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Notice of Appeal.

New Jersey Supreme Court

10

PASSAIC COUNTY.

SHELLEY R. SAFIR,  
*Plaintiff-Appellee,*

*v.*

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

Action at Law.

20

To: Levitan & Levitan, attorneys of the plaintiff-appellee, Shelley R. Safir; and attorneys for Abraham H. Gottlieb, alleged assignee of said judgment:

SIRS:

PLEASE TAKE NOTICE, that the defendant-appellant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause, against the defendant-appellant and from each and every part thereof.

30

ABRAHAM M. HERMAN,  
Attorney of Defendant-Appellant.

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## Grounds of Appeal.

NEW JERSEY SUPREME COURT.

10

SHELLEY R. SAFIR,  
*Plaintiff-Appellee,*

*v.*

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

} Action at Law.

To: Levitan & Levitan, Attorneys of the plaintiff-appellee, Shelley R. Safir, and attorneys for Abraham H. Gottlieb, alleged assignee of said judgment:

20

SIRS:

The defendant, West Ridglawn Cemetery, a corporation of the State of New Jersey, appellant in the above entitled matter finds itself aggrieved because the Supreme Court erred in giving judgment to the plaintiff instead of the defendant, in that:

30

1. The trial judge erred in denying defendant's motion to dismiss the complaint before the trial, pursuant to the reservation contained in defendant's answer.

2. The trial judge erred in denying defendant's motion for a nonsuit when the plaintiff rested his case.

3. The trial judge erred in denying defendant's motion for a direction of a verdict at the conclusion of the case.

40

ABRAHAM M. HERMAN,  
Attorney for Defendant-Appellant.

**Summons.**

Hudson County, ss.:

The State of New Jersey, to: West Ridgelawn  
Cemetery, a corporation of New Jersey:

YOU ARE SUMMONED to answer the annexed complaint of Shelley R. Safir, in an action at law in the Supreme Court of New Jersey, Hudson County. 10

AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this Writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 20

WITNESS, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 1st day of August, 1928.

FRED L. BLOODGOOD,  
Clerk.

LEVITAN, LEVITAN & AUERBACH,  
Attorneys.

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40

**Complaint.**

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

10

SHELLEY R. SAFIR,  
*Plaintiff,*

*v.*

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

} Action at Law.

20

Plaintiff, Shelley R. Safir, residing in the City of New York, State of New York, respectfully shows:

1. Defendant West Ridgelawn Cemetery is a corporation organized pursuant to the Cemetery Laws of the State of New Jersey.

2. On or about the 17th day of June, 1927, plaintiff entered into an agreement with the defendant for the purchase of cemetery plots, a copy of which agreement is annexed hereto and marked Exhibit "A."

30

3. In accordance with this agreement plaintiff exercised his option by transforming the purchase of the cemetery plots into a loan for Three thousand (\$3,000) dollars, which option was in writing, a copy of which is annexed hereto and marked Exhibit "B."

40

4. Plaintiff has satisfactorily performed his part of the agreement, but the defendant has refused and still refuses to return the sum of \$3,750.00, although a demand was made for the

*Exhibits Annexed to Complaint.*

return of said sum on June 17, 1928, and several times thereafter.

Plaintiff claims damages in the sum of \$3,750.00 together with interest from June 17, 1928.

LEVITAN, LEVITAN & AUERBACH,  
Attorneys for Plaintiff. 10

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EXHIBIT "A."

Adam Frank, President      Tel. 2604 Vanderbilt

WEST RIDGELAWN CEMETERY

office of the president

36 West 44th Street,

New York

Grounds: 20

Passaic Avenue

and

Allwood Road,

Clifton, N. J.

(Bet. Passaic and Nutley)

June 17th, 1927

Dr. Shelley R. Safir,

1646 Weeks Avenue,

Bronx, N.Y.C. 30

Dear Sir:—

It is understood that the contract of 1927, whereon you have paid \$3,000, may at your option be transferred into a loan at one year of said amount, plus 25% interest upon your giving us 90 days previous notice in writing, which may be mailed to this office; in which event the land covered thereby shall revert to this company, and any necessary instruments of cancellation executed between us. 40

Any upkeep charges during said period are waived,

*Exhibits Annexed to Complaint.*

and it is understood that the President of this Company will personally serve as trustee for the collection and turning over to you of said amount.

Yours very truly,

10

WEST RIDGELAWN CEMETERY

By ADAM FRANK  
President.

## EXHIBIT "B."

February 23, 1928

West Ridglawn Cemetery  
36 W. 44th Street,  
20 New York City

Gentlemen:

On behalf of Dr. Shelly R. Safir of #301 East Broadway, New York City, we hereby notify you that in accordance with the agreement dated June 17th, 1927, he exercises his option to transform the purchase of the cemetery plots made on the 17th day of June, 1927, into a loan for \$3000.00 at one year plus twenty-five (25%) per cent profit, the year to expire on the 17th day of June, 1928.

30

Please be advised therefore, that on June 17th, 1928, our client will be prepared to receive the sum of \$3750.00 from you and he, on his part will be ready to execute all necessary instruments of cancellation between you and him.

Very truly yours,

AL:AG

LEVITAN, LEVITAN & AUERBACH  
by

40

ABRAHAM LEVITAN.

**Answer.**

NEW JERSEY SUPREME COURT,  
PASSAIC COUNTY.

<p style="text-align: center;">SHELLEY R. SAFIR, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">WEST RIDGELAWN CEMETERY, <i>Defendant.</i></p>	}	<p>10</p> <p>Action at Law.</p>
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Defendant, answering the complaint filed in this cause says that:

1. It admits the allegations contained in paragraph one of the complaint. 20

2. It denies the allegations contained in paragraphs two, three and four of the complaint.

FIRST SEPARATE DEFENSE.

The alleged agreement purporting to bind this defendant was entered into by one Adam Frank, without authority to bind it.

SECOND SEPARATE DEFENSE. 30

The alleged agreement purporting to bind this defendant is *ultra vires* and not within the powers granted to it, in its charter and by-laws.

THIRD SEPARATE DEFENSE.

The alleged contract purporting to bind the defendant is without a consideration and unenforceable.

FOURTH SEPARATE DEFENSE. 40

Defendant hereby alleges that the said com-

*Reply.*

10 plaintiff of plaintiff does not allege or disclose any cause of action against the defendant and hereby reserves its right to set up and raise at the trial of this issue, the objection that said plaintiff fails to allege or disclose any cause of action against defendant in that:

(a) It appears that the alleged contract is not supported by any present consideration and is unenforceable.

ABRAHAM M. HERMAN,  
Attorney of Defendant.

**Reply.**

20

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

SHELLEY R. SAFIR,  
*Plaintiff,*

*v.*

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

} Action at Law.

30

Plaintiff replying to the answer of the defendant says that:

1. Plaintiff denies the first, second, third and fourth separate defenses.

40 The plaintiff hereby alleges that the said defenses of defendant do not allege or disclose a sufficient legal defense against the plaintiff, and hereby reserves his right to set up and raise at the trial of this issue, the objection that the said de-

*Case.*

defendant fails to allege or disclose a sufficient legal defense against plaintiff.

LEVITAN & LEVITAN,  
Attorneys for Plaintiff.

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NEW JERSEY SUPREME COURT,  
PASSAIC CIRCUIT.

<p>SHELLEY R. SAFIR, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>WEST RIDGELAWN CEMETERY, <i>Defendant.</i></p>	}	<p>At Law.</p>
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Paterson, N. J., October 22, 1929.

Before—Hon. NEWTON H. PORTER, Judge, and a  
Jury.

APPEARANCES:

For the Plaintiff: LEVITAN AND LEVITAN,  
Esqs.

For the Defendant: ABRAHAM M. HERMAN,  
Esq. 30

(A jury was called and sworn.)

PLAINTIFF'S OPENING.

Mr. Levitan: May it please your Honor, ladies and gentlemen of the jury, this case we are about to try is rather a simple one; there is nothing complicated about it. The facts briefly are as follows: In May, 1927, Dr. Safir, who we will show you is a high-school principal, had some money to invest

40

*Case.*

and was accosted by the agent of the defendant, which was a cemetery association up here near Passaic. They had a large plot in a cemetery that was used for Jewish burial purposes. Their cemetery agent accosted Dr. Safir and arranged with  
10 him to sell him some cemetery lots at a certain price, which we will show you was \$100 a plot, and he bought 30 plots for \$3,000. Thereafter, after the plots were purchased, he gave a \$1,000 deposit to the agent and arranged with this agent upon certain terms, namely, that as an inducement he received a double proposition, that he would have the lots, and if at the end of the year, after he had paid his money, he was not satisfied with the investment, he would get his money back plus  
20 a reasonable, small profit then agreed upon of twenty-five per cent. So it was arranged, and after the deposit was paid the contract was brought back to Dr. Safir for inspection and he looked at it and he found that this privilege of turning back the property and getting his money was missing, and the agent accordingly went back and came back with an additional paper in writing, which we will show you stated as follows: "It is understood that the contract of 1927 whereon you have  
30 paid \$3,000—" at the same day when this paper was executed he paid the difference of \$1,500 and \$500 which was credited on another matter, making a total of \$3,000, and a receipt was given him as follows: "It is understood that the contract of 1927 whereon you have paid \$3,000 may at your option be transferred into a loan at one year," etc.  
(Reads.)

In other words, at the time he paid his money he received this additional option of at the end  
40 of the year either occupying the property or

*Case.*

getting his money back. Dr. Safir was not satisfied with the condition of the cemetery development there, and in due course of time, we will prove to you, he notified the cemetery association that he wanted his money back in accordance with the terms of this contract. The money was never paid, and we are suing to get back this \$3,000. We will show you that we actually paid this money, and we served this notice, and this letter was executed, and if we prove those facts to you, gentlemen, we will ask you for a verdict of \$3,000 plus the interest in accordance with the terms of the contract.

10

## MOTION FOR NONSUIT.

Mr. Herman: If the Court please, if I am permitted at this time, I want to make a motion for a nonsuit in favor of the defendant on the pleadings filed in the case and upon the opening of counsel to the jury, upon the ground, first, that according to the pleadings and according to the opening the writing upon which they base their claim is wholly without consideration in that it alludes to a contract that had been previously executed between the parties, and that this writing or letter came subsequently thereafter, and there was absolutely no consideration for it whatsoever. On that ground the plaintiff could not establish a *prima facie* case. Secondly, upon the ground that if this paper upon which they rely is in fact a contract, the contract would be *ultra vires*, because no cemetery association has the power, as I understand it, to make a contract of that nature. The cemetery corporation derives its power solely and purely from its statutory provisions; it is limited by its statutory provisions. The cemetery as-

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30

40

*Case.*

10       society is a quasi public corporation and should be limited strictly. It has certain privileges, certain exemptions; it need not pay any taxes to the community in which its property lies. There is nowhere in the statute any provisions whereby a cemetery association could by its board of trustees sell a piece of property and then agree to rebuy that property at a later day, paying a profit to the buyer.

