid was unliquidated." 85-E, p. 505. But the Court also held that:

> "Normally the remedy would be the recision of the contract, notwithstanding the covenants, the vendee being thereby absolved from its illicit covenant, and the vendor having his land restored to him. If for valid reasons this cannot be done, it still furnishes the criterion by which the rights and equities of the parties are to be worked out. Of such deed an essential feature was the payment of a part of the consideration in a particular way, and if that way is obnoxious to the statute law some other way must be found by which the contract of the parties as expressed in the deed shall as nearly as possible be carried out."
>
> Idem, p. 506.

It also held:

> "That the purchase price included a profit to Smith was known to all the parties interested, to whom the result thus brought about came as a happy solution of the very formidable problem of how an Association that had no money was to acquire the land of an owner who would sell only for cash. That there was a full disclosure to all parties then interested or who might thereafter buy into the scheme cannot be questioned, in view of the fact that the transaction was set forth at length in the deed itself and at once spread upon the public records."
>
> Idem, p. 505.

And the Court also said.

> "That this covenant, which was in lieu of cash, was with the acquiescence of all parties, the profit that Smith was to make, is clear from the evidence."
>
> Idem., p. 503.

So the only fair inference from the opinion is that if any sum had been fixed as liquidated profit to be paid by appropriating ten per cent. of the proceeds of sales until the full amount was paid it would have been held legal.

The profit, as the Vice Chancellor said — "Was not unreasonable, in view of the services of the grantor and their value to the grantees."

There are two elements to be considered, "Services of the Grantor," and "Value to the grantees."

The services of the grantor were, as the Court of Appeals said:

"That Smith bought with his own money

and that his sole object was to make a profit." The Association had no money to pay the considera tion and if the scheme failed he would get nothing. His services were in enabling the Association to acquire property of great value without paying any money. The grantor assumed all the risk and therefore he was entitled to a greater profit.

What was the value of the services to the grantees? Without the services of Smith they could not have acquired the property. As the Court said: "They had no money and no means of raising any." By Smith's advances and assumption of the risk of ever getting any return they were enabled to acquire very valuable property. By the testimony of the Receiver it appears that a reasonable estimate of the value of the property unsold is $1,822,000.00 and that they may reasonably expect a return of over $1,000,000.00 after all the expenses are paid. Is it not therefore clearly equitable to say that the compensation of the vendor, or his assignees, for his profit and the value of the services to the grantees should be estimated on the percentage fixed by the covenant, which the Court said was made "with the acquiescence of all parties." The Court held that this covenant was not within the statutory power of the grantees to make *solely because the profit was not liquidated.*

The covenants reserved to Smith and his assignees ten per cent. of the gross proceeds of sale.

The Receiver estimates the value of the property as follows:

Total area	250 acres
For sale for other than Cemetery purposes and not available for lots....	120 "
Available for lots.....	130 "

The Receiver and Mr. J. L. Bauer, County Engineer, testified that about one-third of each acre would be absorbed for roads and walks, leaving about 29,000 square feet per acre for sale in lots.

The Receiver testifies that a fair and reasonable average price for the lots would be .50 per square foot.

29,000 x .50	$ 14,500.00
There are 130 acres available for lots:	
14,500 x 130	1,885,000.00
The Receiver also estimated that the 120 acres not available for lots are worth at least $1,000 per acre, that is.....	120,000.00
Total,	$2,005,000.00
(The P.R.R. paid for a part of the property adjoining its line taken in condemnation at the rate of $9,000 per acre.)	
Deduct amount already sold.....	183,000.00
Leaving,	$1,822,000.00

Ten per cent. of this sum would be $182,200.00 and if this sum had been fixed in the covenant as profit the amount would have been liquidated and therefore the covenant would have been good.

These defendants expressly rely upon the opinion of the Court of Appeals that although covenant two in the deeds are void solely upon the ground that they were extra-statutory, yet they still furnish the "criterion by which the rights and equities of the parties can be worked out," and that the contract of the parties as expressed in the deed shall, as nearly as possible, be carried out.

The Master, instead of following the criterion

as laid down by the Court of Appeals, fixes an arbitrary value upon the services of the grantor and his associates which is not supported by any evidence submitted to him and which is grossly inadequate considering the services rendered and the risks incurred of losing all the money expended.

The grantor by furnishing all the money enabled the Cemetery Association to acquire large and valuable properties which in the opinion of the Court of Appeals they could not have otherwise obtained.

There was nothing immoral in the contract and the only illegality was that the amount was unliquidated.

The ten per cent. profit based on the Receiver's valuations are large on paper, but it must be recognized that the immediate profit is small and depends entirely on the sale of the lots and judging from past sales the yearly income derived from ten per cent. of the sales will furnish very small proceeds for years to come. . .

The above estimate is based upon the value of the services of the grantor but a consideration quite as important is the value of the services to the grantees. As the Court of Appeals said, these corporations had no money and no means of raising any and it was only by Smith's advances and assumption of risk that they were enabled to acquire very valuable properties.

This consideration the Master entirely overlooked. It certainly would be inequitable to allow the grantees to retain the properties without paying for the value of the services not only of the grantor but the value to the grantees. As the Court of Appeals said, "The contract of the parties as expressed in the deeds should as nearly as possible be carried out. That any objection by the Complainant to this course is met by the most funda-

mental of all the maxims, 'He who seeks equity must do equity.'"

It is therefore respectfully submitted, that the appeals should be dismissed and the order of the Court of Chancery be affirmed.

VAIL & McLEAN,
Solicitors for and of Counsel with Respondents.

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Remittitur.

Filed July 14, 1916.

New Jersey Court of Errors and Appeals

ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et al.*, *Respondents*, *vs.* LINDEN CEMETERY ASSOCIATION, *et al.*, *Appellants.*	*On Appeal.* *Remittitur.*

This cause coming on to be heard at the November Term, 1915, in the presence of the counsel of the respective parties, and the case having been read, and the argument of counsel, as well as the record and proceedings duly considered upon the appeal set forth and specified in the petition of appeal,

It is, thereupon, ORDERED, ADJUDGED and DECREED, that the decree of the Chancellor wherein it adjudges that covenant "two" mentioned in the deed from William F. Smith to the Linden Cemetery Association as consideration for the conveyance, is extra statutory, fraudulent, was not ratified by any competent authority and is void; Third: That covenant "two" in the deed from William F. Smith and wife to Linden Cemetery Association, which provided that the said association must pay semi-annually in cash to William F. Smith, his heirs, administrators, ex-

ecutors and assigns, one-tenth part of the gross proceeds of the sale, lease or loan of each burial plot or of any use thereof or interest therein, made by the Linden Cemetery Association from the land conveyed by said deed, was without authority of the statute, was a secret profit of the promoters, was unauthorized and fraudulent in fact, and is hereby declared void; That the said deed of conveyance is hereby reformed by striking out and eliminating therefrom covenant "two," be REVERSED, set aside and for nothing holden, and the case is remanded to the Court of Chancery to ascertain what will be a reasonable sum to be paid to the grantor, or his assigns, for services and profit on the purchase and sale of said property, and their value to the grantee less any credits to which the grantee is entitled. And that when such sum is ascertained it shall be treated as unpaid purchase price for the land until extinguished by payment in gross or by a percentage from the price of lots, as provided in the said covenant, which covenant is declared to be extra statutory solely because the amount to be paid to the grantor was unliquidated and the Court of Chancery is hereby directed to correct said decree in accordance with the views of this court as expressed in its opinion filed in this case.

And it is further ordered that the costs of the said appellants in this Court be paid to the counsel of the said appellants by the receiver of the said Linden Cemetery Association in the court below, and that the record and proceedings be remitted to the Court of Chancery to be

Remittitur.

therein proceeded on according to law and the practice of said Court.

On motion of

VAIL & McLEAN,
Solicitors for and of Counsel with Appellants.

Endorsed.

Filed June 24, 1916.

THOMAS F. MARTIN,
Clerk.

Decree of Reversal.

Filed July 12th, 1916.

In Chancery of New Jersey.

Between

ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*, *Complainants,*

and

LINDEN CEMETERY ASSOCIATION, *et als.*, *Defendants.*

Decree of Reversal for Modification on Remittitur.

On opening the matter this day to the Court by Vail & McLean, of counsel with Elaine Smith, Marie Smith, Irene Smith, Carlton Smith and Lillian O. Smith, by Robert H. McAdams, Guardian *ad litem,* and Clifton O. Smith and Zevelia A. Prentice Coburn, defendants, and it appearing that the said defendants filed an appeal from a portion of the decree made in this cause, on the thirtieth day of July, 1914, to the Court of Errors and Appeals in the last resort, and that the said appeal has been determined by the said Court of Errors and Appeals and the proceedings have been remitted to this Court to proceed further thereon, according to law, and upon reading the remittitur from the said Court of Errors and Appeals, whereby it appears that it was ordered and decreed by said Court "that the decree of the Chancellor wherein it adjudges that covenant 'two' mentioned in

the deed from William F. Smith to the Linden Cemetery Association as consideration for the conveyance, is extra statutory, fraudulent, was not ratified by any competent authority and is void; third, that covenant 'two' in the deed from William F. Smith and wife to Linden Cemetery Association, which provided that the said Association must pay semi-annually in cash to William F. Smith, his heirs, administrators, executors and assigns one-tenth part of the gross proceeds of the sale, lease or loan of each burial plot or of any use thereof or interest therein made by the Linden Cemetery Association from the land conveyed by said deed, was without authority of the statute, was a secret profit of the promoters, was unauthorized and fraudulent in fact, and is hereby declared void; that the said deed of conveyance is hereby reformed by striking out and eliminating therefrom covenant two, be reversed, set aside and for nothing holden, and the case is remanded to the Court of Chancery to ascertain what will be a reasonable sum to be paid to the grantor, or his assigns, for services and profit on the purchase and sale of said property, and their value to the grantee, less any credits to which the grantee is entitled. And that when such sum is ascertained it shall be treated as unpaid purchase price of the land until extinguished by payment in gross or by percentage from the price of lots, as provided in the said covenant, which covenant is declared to be extra statutory solely because the amount to be paid to the grantor was unliquidated, and the Court of Chancery is hereby directed to correct said decree in accordance with the views of this Court, as expressed in its opinion filed in this case. And it is further ordered that the costs

of said appellant in this court be paid to the counsel of the said appellant by the receiver of the said Linden Cemetery Association in the Court below," IT IS, thereupon, on this 11th day of July, 1916, on motion as aforesaid,

ORDERED, that the decree of the said Court of Appeals be and the same is hereby made the decree of this Court, and it is further

ORDERED that it be referred to Raymond T. Parrott, one of the special masters of this court to ascertain what will be a reasonable sum to be paid to the grantor in said deed and his assigns for services and profit on the purchase and sale of said property in view of the services of the grantor and their value to the grantee, and also to ascertain the credits to which the grantee is entitled, by reason of payments made on account of this covenant, or otherwise.

E. R. WALKER,
C.

Respectfully advised,

J. E. HOWELL,
V. C.

Master's Report.

Filed June 4, 1917.

IN CHANCERY OF NEW JERSEY.

Between

ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*,
Complainants,

and

LINDEN CEMETERY ASSOCIATION, *et als.*,
Defendants.

On Bill, etc.

Master's Report.

In pursuance of an order made in the above entitled suit, bearing date July 11, 1916, whereby it was referred to me, the subscriber, one of the special masters, to "ascertain what will be a reasonable sum to be paid to the grantor in said deed and his assigns for services and profit on the purchase and sale of the said property in view of the services of the grantor and their value to the grantee and also to ascertain the credits to which the grantee is entitled, by reason of payments made on account of this covenant or otherwise," I do respectfully report that I have been attended by Messrs. Vail and McLean, solicitors for Elaine Smith, Irene Smith, Marie Smith, Carlton Smith, Lillian O. Smith by Robert H. McAdams, guardian *ad litem;* Clifton O. Smith and Zevelia A. Prentice Coburn, H. B. Reed, solicitor for loan certificate holders, and by Mr. Abram H. Cor-

nish, solicitor for the receiver, Clark McK. Whittemore. These parties have submitted evidence and each offer a different test or criterion by which they claim the profits and services aforesaid should be measured and determined.

Elaine Smith, *et als.*, make the following contention: That the second covenant in the deed which made provision "to pay semi-annually in cash to the said William F. Smith, his heirs, administrators, executors and assigns, one-tenth part of the gross proceeds of sale, lease or loan of each burial plot or of any use thereof or interest therein, made by the said cemetery association, party of the second part, from the land hereinafter conveyed to said association by this indenture," was held by the Court of Errors and Appeals to be extra statutory, "solely because the amount to be paid was unliquidated"; that this covenant still furnished the criterion by which the rights and equities of the parties are to be worked out; that by reference thereto and the evidence submitted, the payment for services and profits can be liquidated. On this basis evidence was introduced to show the following:

The receiver estimates the value of the property as follows (both cemeteries treated together):

Total area	250 acres
For sale for other than cemetery purposes and not available for lots..	120 "
Available for lots.....	130 acres

The receiver and Mr. J. L. Bauer, county engineer, testified that one-third of each acre would be absorbed for roads and walks, leaving about 29,000 square feet per acre for sale in lots.

The receiver testifies that a fair and reasonable average price for the lots would be .50 per square foot.

29,000x .50	$	14,500.00
There are 130 acres available for lots:		
14,500x130		1,885,000.00
The receiver also estimated that the 120 acres not available for lots are worth at least $1,000 per acre, that is		120,000.00
Total		$2,005,000.00
(The P. R. R. paid for a part of the property adjoining its line taken in condemnation at the rate of $9,000 per acre).		
Deduct amount already sold		183,000.00
Leaving		$1,822,000.00

Ten per cent. of this sum would be $182,200 for the two cemeteries combined, or $91,000 for each cemetery. This is the amount Elaine Smith and others claim should be fixed as compensation due William F. Smith and his assigns, and they desire that there be set apart ten per cent. of the proceeds of the future sales for the benefit of William F. Smith and his assigns, as the sales are made, until the said sum is paid.

On the other hand the receiver insists that a reasonable sum should be paid to William F. Smith and his assigns for services and profit on the purchase and sale of the property, on the basis of what his services in this transaction were actually worth, having in view the time

spent for services actually rendered and their value to the grantor.

In my opinion the latter course or measure is the proper one to here adopt. To follow the former course would be virtually a substitution of the fact and condition which the Court of Errors and Appeals in declaring the second covenant in the deed extra statutory, sought to avoid and eliminate. The Court in its opinion said: "The excinded covenant provided for the profit that it was agreed the grantor should have but what that profit should be, the parties themselves never fixed at any particular sum; hence inasmuch as such sum cannot be ascertained from the covenant itself it must be held by a court of equity to be a reasonable sum in view of the services of the grantor and their value to the grantee, less any credit to which the grantee is entitled." Hence, it seems proper to estimate these services and their value to the grantee, for what they were reasonably worth.

The services and profits here to be considered are those of the "grantor in the deed and his assigns." The grantor is William F. Smith; his assigns are Dorothy A. Raymond, who has since married Roswell A. Benedict, a one-quarter interest; Clifton O. Smith, a one-quarter interest; Vernette E. Prentice, later Zevelia Prentice Coburn, a one-quarter interest; the remaining one-quarter interest has now become vested under the will of the said William F. Smith.

Briefly reviewing the testimony in the printed case herein, it appears that William F. Smith had no connection with the cemetery at the time it was started; that his connection with it be-

gan about a year later (printed case, pages 51, 80, 173). At this time, at the solicitation of Vernette E. Prentice, a contract to sell the land to the said William F. Smith was consummated (printed case, pages 50, 80, 81). In pursuance of this contract, deed of Joshua Rose, executor to William F. Smith, dated January 23, 1901, was given and a purchase money mortgage taken back. Mr. R. A. Benedict served as attorney (printed case, pp. 51, 103). Mr. Benedict was employed by Mr. Smith and not by the association (printed case, p. 123). He worked four or five weeks, possibly six or eight weeks investigating and studying the legal side of the matter (printed case, pp. 105, 122). Mr. Benedict visited Mr. Smith at his house several times (printed case, p. 107) and drew the deed for William F. Smith and wife to the Linden Cemetery Association, dated January 29, 1901 (printed case, p. 107). This deed contained the covenants above referred to. Mr. William F. Smith induced his son, C. O. Smith, to advance twenty-five hundred dollars, for which he was to receive two hundred shares in the cemetery (printed case, pp. 175, 174). He likewise induced Mr. Henry L. Dyer, Myron T. Wilbur, Rosewell A. Benedict to advance like amounts, for which they were each to receive two hundred shares (printed case pp. 185, 187, 124, 125). Mr. William F. Smith put up no money himself (printed case, pp. 122, 125). There also appears to have been an arrangement whereby the ten per cent. of profits of sales, to be reserved under the second covenant of the deed aforesaid, should be distributed one-quarter to Rosewell A. Benedict in return for his professional services of six or eight weeks, one-

quarter to William F. Smith "for his intelligent effort in promoting," one-quarter to Vernette E. Prentice as the "largest promoter," one-quarter to Clifton O. Smith for services (printed case, pp. 122, 123, 196, 204, 207).

William F. Smith applied $5,500 of the money so advanced on account of the purchase of the cemetery land, the cemetery taking the property subject to mortgage amounting to thirty-two thousand dollars (printed case, p. 191).

With these facts in mind the question is what would be a reasonable sum to be paid to William F. Smith and his assigns for services and profits on the purchase and sale of said property in view of the services of the grantor and their value to the grantee. The question is narrowed to the profit that William F. Smith was to take. As was said in the opinion of the Court of Errors and Appeals, "the fact that it was to be distributed by Smith between himself and three others is a circumstance that does not effect the equitable rules applicable to the transaction saving as it has some bearing upon the right of Smith to take a profit and the amount thereof."

It is apparent that the fact that C. O. Smith, Vernette E. Prentice and Rosewell A. Benedict were entitled to a distributive part of the proceeds of sale of lots which William F. Smith was to take, as averted to in the opinion last aforesaid, "has some bearing on the right of Smith to take a profit and the amount thereof." It is therefore fitting to figure a reasonable amount for services rendered by these men; in one view of the matter they can be thought of as rendering services to William F. Smith for which he is to repay them. Just what their services

were does not very fully appear from the evidence. It does appear that Prentice brought the original owners of the land and Mr. William F. Smith together. C. O. Smith acted as his father's personal agent and was an active promoter in the company. Their services, at least up to the time the title became vested in the cemetery association, and that is the time to which this reference is directed, were evidently not very considerable. What the business capacity or earning power of these men were does not appear. Taking everything in consideration, I am of the opinion that five hundred dollars apiece would represent a fair allowance for their services.

The situation with reference to Rosewell A. Benedict is somewhat different. He seems to have done most of the hard work in connection with the scheme, on the basis of which the financing of the association was rested. He spent four to five weeks studying decisions and statutes of this state and finally worked out the plan for the issuance of the share certificates. He drew the deeds with the above covenants and otherwise acted as legal advisor to Mr. Smith. Taking all these matters in consideration the sum of eight hundred and fifty dollars would seem to be a reasonable allowance for his services.

So far as the services actually rendered by William F. Smith personally are concerned, no definite standard is submitted to show his standing as a business man. He was an old gentleman at the time here considered and presumably not a large salaried man or person of great earning capacity. He undoubtedly gave considerable time and thought to the cemetery affairs,

which chiefly in its early stages, was concerned with the purchase and sale of the land. He provided the brains that worked out the financial scheme for the association and launched it on its way in the purchase of the land. The project involved was one of comparatively large proportions and responsibility. Mr. Smith never seems to have fixed upon a definite amount at which he valued his services or at which he estimated his profits and the amount was really contingent upon the success of the cemetery and in the end the cemetery was not a success. William F. Smith did not actually advance his own money to purchase the land, but he was the person who induced C. O. Smith, Henry L. Dyer, M. T. Wilbur and Rosewell A. Benedict to advance the money. Hence he did not risk his own money, but as a broker he secured the ten thousand dollars from which $5,500 in cash was actually used as part of the consideration at the time title to the land was taken by the cemetery association. For these services and profits, I am of the opinion that a fair amount is twenty-five hundred dollars.

To recapitulate: For the services rendered by or through Mr. Prentice and Mr. C. O. Smith together as aforesaid, one thousand dollars should be allowed; for the services of Mr. Benedict, eight hundred and fifty dollars should be allowed; which sums added to the twenty-five hundred dollars above indicated, would make in all $4,350 due William F. Smith and his assigns.

This amount is figured for services and represents the profits as the same accrued or should have accrued at the time the property passed from William F. Smith and first became fully vested in Linden Cemetery Association, that is

January 31, 1901. On this amount interest should accordingly be figured to date and is here calculated at four thousand two hundred and nineteen dollars and fifty cents ($4,219.50), making in all the sum of eight thousand five hundred and sixty-nine dollars and fifty cents ($8,569.50).

It appears from the assignments executed by William F. Smith that the following persons are those in interest as the present assignees: Dorothy A. Benedict (wife of Rosewell A. Benedict), a one-quarer interest or part; Clifton O. Smith, a one-quarter interest; (Zevelia Prentice Coburn), a one-quarter interest and the estate of William F. Smith a one-quarter interest. The last aforesaid sum should accordingly be credited to or divided among the said assigns in equal quarterly parts.

In pursuance of the direction of the said order of reference, that I ascertain the credits to which the grantee, Linden Cemetery Association is entitled, I report that the audit marked as Exhibit C. 80 in this suit and the books of the Association show that the Linden Cemetery Association is entitled to certain credits for payments made to William F. Smith or his assigns on account of principal as follows:

William F. Smith and later his estate		
Estate Wm. F. Smith	$2,300.32	
Emma A. Carpenter	938.87	
	$3,239.19	$3,239.19
Vernette E. Prentice	$2,339.19	
Ella G. Prentice	900.00	
	3,239.19	3,239.19

Dorothy A. Raymond	1,301.16	
R. A. Benedict	1,938.03	
	3,239.19	3,239.19
C. O. Smith		3,239.19
		$12,956.76

Inasmuch as interest to date has been figured upon the sum of $4,350 calculated for services and profits as aforesaid it is in my opinion proper that interest should be calculated to date on the various amounts that have been paid from time to time to William F. Smith and his assigns as aforesaid. The interest upon the various credits is accordingly figured as follows:

ESTATE OF WM. F. SMITH, DEC'D.