20       There is another ground in support of my second point. Section 62 of the Cemetery Act provides the only way in which a cemetery association can buy property, and this is in effect a contract for the repurchase of property, and that provides that any property or any lot owner desiring to convey a lot to the cemetery can do so only upon three-fifths consent of the board of trustees. Nowhere in the pleadings or anywhere in the opening do they allege that such authority had been given. Section 4 of the Cemetery Act provides that any deed of conveyance must be signed by the president and the treasurer, and I assume that any contract or conveyance to be effective must have the same solemnities that the deed of conveyance would have, and any contract whereby a cemetery agreed to repurchase property would naturally have to be signed formally both by the president and treasurer under the seal of the company, and would further have to show a three-fifths consent of the board of trustees.

30       The Court: Title never passed to this, did it?

Mr. Levitan: No, sir.

The Court: There is no repurchase, is there?

40       Mr. Herman: This contract itself, which is not a part of the pleadings, is a contract for the purchase of certain lots.

*Ernest Kurzorak, direct.*

The Court: Did he or did he not get the title? He did not. That contract was never carried out.

Mr. Herman: No. The purchaser did not carry out the rest of the provisions of his contract. He had contracted to buy \$6,000 worth of cemetery lots for burial purposes. We allege he paid \$2,500 on account. That is one question of fact, I suppose, that may have to be decided. He paid \$2,500 on account and agreed in the contract to make semi-annual payments, I think within a period of two years. He has not carried out that provision of the contract. The contract provides, among other things, that the cemetery association may at its option deed to the buyer certain lots included in the price, in the amount of money already paid, I think with a diminishment of ten per cent., but the contract itself is a formal instrument that has been executed prior to this letter. This letter is signed by Mr. Frank, and Mr. Frank under no stretch of imagination would have the authority to bind the cemetery association to such a contract. He is limited purely by the statute. I think on those grounds we are entitled to a nonsuit in favor of the defendant.

(Mr. Levitan replied.)

The Court: I will deny the motion.

Mr. Herman: I ask for an exception.

The Court: You may open to the jury.

(Counsel for the defendant opened the case to the jury.)

---

ERNEST KURZORAK, sworn.

*Direct examination by Mr. Levitan:*

Q. Mr. Kurzorak, where do you live? A. I live at 411 Paulison Avenue, Passaic, New Jersey.

*Ernest Kurzorak, direct.*

Q. What is your business? A. I am a cemetery salesman.

Q. Where were you employed during the years 1926 and 1927? A. I was employed at the West Ridgelawn Cemetery.

10 Q. Who was president of that corporation at that time? A. Adam Frank.

Q. What capacity were you employed? A. I was employed as the superintendent.

Q. Do you see Mr. Frank in court, Adam Frank? A. Yes, I see him.

Q. The gentleman alongside of Mr. Herman? A. Yes.

Q. Did you sell any land for this West Ridgelawn Cemetery? A. Yes, I sold considerable.

20 Q. How much did you sell? A. Oh, ran about 80,000.

Q. How much? A. I should say about 80,000.

Q. How many plots or parcels? A. Oh, offhand I could not say; must have been about—I should judge about—

Q. Roughly speaking, as near as you can tell. A. Oh, around 200 plots or more.

30 Q. To about how many purchasers, roughly speaking? A. Oh, about from fifteen to eighteen purchasers, that is roughly.

Q. Who conducted the negotiations on behalf of the cemetery corporation for these purchasers? Who represented the cemetery corporation during these transactions? A. Mr. Adam Frank as the president.

Q. Anybody else? A. Well, no, Mr. Adam Frank is the president.

40 Q. You brought the purchasers to Mr. Frank? A. Yes; I acted as a sort of salesman, with my other duties as superintendent.

*Ernest Kurzorak, direct.*

Q. What compensation did you receive? A. Originally I started at \$35 a week and then I had my expenses paid.

Q. Do you know Dr. Shelley Safir? A. I do.

Q. He is related to you, is he? A. Yes, sir.

Q. In what capacity? A. Brother-in-law. 10

Q. Did you have any transactions with him with reference to the cemetery corporation? A. Yes.

Q. When? A. Well, on the first occasion was sometime during the late spring of 1926.

Q. That transaction was complete? A. Yes.

Q. Did you have any other transactions with Dr. Safir? A. Yes.

Q. When? A. Well, about three or four months after that first transaction. 20

Q. Do you recall a transaction in the month of May, 1927? A. Yes.

Q. I show you a check and ask you if you recognize that check and that endorsement. A. Yes.

Q. Will you please tell the Court and jury the circumstances under which you came to receive this check? We will mark it for identification.

(Paper marked P-1 for identification.)

A. It was during the spring of 1927, that the cemetery was under some difficulties due to the fact that Dr. Gourley of Clifton was after the cemetery because it was not really conducted in a cemetery way. It had no office building. It looked more like a farm, and they hadn't improved and also the—it had no appearance of being a cemetery; all it had was one of those builder's shacks; and we also found that the prospects who came out to look at the property were discouraged and we couldn't sell any ground. 30  
40

*Ernest Kurzorak, direct.*

Mr. Herman: I object to any conclusions.

The Court: Yes, we are not concerned with that.

10 Q. Just tell us what led up to your getting this  
check for \$1,000 which was identified. A. Well,  
Mr. Frank—sales were kind of poor, and Mr.  
Frank came to me and said, "Gee, we have got to  
put up some improvements on the place; the tun-  
nel is about to open and we are expecting to get  
some business from the New York organizations,"  
and I said, "To get outsiders in it is almost impos-  
sible. I tell you the only thing I can do is to get  
some money among some of my friends," and he  
said, "That will be all right, Kurzorak, we will ap-  
20preciate that very much. It will be a feather in  
your hat if you can do that," and I went ahead,  
and I said, well, we haven't got much—

The Court: We do not want conversa-  
tion. The purpose of what you say is that  
you were short of money?

The Witness: Yes, sir.

The Court: Well, then, what, after you  
discussed the need for moneys?

30 The Witness: Well, then the thing was to  
see where we could get it from.

The Court: What did you do?

The Witness: Then I went and spoke—

Q. Just pardon me. What were your instruc-  
tions by Mr. Frank to proceed to do? A. Well,  
to try to sell some ground, and give some induce-  
ment should anyone want to realize their money  
back.

40 Q. Tell us specifically what those instructions  
were. A. Well, that he would sell some ground in

*Ernest Kurzorak, direct.*

the Gilead section. If I had some sort of description—

The Court: We are not concerned where it was.

A. The Gilead section, which is considered the back of the cemetery. 10

Q. That was an inferior part of the cemetery?

A. That was in the wooded section. That he would give us that ground at \$100 per plot, and I said, "Well, Mr. Frank, should my folks want—should there be some reason for their being remunerated—should they want money for some cause and that ground would not be ready for sale for a number of years yet, because there were no roads or it is not improved, nothing but a wilderness," and he said, "Kurzorak, I will tell you what we will do. We will take care of that. Why, it is worth to the cemetery twenty-five per cent. to take care of that property, should we put up our office building it will be something worth while, the cemetery will gain considerably more than what we will be able to repay your brother-in-law." 20

Q. With those instructions what did you do? A. Why, I went to see my brother-in-law, Safir. 30

Q. That is the plaintiff in this suit? A. Yes, and I spoke to him about it, and I thought it would be more or less—however, I being, of course, in the business, he asked my advice, and I said, "Yes, the cemetery would remunerate him and that it would be a pretty good investment, a safe investment," and he said, "All right," he said, "here is \$1,000; see what you can do about getting the contract drawn up," and he also said, "I want some sort of clause whereby should I want my money, why, the cemetery will turn it to me without reselling." 40

*Ernest Kurzorak, direct.*

The Court: Without what?

The Witness: Without reselling it to anybody outside.

10 Q. As a result of that conversation was that the time you received the exhibit P-1 for identification? A. Yes.

Mr. Levitan: I offer this check in evidence.

Mr. Herman: No objection.

(Check marked Exhibit P-1 in evidence.)

Q. After that check was given what did you do?

20 A. Why, then I went and took this check—I took that check—it was too late to go to Mr. Frank's office; he lived out in Passaic, and I deposited that check in my account in the Service Trust Company in Passaic.

Q. When, if at any time, did you turn over that money to the West Ridgelawn Cemetery? A. I think it was on May 27th that I went down to the office, and I met Mr. Frank at the cemetery office in New York, and I said that we are ready to proceed with the sale, and I handed him the check for this thirty—for this sixty plots in that Gilead section.

30

Q. Your personal check? A. My personal check.

Q. For how much? A. For \$1,000.

Mr. Levitan: I will ask the other side to please produce that deposit slip, that record showing the receipt by the corporation of that check. I might say that all the papers in connection with the cemetery and Mr. Frank's transactions have been impounded by Vice Chancellor Backes in the Court of Chancery and were brought here

40

*Ernest Kurzorak, direct.*

by Mr. Braverman, who represented the Court.

Mr. Herman: I must object to counsel's statement. It had nothing to do with it. It is merely stated for the effect on the jury.

Mr. Levitan: Will your Honor send a constable up to Judge Mackay's court for that file?

10

The Court: Mr. Lee, will you send one of the constables upstairs to Judge Mackay's court to bring down some papers there in case 110?

Mr. Herman: We want to expedite matters. We are willing to consent to the fact that we received \$2,500 and also a certain contract was signed.

20

Mr. Levitan: We will want those papers, because there are other exhibits.

The Court: You will want them anyway. All right.

(Stipulation repeated by the reporter.)

*By Mr. Levitan:*

Q. Now, Mr. Kurzorak, after you delivered your check for this \$1,000 to Mr. Frank on behalf of the corporation, what else was done then? A. Why, then Mr. Frank drew up the contract with the young lady by the name of Miss Malane in the office there, and he asked her to draw up a contract for sixty plots in the Gilead section.

30

Q. I show you a contract dated the 27th of May, 1927, and ask you if that is the contract you refer to. A. Yes, that is the contract.

Mr. Levitan: Want to see that? You admit the signature? I offer this.

40

The Court: Let it be received.

(Paper marked Exhibit P-2.)

*Ernest Kurzorak, direct.*

Q. Now, this contract recites the receipt of \$3,000. Was \$3,000 paid at the time of the 27th of May? A. I will have to explain that.

Q. Yes, please do. A. There was only \$1,000 paid on that date.

10 Q. Yes? A. With the understanding that I get \$1,500 from my brother-in-law and that \$500 would be paid to me as a commission on the total sale of \$9,000.

Q. Was that the understanding under which the \$3,000 was recited in there? A. Yes.

Q. What did you do when that contract was executed by Mr. Frank on behalf of the cemetery? A. I brought that contract up to my brother-in-law for him to look over and for his approval.