Date of Payment	Amount paid	To whom paid	Interest to Apr. 1, 1917
Jan. 31/03	150.00	William F. Smith	127.50
Dec. 15/03	400.00	" " "	319.00
Dec. 30/05	350.00	" " "	236.33
Feb. 17/10	1,075.00	" " "	459.57
May 4/11	863.03	Emma A. Carpenter	305.87
Feb. 23/11	325.32	" " "	117.12
July 17/11	75.84	" " "	26.55
	$3,239.19		$1,591.94

CLIFTON O. SMITH.

Date of Payment	Amount paid	To whom paid	Interest to Apr. 1, 1917
Jan. 31/03	150.00	C. O. Smith	127.50
Dec. 15/03	400.00	" " "	319.00
Dec. 30/05	350.00	" " "	236.33
Dec. 31/06	175.00	" " "	107.63
Dec. 16/09	900.00	" " "	393.75
May 4/11	863.03	" " "	305.87
Apr. 3/11	325.32	" " "	117.12
July 17/11	75.84	" " "	26.55
	$3,239.19		$1,633.75

DOROTHY A. BENEDICT.

Date of Payment	Amount paid	To whom paid	Interest to Apr. 1, 1917
Jan. 31/03	150.00	R. A. Benedict	127.50
Dec. 19/03	400.00	" " "	319.00
Dec. 30/05	350.00	" " "	236.33
Dec. 31/06	175.00	" " "	107.63
Dec. 16/09	900.00	D. A. Raymond	393.75
May 4/11	863.03	R. A. Benedict	305.87
Apr. 3/11	325.32	D. A. Raymond	117.12
July 17/11	75.84	" " "	26.55
	$3,239.19		$1,633.75

ZEVELIAH PRENTICE COBURN
(VERNETTE E. PRENTICE)

Date of Payment	Amount paid	To whom paid	Interest to Apr. 1, 1917
Jan. 31/03	150.00	Ella A. Prentice	127.50
Dec. 15/03	400.00	" " "	319.00
Dec. 30/05	350.00	V. E. Prentice	236.35
Dec. 31/06	175.00	" " "	107.63
Dec. 16/09	900.00	" " "	393.75
May 4/11	863.03	" " "	305.87
Apr. 3/11	325.32	" " "	117.12
July 17/11	75.84	" " "	26.55
	$3,239.19		$1,633.75

Total credited against Wm. F. Smith and his assigns:

Clifton O. Smith	interest	$1,633.75
Dorothy A. Benedict	"	1,633.75
Zeveliah P. Coburn	"	1,633.75
Estate Wm. F. Smith	"	1,591.94
		6,493.19
Total principal credited as aforesaid,		12,956.76
		$19,449.95

Respectfully submitted this first day of April, nineteen hundred and seventeen.

RAYMOND T. PARROT,
Special Master.

IN CHANCERY OF NEW JERSEY.

Between	
ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*, *Complainants,*	*On Bill &c.*
and	*Depositions.*
LINDEN CEMETERY ASSOCIATION, *et als.*, *Defendants.*	

Depositions taken in the above entitled matter before me, Raymond T. Parrot, one of the special masters in the Court of Chancery at my office, 120 Broad street, Elizabeth, N. J., this ninth day of November, 1916, at ten A. M. in pursuance of an order of reference dated July 11, 1916, the hearings having been previously adjourned at the request of the parties from September 26, 1916, and subsequently from November 2, 1916.

RAYMOND T. PARROTT,
Special Master.

APPEARANCES: Abram H. Cornish, for the Receiver, Clark McK. Whittemore.

Hugh B. Reed, for the loan certificate holders.

Vail & McLean (represented by Judge Vail), for Elaine Smith, Marie Smith, Irene Smith, Carlton O. Smith and Lillian O. Smith, by Robert H. McAdams, guardian *ad litem,* Clifton O. Smith and Zevelia A. P. Coburn.

Testimony Read in Evidence.

Mr. Cornish made the following statement:

The solicitor for the receiver offers and expects to rely on the following testimony taken in open court before Vice-Chancellor Howell in this case and shown in the printed case in the appeal of Robert H. McAdams, guardian, *et als.*, on the pages as set forth below, in regard to the services of the grantor in the deeds to the Cemetery Association on the purchase and sale of the property:

Testimony of Roswell A. Benedict, printed case, pages 103, 104, 105, 106, 107, 108, 109, 122 and 123.

Testimony of Clifton O. Smith, printed case, pages 173, 175, 176, 177, 178, 184, 193, 203, 212, 213, 215.

Testimony of John P. Winans, printed case, pages 48, 49, 51, 52, 53, 65 and 66.

Testimony of Clarence H. Winans, pages 80 and 81.

The solicitor for the receiver further offers and expects to rely on the statements set forth in the cash book and ledger of the Company, Exhibit C. 81 and Exhibit C. 80, to show the amount of money paid by the Cemetery Associations to the holders by assignments and otherwise of the interest in covenant two of the deed of conveyance to the Cemetery Association. These audits showing in the case of Linden Cemetery Association in payment by the Association to the holders of interest under said covenant, as follows: To Vernette E. Prentice, $2,339.19; to Ella G. Prentice, $900; to Dorothy Raymond, $1,301.16; to Roswell A. Benedict, $1,938.03; to C. O. Smith, $3,239.19; to the estate of W. F. Smith, $2,300.32; to Emma A. Carpenter, $938.87, making total payments to the holders of said interest $12,956.76.

In the case of Rosedale Cemetery Association, Exhibit C. 81, showing payment to Vernette E. Prentice of $620.87, to C. O. Smith $620.87 and to the estate of W. F. Smith payment of $310.45, making total payments to the holders of these interest $1,552.19.

It is stipulated by all the parties present that this evidence shall be accepted by the master as set out in the printed case and in said offer.

The testimony referred to in the foregoing stipulation is as follows:

"*John P. Winans, direct.* Page 48

"A I can't say as to that; I know there was an extension.

"Q And did that extension expire?

"A It must have expired.

"Q So that after this incorporation the enterprise dropped for a while?

"A Yes.

"Q Now, what happened after that?

"A Why, then I imagine somewheres around about a year, when I met Mr. Prentice, and he told me he had a party now that was able to carry it through, and we told him at that time there would be no more option business.

"Q Who was 'we'?

"A Mr. C. H. Winans and myself was most interested in it, that is, me as executor, and him as the owner of his own property.

"Q Said there would be no more option in it?

"A No, we wanted the contract, and some money; so he said that was all right, and this Mr. Benedict would be out and we would take it up.

"Q What Benedict was that?

"A Roswell A. Benedict.

"Q This was Mr. Prentice who had this interview with you?

"A Yes.

"Q Did you see anything of Walker at that time in relation to this enterprise?

"A No, he seemed to be out of it, the second enterprise, he was out of it.

"Q Then you refused to give Prentice an option, but offered to give him a contract?

"A Yes.

"Q For the same amount of money?

"A Yes, the same amount.

"Q Did you ask him to put down anything additional?"

"*John P. Winans, direct.* Page 49

"A No, simply asked that price.

"Q Did you make arrangements then to execute and deliver the contract?

"A We did.

"Q Did you afterwards meet somewhere for the purpose of executing the contract?

"A I think it was down in Mr. English's office.

"Q How long after you had this conversation with Prentice?

"A Oh, possibly it drawed out maybe two months before it was completed, the contract.

"Q You executed then a contract to sell this property?

"A Sell this property.

"Q To whom?

"A I don't know; I think it was sold to Mr. Smith.

"Q What Smith?

"A William F., I think.

"Q Was Mr. Smith present when you executed the contract?

"A I never saw Mr. William F. Smith but once in my life.

"Q When was that?

"A Out at the cemetery, after the cemetery had been started and they was making the improvements.

"Q (By the Court): Is the agreement in existence?

"A Not to my knowledge I ever recollect seeing Mr. William F. Smith, then I saw him two or three times after that.

"Q Is this agreement that we have been talkink about now in existence, have you a copy of it?

"A I can't say; if it is it is among Mr. English's papers, because Mr. English is the attorney, Theodore C. English."

"*John P. Winans, direct* Page 51

"A Oh, yes.

"Q And franchise had already been granted to use it as a cemetery?

"A Yes.

"Q Did Mr. Prentice state when he asked you to give him a contract that he was buying it for the Linden Cemetery?

"A I don't know as Mr. Prentice stated, but I certainly thoroughly understood it was to be for cemetery purposes; I don't recollect his statement.

"Q Did you see Roswell A. Benedict with Mr. Prentice at any of the meetings you had with regard to this contract?

"A Why, it was Mr. Roswell Benedict who seemed to be the gentleman that had it in charge, I understood he was the attorney, and one of the men that put up the money.

"Q Were you acting as trustee for the cemetery association at this time?

"A No, it was not organized at this time.

"Q It was organized in 1900, this contract you have been testifying about was given in you say the latter part of 1900?

"A That is the first you are speaking of?

"Q That is the contract.

"A The Walker?

"Q The Prentice, and the association was organized in January, 1900.

"A I don't know; I acted in the first, and also they had——

"Q The option you testified you gave in the latter part of 1899, that expired after you had organized the cemetery association in January, 1900?

"A I couldn't just recollect what year it was, but I know the first, what I call the Walker outfit, there was a year elapsed between them after Mr. Brown fell down, there was a year I should judge

that elapsed between them. Now, as to dates I couldn't say.

"Q But this contract that you gave to Prentice for William F. Smith was given not more than two months, say, before the deed was turned over?

"A I should imagine that, as near as I can recollect it; I can't begin to recollect those little details.

"Q Now, then, did you see Prentice again in regard to carrying out this contract and taking over the property by the cemetery between the time you gave him the contract and the time the deed was turned over?

"A Why, I know we seen him quite a few times, always in Mr. English's office, and we

would meet there. Mr. English took full charge of that end of it.

"Q When you agreed to sell this property for $20,000 that was to convey a title clear of all encumbrances, was it not?

"A Yes, sir.

"Q You did not assume any mortgages which were outstanding against the property at that time?

"A There wasn't none against it.

"Q Do you recall a meeting of the trustees of the association, of the Linden Cemetery Association, held on January 16, 1901?

"A I cannot unless you mention who was there and what it was for.

"Q Well, the minutes of that meeting show that E. Prentice, D. C. Winans, Charles L. Savage, John P. Winans, Edward R. Winans were present?

"A Well, I was there then.

"Q That is your signature attached to the waiver of notice?

"A Yes.

(The witness is shown Exhibit M 63.)"

"*John P. Winans, direct* Page 53

"Q Do you recall a meeting held about that time at which the trustees of the cemetery association authorized the purchase of this property from William F. Smith?

"A Now, I can't recollect, Mr. Cornish, but if my name appears there I must have been there, that is sure; I don't recollect.

"Q Have you any recollection of any meeting at which a resolution was passed authorizing the purchase of this property from William F. Smith?

"A I don't think there was any resolution

at any meeting I attended, to my recollection, that there was such a resolution there brought out and then passed.

"Q The resolutions that were passed at the meetings you were present were brought out ready prepared from New York?

"A There was never any resolution prepared in the board meetings.

"Q But you haven't any definite recollection as to any particular meeting or any particular resolution passed at any meeting in regard to the purchase of this property by the cemetery association?

"A No, sir. I have not.

"Q Did you ever discuss with Prentice, William F. Smith or Benedict what the association was to give in exchange for this property?

"A No, sir.

"Q Did you know?

"A No, sir; I did not.

"Q Was it ever discussed in any board meeting that you attended, so far as you can recollect?

"A Not to my knowledge.

"Q Was it ever discused with your sons, DeWitt C. Winans and Edward R. Winans, in your presence?"

"*John P. Winans, cross* Page 65

"A Born in 1873.

"Q And DeWitt C. was younger than him?

"A He is younger.

"Q I show you check marked Exhibit M 227 and ask if you recognize the endorsement of Joshua Rose, executor, on the back?

"A Yes; that is Mr. Rose's signature.

"Q I show you check marked Exhibit M 228 and ask if you recognize the endorsement of Mary

M. Fleming on the back of it? Is that the signature of Mary M. Fleming on the back?

"A It resembles it very much; I would say that that was her signature.

"Q I show you a check marked Exhibit M 224 and ask if the endorsement of John P. Winans on the back is your signature?

"A That is my signature; yes.

"Q I show you a check marked Exhibit M 225 and ask you if that endorsement of Mary M. Fleming is the signature of Mary M. Fleming?

"A It looks like it very much.

"Q Did you ever hear at any time or place prior to the transfer of this deed to William F. Smith the conditions under which the cemetery was to take the property discussed?

"A That is, I know it was to be a cemetery.

"Q No; did you know what the cemetery was to give for the property? I mean, did you hear it discussed in any place what the terms of the contract between the association and Smith were to be?

"A No; I don't know anything about that.

"*Cross examination* by Mr. Parker.

"Q You said that the contract to sell the property to W. F. Smith took place several months before the organization of the cemetery association, didn't you?"

"*John P. Winans, cross* Page 66

"A No, I don't know; several months, I think it was possibly a month or six weeks, so far as my recollection goes, as I recollect it.

"Q Well, the contract was made and left with Mr. English, and Mr. English was acting as your agent to close up the matter?

"A Yes.

"Q And you left it with him?

"A Yes.

"Q (By the Court): What do you mean by the organization of the cemetery? Do you mean the signing of the original certificate at the time when the officers were elected, or when?

"A I mean from the time of the second formation, the second, Mr. Prentice and Mr. Benedict and Mr. Smith.

"Q (By the Court): That is what you call the organization?

"A And after the contract was signed that there was only an option.

"Q (By the Court): When you refer to the organization of the cemetery company you refer to a time when you gave your contract for the sale of the property to Mr. William F. Smith?

"Q Yes; that is what I say.

"Mr. Parker: I think the witness is confused there.

"The Court: Straighten him out then.

"Q You had for, you say, a year or two contemplated the sale of your property for the purpose of the cemetery, you said, didn't you? That is, you had been giving options on it to various persons?

"A No; there never was any option on that property, only to one man, Joshua Brown, and that didn't go through, that lapsed and fell down.

"*Clarence H. Winans, direct* Page 80

"A I do not.

"Q Did you say how long the option was for?

"A No, I didn't, because I couldn't say.

"Q Now, in regard to the property which you transferred to Linden, was this option for the

price at which you afterwards conveyed it to the association?

"A Yes, sir, no changes.

"Q Did you get anything down?

"A I think I did.

"Q (By the Court): You mean on signing the option?

"A Yes, sir; I think I got $250, but I wouldn't say, in fact, I have been told that.

"Q After this option expired what happened?

"A Why, it seemed to kind of die out, and there was nothing taken up until about a year from that time.

"Q Was the option ever renewed?

"A No.

"Q Well, after the expiration of this year's time, as you say, what happened then?

"A Why, then Mr. Prentice come out there.

"Q Had you seen Prentice before this?

"A No, sir.

"Q In whose name was the first option taken?

"A Why, Mr. Winans mentioned his name here.

"Q Was it Joshua Brown?

"A Joshua Brown, yes, sir.

"Q And when Mr. Prentice came out the second time what happened at the expiration of this year?

"A Why, he came out there and said, 'We are going to buy this and make a cemetery of it.'

"Q Is that the first you had heard it was going to be used as a cemetery?

"A No.

"Q When did you first hear?"

Clarence H. Winans, direct Page 81

"A It was quite a while after they took the option.

"Q But before this conversation you are describing with Mr. Prentice?

"A Yes.

"Q Now, what did Mr. Prentice say to you?

"A He said, 'We are going to take and make a real cemetery of this, the finest one in the state.'

"Q Well, what did he want of you?

"A He wanted to know would I take the same price that I offered the other party; I told him I would.

"Q And what happened then?

"A Why, they talked then about getting ready to pay us some money down on it.

"Q Did they pay you any money down then?

"A No, didn't pay any money until I received the three thousand dollar check to pay off my mortgage.

"Q Did you give him an option or a contract at that time?

"A No, I told him when he was ready to buy and pay some money he could have it. I wouldn't tie it up any more; no agreement was made, to my memory, after that until we went over to New York and fixed up there and I received the $3,000.

"Q Do you remember when it was you went to New York?

"A No, sir.

"Q Could you say how long before that it was that you had this conversation with Prentice?

"A I think it was several months; he was out there several times.

"Q Are you a trustee in the association?

"A No, sir.

"Q Never?

"A Never."

Testimony Read in Evidence.

"R. A. Benedict, direct Page 103

"deed was passed I supervised the operation. Whatever led up to that I know nothing about.

"Q When did you first become connected with the Linden proposition?

"A Well, as attorney. As consulting attorney, I would say. I think it was some time in December, 1900.

"Q Were you connected with it or approached in regard to it at any time prior to that?

"A Not to my recollection.

"Q By anybody?

"A By anybody.

"Q Your first connection with it then was in December, 1900, and who first approached you in regard to it?

"A William F. Smith.

"Q Was he a friend of yours?

"Q Yes; I had known him for a number of years.

"Q Prior to that?

"A Yes; prior to that.

"Q Did you know C. O. Smith prior to that time? I am speaking of the time when Mr. W. F. Smith first came to you?

"A I was not acquainted with C. O. Smith at that time.

"Q Were you acquainted with V. E. Prentice?

"A No; I was not; never had met Mr. Prentice.

"Q Were you acquainted with Joshua Brown?

"A No.

"Q Ever know him?

"A Never met him.

"Q Ever know Ross Taylor?

"Q Never at that time. Since that time and within a year I have met Ross Taylor.

"Q Within a year of this time?

"A Within a year of the present time."

Testimony Read in Evidence.

"R. A. Benedict, direct Page 104

"Q And you never had met him until within a year of this time?

"A No, sir.

"Q Did you know Nathan Barrett?

"A I did not.

"Q Your first interview with W. F. Smith was in December, 1900—what was the substance of that interview?

"A To the best of my recollection it was in December. It might have been a few days earlier, in November, but it was in the latter part of 1900 and very late in the year. The substance was that he was thinking about getting interested —I can't quote his language—in a cemetery proposition in New Jersey and he wanted me to draft the deed to the cemetery association; the idea being to arrange it so that shares issued as a result of the deed should be valid. That was the general substance of the thing.

"Q Did you have any conversation with him in regard to the laws in New Jersey in relation to cemeteries?

"A I couldn't state definitely whether I did. I don't want to entrench on your function as attorney, but that matter suggested itself to me the moment that he spoke about shares. The question arose in my mind what was the law of the State of New Jersey in regard to shares in a cemetery.

"Q Did Mr. Smith present a plan for the issuance of shares, to you?

"A He did not.

"Q He simply suggested that he proposed to issue shares or wished to issue shares and asked you to prepare a valid scheme?

"A That is the idea.

"Q Did you go into the laws of the State of New Jersey with him in regard to this matter of shares?"

"*R. A. Benedict, direct* Page 105

"A Not with him. I went into it independently as an attorney who was called upon to see that these shares were valid if they could possibly be made valid.

"Q When you speak of those shares, you mean any shares which the association might issue and not any particular form of shares that he suggested to you?

"A No, no.

"Q Your authority was complete enough so that you could draft the entire scheme authorizing the issuance of these shares?

"A Well, it took me some four or five weeks to investigate the thing to my satisfaction. I looked into the New Jersey statute and saw that it said in one division of the rather confusing record of statutes there that at least one-half of the proceeds of sale should be set aside for the purchase of the land. From that I passed to the question of whether the law in any respect, either by obiter dictum or by specific ruling of any court in any case where cemeteries were involved, prohibited more than 50% division of the proceeds of sale. I examined all the cases that I could find in the digests and I came to the conclusion that, theretofore, there never had been any limit to the amount which could be stipulated by the grantor of lands to the cemetery arising from the sale of lots which should be in consideration for transferring the property. I at one time made a complete digest of those cases.

"Q Was that at this time?

"A It was somewhat later.

"Q Now, to go back to this time, were you familiar at this time with the statutes passed in 1847 and 1848 in New York which authorized the issuance of shares by cemetery associations, or"

"*R. A. Benedict, direct* Page 106

"rather authorized the giving of 50% of the proceeds, not more than 50%, as a consideration for the conveyance?

"A In New York State, governing New York cases?

"Q You were familiar with the New York law on that subject?

"A I do not remember that I investigated the New York law at all on that subject. I had the New Jersey cases at hand.

"Q Had you ever had any experience before that time in incorporating cemetery associations?

"A No; not at all. On that account it was a very hard nut for me to crack. I spent a great deal of time over it.

"Q Did Mr. Smith, when he came to you, tell you what interest he had in the property?

"A William F. Smith?

"Q Yes.

"A No; he never told me. I never knew.

"Q This first visit of his to you was about the first of December, 1900?

"A I don't know that it is material—he sent for me to come to his house. He was a very old man, some eighty-odd years old at this time and suffered somewhat from defective sight and didn't go out much; he sent for me to come to his house.

"Q This was the meeting you referred to in December?

"A Yes; he was living at that time on West 21st street, New York City, and I was living in

Hoboken, N. J., and I crossed the ferry at night and had a long talk with him.

"Q When did you next see Mr. Smith?

"A It would be impossible for me to say how soon it was that I saw him again, or how many times I did see him. I saw him a good many times,"

"*R. A. Benedict, direct* Page 107

"possibly twice or three times a week for several weeks.

"Q At his house?

"A Always at his house.

"Q Did you meet V. E. Prentice on any of those trips?

"A After, I should think, about two or three meetings with Mr. Smith, one evening when I arrived at Mr. Smith's there was a stout, elderly gentleman there, whom Mr. Smith introduced to me as V. E. Prentice. That was the first time that I had seen Mr. Prentice.

"Q That you think might have been a couple of weeks after your first visit?

"A Yes; possibly.

"Q Did you go with Mr. Prentice, after that, to Linden to see certain people there?

"A No; I never went with Mr. Prentice anywhere. I don't think I ever went to Linden until after the purchase of the property. I don't think I ever did and I never went anywhere that I remember with Mr. Prentice to see anybody.