20 Q. What did he do after he looked at it? A. Well, he claimed that the—

The Court: What did he do?

A. Well, that it was not fully as to what I told him what the cemetery would do.

Mr. Herman: I ask that that be stricken out.

The Court: Strike it out as not responsive. The question is, "What did he do"?

30 The Witness: He read the contract.

Q. Then what did he do after he read it? A. He claimed it was not up to his expectations.

Mr. Herman: I object.

The Court: That is not what he did, is it?

A. Well, he said—he expected another document. He says there was not a full document as to what he was supposed to get.

40 Q. What other document did he demand? A.

*Ernest Kurzorak, direct.*

As I said before, there was supposed—he was supposed to get an extra remuneration.

Mr. Herman: I object.

The Court: He may recite what the contract was. That is what he is trying to do.

10

A. Yes, that there would be a remuneration—should they want to dispose of their—sort of an option should they want to turn the ground back without keeping it, they would have it for a year.

*By the Court:*

Q. In other words, what you are trying to say, I take it, is that Dr. Safir refused to sign it because it was not the contract that he made? A. Yes, sir.

Q. The understanding that was had; is that it? A. Yes, sir.

20

The Court: All right. Let us get along.

*By Mr. Levitan:*

Q. Why didn't you say that, if that is the fact? What did you do then? A. Well, then I went back to Mr. Frank and I told him about it. He said, "Well, we will straighten that out." He said, "You are too good a man for me to go back on you in a way like that." He says, "I realize your willingness to help the cemetery along."

30

Q. What did Mr. Frank do or what did you do after that? A. Well, the thing is he kept on riding the thing along and I didn't get that contract, that approval.

Q. This was on the 27th of May or a few days thereafter; what did you do then? A. Why, then I said to my brother-in-law, I said, "Gee, we are all ready getting the signing up of the contract and we have to get some money to pay for that building,"

40

*Ernest Kurzorak, direct.*

and I says, "We will have to get that contract. We will have to get that money for you for the contract."

Q. Went back to Safir and asked him to give you the balance of the money? A. Yes.

10 Q. What did he say? A. He said, oh, well, he will give it to me if he gets that letter.

Q. What did you do after that? A. Well, I asked him for the check to close that deal.

Q. Did he give you a check? A. Yes, he gave me a check.

Q. I show you a check for \$1,500 dated June 10, 1927, and ask you if that is the one you refer to. A. Yes, this is. It is a certified check.

20 Mr. Levitan: I offer it in evidence.  
(Check marked Exhibit P-3.)

Q. After you received this check from Dr. Safir, Exhibit P-3, what did you do? A. Well, I went down to Mr. Frank with it.

Q. What did you say to him? A. I told him that my brother-in-law is trusting the entire transaction to me and I want to make sure, although I am representing the cemetery, I want to see the thing go through with him, after all he is in the family.

30 Q. All right. What did Mr. Frank say? A. Well, he said, "I will give you that letter to appease your brother-in-law."

Q. What letter are you referring to? What was said before the letter, if anything? What did Mr. Frank say before that? A. Well, he said that—when I spoke to him about this option to return the money plus the suitable interest to cover the money invested—

40 Q. What did Mr. Frank say? A. He said, "We will agree to that."

*Ernest Kurzorak, direct.*

Mr. Herman: I object to this line of questioning.

The Court: What is the purpose of it?

Mr. Levitan: Showing that this was the agent of the defendant, to show the transaction.

10

The Court: I will allow that if that is the purpose.

Mr. Herman: I ask an exception.

(Question repeated by reporter as follows:) "Q. What did Mr. Frank say?"

A. Well, he said, "Kurzorak, I will do anything to appease your brother-in-law, and I will give him an option for the return of his money when he wants it."

20

Q. Then what did Mr. Frank do? A. Then he dictated a letter to the stenographer, and I gave him the check, and he says, "You better go down and get it certified," because he has to make a payment to Abramson the builder.

*By the Court:*

Q. How much had been paid at that time? A. \$1,000.

Q. That is all? A. Yes.

30

*By Mr. Levitan:*

Q. I show you this check marked P-3 for identification bearing, I suppose, the certification stamp on June 17th, and the check being dated June 10th. How do you explain the seven days lapse of time?

A. Well, I tell you, I couldn't get hold of Mr. Frank to make up that paper, and I was not going to take the responsibility upon my own shoulders, because it was quite a considerable amount of money,

40

*Ernest Kurzorak, direct.*

because I didn't want to have any bad feeling in the family, and I wanted to make sure if he wanted that option I was going to try to get it.

Q. Who had the check certified? A. Mr. Frank.

10 Q. You went to the bank? A. I went to the bank.

Q. You yourself? A. Yes.

Q. After you had the check certified and brought it back what did you do with it? A. I gave it to Mr. Frank.

Q. Then what did Mr. Frank do? A. Well, he thanked me for the help, as I said before, because I am helping him along with the cemetery.

20 Q. When did you get that option or whatever you call it, that other letter? A. Upon my giving him the check he told his stenographer to draw up the letter.

Q. I show you a paper dated June 17th, 1927, signed by West Ridgelawn Cemetery, by Adam Frank, president, and ask you if you ever saw that before. A. Yes.

Q. When? A. Why, when I gave him the check.

Q. Was that letter delivered to you when you gave him the check? A. Yes, sir.

30 Mr. Levitan: I offer the check and letter in evidence.

The Court: Let them be received.

(Check and letter marked Exhibits P-3 and P-4.)

*By the Court:*

Q. This says, "The contract upon which you had paid \$3,000 may at your option be transferred into a loan," et cetera? A. Yes.

40 Q. Yet there had been only \$1,000 paid, had

*Ernest Kurzorak, direct.*

there not? A. No; at that time there was \$2,500 paid.

Q. I asked you that a moment ago, how much was paid at that time, and you said \$1,000. A. No, at the delivery of the contract, when I had to bring it back for my brother-in-law, that is the time I delivered it. 10

*By Mr. Levitan:*

Q. What, if anything, was said about the balance of \$500? A. Well, it had been customary for me to receive—

The Court: No, no. Not what had been.

Q. What did you say and what did Mr. Frank say with reference to the balance of \$500? A. The 500 would be covered as my commission in the sale. 20

Q. Was that discussed when the \$3,000 was mentioned in this letter? A. Yes, that was discussed all throughout the entire transaction.

*By the Court:*

Q. Was that discussed at the time you got the letter? A. Why, it was not discussed at the time I got the letter, but it was discussed at the time I got the contract and it was discussed throughout the entire proceedings. 30

*By Mr. Levitan:*

Q. You know Mr. Frank's signature, do you, when you see it? A. Yes.

Q. Is that endorsement there in the handwriting of Adam Frank, if you know? A. Yes.

Mr. Herman: We admit the signature. We admit the check for \$2,500. 40

(Adjourned to October 23, 1929, at 10 A. M.)

*Ernest Kurzorak, direct.*

Paterson, N. J., October 23, 1929, 10 A. M.

(Trial of the Cause Resumed.)

ERNEST KURZORAK, resumed.

10 Mr. Levitan: I was through with the witness yesterday, if your Honor please, but may I ask your Honor's permission to offer some photographs?

The Court: You may.

*Further direct examination by Mr. Levitan:*

Q. Mr. Kurzorak, are you familiar with the cemetery property in question? A. I am, sir.

20 Q. Have you ever been on the premises? A. Yes, sir.

Q. I show you some photographs and ask you if you ever saw these before. A. Yes, sir.

Q. What are those photographs?

Mr. Herman: I object. I don't know what they are. I don't know what the purpose is.

The Court: What is the purpose?

30 Mr. Levitan: We want to show the building that was put up there with part of this money that the witness has testified he wanted 9,000 for.

The Court: What difference does that make? What materiality has it as to what he wanted the money for?

Mr. Levitan: Corroboration of his testimony.

40 The Court: I will sustain the objection. You may use them in rebuttal if it becomes necessary. Do not let us go afield.

Mr. Levitan: That is satisfactory.

*Ernest Kurzorak, cross.**Cross examination by Mr. Herman:*

Q. Mr. Kurzorak, you testified you were employed by the West Ridgelawn Cemetery? A. Yes.

Q. For how long? A. Why, from, I guess, the early part of September, 1926, and then until the latter part of—I think it was September, 1925, until about the last part of June, 1927.

10

Q. What was your position? A. Well, I guess that I was supposed to be the landscape gardener and superintendent. That was the original understanding.

Q. I thought you testified yesterday that you sold about \$80,000 worth of cemetery land during that period? A. Yes, approximately.

Q. When you say you sold it do you mean that you negotiated the deals? A. I engineered the deals.

20

Q. You engineered the deals? A. Yes.

Q. Were you paid any extra compensation for that? A. Yes, at times I was.

Q. What is that? A. At times I did receive remuneration.

Q. At other times you were not? A. At other times I was not.

Q. What was your rate of compensation at the time you were paid? A. Well, five per cent. and over. In the Belleville Congregation deal I received five per cent., and then I don't know whether the Congregation on Attorney Street in New York City—I received a sort of bonus charge, more than five per cent., amounted to about almost nine or ten per cent.

30

Q. What was the last sale you made previous to the sale to Safir? A. Well, it was either the sale to Mr. Beckowitz or the Walkowista Synagogue, or to Dr. Schwartz of Washington, D. C.

40

*Ernest Kurzorak, cross.*

Q. Do you recall the price per unit of that last sale to Mr. Beckowitz?

Mr. Levitan: I object to it as irrelevant and immaterial.

10 The Court: What is the relevancy of it?

Mr. Herman: Just a question of attacking the witness. He opened it up.

The Court: You may ask it.

A. Yes, I believe it was about \$150.

Q. This sale to Mr. Safir was at what price per unit? A. Well, at \$100. In a different section entirely.

Q. \$100? A. Yes.

20 Q. Have you ever in all of your experience during that period sold any land at less than \$100 per unit to anybody? A. Yes.

Q. To whom? A. Well, I was in on the transaction that Herman Goldberg got their property for about \$95.

Q. How long ago was that? A. Oh, that was about less than a year or so before.

Q. About a year before that? A. Yes, about that, and it was in a more favorable location.

30 Q. Were you ever paid a salary? A. At that time I was paid a salary.

Q. How much? A. Well, at that time I received \$35 and my expenses.

Q. 35 and expenses? A. Yes.

Q. At the time you put this deal through were you being paid a salary? A. Yes.

40 Q. The same salary? A. Oh, you see we altered that agreement, being that I did not spend as much time on the grounds, but I did more of the selling than of superintending the grounds. I was more of a selling agent then at that time. Most of my time was spent at—

*Ernest Kurzorak, cross.*

Q. What was the different arrangement? A. Well, I was supposed to receive \$35 for my salary and I received a certain amount of money, varying with the—my expenses paid, for instance, like my fares and my other expenses, taking people out for lunches and expenses a salesman would have of taking out a client for lunch. 10

Q. Your salary was \$35 a week plus expenses; is that what you mean to say? A. Yes.

Q. And your interest in this transaction was merely as an agent for the cemetery? A. Which transaction, sir?

Q. The transaction with Mr. Safir? A. Well, no, it was a bit more than that. You see, my brother-in-law at the time when this transaction was consummated, he would not, of course, go into it without my being a copartner in it. 20

Q. You were a partner in that transaction? A. Yes, I was a partner in that thing.

Q. You were interested, then, in this contract? A. Yes, as I was in previous contracts, too.

Q. Will you still say, then, as a partner and principal in this transaction, you were working entirely as the agent for the West Ridgelawn Cemetery?