"Q How long after your first visit to Mr. Smith was it before you reported a scheme for the issuance of shares to him?

"A I don't know, as a matter of fact, that I ever reported any scheme to Mr. Smith at all.

"Q To whom did you report the scheme?

"A I don't think I reported any scheme to anybody. I think I simply went ahead and on such data as I gathered from them, Mr. Smith and afterwards Mr. Prentice, as to what they desired, I drafted this deed.

"Q What deed do you refer to?

"A The deed from the grantor of the property to the Linden Cemetery Association.

"Q That must have been William F. Smith?"

"*R. A. Benedict, direct* Page 108

"A Who must have been William F. Smith?

"Mr. Reynolds: The grantor?

"A He was the grantor of the property?

"Q What did you do with that deed?

"A I forget the date, but I think it was very late in January, possibly the very last day, when I was told to meet certain parties at the Astor House at a certain time.

"Q Can you give me the names of those parties?

"A I think Clarence H. Winans was one, John P. Winans was another, C. O. Smith was another, William F. Smith was another, and I think there was a party there representing some one of the original owners of the property, a portion of the property, which was finally conveyed to the Linden Cemetery Association, I forget the name.

"Q Do you mean an attorney?

"A No; I think he was a trustee or guardian or something of that sort.

"Q Was his name Fleming?

"A Possibly it was Fleming.

"Q Or Rose?

"A I don't remember Rose. I think it may have been Fleming. I remember it was a party acting as guardian or trustee. That is my pres-

ent impression, and these people were there with various deeds. They were selling their property to the grantor, who conveyed it afterwards.

"Q That is, to William F. Smith?

"A Yes; as I recollect it. And he, at the same time, after the deeds passed, executed this deed to the Cemetery Association.

"Q Was V. E. Prentice there at the time?

"A I think he was.

"Q Was Ross Taylor there?

"A No; Ross Taylor was not there. I never met Ross Taytor until a short time ago."

"*R. A. Benedict, direct* Page 109

"Q I hand you deed of William F. Smith and Emma A. Smith, his wife, to the Linden Cemetery Association, dated January 29th, 1901, and recorded in the Union County Clerk's office in book 376 of deeds, pages 451, etc., and ask you if that is the deed you have referred to in your testimony?

"A Yes; I recognize this deed.

"Q This is the one you referred to, you drew the deed?

"A Yes, sir.

"Q And in this deed you expressed for the first time the scheme for the issuance of shares concerning which Mr. Smith had consulted you early in December?

"A Yes, sir.

"Q Hadn't you made any report to him in the meantime?

"A I undoubtedly did, but I didn't show him a draft of the deed that I remember; possibly I did.

"Q Did you report to him on the details of the plan?

"A I think I must have done so.

"Q Can you give me any more specifically his instructions to you or his requests to you as to the drawing of this deed in the first instance? That is to say, what did he tell you he wanted inserted in there as the consideration for the conveyance? Or didn't he say anything about that?

"A He didn't say anything about that.

"Q Well, what did he say that he wanted to receive from the cemetery association in return for his conveyance?

"A Well, of course, there was a question with regard to the number of shares that were to be issued. That question was decided and then that was the shares were issued as the consideration."

"R. A. Benedict, direct Page 122

"Q The deed provided that he should take the property subject to the mortgage?

"A Yes.

"Q So that W. F. Smith didn't put up any money himself?

"A No; he didn't except that those shares which he turned over to us people—he was entitled to consideration and he turned the consideration over.

"Q He didn't put up any money himself?

"A No cash.

"Q The money was put up by you and Mr. Wilbur and Mr. Dyer and possibly Mr. C. O. Smith?

"A Yes, sir.

"Q It wasn't W. F. Smith?

"A No, sir; he put up the shares.

"Q Now, what were you to get of this 10% interest?

"A I was to get one-quarter of that. That is where my six or eight weeks of hard work came in.

"Q That was in return for your services?
"A As I understood at that time.
"Q Who else got part of the 10%?
"A W. F. Smith.
"Q What did he get it for?
"A He kept an amount of it.
"Q What did he get it for?
"A Intellectual effort in founding this concern.
"Q In return for services?
"A I presume so.
"Q Did you say V. E. Prentice had some?
"A Yes; he had some.
"Q What did he get his for?
"A He was the largest promoter.
"Q He was a promoter?
"A Yes, sir. C. O. Smith got an equal amount.
"Q What did he get it for?"

"*R. A. Benedict, direct* Page 123

"A Services, too.

"Q Then that 10% was not part of the consideration, it was a payment for services which you four had rendered to the Linden Cemetery Association?

"A It is what W. F. Smith gave me for my counsel fees; I had done no work for the association at all. The association was not indebted to me.

"Q You just said that W. F. Smith reserved this 10% for his services of promotion and that Prentice got his as payment for his services for promotion and C. O. Smith for services of promotion, and you got yours for the services in drawing this deed?

"A Yes, sir.

"Q Then you got it from the association?

"A No; out of the consideration which was given to Smith for his title to the property.

"Q But it was in payment for your services in drawing this deed?

"A Surely. Smith owed me for that, W. F. Smith. I had nothing to do with the association.

"Q It wasn't considered then that this was part of the purchase price, but it was payment of services which might very profitably have been rendered by the promoters?

"A Smith had to provide a way to pay the people in the concern besides himself.

"Q And he didn't think he could afford to do it out of the 50%?

"A Didn't seem to think so.

"Q How did you fix the price of these shares which you bought?

"A Didn't fix any price at all.

"Q How did you agree between yourselves as to what they were worth?"

"*C. O. Smith, direct* Page 173

"Q The deed is dated January 29th, 1901, you were present at that meeting?

"A I was.

"Q Now, when did you first get into this cemetery project? I don't mean as an officer, but when did you first become connected with it in any way?

"A About that time.

"Q How did you become acquainted with it first?

"A Well, my father had been more or less interested in cemetery propositions like Kensicoe in New York and said he had an opportunity to purchase a piece of property.

"Q Just fix the date of that conversation, will you?

"A Well, I should think it was sixty or ninety days before the property was purchased.

"Q That would be in the early part of December or November of 1900?

"A Yes. He said he had an opportunity to purchase a piece of property admirable for cemetery purposes in Linden, New Jersey, and he said that he intended—he would like to have me financially interested in the thing. I asked him on what basis I could come in and he said I could have 200 shares for $2,500 and any associates of mine could come in on the same basis. That all cemetery shares started at $25.00 and I put up $2,500 for 200 shares. Mr. Wilbur put up $2,500—

"Q You are getting ahead of your story. This conversation, I understand, occurred the early part of November or December, 1900?

"A Yes. Just qualify that, that before I put up this $2,500—

"Q We haven't got to that yet. We are talking about the conversation that you had with your father when you first learned of the project."

"*C. O. Smith, direct* Page 175

"Q That was at this meeting?

"A One of the interviews I had with him.

"Q You have only spoken of one so far?

"A Well, put it several. Two or three times I saw him.

"Q Then this might have been the result of several interviews?

"A No; he said it—

"Q This conversation was all—

"A Had at one time.

"Q And at that time did you tell him that you would take 200 shares, for $2,500?

"A Yes, sir.

"Q That would be $12.50 a share?

"A Yes, sir.

"Q Now, did your father tell you how he came to have this opportunity to get the cemetery property at Elizabeth?

"A No; didn't go into details.

"Q Did he say anything to you at that time about a man by the name of Vernet E. Prentice?

"A Yes; he said he knew Mr. Prentice.

"Q Did he say that Mr. Prentice was interested in this proposition at that time?

"A Yes, sir.

"Q Did he say that he already had the franchise from the township for that cemetery?

"A He did.

"Q Did he tell you that Joshua Brown was interested in it?

"A No; I don't think he did.

"Q Did you know Joshua Brown?

"A Yes, I met him at Venice, by accident, once.

"Q Did you know of his having any connection with this cemetery?

"A Not positively. He said once that he had been identified with it."

"*C. O. Smith, direct* Page 176

"Q That was afterwards?

"A Yes.

"Q Did you know H. H. Walker?

"A Well, only that he came into my office one time, on one or two occasions.

"Q When was that, subsequently?

"A Yes; after the property had been acquired.

"Q You didn't know of his having been connected with it at all?

"A None, whatever.

"Q Did you know Ross Taylor?

"A I don't think I ever saw him.

Testimony Read in Evidence.

"Q Didn't know of his having any connection with the cemetery?

"A Didn't know any details of it.

"Q Know Nathan Barrett?

"A No, sir.

"Q When did you first meet Mr. Prentice?

"A My father introduced me to him about that time.

"Q About the time of this first interview with your father?

"A I might have been introduced to him at my father's house.

"Q Early in December or November of 1900?

"A I might have met Mr. Prentice, but without any particular recognition until just before the property was purchased.

"Q When did you first become acquainted with Roswell A. Benedict?

"A Oh, I have known him twenty-five or thirty years.

"Q You knew him before this conversation with your father?

"A Oh, yes; we were boys together; went to school with him.

"Q Did you introduce him to your father?"

"*C. O. Smith, direct* Page 177

"A No, sir.

"Q Your father knew him prior to this?

"A Oh, yes, sir.

"Q What connection did Mr. Benedict have with the incorporation of this association?

"A Well, as my father used to term it, he was the legal light.

"Q When did he become the legal light?

"A Well, I don't know.

"Q When did you first meet him in connection with this project?

"A I don't know. It might have been three months, I might have been talking to my father longer, six months.

"Q Three months before you took the property?

"A Well, I don't know.

"Q Well, some time before?

"A Yes.

"Q Did you have any conversation with him as to the provisions of the conveyance to the association?

"A How do you mean?

"Q Did you discuss with Mr. Benedict the provisions of the conveyance to the association or the scheme in general?

"A I don't recall it.

"Q Mr. Benedict testified that he made up this whole scheme, that he devised this scheme of issuing the shares, purchase money shares and all. Is that so?

"A I don't know.

"Q You told me at your first interview your father outlined in detail this whole scheme to you and that was early in December, 1900?

"A I say, so far as the legal light was concerned, Mr. Benedict said to me—I said to him. 'I can't see what is the necessity of—' "

"*C. O. Smith, direct* Page 178

"Q When was this?

"A Before we took the deed. I went to my father's house and met Mr. Benedict and he said all these papers had been drawn up and that the certificates would be issued 9,000 in one and 8,000 in the other and a separate trust and he asked me to read this trust over that he had drawn, which I

did. I considered them all right, but so far as the 15 acres——

"Q Wait a moment now. You considered them all right?

"A I considered them as outlined by my father all right.

"Q And you approved, that was the final draft of the deed, was it?

"A Yes.

"Q And you approved it then?

"A Of course, I didn't see the deed. I only saw the Smith trust papers.

"Q Oh, this was not the deed?

"A Oh, no. I never saw the deed.

"Q To the association?

"Q No; I didn't see that. I was present at the Astor House when it passed through.

"Q This was the Smith trust?

"A Oh, yes; entirely.

"Q That Smith trust was drawn then prior to the giving of the deed by Smith to the association?

"A Certainly. I wouldn't become identified—

"Q It was intended, its provisions were included in the original plan?

"A Yes.