A. Yes, I was, and it was to the knowledge of everyone concerned, Mr. Herman. 30

Q. Yes. You were to receive a commission in addition to your usual compensation? A. Yes; it was a commission.

Q. Commission? A. Yes.

Q. You were a principal? A. And I was a principal.

Q. Now, when you gave the first check to Mr. Frank I think you testified sometime on May 27, 1929, whose check was that? A. It was my personal check. 40

*Ernest Kurzorak, cross.*

Q. Your own personal check. That represented your part of the transaction? A. No, it did not. It was due to the fact that—

The Court: You have answered it.

10 Q. But you did take a half interest in that transaction? A. I did take an interest in that contract, not a half interest.

Q. How much was your interest? A. Well, that would vary according to my being able to get the funds to cover the thing, you see.

Q. But there was an arrangement that would vary according to your arrangement with Mr. Safir; is that correct? A. Yes.

Q. As far as the cemetery was concerned, you and Safir were jointly on that contract? A. Yes.

20 Q. As far as the cemetery is concerned, they received your check of \$1,000 for the first payment and at that time you accepted the contract? A. Yes.

Q. Yes. Did you deliver that contract to Mr. Safir? A. Yes.

Q. Did he sign it? A. Yes.

Q. He did sign it? A. With the understanding—well, not at the original—not the first time I brought the contract.

30

The Court: He asked you if he signed it.

The Witness: He signed it at the second time—when I brought the letter he signed the contract.

The Court: His answer is he did.

Q. Did you sign that contract? A. Yes.

Q. Where is that contract now? A. That contract must be in Mr. Frank's possession.

40 Q. As a principal you accepted that contract on May 27th and gave \$1,000; am I right? A. Yes.

*Ernest Kurzorak, cross.*

Q. Now, in the letter referred to, dated June 17th,—to what contract did that refer? A. It refers to the contract that we—

Q. Of May 27th? A. Of May 27th.

Q. Why, Mr. Kurzorak, if you were a principal, was not that letter addressed to both you and Mr. Safir? A. Well, I will tell you, it was this way, during that intervening period certain things arose whereby I found that I could not continue with that carrying out of the contract and I told Mr. Frank so, so I said the best thing for him to do was to address the thing to my brother-in-law and for my brother-in-law to be the sole owner of that property.

10

Q. And notwithstanding the fact that you had no more interest in the contract, as you state now, you delivered your signed contract to him the day you got the letter? A. Yes.

20

Q. So that you are still on the contract? A. I am still on the contract, yes.

Q. Why, Mr. Kurzorak? A. Well, Mr. Frank and I got—

Q. Wasn't your name taken off that contract by Mr. Frank? A. Mr. Frank and I got in some difficulties about that time, and the understanding we had at that time was that I would be able to make most of my payments as I had in the previous time—make my payments due to commissions received on other sales, and when I found that I did not dare to assert myself any longer with Mr. Frank, why, I told him that, and he agreed at that time that it would be O. K.

30

Q. Are you trying to tell me now that because Mr. Frank had difficulties with you he tried to relieve you of your contract to pay? A. Yes, sir.

40

The Court: Was not the contract offered yesterday?

*Ernest Kurzorak, cross.*

Mr. Herman: Yes.

The Court: Of which this June 27th is the supplemental agreement?

Mr. Levitan: Yes.

The Court: It is in evidence?

10

Mr. Levitan: Yes.

Q. Were both contracts signed, Mr. Kurzorak?

A. No; the only—the duplicate that I returned to Mr. Frank was signed.

Q. You are certain that was signed? A. Yes.

Q. And signed by yourself and Mr. Safir? A. Yes, and Dr. Safir.

Q. You witnessed Mr. Safir's signature? A. We were in the same house with Mr.—

20

Q. During all this time did Mr. Safir see Mr. Frank? A. No; Mr. Safir left practically the next week then on his vacation to Belmar and he stayed there all summer.

Q. Next week when? A. It was right after the 17th.

Q. You mean the 17th of June? A. After the 17th of June.

30

Q. We are talking about the period between May 27th and June 17th. A. No; at that time he did not see Mr. Frank.

Q. And he left that entirely to you? A. Yes, to me, as in all transactions.

Q. As a partner he left the whole transaction to you? A. As a partner and agent, of course.

Q. Was that letter mailed to Mr. Safir or delivered to you? A. No; it was given to me at the time.

40

Q. Isn't it a fact Mr. Safir knew that you were getting \$500 commission? A. Yes; I told him that I was getting \$500.

Q. \$500 commission? A. Yes, sir.

*Ernest Kurzorak, redirect.*

Q. Was that supposed to represent the \$500 and a thousand dollars, was that supposed to represent your half of the contract? A. No; it was not supposed to represent my half; it was only supposed to represent the 500 that I put into the deal.

Q. Is it your contention, Mr. Kurzorak, that if Mr. Safir had this option, that \$3,000 would be returned to him plus interest at twenty-five per cent. for the use of one year? A. Yes.

10

Q. That you were still to receive \$500 commission? A. Yes.

Q. In other words, the cemetery would pay for the use of \$2,500, \$1,250; is that correct? A. This \$500, pardon me, was not on \$3,000; it was on a \$9,000 sale that was consummated during that period, and on May 27th there were two contracts made out to Dr. Schwartz and to Dr. Safir—there is a total of \$9,000.

20

Q. Dr. Schwartz is the other suit we have in this court? A. Yes.

Q. Also on a similar proposition? A. Yes.

Q. So it is your contention that this money plus a commission is to be returned to Dr. Safir, plus twenty-five per cent. commission? A. Yes.

Q. That was the arrangement? A. Yes.

30

Q. And you would still be on that contract? A. No. When I received that letter, the understanding was that I would be released from that contract.

Q. The understanding is as expressed in that letter? A. As in the letter, yes. The letter was the final thing we do.

Q. That is all.

*Redirect examination by Mr. Levitan:*

Q. Mr. Kurzorak, you testified about the sales of plots. Will you please explain to the Court and

40

*Ernest Kurzorak, redirect.*

10 jury who were these individuals or organizations that purchased these plots? A. Well, we have had different varieties of plot owners. We have had them bought for organizations and synagogues, family plots, and also people who were induced to invest money in the cemetery to aid the cemetery in organizing and developing.

Q. Most of these other sales that you made were to whom? A. To organizations and synagogues and burial societies.

Q. Jewish organizations? A. Yes, strictly Jewish.

Q. They bought certain tracts? A. Yes.

Q. And subdivided them into plots themselves? A. No. The unit was 16 by 20. It was a plot. That is the unit.

20 Q. That was a standard, I suppose, of the cemetery? A. Yes.

Q. The different organizations would purchase a certain number of units, multiples of these units? A. Yes. A tier would be another form. It would vary from, say, about eight to ten plots to a tier.

Q. And you would sell it in the form of tiers, would you? A. Yes; we will sell it in the form of tiers, but gauge it by plots.

30 Q. You testified in answer to Mr. Herman's question that you are interested in this proposition of the claim of Dr. Safir's now. Did I understand you correctly? A. No, I was interested until the 27th of June, 1927.

Q. The 17th of June. A. 17th of June.

Q. Well, have you any interest in this litigation whatever now? A. No, I have no interest—

40 Mr. Herman: I object, if the Court please. The contract is in evidence and it speaks for itself.

*Dr. Shelley R. Safir, direct.*

The Court: I will allow it. I think it is proper.

A. I have no interest in it whatsoever now.

Q. When you accepted this contract for Dr. Safir on June 17th, 1927, in what capacity did you accept it—as a principal or as agent? A. Well, at that time I already was just—as agent, see. 10

Q. That is all.

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DR. SHELLEY R. SAFIR, sworn.

*Direct examination by Mr. Levitan:*

Q. Mr. Safir, where do you live? A. 1646 Weeks Avenue, New York City.

Q. You have been referred to here as a doctor. What kind of a doctor are you? A. That takes in the eye doctor who is known as a doctor of philosophy, no particular subject. My subject being biology. 20

Q. What is your profession? A. I am Professor of Biology in the Asheva College, New York City.

Q. Do you know Mr. Kurzorak? A. Yes.

Q. How long have you known him? A. Ever since he was a child.

Q. Do you know Mr. Frank, Adam Frank? A. Yes. 30

Q. Do you know the West Ridgelawn Cemetery Corporation? A. Yes, sir.

Q. Did you have any conversation with Mr. Kurzorak on or about the 26th of May, 1927, with reference to some cemetery properties? A. Yes.

Q. Just tell the Court and jury what that was.

Mr. Herman: I object to that, if the Court please, as not being binding on the West Ridgelawn Cemetery. 40

*Dr. Shelley R. Safir, direct.*

The Court: I don't understand that there is any dispute with respect to this witness being employed by the cemetery company and acting as agent. Now, if there is such, find it out.

10

Mr. Herman: If the Court please,—

The Court: But if there is, this witness cannot testify with respect to it.

Mr. Levitan: I understood that was conceded yesterday, because all the testimony was brought in without any objection and they are bound by that testimony now.

The Court: Oh, no, they are not bound by what your witness says. They may say they never saw this man.

20

Mr. Levitan: But for the purposes of the prima facie case I submit respectfully, your Honor, this man Kurzorak now is the authorized agent, as far as the plaintiff is concerned. That may become an issue in the case later on.

The Court: You say he is.

Mr. Levitan: Yes, and we have produced evidence upon which we base our conclusion.

30

The Court: All right.

Q. Now, Doctor, did you have any conversations with Mr. Kurzorak with reference to this cemetery proposition about the 26th of May, 1927? A. I did.

Mr. Herman: I object to the question.

The Court: I will allow it.

Mr. Herman: I ask an exception.

40 Q. I show you a check dated May 26th, which is in evidence marked Exhibit P-1, and ask you if you ever saw that before? A. Yes, I did.