"Q It was executed and delivered simultaneously with the deed?

"A Well, I don't know about that.

"Q It was the intention that it should be?

"A Yes, it was the intention."

"*C. O. Smith, direct* Page 184

"posing of 5,000 shares under this trust agreement?

"A Yes; putting 5,000 in the trust agreement.

"Q For the purpose designated in this trust among which was the paying of the mortgages?

"A Yes, sir.

"Q Did your father have the property at this time?

"A No, sir.

"Q Did he have a contract for it?

'A No, sir.

"Q When did he get a contract for it?

"A I don't know that he ever got a contract.

"Q Who held the property at this time?

"A That I don't know.

"Q What makes you say positively that he didn't have a contract?

"A Well, I will qualify that. I don't know that he did. I don't think he did. My impression was in the conversation I had with him that he could purchase the property at any time he wanted it.

"Q How did he know it?

"A I presume he must have know that, a proposition, the same as you and I might know it. They may have said we will sell the property.

"Q Had he fixed on any price with the owners?

"A I don't know about that.

"Q Tell you who the owners were?

"A No, sir.

"Q Did he secure a contract for it later?

"A I don't think he ever did. I don't know. My impression is he said he could acquire this property.

"Q Did he go into all these arrangements without having any contract to purchase the property?

"A I don't know.

"Q Did he tell you anything about it?

"A No, sir.

"*C. O. Smith, direct* Page 193

"of money was what was left over. I think the $10,000 was in my name absolutely. Because, if for

any reason there was a slip up that morning I would have to draw a check back because if it had been deposited in the association I couldn't have paid myself or my associates back.

"Q Wasn't it part of the original plan that this 900 shares and the 4,100 shares should be sold and the money turned over to the uses of the cemetery association?

"A Why, I said some time ago there was to be 5,000 shares. That was what my father stated. But this 900 didn't become a part of the trust, it was separate and distinct. The cemetery was to get the benefit provided the deal went through.

"Q And the deal did go through so the cemetery got the benefit of it?

"A They did; yes.

"Q So that on that assumption you entered in the books of the association the proceeds of these sales of shares as if it were a receipt by the association and the disbursement as if it were a disbursement of the association?

"A Yes.

"Q It was your understanding that since the sale had gone through the proceeds of those shares were the property of the association, to be used for its purposes?

"A That is right.

"Q You say that the deed was transferred on January 29th, 1901. Do you remember who was present at that meeting where the deed was transferred?

"A Why, I think Theodore C. English; he was the man who passed everything and told me to pay the money over.

"Q Who did English represent?"

"C. O. Smith, direct Page 203

"A Can I refresh my memory by visual evidence? Just exactly what I meant, original promotor of the scheme on paper. I raised the money and that is all I ever had to do with this enterprise.

"Q This was a report read by you at this meeting of the executive committee?

"A Yes, sir.

"Q And in it you say, 'Perhaps I appreciate more keenly than the other trustees the great intrinsic value of this proposition not only as an original promoter of the scheme on paper but as the practical manager of every section of the work from January, 1901, to June, 1908'?

"A Yes, sir; I raised the money and went in.

"Q You said you were a promoter?

"A On paper.

"Q Then this scheme was your scheme?

"A Not at all. I beg to differ from you; that is not true. When I said on paper I meant that purely and simply. I said that I raised the money that bought it.

"Q You didn't say so there.

"A Well, on paper; I am telling you now just exactly as it was. I had no connection with it.

"Q What was your understanding?

"A I filled the personnel. I got Eldridge and Barney and I got Haye of the Adams Express, all personal friends of mine, and I said, 'Gentlemen, come in and take 200 shares at $2,500.'

"Q You raised all the money to promote it?

"A No, I didn't. I don't know how much my father spent, but he spent a good deal.

"Q What did you mean by 'on paper'?

"A Paper; this is paper. That I wrote the literature and wrote the little booklets. I wrote that

one with the golden gates there, after the thing was started, and turned it all over to the com-"

"*C. O. Smith, direct* Page 212

"Q You hadn't sold in 1902 all of those 4,100 of the trust shares?

"A No, sir.

"Q How long before you sold all of the 4,100 trust shares?

"A Well, they were disposed of according to the terms of the trust deed until the trust was closed.

"Q And what time was the trust closed?

"A June 10th, 1909.

"Q So that you kept making sales from these trust shares from time to time from 1901 down to 1909?

"A Up to the time the trust was closed on June 10th, 1909.

"Q Do you know how much was realized from the sale of these shares?

"A Yes, sir.

"Q How much?

"A Up February 24th, 1909, $74,812.50.

"Q Now, Mr. Smith, after you had taken the deed for Linden Cemetery Association on January 29th, 1901, it was some time before you closed up the deal and took the property for Rosedale Cemetery, wasn't it?

"A Well, I didn't close it up. About March 1st, 1901, my fatherstated that he was about to acquire the Rosedale property on the same basis as Linden and if I would select as trustee responsible men that could become trustees and identified with the enterprise he would give them shares for $12.50, and was desirous of raising $10,000. Part to be paid for the purchase of the property and the balance

to be put in trust to be turned over to Rosedale Cemetery Association for operating expenses. If I did that I was to receive four-tenths of the 10% reservation. I brought the matter to the attention of Mr. Wilbur, who had read the Linden deed, and"

"*C. O. Smith, direct* Page 213

"he felt that he should be entitled to two-tenths of the 10% by reason of the fact that his money being put in in advance to William F. Smith, to buy the property.

"Q How much did he put up in advance?

"A $2,500.

"Q When did he put that up?

"A Prior to the purchase of the property.

"Q Was that $2,500 which he put up to purchase shares with?

"A Yes, sir. And Mr. Dyer felt the same way. I spoke to my father regarding it and he said—he advised me to have Mr. Prentice meet these gentlemen and see what arrangements could be made as it was impossible for him to divide up the 10% that he had in mind, that is 4/10 to Mrs. Prentice, who had advanced some money, 4/10 to me for the purpose stated and 2/10 to himself. Mr. Prentice, Mr. Wilbur and Mr. Dyer and I met, took dinner uptown, and Mr. Prentice stated to Mr. Wilbur that it was possible that Mr. Smith might consent to give him the equivalent of the 2/10 reservation in shares. Whereupon Mr. Wilbur took a pencil and figured it out as being 400 shares and said that if 600 shares were given him he would turn over to Mr. Smith $2,500. Mr. Dyer consented to do the same thing.

"Q Now, Mr. Smith, just let me ask you if your father intended to establish a trust in regard to Rosedale the same as he did for Linden?

"A Just the same.

"Q He intended to set aside 4,100 shares?

"A 4,000 shares——

"Q Under a trust deed having the same provisions as the trust deed in the Linden case, is that right?

"A Well, there were 3,400 in the trust deed,"

"*C. O. Smith, direct* Page 215

"with him?

"A I don't know.

"Q Did he tell you any of the details with regard to his purchase of the property?

"A Yes. I objected to my father assuming over $60,000 worth of mortgages for an Association that didn't have a dollar, was not sure that they could sell any shares——

"Q You are referring now to both Linden and Rosedale?

"Q I am referring to Rosedale. That was a very strong point.

"Q You objected to his assuming the $60,000 worth of mortgages?

"A Yes, sir.

"Q How did you know that he was going to assume them?

"A He bought the property.

"Q He hadn't yet?

"A Well, if he did buy it.

"Q How did you know he was going to assume the mortgages?

"A If he bought the property he had to.

"Q You know that there was a contract in existence at that time, don't you?

"Q No, sir.

"Q How did you know then that he was going to assume certain mortgages?

"A Because he told me that on the purchase of this property it was at a certain price and he would have to put down—make the first payment of so many thousand dollars.

"Q He was getting it at a certain price?

"A Yes, sir.

"Q And had to put down so many thousand dollars?

"A Yes."

Judge Vail made the following statement:

I propose to prove by the receiver of the two cemeteries the amount of money which came into his hands when he was appointed receiver for either association, the amount of lots which at that time were unsold in either association, the amount of lots sold by the receiver, the proceeds of sale and what disposition, if any, he made with the ten per cent reservation under covenant two of the deed and the schedule of prices of the lots still unsold in either cemetery association.

The solicitor for the receiver objects to the admission of the testimony so offered or to be offered on the ground that under the decree of the Court of Chancery the rights of the parties in interest are established and that under such decree and the order of reference the testimony offered is immaterial, irrelevant, impertinent and inadmissible.

The master said: "I will admit the testimony. Inasmuch as the basis or measure for determining what is a reasonable sum to be paid to the grantor in the deed for services and profit on the purchase and sale of the property, is open to some question. I feel that this method of fixing the same should be considered. I understand that Mr. Cornish's objection extends and will extend to all the testimony offered and to be offered by Judge Vail along the above lines.

Continuation of hearing this eleventh day of January, nineteen hundred and seventeen, at ten A. M., the hearings having been previously adjourned at the request of the parties on December twenty-eighth, nineteen hundred and sixteen.

RAYMOND T. PARROT,
Special Master.

Appearances:

Vail & McLean, represented by Judge Vail, for Elaine Smith, *et als.*

Clark McK. Whittemore, receiver.

Clark McK. Whittemore, called as a witness by Judge Vail, being duly sworn, testifies as follows:

I am the receiver of the Linden and Rosedale Cemetery Association, taking charge about March 17th, 1913, and have been in actual control since that time. I understand the total of the two cemeteries to be two hundred and fifty acres combined. In the acreage of approximately two hundred and fifty acres there are a number of separate lots already laid out for lots and graves known as the Winans Plot, Wilbut Plot, Hillside Plot, Elmer Plot, Sunnyside Plot, Rosedale Plot, Otis Plot, Necker Plot and the colored ground. These plots are shown on the seven maps contained in one folder which are now produced with the exception that this folder does not include the map of the Necker Plot nor the map of the colored ground, being the plot on the east side of Edgar Road, where interments of colored people are made at low prices for graves. There is also a section for the sale of single graves known as the Midvale

section of which this folder does not include a map. The folder containing seven maps is offered in evidence on part of Elaine Smith, *et als.*, and marked Exhibit . The plots to which I have referred, in the total comprise a small portion of the area of the two cemeteries. I cannot give the total acreage of these plots, but in the best of my judgment it would be between twenty and twenty-five acres and they have already been plotted out for lots and graves. In between these plots in some cases which are widely separated, there are other plots designated by name as Maple Grove Plot, Woodlawn Plot, Oakview Plot, Greenlawn Plot, Cedarlawn Plot, Edgarlawn Plot, Evergreen Plot, Hilbur Plot, Lakeside Plot and the plot for the receiving vault, Pilgrim Plot and Linden Lodge No. 1, Linden Lodge No. 2, Rosedale Lodge and plots for the stables are located, all of which are shown on the sixth map in the folder offered in evidence. Now all of these plots with the exception of possibly Pilgrim Plot are sub-divided into separate plots. There appears to have been a tentative sub-division of Pilgrim Plot, but there has been no sales of lots in that plot and I have never had any exact map of it. The various plots are without walks and trees as shown on the map. The situation of these plots between the plots in which sales have been made and interments also made, makes it inadvisable or perhaps impossible that this land shall ever be used for anything except cemetery purposes. In addition to the plots designated by name, there is a large plot without name lying between Oakfield Plot and Sunnyside Plot, which I do not think can be used for anything but burial purposes because of

its situation. The cemetery owns another piece of land lying between Linden avenue and the railroad, which is about two hundred and seventy-five feet wide and perhaps one-third of a mile long. In the middle of this strip there is an attractive private railroad station built by the cemetery and fences and drives and an attractive entrance to the cemetery already laid out. This railroad station cannot now be used as a railroad station because no train service can be secured from the railroad company, but I think it is probably impracticable to use this central portion of the strip of land where the building is located for anything else than as an appurtenance to the cemetery. In addition to the property which I have mentioned the cemetery owns another piece of land fronting upon Edgar Road, which I understand contains approximately seventy acres of land and another triangular piece of land fronting on Edgar Road and the B. & O. Railroad, which I have been informed contains approximately thirty-five acres. These two pieces have never been laid out into burial plots and I think they are susceptible of being separated from the cemetery and being made available for sale for real estate or development purposes or possibly sold to some other cemetery association. The strip of land which I have mentioned as lying between Linden avenue and the Pennsylvania Railroad with the exception of the central portion, where the station is located, I think might also be available for sale for other than burial purposes. I have estimated that the total land which might be available for sale for other than burial purposes might approximate a total of one hundred and twenty acres. I anticipate

a sale of this unused land will be absolutely necessary in connection with the reorganization of these cemeteries in order to provide to some extent at least for the creditors of the cemetery association, whose obligations amount to very large sums of money. At present I do not know of any other way of paying off this obligation. The amount which I may be able to obtain upon the sale of this one hundred and twenty acres is very speculative. If sold to some other corporation with the right to exercise the cemetery franchise to which this land is dedicated, I ought to obtain a considerable larger amount than will probably be obtained if the land is used for development purposes. The cemeteries have sold land before I was appointed as receiver on the east side of Edgar Road to the Polish Church for burial purposes by the acres at $2,500 an acre. If the one hundred and twenty acres should be used for other purposes than burials in my judgment the cemeteries ought to realize an average of not less than one thousand dollars an acre. I am not prepared to say that I would recommend a sale for an average price for one thousand dollars an acre for any purpose, but my personal opinion is that one thousand dollars an acre would be the minimum amount that I would be willing to consider unless I should secure information different from that I now have. If the one hundred and twenty acres is sold by the cemetery association the balance of the cemetery remaining unsold including the plots upon which sales have been made would be one hundred and twenty acres approximately. Out of this acreage I assume that one-third of the area would be

necessary for drives, paths and decorative plots which would leave approximately twenty-nine thousand square feet out of this acreage available for sale in burial plots or graves. The prices which have been obtained for burial plots before I was appointed and which I have substantially adhered to since my appointment in making sales varied from fifty cents a square foot to $1.50 a square foot according to location and desirability. There have been practically no sales during the period I have had charge over a dollar a square foot. The present situation in the cemeteries is such that the business done is almost entirely of the cheaper class. In addition to this fact there is also the fact that the net amount received by the cemetery on the sale of single graves after the payment of commissions and other expenses will in many cases by very much less than fifty cents a square foot. On the cheapest child's grave after the payment of the expense of opening the grave and the commission paid to the undertaker, the net amount the cemetery received is two dollars and this grave requires twenty-one square feet of ground. In the best of my judgment it is probable that the cemetery may realize on an average of fifty cents a square foot as the price for burial plots between now and the time it is sold which will take a very long period of time. Assuming there are twenty-nine thousand square feet available and that fifty cents a square foot will be realized, making $14,500 per acre, and if one hundred and thirty acres are sold at this rate, $1,885,000. As stated above the land which may be sold for other purposes may produce a total of at least $120,000, thus mak-

ing a total that may be received when all the land is sold of approximately $2,000,000. I am informed that the audit of the cemetery associations account shows that before my appointment. sales of burial plots were made for the total amount of $174,000 in the two cemetery associations. I have made a calculation of the sales made by me since my appointment. The amount I have realized on the sale of burial plots in the period of nearly four years has been $3,843.70 and for graves after deducting the expense of opening the graves, $1,896 in Linden Cemetery Association. And in Rosedale Cemetery Association for burial plots the gross amount of $412.50. There has also been sold to the Pennsylvania Railroad Company a strip of land along the railroad for which I received the sum of $5,984.95 in Linden Cemetery Association and Rosedale Cemetery Association the sum of $7,515.05. These last mentioned amounts comprise ninety per cent. of the total purchase price of the strip of land sold to the Pennsylvania Railroad Company. The other ten per cent. was paid into the Court of Chancery and amounts to a total of $1,500. The figures which I have given on the sale of burial plots and graves is gross and I think that the total of $174,000 of sales made before my appointment is also gross. The selling expense connected with the sales of the burial plots and graves is very high. At the time of my appointment the cemetery was paying a commission of twenty per cent. to its manager and general sales agent and a salary of $1,200 a year and previously the cemetery has paid as high as thirty per cent. in addition to a salary. The other officers of the cemetery formerly under a salary also as part of their

work performed administrative duties connected with the sale of burial plots and graves. I have made a rough and tentative estimate of the selling expense connected with the sale of all burial plots and graves of at least thirty-three per cent. I do not think that this estimate is high, experience may show that it is low, but from the total amount that may be realized by the cemetery associations from the sale of lots and graves, I should think there ought to be deducted thirty-three per cent. for selling expenses.

The above estimate of one hundred and thirty acres includes the plots which have been laid out for burial lots and graves which I have estimated at about twenty-five acres. The other one hundred and five or one hundred acres as the case may be, has not been plotted by a surveyor, has not been graded to a level grade so as to be available for interments, has not been underdrained and has not had any paths or drives laid out. And has not been marked with markers as has been done in the laid out section in the cemetery. Nor has any extensive decorative work been done upon these plots by the planting of shrubbery, trees or flowers. In order to make this one hundred or one hundred and five acres available for interment purposes this work will have to be done. I am unable to give any opinion as to the cost of doing this work. The accounts of the cemeteries before my appointment show that very large sums of money were expended to contractors for the work on the twenty-five or thirty acres which were laid out. The cost of this work whatever it may be on the one hundred or one hundred and five acres should be deducted from the net amount which the cemeteries will

otherwise receive from the sale of the land and graves.

The length of time that it may take to sell all the land in the cemetery available for burial purposes is exceedingly uncertain. Out of the total sales which I have estimated in my testimony at an amount exceeding $2,000,000, there has been sold in the sixteen years that the cemeteries have been in existence an amount less than $200,000. The bulk of these sales were made before I was appointed receiver and were made for the most part in connection with most extraordinary efforts and remarkable inducements to purchasers and at an exorbitant expense, the expense of selling and the expense of development exceeding many times over the total amount received at all sales. This was, of course, in connection with the first work of getting the cemetery started. The normal development of these cemeteries in my judgment will be controlled by the patronage from the neighboring territory and there will be as many sales under normal conditions as will be called for by the needs of the number of inhabitants within a reasonable district in the neighborhood of the cemeteries having regard to the competition with other cemeteries. In the last four years the total sale of lots and graves made by me amounts to $7,700, thus indicating the rate of sale during the period of time the property has been in the hands of the receiver. If the Cemetery Associations are successfully reorganized and provided with an income of proper upkeep, I am inclined of the opinion that the rate of sales would be somewhat increased as time goes by, especially and particularly if some reliable and regular means of transportation from the City of Elizabeth is provided, which transportation is

substantially lacking now. Trolley communication which is lacking now would be a wonderful benefit to the cemetery association. The cemeteries are now located about two miles of the termination of the terminus of the trolley line. The Pennsylvania Railroad Company paid for the strip of land twenty feet wide along the railroad as the result of an agreement and friendly condemnation proceedings the sum of fifteen thousand dollars. I estimate that this strip comprised about two acres of land in the total, having a frontage along the railroad of thirty-five hundred feet or more.

Continuation of the taking of testimony in the above entitled suit this twenty-fifth day of January, nineteen hundred and seventeen, before me, at my office, 120 Broad street, Elizabeth, New Jersey, at ten A. M., hearing having been adjourned, at request of parties, on January 18, 1917.

R. T. PARROT.
Special Master.

APPEARANCES: Judge Vail representing Robert H. McAdams, guardian *ad litem* for Elaine Smith, Marie Smith, Irene Smith, Carlton O. Smith and Lillian O. Smith, Zevelia A. Prentice Coburn, Emma B. Carpenter and Dorothy R. Benedict.

JACOB BAUER, a witness produced on behalf of the defendant, being duly sworn and examined by Judge Vail, testifies as follows:

Q Mr. Bauer, you have been a civil engineer for how many years about?

A Twenty-five years.

Q And you have been County Engineer?

A About twenty years.

Q And as County Engineer and in your private practice as engineer, have you had experience in plotting roads, draining and laying out plots?

A I have.

Q Are you familiar with the property owned by the Linden and Rosedale Cemeteries?

A I am.

Q I show you Exhibit V. 3 and ask if you did any work upon that—laying out any of these plots?

A Most of the plots in this exhibit were made by me, a few of them were not. There was a man named Burley who did some work there. Practically all of the work in the cemetery I did myself including the laying out, supervising and construction of the grounds.

Q And in your capacity as engineer can you say about what it would cost to lay out the property which has not been laid out in plots in the same way which they were including the roads, drives, underdraining and shrubbery. About how much an acre?

A I should say the balance of the property which comprises something about one hundred acres which could be developed into cemetery lots in a way sufficient for their sale and in a manner similar to what has already been done there, for about four hundred dollars per acre.

Q Now will you give us the details of how you make up the four hundred dollars an acre?

A First, I have prepared some details. The first item that I have would be the necessary surveying of the ground and the preparation of maps in detail of the various plots similar to

the maps in this Exhibit V. 3. This work estimates a cost of fifty dollars per acre, or for a tract of one hundred acres five thousand dollars.

The second item which I have is the grading and construction of roads. I have estimated from the work already done in the cemeteries that there would be required about two hundred and fifty lineal feet of new road twelve to fifteen feet wide per acre of land developed. This road, inclusive of grading, which is not expensive on this tract of property and also inclusive of certain driveway ten feet wide by four inches thick, would in my opinion cost sixty cents per foot or one hundred and fifty dollars per acre; for the one hundred acres this item would be fifteen thousand dollars.

The third item in my list would be the necessary paths leading through the plots from road to road. These paths are from five to eight feet wide and there would be required about one thousand lineal feet of such path work per acre of development. Most of these paths in the present plots are turf paths, while some are cinder or crushed stone paths. Assuming that one-fifth of the total length of paths would be built of sand or crushed stone and the balance of turf, I think that sixty dollars per acre would be a fair estimate of the cost or six thousand dollars for a one hundred acre tract.

The next item in my list would be the necessary underdraining so that burials could be made without having water in the excavations. A considerable part of this underdraining work has already been done, as there is now already laid out a large storm water sewer or drain. The work which would have to be done would be the draining of possibly fifty acres of land into this

present storm water drain. The balance of the undeveloped property is, I think, already taken care of in drainage matters. An estimate of this work would necessarily have to be quite vague without a great deal of field work, but I should say five thousand dollars expended on this drainage work would take care of the areas that are now badly drained.