*Dr. Shelley R. Safir, direct.*

Q. Whose check is that? A. It is my check, given to the agent of the West Ridgelawn Cemetery, Mr. Kurzorak.

Q. Will you state the circumstances under which you gave this check, please? A. Yes. He came to me and told me about some difficulties that they had at the cemetery, most of those difficulties referring to the lack of funds. They were thinking of making some improvements and they needed money badly, and that the president of the West Ridgelawn Cemetery had come to him and asked him to help raise funds. Now, he thought of various ways of doing so and finally suggested—

10

Mr. Herman: I object.

20

The Court: Oh, no, not what he thought. Just what he said to you. What was said? He proposed to you that you advance some money?

The Witness: Yes, he proposed to me that I advance.

The Court: Let us get right down to brass tacks.

The Witness: He proposed to me that I advance some money.

30

Mr. Herman: Will the Court please note my objection to the question and also to the answer, because I think in this case it is quite apparent that Mr. Kurzorak is here in the capacity of a principal. The contract is in evidence. The contract that all this controversy is about, and he is mentioned there as a principal.

The Court: This is not testimony with respect to the agency. That is not the purpose for which this testimony is going in.

40

*Dr. Shelley R. Safir, direct.*

Mr. Herman: I understood it is.

The Court: Oh, no.

Mr. Herman: He testified he spoke to Mr. Kurzorak in the capacity of an agent.

10 The Court: I strike it out. You did not object to that. It is a conclusion of this gentleman, and if you object to it I will strike it out. I will strike out that response to the question where he said as agent for the company, being a conclusion, and something that might be true and might not be true. This man does not know. Proceed.

20 A. Well, he suggested to me or he asked me to invest some money in the corporation, and I asked him upon what terms. Now, he told me the terms he and the president of the corporation had agreed upon was to purchase land at the rate of \$100 per plot and that in the event that I did not wish to hold the land until I could sell it I could get my money back at the end of a year by giving three months' notice—could get my money back plus twenty-five per cent. interest for the use of my money during that year, and I thought that those conditions—

30 The Court: No.

Q. What did you do then? A. I agreed to those conditions and gave him a check for \$1,000 as my first payment thereon.

Q. That is Exhibit P-1 that you saw? A. Yes, that check that you just showed me.

Q. When did you next see Mr. Kurzorak in connection with this transaction? A. In the course of the next few days.

40 Q. What conversation, if any, took place with reference to this transaction? A. He brought me

*Dr. Shelley R. Safir, direct.*

the contract or a statement which you call a contract and I read that contract and not finding, as I remember—not finding the second condition, namely, that I could return the land to the corporation and get my money back plus a certain percentage that we had agreed upon, I told him that I would not sign it until that clause was contained in the contract.

10

Q. I show you Exhibit P-2 and ask you if that is the document you refer to. A. It is.

Q. That bears the signature of the West Ridgeway Cemetery and not yours? A. No; I refused to sign it because it did not contain the clause that I have mentioned.

Q. What did you then say to Mr. Kurzorak with reference to this? A. I told Mr. Kurzorak that if he would bring me the statement that we had agreed upon that I would then proceed with the deal, not otherwise.

20

Q. What did Kurzorak say? A. He said he was sure he would do so and asked me for a check of \$1,500 which would discharge my half of the contract, the understanding between me and Mr. Kurzorak being that I would take thirty plots and that he would take thirty plots, that I would pay \$3,000 for my thirty plots.

30

Q. When did you next see Mr. Kurzorak after that? A. About the 17th—I believe on the 17th of June he came, or perhaps it was the morning of the 18th of June he came to me with a letter from Mr. Frank.

Q. Oh, well, wait a minute; you are a little ahead. What was the date when he came back to you after this contract had been rejected, Exhibit P-2?

Mr. Herman: I object.

40

*Dr. Shelley R. Safir, direct.*

A. Oh, a few days later; I can't remember definitely.

Mr. Herman: No question about the contract being rejected.

10 The Court: Well, the contract he did not sign. He says he cannot remember. A few days later.

A. I will say a few days later. I can't remember the exact date, only I remember I made a check about a week prior to the 17th.

Q. I show you Exhibit P-3 bearing your signature and ask you if that is the check you refer to.

A. Yes, sir; this is the check I refer to.

20 Q. Please tell us the circumstances under which this was given, Exhibit P-3. A. When he assured me that he would bring me the statement that I asked for, I gave him the check, but told him not to deliver that check to Mr. Frank until I had the statement saying that I could return the land before a year was up and get my money back plus twenty-five per cent. interest.

30 Q. Now, you testified a moment ago that your interest in this transaction was to be to the extent of \$3,000? A. That is right. Thirty plots, that was my—

Q. Where was the deficit of 500 made up? A. Mr. Kurzorak gave it to the West Ridgelawn Cemetery or to Mr. Frank, the president of the West Ridgelawn Cemetery.

Mr. Herman: I object and ask that it be stricken out.

The Court: Strike it out.

40 Mr. Levitan: I consent that it be stricken out.

*Dr. Shelley R. Safir, direct.*

Q. How was the \$500 difference between \$2,500 and \$3,000 made up, to your knowledge? A. Mr. Kurzorak owed me some money from a previous deal, that is to say, I advanced—he did not have enough money and I advanced a considerable amount of money to Mr. Kurzorak, and he owed me that money, and he told me that his commission was \$500, and therefore I should give him a check for only \$2,500; I mean \$1,000 plus 15 would be the \$500 difference he would give to Mr. Frank.

10

Q. When did you next see Mr. Kurzorak after this delivery of your check, Exhibit P-3? A. I believe about a week later he brought me a letter from Mr. Frank in which I believe he mentions the conditions that we had agreed upon.

Q. I show you Exhibit P-4 and ask you if that is the letter you refer to. A. Yes, this is the letter I refer to.

20

*By the Court:*

Q. Did you at that time sign the contract? A. Yes, sir.

Q. That you had previously not signed? A. Yes, sir.

*By Mr. Levitan:*

30

Q. Did you see Mr. Kurzorak or Mr. Frank after that? A. Yes, I did.

Q. I suppose that question is vague. When did you see Mr. Frank? A. I believe it was in the fall of that year—no, it was in August of that same year.

Q. Did you have any conversation with him at that time with reference to this property? A. Yes.

Mr. Herman: I object to that as immaterial.

40

*Dr. Shelley R. Safir, direct.*

The Court: What is the materiality? What difference does it make?

Mr. Levitan: We want to lead up to the demand for the exercise—the preliminary conversations leading up to the exercise of the option mentioned in this Exhibit P-4.

The Court: We do not need any preliminaries. Jump right into it. Let's save time.

*By Mr. Levitan:*

Q. Did you ever get your money back? A. No, sir.

Q. From the cemetery? A. No, sir.

*By the Court:*

20 Q. You asked for it? A. Yes, sir.

Q. And did not get it? A. Yes, sir.

Q. Then you brought your suit? A. Yes, sir.

*By Mr. Levitan:*

Q. How much is due you to date with interest up to date? Have you made the computation? A. A little over \$4,000.

30 Q. Have you the exact figures? A. \$4,053 and some sixty-odd cents—sixty-seven cents, I think, something like that.

Q. \$4,053.67? A. Yes.

Q. That is the exact computation with interest to date? A. Yes, sir.

*By the Court:*

Q. In other words, you took your \$3,750 and added interest from June 17, 1928, to date? A. Yes.

Q. At six per cent.? A. At six per cent.

40 Q. You did not add twenty-five per cent.? A. No, sir; at six per cent.

*Dr. Shelley R. Safir, cross.*

*Cross examination by Mr. Herman:*

Q. Doctor, when did you sign that contract? A. On the 17th of June, 1927.

Q. Where did you sign that contract? A. In my home. 10

Q. In your home? A. Right.

Q. In New York? A. Yes.

Q. Did you hear Mr. Kurzorak say that you were down at Bradley Beach or some place and did not come back for a week after that time? A. No; he said that I left shortly thereafter on my vacation.

Q. Doctor, you are right. A. School was not out until nearly the end of June and I left about a week or ten days later.

Q. You are right, Doctor. Now, you say that you contracted to buy thirty lots? A. Yes. 20

Q. That was the understanding? A. That is right.

Q. And Kurzorak had contracted to buy the other thirty lots? A. I don't know what he contracted to do with Mr. Frank.

Q. Well, there was a contract for sixty lots? A. Yes, sixty lots.

Q. And Mr. Kurzorak was your partner in this transaction? A. Yes. 30

Q. No question of a doubt in your mind, is there, Doctor? A. Well, subject to interpretation.

Q. All you actually put up was \$2,500? A. That is right.

Q. \$1,000 of which you gave to Kurzorak? A. That is right.

Q. Does Kurzorak owe you money now? A. Yes.

Q. Does he owe you that \$1,000? A. No.

Q. Wasn't that a personal loan to him? A. No.

Q. Did you ask Mr. Kurzorak why this \$1,000 was not delivered to the cemetery? A. I did. 40

*Dr. Shelley R. Safir, cross.*

10 Q. What did he say? A. He said it was—well, I don't remember exactly, but I am trying to recall. It was only—you see, I did not ask him this until very recently, when I noticed that the difference in the two checks was that one was signed by Adam Frank and the other was not, and I asked him about that, he told me that he deposited it in his own personal account and then gave Mr. Frank a check for \$1,000 a few days later. I think he can tell you better than I why he did not do it the way—

Q. You have advanced to Kurzorak moneys before?

20 Mr. Levitan: I object to it as irrelevant and immaterial.

The Court: Objection sustained.

Q. Isn't it a fact, Doctor, that this \$1,000 was a personal loan to Kurzorak? A. No, it is not.

Q. Isn't it a fact that the \$1,000 and the \$500 that he claims represents his one-half interest— A. No, sir.

Q. —in the sixty lots— A. No, sir. The contract will bear me out in that. No, sir.

30 Q. In what way will the contract bear you out? A. It shows that there are thirty more plots to be purchased and that those are to be paid for within a year. That is Mr. Kurzorak's end of it. Had nothing to do with me. Moreover, the letter of Mr. Frank to me bears that out also.

Q. I show you this contract, this Exhibit P-2.

Mr. Levitan: Let him see the letter, Mr. Herman.

40 Q. That contract is for \$6,000, isn't it? A. That is right.

*Dr. Shelley R. Safir, cross.*

Q. And you made an initial payment of \$3,000?

A. That is right.

Q. And you bought thirty lots and Kurzorak bought thirty lots? A. That is right.

Q. Is there anything further in that contract for any additional lots? A. Additional to the sixty? 10

Q. Yes. A. No.

Q. Isn't that what you said a moment ago, or didn't I understand you? Isn't that what you said a moment ago? A. What?

Q. That there was an additional contract for thirty more lots? A. Yes, thirty plus thirty, sixty lots in all.

Q. Was that contract in your possession all that time? A. Which time? This one?

Q. Yes, from May 27th. A. No, not from May 27th. From after June. He took this contract back. I would not sign it. 20

Q. Who took it back? A. Mr. Kurzorak.

*By the Court:*

Q. Let me see that again. Have you it there?

A. Certainly. (Hands paper to the Court.)

Q. You say afterwards, on the 27th of June, you signed this? A. On the 17th of June.

Q. Whenever it was. A. Yes. 30

Q. And you got a letter? A. Not this one. There was another one. This was a duplicate. I was supposed to hold onto this one.

Q. Did Mr. Kurzorak sign one, too? A. Yes.

Mr. Levitan: May I interrupt your Honor just to clear up on this point, out of order?

The Court: Is counsel through?

Mr. Herman: No.

Mr. Levitan: I just asked permission to 40

*Dr. Shelley R. Safir, cross.*

interrupt one question that I thought would clear up that question.

The Court: No; wait.

Mr. Herman: Go ahead.

10 *By Mr. Levitan:*

Q. You kept this copy for your file without Mr. Frank's signature and you did deliver this with your signature to Mr. Frank? A. Yes, Mr. Kurzorak—it was delivered to Mr. Kurzorak to take to Mr. Frank.

*By Mr. Herman:*

Q. You don't know whether it was delivered back to Frank? A. In what respect?

20 Q. You gave it to him? A. Yes.

Q. He was also your partner? A. I said in a certain sense, yes.

Q. Did you at any time draw up any assignment back of your interest to the cemetery? A. To the cemetery?

Q. Yes. A. Just what do you mean?

30 Q. Did you at any time draw up an assignment of your interest into this contract back to the cemetery? A. I don't think so. I may not understand your question. I do not think so.

Q. Did you sign any papers whatsoever assigning your interest in this contract back to the West Ridgelawn Cemetery? A. No.

Q. You never offered any such paper back to the West Ridgelawn Cemetery? A. Yes; except through my lawyer. My lawyer informed the cemetery.

Q. You have not done it yourself? A. It was not necessary for me.

40 Q. I didn't ask you that. That is all.

*Dr. Shelley R. Safir, redirect.*

*Redirect examination by Mr. Levitan:*

Q. When you received this letter, Exhibit P-4, the final contract, was Kurzorak then your partner or not?

Mr. Herman: I object. 10

The Court: Don't let us waste time about that.

A. No, sir.

Q. All right. That is all.

Mr. Levitan: We served notice to produce the letter that I sent or our office sent to the cemetery, West Ridgelawn Cemetery, on February 23rd.

Mr. Herman: I haven't it. It must be in the papers. You have all the papers impounded. 20

The Court: You mean Exhibit B in your complaint?

Mr. Levitan: Yes, sir. We have the secondary evidence on that.

The Court: No objection?

Mr. Herman: We will admit it has been received. 30

The Court: Very well.

Mr. Levitan: I will take the stand.

The Court: Is that necessary?

Mr. Levitan: You admit the receipt?

Mr. Herman: Yes.

The Court: Then, a copy of it may be introduced in evidence.

Mr. Levitan: I will swear that is an office copy. (Hands paper to Mr. Herman.)

The Court: Letter of February 23, 1928. Let it be received. 40

(Paper marked Exhibit P-5.)

*Case.*

The Court: Is it signed?

Mr. Levitan: Yes.

Mr. Levitan: Will you please produce your copy of the contract that was delivered to you by Dr. Safir with his signature?

10

Mr. Herman: If the Court please, I have never received any contract signed by either Kurzorak—

The Court: Then you cannot produce it.

Mr. Herman: I cannot produce it.

## PLAINTIFF RESTS.

## MOTION FOR NONSUIT.

20

Mr. Herman: Now, if the Court please, I move for a nonsuit, first, upon the ground that the letter of June 17th is made without consideration. It relates back to a contract which is in evidence and which must speak for itself, dated May 27, 1927, I believe.

The Court: Well, that is incorrect, because the paper that is in evidence is not a contract. It is a paper that is not executed.

30

Mr. Herman: Oh, yes; executed by—

The Court: One party only.

Mr. Herman: Yes.

The Court: And you say you have no such contract in your files. You say there is no contract.

40

Mr. Herman: Never been returned. We say there is a contract, because we received a certain amount of money for it. The testimony is it has been signed by both parties. Now, whether we have it or not, the testimony was that it is signed.

## Case.

The Court: And I understood that you did not insist—

Mr. Herman: We say we haven't it in our possession and did not get it back.

The Court: That ground does not appeal to the Court. 10

Mr. Herman: Secondly, a contract as stated in the letter of June 17th was a contract that would consist of both the original contract and the contract of June 17th, is absolutely *ultra vires* and without effect.

The Court: I think this case that counsel has referred me to disposes of that.

Mr. Herman: The Fidelity Union case?

The Court: Doesn't it?

Mr. Herman: I do not think so. 20

The Court: I have not read it. I just glanced at it. I suppose that was the purpose of citing it.

Mr. Herman: I brought it with me because I thought it might help me.

The Court: It does not strike me so. It says a cemetery association mortgage to secure negotiable bond issues was held *ultra vires*, something beyond which they had power to do, except to the extent of value received for cemetery purposes. Now, the plaintiff contends here that this transaction is tantamount to that, in that the moneys represented by this transaction were received for cemetery purposes and therefore were not *ultra vires* under the decision in the case mentioned, and it cannot avail as a defense because it received the benefit. Am I right? Is that the theory? 30

Mr. Levitan: Yes, that is the theory. 40

*Case.*

10 The Court: I am bound by that, if that is a correct statement of what that case holds. Unfortunately, I have not read that case, but from my understanding of it, as I have just expressed it, it seems to me that it would be just as good in a court of law as it would in a court of equity. I see no difference in the application of that principle. Therefore, I will deny your motion on that ground.

20 Mr. Herman: On the further ground that there is absolutely no testimony of any kind that the president of the corporation, a cemetery corporation, has the power or the authority as president without the consent of three-fifths of the board, and we refer to Section 62 of the Cemetery Act, to sign such a letter binding on the corporation.

The Court: I think he had apparent authority. I think the corporation is bound. I do not think there can be any doubt about that. My ruling is that the motion will be denied.

30 Mr. Herman: One other ground: that to the extent of moneys actually advanced by Safir, at any rate, there is no cause of action for any moneys above that, outside the legal rate of interest.

Mr. Levitan: They have not pleaded usury, your Honor.

The Court: I noticed that. Motion denied and an exception allowed.

40 Mr. Herman: Just one other point perhaps I should make at this time. The testimony shows, and the contracts are in evidence, that the contract was made between

*Case.*

Kurzorak and Safir, but there is no testimony of any kind outside of a letter tendering nothing, but saying they are in a receptive mood, they are willing to accept \$3,750. There is nothing there. There is no tender of any assignment; no assignment ever drawn up of Safir's interest in this contract. 10

The Court: I think that the letter that was offered in evidence expressed a willingness to comply with the terms of the contract of June 17th. It said, "We will receive and shall expect to receive at the end of the year \$3,750"—June 17th, 1928, or 1929, whenever it was—"at which time we will execute and deliver all necessary documents that may be required under the contract." 20

Mr. Herman: Furthermore, I will object on one other ground and then I think I will be through. I do not think this Court is the proper Court to bring this action. I think that the jurisdiction should be within the Chancery Court. I think the cemetery is a charitable institution, and the board of trustees are trustees for the benefit of lot owners. 30

The Court: I suppose the time to have raised the question of jurisdiction is prior to taking the time of the Court to try this case, on a preliminary motion. If that point were well taken we would have been saved all this time. Or, not having done that, I think the question should have been raised at the beginning of the trial, in fairness to the Court. I think it is a question of fact that can always be raised, the jurisdiction 40

*Adam Frank, direct.*

of the Court, and I do not say that you are not justified in raising it at this time, but I think that there is nothing to do, since we are here and since we have gotten this far, but to go the rest of the distance.

10 Mr. Herman: I will ask an exception.

The Court: You may have an exception to all my rulings.

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DEFENDANT'S TESTIMONY.

ADAM FRANK, sworn.

*Direct examination by Mr. Herman:*

20 Q. Mr. Frank, I show you this contract made between West Ridgelawn Cemetery, Shelley R. Safir, and Ernest Kurzorak. Did you see that contract before? A. Yes, sir.

Q. Drew it up? A. It was drawn in my office.

Q. Did you ever receive the signed copy of that contract? A. No; Kurzorak never returned it.

Q. How much money did you receive under that contract? A. \$2,500.

30 Q. How was it received? I mean, when was the first payment made? A. The first payment was a payment by Kurzorak for some of his part of \$1,000; later he brought in \$1,500 from his partner or associate, and promised to produce an additional \$500 within a few days, stating that he had been unable to get it. That represented part of his payment.

The Court: Never came in with the five?

The Witness: Never came in with the five.

40 Q. Did he ever bring the contract back to you?

*Adam Frank, direct.*

A. No. He told me subsequently he had put it into his own safe deposit.

Q. A letter on June 17th addressed to Mr. Safir. Will you explain that transaction?

Mr. Levitan: I object to any explanation, because the letter speaks for itself. 10

The Court: Oh, I will allow him to tell what he wishes about it, I think.

A. There was no suggestion of this letter until the date it was written. The negotiations were, as in several other cases where they speculated—where the same parties speculated in our ground, buying at a fraction of their value, a flat purchase, This time there was a question about the production of the additional moneys immediately under this contract, and Kurzorak told me that his brother-in-law was prepared to pay the entire balance of his part in cash, but would like a letter from me. 20

*By the Court:*

Q. So that when that letter was written he had not paid his half, had he? A. He had paid the \$1,500. 30

Q. But not \$3,000? A. Oh, not the \$3,000.

Q. Then, why did you write the letter that he had paid \$3,000? A. I was handing that letter to Kurzorak, then in our employ, to be delivered on the receipt of the balance. That was merely addressed to him to receive the balance before—

Q. But he did not? A. He never returned anything after that.

Q. Then, did you ask him for the return of the letter, not having received the \$1,500? A. Yes; I asked him for the return of the letter and I asked 40

*Adam Frank, cross.*

him where the contract which was never returned to us was.

Q. And got neither? A. And got neither.

Q. Did you write him to that effect? A. No; he was in my—he was in my office frequently. For a short time thereafter he was still in our employ.

10

*By Mr. Herman:*

Q. Did Mr. Kurzorak ask you to relieve him of his contract? A. Never.

Q. You never received that contract back? A. No.

*Cross examination by Mr. Levitan:*

Q. Mr. Frank, according to your contention, Mr. Kurzorak defrauded you in getting this paper for the \$3,000, Exhibit P-4; is that right? A. Mr. Kurzorak practiced several frauds upon us, of which this was one, and we then fired him.

20

Q. You are a member of the bar of New York State, are you not? A. Yes.

Q. How long have you been practicing? A. Oh, upwards of thirty years.

Q. Upwards of thirty years? A. Yes.

Q. You never wrote any letters like this before, this Exhibit P-4? A. No, sir.

30

Q. First time in your life you ever made a proposition of paying twenty-five per cent. bonus? A. First time in my recollection, yes.