Q That is, the one hundred acres which are still undeveloped and not laid out in cemetery lots?

A Yes.

The next item which I have would be the preparation of the ground surface in the plots as they are laid out so as to make them presentable and ready for sale. This would require the cutting down of the grass and weeds, possibly some small amount of grading work in filling up holes, etc., and the removal of unnecessary trees in some portions that are wooded. I think that fifty dollars per acre would take care of this item or the sum of five thousand dollars for a one hundred acre tract.

The next item would be the planting of trees and shrubbery on tracts as they are developed, which is generally done on grounds that have no trees at the present time and which has been done on most of the tracts already developed. I think that thirty dollars per acre would cover this cost or three thousand dollars for the one hundred acre tract. The total for the one hundred acre tract for these six items figures $39,000, or $390 per acre. I should therefore say that an estimate of four hundred dollars per acre would be sufficient to develop the property in the manner indicated and I think that

estimate would also include the necessary engineering expenses on parts of the work.

Q Judge Whittemore testifies that in his judgment about one-third of each acre when laid out would be absorbed in roads and walks leaving two-thirds of an acre available for sale of lots, what have you to say of that estimate?

A I should think that would be a fair estimate of the area.

Mr. Vail: "I now offer the record of the condemnation proceedings of the United New Jersey Railroad and Canal Company against the Linden Cemetery Association, petition filed in county clerk's office of Union County, April 31, 1914, and also the record of condemnation proceedings of same company against the Rosedale Cemetery Association, record filed in the county clerk's office April 13, 1914."

Rule Nisi.

Filed June 4th, 1917.

IN CHANCERY OF NEW JERSEY.

Between	
ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*, *Complainants,*	*On Bill, etc.*
and	*Rule Nisi.*
LINDEN CEMETERY ASSOCIATION, *et als.*, *Defendants.*	

Upon reading and filing the two reports made in this cause by Raymond T. Parrot, one of the special masters of this court, bearing date the first day of April, 1917, IT IS

ORDERED, that the said reports and all the matters and things therein contained do stand in all things confirmed, according to the tenor and meaning thereof, unless the defendants shall within eight days after service upon him or them of a true but uncertified copy of this rule, show cause to the contrary.

Entered by Osborne & Cornish, solicitors of Clark McK. Whittemore, receiver.

ROBERT H. McADAMS,
Clerk.

By the Court.

Dated June 4, 1917.

A true copy,

ROBERT H. McADAMS,
Clerk.

Exceptions to Master's Report.

Filed June 15th, 1917.

IN CHANCERY OF NEW JERSEY.

Between

ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*,
Complainants,

and

LINDEN CEMETERY ASSOCIATION, *et als.*,
Defendants.

Exceptions to Master's Retort.

Exceptions taken by the defendants, Elaine Smith, Irene Smith, Marie Smith, Carlton Smith, Lillian O. Smith by Robert H. McAdams, guardian *ad litem;* Clifton O. Smith and Zevelia A. Prentice Coburn, to the report made therein dated April 1, 1917, and filed June 4, 1917, by Raymond T. Parrot, one of the Special Masters of this Court, under order dated July 11, 1916, touching the matters therein referred to him.

First Exception: For that the Master reported that the full fair value of the property was $37,500 whereas he should have reported that the value was $911,000 as testified by the receiver.

Second Exception: For that the Master fails to report that the sum to be awarded to William F. Smith and his associates should be ten per cent of the gross proceeds of sales as provided in second covenant in the deed.

Third Exception: For that the Master instead of fixing the compensation as claimed in exception two, fixed an arbitrary sum as the value of the services of William F. Smith and his associates as follows: William F. Smith, $2,500; C. O. Smith, $500; Vernette E. Prentice, $500, and Rosewell A. Benedict, $850.

And said defendants insist that the Master's report is contrary to the opinion delivered by the Court of Errors and Appeals on the hearing of said cause.

Whereas, the said Master has not reported properly or in accordance with the terms of said opinion, or with the principles of equity. In which several matters and respects these exceptants pray the judgment of this court.

VAIL & McLEAN,
Sol'rs and Counsel of Defendants.

Conclusions.

Filed Sept. 18th, 1917.

IN CHANCERY OF NEW JERSEY.

Between

ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*,
Complainants,

and

LINDEN CEMETERY ASSOCIATION, *et als.*,
Defendants.

Conclusions.

Submitted, July 3, 1917.

Decided, September 17, 1917.

On Exceptions to Master's Report.

For the Exceptants: Messrs. Vail & McLean.

For the Respondents: Messrs. Osborne & Cornish.

BACKES, *V. C.*

For a comprehensive understanding of the question presented by the exceptions filed to the Master's report, the opinion of Mr. Justice Garrison in the Court of Appeals (85 Eq. 501), reversing this court (83 Eq. 494) must be consulted.

Upon the coming down of the remittitur, the matter was referred to a master "to asertain what will be a reasonable sum to be paid to the grantor in said deed and his assigns for services and profit on the purchase and sale of said prop-

erty in view of the services of the grantor and their value to the grantee," and the master has reported the sum at $4,000 with interest, to which exceptions are filed. The master measured and determined the amount upon the basis of compensation for the services of the grantor, whereas, according to the view of the Court of Appeals, he should have ascertained and reported a reasonable sum for the profit of the grantor "in view of the services of the grantor and their value to the grantee." While the remittitur is not precisely in the language of the opinion of the Court of Appeals, its phraseology is such as to permit an inquiry and findings conformable to the directions laid down in the opinion. The supposed variance in nowise interferes with the application of the criterion, adopted by the appellate court, in establishing the sum to be paid the grantor.

Covenant "two" providing for the profit of the grantor, was declared extra-statutory solely because the amount to be paid was unliquidated. In its moral aspect it has the approval of the upper court and percentage as a basis of calculation is not looked upon with disfavor.

A profit of ten per cent of the gross proceeds of the sales of burial plots was agreed upon by the contracting parties and is to be presumed reasonable, and had they estimated the probable total income from sales and thereon accordingly fixed the amount of the profit, the vice in the covenant, which caused its destruction, would have been obviated. A substitute for this indispensable element of the covenant will be furnished by adopting the course the parties themselves could lawfully have pursued. The amount of the percentage is not unreasonable under the circumstances,

and the aggregate will be small or large, depending entirely upon the successful prosecution of the cemetery enterprise. The testimony before the master disclosed that a fair and reasonable average price for lots is fifty cents per square foot; that the gross proceeds of the sale of all of the lots at this rate will exceed a million and a half dollars, and that the net income will be over a million dollars. Staggering as these figures are and large as the profit must be, if they are realized, they serve to emphasize the value of the grantor's services to the grantee—a controlling factor in the measure of profit which the master has wholly ignored.

The exceptions will be sustained and the matter re-referred to the master for further investigation and report in accordance with these conclusions.

Order Sustaining Exceptions.

Filed October 2, 1917.

IN CHANCERY OF NEW JERSEY.

Between

ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*, *Complainants*,

and

LINDEN CEMETERY ASSOCIATION, *et als.*, *Defendants.*

Order.

This matter coming before the court on exceptions to the report of Raymond T. Parrot, Special Master, dated April 1, 1917, and the Court having heard and duly considered the arguments and briefs of counsel and examined the evidence returned with the report;

It is hereby on this first day of October, 1917, on motion of Vail & McLean, of counsel with the exceptants, ORDERED that the exceptions be sustained with costs to be taxed, and that the matter be referred to the said Special Master for further investigation and report in accordance with the order of reference heretofore made and the conclusions of the court in sustaining the said exceptions.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V. C.

Notice of Appeal.

Filed October 15, 1917.

IN CHANCERY OF NEW JERSEY.

Between	
ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*, *Complainants,*	*On Bill, etc.*
and	*Notice of Appeal.*
LINDEN CEMETERY ASSOCIATION, *et als.*, *Defendants.*	

Clark McK. Whittemore, receiver, heretofore appointed in this cause, hereby appeals from the interlocutory order made in this cause on the first day of October, 1917, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

Dated October 8, 1917.

ABRAM H. CORNISH,
Solicitor and of Counsel with
Clark McK. Whittemore, Receiver.

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

ABRAM H. CORNISH,
Of Counsel with Receiver.

Petition of Appeal.

Filed October 15, 1917.

New Jersey Court of Errors and Appeals

Between

ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*, *Complainants,*

and

LINDEN CEMETERY ASSOCIATION, *et als.*, *Defendants.*

Petition of Appeal.

To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:

The petition of Clark McK. Whittemore, receiver, the appellant in the above stated cause, respectfully shows:

That your petitioner finds himself aggrieved by an interlocutory order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the first day of October, 1917, wherein the said William Bliss, *et als.*, are complainants, and Linden Cemetery Association, *et als.*, are defendants, which said order sustains the exception filed to the report of Raymond T. Parrott, Special Master, which report was made in pursuance of an order of reference entered in this cause on the eleventh day of July, 1916, in this respect, to wit:

That the said order adjudges "That the exceptions be sustained with costs to be taxed, and that the matter be referred to the said special master for further investigation and report, in accordance with the order of reference heretofore made and the conclusions of the Court in sustaining the said exceptions."

And your petitioner humbly appeals from all of said order upon the ground that the same is erroneous, for that the report of the said master was made in accordance with the order of reference and in accordance with the evidence submitted to him, and that the said report should have been confirmed.

Your petitioner therefore prays that the said order of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden.

And that your petitioner may have such further relief in the premises as to this Honorable Court shall seem meet.

Dated October 8, 1917.

ABRAM H. CORNISH,
Solicitor and of Counsel with
Receiver, Clark McK. Whittemore.

Answer to Petition of Appeal.

Filed Oct. 15th, 1917.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*, *Appellants*,

and

LINDEN CEMETERY ASSOCIATION, *et als.*, *Respondents.*

} *Answer.*

The Answer of the respondents, Elaine Smith, *et als.*, to the petition of appeal of the above named appellants.

The said respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit that an order was on the first day of October, 1917, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as therein stated; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said order is agreeable to equity and pray that the same may be affirmed, with costs to be adjudged to these respondents.

VAIL & McLEAN,

Sols. for and of Counsel with Respondents.

Stipulation.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ATTORNEY GENERAL, *ex rel.*, WILLIAM BLISS, *et als.*,
Complainants,

and

LINDEN CEMETERY ASSOCIATION, *et als.*,
Defendants,

and

Between

ATTORNEY GENERAL, *ex rel.*, EMMA W. NOLL, *et als.*,
Complainants,

and

ROSEDALE CEMETERY ASSOCIATION, *et als.*,
Defendants.

Stipulation.

It is stipulated between Abram H. Cornish, solicitor of Clark McK. Whittemore, receiver, the appellant in the above stated matter, and Vail & McLean, solicitors for Elaine Smith, *et als.*, respondents, that the condemnation proceedings of the United New Jersey Railroad and Canal Companies against the Linden Cemetery Association and Rosedale Cemetery Association

show that the amount paid for the properties of said associations taken under the condemnation proceedings was $9,000.00 per acre.

VAIL & McLEAN,
Solicitors of Respondents.

ABRAM H. CORNISH,
Solicitor of Appellant.