The Court: What difference does that make?

Mr. Levitan: I promise to connect it. I just ask your Honor's indulgence.

The Court: All right.

40

Q. You knew that at the time you drew this

*Adam Frank, cross.*

agreement as a member of the New York bar that a paper like that under the law of New York was absolutely void, didn't you?

Mr. Herman: I object.

A. No.

10

The Court: I will let him answer.

Q. What is that? A. No.

Q. Well, did you have any intention of compensating Dr. Safir this twenty-five per cent. in case he desired to exercise his option? A. Yes. Had a trick not been played us by Dr. Safir in taking certain of our customers which we had paid Kurzorak for bringing to our place and selling them with Kurzorak's aid his ground, the situation probably would have been ironed out.

20

Q. Dr. Safir played a trick on you and therefore you refused to pay him this money? A. No; he and his partner.

Q. He and his partner? A. No; his partner more directly was found steering our business to their organizations and steering some of them to their own account, this and other ground they had in our place.

30

Q. Yes. A. Then we fired Mr. Kurzorak and let the matter rest as it was.

Q. You objected very strenuously to Dr. Safir selling his land which he had purchased from you on a previous occasion, did you not?

Mr. Herman: I object.

The Court: I will allow it.

A. To our customers—to customers that we paid for, yes.

40

Q. That led you to conclude not to pay him back this \$3,000? A. Dr. Safir was to hold his

*Adam Frank, cross.*

land in order to insure his profit, at his own suggestion, he was to hold his land for upwards of two years before making any effort to sell. They were making the effort before that, and holding back our business at the time of this contract, in order to steer our current business to their own purposes.

10

Q. Now, will you please explain, Mr. Frank, as an intelligent member of the bar, what you meant when you wrote this letter, Exhibit P-4, authorizing him to exercise the option, where you said in so many words, "It is understood that the contract of 1927, whereon you have paid \$3,000, may, at your option, be transferred into a loan at one year of said amount"? Did you mean that? A. Yes.

20

Q. Yes. Plus twenty-five per cent. interest. Did you mean that? A. Yes.

Q. Upon your giving us ninety day's previous notice in writing. Did you mean that? A. Yes.

Q. Which you may mail to this office, in which event the land shall revert to this company, and any necessary instruments of cancellation be executed between us? A. Yes.

30

Q. You meant all that? A. But we never talked that over with Dr. Safir, and that was delivered to our own clerk or to our own representative for a conditional delivery. He had no business delivering it without having received the moneys referred to in it.

Q. Had you received Kurzorak's \$3,000? A. No.

Q. How much money had you received on account of this \$6,000 transaction? A. Mr. Kurzorak \$1,000, Dr. Safir \$1,500.

40

Q. You are always very careful before you make any notation of any moneys on any instrument? A. Yes.

*Adam Frank, cross.*

Q. Had you received the \$3,000 mentioned in Exhibit P-2 at the time? A. Pardon me, I don't know what P-2 is.

Q. Oh, this. A. Yes.

Q. That recites \$3,000 consideration. Had you received it? A. No. 10

Q. Why did you put that in? A. Why, it is a document delivered conditionally in my own office to my own clerk, so to speak. Kurzorak was merely my clerk.

Q. You delivered that document with what understanding? A. That the document should be returned signed, together with \$3,000. Then, on this letter an additional \$1,500 in cash to make up Dr. Safir's half of this—

Q. \$3,000? A. Yes. 20

Q. Dr. Safir offered, tendered, a certified check? A. That is his previous—his first payment.

Q. This \$3,000? A. No, that has nothing—the letter is not with reference to the \$3,000 represented here as received, even had it been received, as it was not.

Q. What did you mean, then, when you said in this letter, "It is understood that the contract of 1927, whereon you have paid \$3,000"? A. The understanding being that when— 30

Q. Just let me finish the question. A. Beg your pardon.

Q. "Whereon you have paid \$3,000," the payment of which is consummated on the same date, bearing date June 17, 1927, for \$3,000? A. Kurzorak was to have brought me back before delivering that letter an additional \$1,500 on that day.

Q. That would have been all right for this letter, then? A. Yes. 40

Q. Well, where was Kurzorak's contract? A.

*Adam Frank, cross.*

This was to be signed by Kurzorak and Safir, and as far as I know the alternate copy mailed them.

10 Q. You have testified it was never sent? A. I have not so testified, sir. I testified that I never saw it again and that Kurzorak told me he was keeping it himself.

Q. What induced you to give Dr. Safir this extraordinary bonus of twenty five per cent.? A. They were forcing that. They were holding back our business, putting us into somewhat a tight box. We had just contracted for a new building. It was important to get the money. But, of course, we never got it.

Q. You needed money badly? A. Surely.

20 Q. Did you hear the instructions you gave to your associate, Kurzorak, to go out and try to get customers? A. No. This proposition was all his and his brother-in-law.

Q. This came out of a clear sky on this occasion for the first time? A. No, Mr. Kurzorak—

Q. Answer the question.

(Question repeated by reporter.)

Q. This twenty-five per cent.? A. Yes, yes.

30 Q. Never heard of such a thing before? A. It had never been broached before.

Q. Never had any occasion? A. No, sir.

Q. You never said anything to anybody? A. It was broached in this connection: Kurzorak had suggested to me that he knew a man who would lend us money at twenty-five per cent., and I told him we were not dealing that way. That did not refer to Dr. Safir at that time at all.

40 Q. You did not know what prospect Kurzorak had in mind when he told you that? A. It happened that I did, and we did not car for the deal.

*Adam Frank, cross.*

Q. This statement that Kurzorak made to you was a few days before this 17th of June, 1927?

A. That refers to this? I think it was on the day it was drawn. I do not—

Q. In other words, Mr. Frank, what I want to know and what I want this jury to hear from your mouth is this: You never authorized Kurzorak to make any proposition of giving Dr. Safir this twenty-five per cent. interest? A. Of course, I did. 10

Q. You did? A. I told you I did.

Q. What is that? A. I told you I did.

Q. Who? When? A. That day in my office, when I wrote the letter.

Q. Not before that? A. No.

Q. That was the first time anything was ever mentioned of this twenty-five per cent.? A. By me or to me. 20

Q. You never made any such offers before or since? A. No.

Q. Sure about that? A. Sure about it.

Q. Quite positive? A. Quite positive.

Q. Never made any offers in your own handwriting as an inducement to purchase lots giving the same proposition of twenty-five per cent.?

Mr. Herman: I object to that. 30

The Court: I will allow it.

Q. Yes or no. A. There is one other, and you are in court with reference to it. Now, what the date of it is—

Q. Dr. Schwartz? A. Yes. You are speaking of Dr. Schwartz. He was the other brother-in-law.

Q. You never made any other except that one? A. No, sir.

Q. Quite sure? A. Quite sure. 40

Q. Positive, now? A. Positive.

*Adam Frank, cross.*

Q. At no time before or since? A. Absolutely.

Q. Is this your signature, "Adam Frank, president"? A. Yes.

10 Q. Did you write that letter (handing witness a paper, which the witness reads to himself)? You can just glance over it and answer yes or no. Do not let us waste time. What is your answer? A. My answer is what it was.

Q. What is your answer? Did you write this letter? A. Yes, but the additions were not—but the manuscript there was not there on the date on which the letter was sent, otherwise it would have been dictated at the same time.

20 Q. Just one moment, please; do not anticipate. In whose handwriting is the wording around the bottom and the side? A. Mine.

Q. All in your handwriting? A. Yes.

Mr. Herman: I object to it as immaterial and irrelevant.

The Court: What difference does it make? Just credibility? It is not cross examination.

Mr. Levitan: I am attacking his credibility direct.

30 The Court: You might do that.

Q. Here is a letter dated May 26, 1926. Was it written on that date? A. The dictation was on that day, but the writing was not.

Q. And the letter is in Dr. Safir's possession, as far as you know, isn't it? A. I don't know.

Q. It was not in your possession? A. It was given to Kurzorak.

40 Q. You say here on the bottom, "It is agreed the actual purchase price received from said Safir and Kurzorak on the above deed and contract may

*Adam Frank, redirect.*

at their option be reclaimed as a loan at the end of twelve months from date, with interest at twenty-five per centum per annum on their giving sixty days' notice in writing to that effect, in which case said deed and contract shall be clearly understood to have been given as security only as for a loan. W. R. C. by Adam Frank." What is W. R. C.? A. West Ridgelawn Cemetery. 10

Q. That is all in your handwriting, isn't it? A. Yes.

Mr. Levitan: I will ask that this letter be marked for identification.

(Paper Marked Exhibit P-6 for Identification.)

*Redirect examination by Mr. Herman:*

Q. Mr. Frank, Mr. Levitan made a remark about the \$3,000 in the letter. When you delivered this contract to Kurzorak on May 27th, how much money did you receive? A. \$1,000. 20

Q. And that despite the fact that the letter reads— A. I don't think I even had the \$1,000; that that was delivered. I received that later.

Q. Despite the fact that the letter reads, "\$3,000 in cash is hereby acknowledged, and the remaining one-half," and so on, "is to be paid"— A. Had nothing to do with it. It was practically in my office as long as it was in Mr. Kurzorak's hands, to my mind. 30

Q. So you gave Kurzorak papers even acknowledging receipt of money that you were to get? A. Surely. He was to collect for us at various times and make conditional delivery of the instruments. This was one.

(Defendant Rests.)

40

*Dr. Shelley R. Safir, direct.*

Mr. Herman: I want to renew my motion again for a direction of verdict.

The Court: For the same reasons?

Mr. Herman: On the same reasons.

The Court: The same ruling.

10 Mr. Herman: Exception.

The Court: Exception allowed.

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PLAINTIFF'S TESTIMONY IN REBUTTAL.

SHELLEY R. SAFIR, recalled.

*Direct examination by Mr. Levitan:*

Q. Dr. Safir, I show you a letter marked Exhibit P-6 for Identification and ask you if you ever saw that before? A. Yes, it has been in my possession all this time.

20

Q. When was the handwriting or the words written in longhand put in that letter? Before or after or at the time of its receipt by you? A. It is my belief, after a lapse of three years, it was written the same time or perhaps a day or two later. I am not absolutely certain about that, but I believe the same time.

Q. You have heard the testimony of Mr. Frank that this \$3,000 mentioned in this letter of June 17th was to be paid by you in full at or after the receipt by you of this paper, Exhibit P-4. Did you ever have such an understanding with Mr. Frank or his agent, Mr. Kurzorak? A. I had no such understanding. I was to pay \$3,000 in all, which I did. First, \$1,000, then \$1,500, and then \$500, which Mr. Kurzorak owed me. We simply cancelled; instead of him giving 500 and me giving back 500, the understanding was that he was to pay it to Mr. Frank, and that would make up my \$3,000 full payment.

30

40

*Dr. Shelley R. Safir, direct.*

Q. When was the first occasion you heard about this twenty-five per cent. interest? A. Why, in this particular—

The Court: You have already told that.

A. Late in May, that he first came to me with this proposition. 10

Mr. Levitan: This is rebuttal. Mr. Frank testified it came out the day the paper was executed, this twenty-five per cent. was suggested.

The Court: This is not rebutting. He is repeating what your witness already said in that respect. He said that was the arrangement from the beginning, at the beginning of the negotiations, as I understand it. 20

Mr. Levitan: That is all right.

A. I would not have entered into this thing otherwise.

Q. How many conversations have you had with Mr. Frank since this date, June 17th, 1927? A. I believe two.

Q. On any of those occasions did Mr. Frank ever admit the return of a letter of this kind or attempt to repudiate any such payment of \$3,000 by you? A. No, sir. 30

Q. Such as he has testified here this morning? A. No, sir.

Q. Have you ever received any letter or any other notice? A. No, sir.

Q. Demanding the return of this document? A. No, sir, I never did.

Q. Did you ever discuss this paper with Mr. Frank in any of your discussions with him? A. 40

*Ernest Kurzorak, direct.*

Well, that would be hard to say, unless I were to be permitted to say some of the things we discussed.

The Court: No; only that.

10 Q. I am just asking a simple question. Did you discuss the return to you of this money? A. Yes, of the money, certainly.

*By the Court:*

Q. Or did he say to you at any time that he only parted with that letter under the conditions— A. No, sir.

Q. —that he has described here on the stand, and ask you for the return of it? A. No, sir.

20 *Cross examination by Mr. Herman:*

Q. When did Mr. Kurzorak deliver that letter to you? A. On the 17th of June, 1927.

Q. That letter was not mailed to you? A. No; he brought it to me.

Q. Brought there by Kurzorak? A. That is right. He brought other things to me, also.

Q. Do you know whether he brought that back or not? A. That was not my business.

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ERNEST KURZORAK, recalled.

*Direct examination by Mr. Levitan:*

Q. Mr. Kurzorak, you have heard the testimony of Mr. Frank in this case a few moments ago? A. Yes.

40 Q. Did you receive this letter under the circumstances stated by Mr. Frank—this letter Exhibit P-4? A. No, sir.

Q. Were you to return this letter to Mr. Frank in

*Ernest Kurzorak, cross.*

case you did not bring an additional \$3,000? A. No, sir.

Mr. Herman: I object. That was not the testimony.

Mr. Levitan: I withdraw that question.

Q. Were you to keep this letter in your possession until you brought some additional sums of money to Mr. Frank? A. No, sir.

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Q. What were your instructions with reference to this letter after you delivered that certified check, Exhibit P-3? A. Why, my instructions were really—it was more on the Safir side than on the West Ridgelawn Cemetery side—it was just an exchange of the check for the letter.

*By the Court:*

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Q. Had you at that time paid the money that had been paid? A. Yes.

Q. Didn't you get that letter and take the \$1,000 after the delivery of that letter? A. No; the \$1,000 was paid when I received the original contract, or \$1,500. No. \$1,500—I got this letter for the \$1,500, and I took the check down on 14th Street and 2nd Avenue to be certified, and I brought it back to Mr. Frank again, because we had to pay the contractor.

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*Cross examination by Mr. Herman:*

Q. Have you any receipt or paper showing what the \$500 was for? A. No, sir. We did not transact our business that way. Mr. Frank—

Q. Did you bring back the contract to Mr. Frank? A. Yes, sir.

Q. When? A. I think it was the next day or—yes, it was the next day after I left my brother-in-law and I came back.

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*Ernest Kurzorak, cross.*

Q. Signed by yourself? A. Yes.

Q. And Safir? A. As a matter of fact, I have transacted a good many transactions for Mr. Frank and I doubt if he can prove one that I—

Q. We are not interested in that. A. Yes.

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The Court: No, that is not responsive. Strike it out.

*By the Court:*

Q. Did you not say to Mr. Frank that you had had the contract signed, that you signed it and your brother-in-law signed it, and that you had deposited it in your safe deposit box? A. No, sir.

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Q. Did you say anything about putting it in your deposit box? A. No, sir.

Q. Did you say to him about not delivering it to him for any reason? A. No, sir.

*By Mr. Herman:*

Q. Did Mr. Frank give you the contract acknowledging receipts of money, leaving it up to you to get the money? A. I don't get that.

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Q. When Mr. Frank gave you this original contract for \$6,000 in which the West Ridgelawn acknowledges receipt of \$3,000, how much money had you paid at that time? A. \$1,000.

Q. Yes; and he left it to you to get the other \$2,000 even though he had signed the contract and acknowledged receipt of \$3,000? A. Yes.

Both Sides Rest.

(Counsel for the respective parties summed up the case to the jury.)

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(The Court charged the jury as follows:)

### Court's Charge to Jury.

PORTER, J.:

Ladies and gentlemen of the Jury:

This is a case brought by Shelley R. Safir against the West Ridgelawn Cemetery for \$3,750 and interest at six per cent. from June 27, 1928, and the suit is based upon a contract of June 17, 1927, made between Dr. Safir and the West Ridgelawn Cemetery, which plaintiff says was not carried out and for which there is a breach and under which he is entitled to this money, and the defendant denies that that is so. Counsel have gone into the facts quite thoroughly, but let me speak very briefly of the real issue in the case.

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There is no dispute that there was an agreement made between the cemetery company and the plaintiff Dr. Safir and Ernest Kurzorak for the purchase of six thousand dollars' worth of cemetery lots. The plaintiff says that he and his brother-in-law Mr. Kurzorak, who was employed by the cemetery company, went into this contract together, wherein they agreed to do certain things in consideration of six thousand dollars. They were to pay six thousand dollars and were to get for that certain lots. Dr. Safir says that he did not sign this contract when it was brought to him by his brother-in-law, who was with him a principal to this contract, and who was also employed by the company, because it was said by Mr. Kurzorak to him that there would be something more than this contract provided, namely, that if he, at his option, preferred to have his money returned to him under certain conditions, he could elect to do that; so Dr. Safir says that he refused to sign this contract unless that clause was inserted, and so he and Mr. Kurzorak say that the president of the com-

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*Court's Charge to the Jury.*

pany when acquainted with that on June 27th wrote this letter which is the basis of this suit, wherein he agreed, upon ninety days' notice being given, to return the money with twenty-five per cent. interest, instead of conveying the lots, and that if that option were exercised the Doctor was to execute such assignments or papers as might be necessary. That in brief is the contract. And Dr. Safir says that he paid twenty-five hundred dollars; first he gave a check to his brother-in-law for a thousand dollars, I think, and then later on fifteen hundred dollars, and that, in addition to that, his brother-in-law Mr. Kurzorak was indebted to him, and that the brother-in-law had a credit, a commission, coming to him on this transaction from the cemetery company amounting to five hundred dollars, and that he was to get that, and therefore that would make the three thousand dollars, which was his part of the contract; and so the Doctor says that he parted with three thousand dollars, twenty-five hundred in cash and the five hundred dollar payment in the way I have just indicated.

Mr. Kurzorak says that at that time he was relieved by the cemetery association through its president of his part of the contract, and that ended it; that he was not obligated to carry out the terms of the contract, and never did pay the three thousand dollars that he was obligated to pay or any part of it; he was released from that verbally by the president of this corporation. So Dr. Safir says that he should have a judgment at your hands under the terms of this contract, as he says the contract was for three thousand dollars, that was the principal of the amount, together with interest of seven hundred and fifty dollars which was to have been paid to him on

*Court's Charge to the Jury.*

June 17, 1928, and not having been paid, he is entitled to interest on that sum from that date to this, at the rate of six per cent. So if you find for the plaintiff, you will find your judgment for \$3,750 with interest from that date, and we will compute the interest, or the Clerk will.

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Now, the defendant says that was not the transaction at all. The defendant says that the contract of May 27th, about which testimony was given, was never signed by the two parties of the second part, Dr. Safir and Mr. Kurzorak, and never returned to us. On the contrary, says Mr. Frank, "Mr. Kurzorak said he had placed it in his safe deposit." There was a contract of that date signed in duplicate by the cemetery company, one copy of which was to have been retained by the two parties of the second part, Dr. Safir and Mr. Kurzorak. It is here and introduced in evidence and it is not denied that it is the copy that was to be retained by them; but Mr. Frank says that the transaction of June 17th on which this suit is based was not as contended for by the plaintiffs, but that at that time there had been or was to have been paid fifteen hundred dollars; he thinks that even part of that had not yet been paid; and he did say, "If you will get the other half, making three thousand dollars, fifteen hundred dollars more than I have received, then I will agree to do this, and I will write a letter to that effect, and I give it to you to deliver to Dr. Safir when you receive from him the other fifteen hundred dollars," and he says, "I never did receive that other fifteen hundred dollars, and therefore that never became effective. The consideration for that contract was my receiving an additional fifteen hundred dollars." He says that is what that contract of June

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*Court's Charge to the Jury.*

17th was, and had that been paid to him I should have carried it into effect, carried it out, but that never having been paid to me, that contract existed, and therefore there was no breach.

10 Now, if that be true, then, of course, your verdict must be no cause for action. Either one story is true or the other is true; both cannot be true.

Was the contract of June 17, 1927, as the plaintiff says it was, or was it as the defendant says it was? That is the issue of fact in this case for you to determine.

20 You are not to be concerned with the question of usury, because if the contract was as the plaintiff says, I repeat, he is entitled to a verdict of \$3,750 with interest; but if the contract was as the defendant says it was, then there can be no verdict for any amount under this contract. That reduces the issue to rather a simple question of fact, which is all you jurors are concerned with, the questions of fact.

30 It is true, as counsel for the plaintiff says in his summation, there were in the pleadings questions raised with respect to the legality of this transaction, technical defenses. The defendant had a right to rely on such defenses. Those matters were presented to the Court for the Court's decision during the progress of the trial, and the Court has ruled on those matters and that is a matter that you need not concern yourselves with. The judge is the judge of the law, and the Court has ruled on the questions of law that have been presented. Those rulings must not be considered by you in any way. They are not of any concern to you. The Court feels that there is an issue of fact here, as I have indicated, an issue of fact  
40 which must be decided by the jury. It is the jury's

*Defendant's Exceptions.*

function to decide questions of fact. I have decided these motions that have been made with respect to questions of law, but you are left to decide the questions of fact. The rulings of the Court must not be considered by you as having any bearing whatever on the questions of fact. I have not decided anything with respect to the facts. I could not. That is not my business. That is your business; that is your sole function.

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Now what was the contract, if there was one? Was it as the plaintiff says, or was it as the defendant says? That is the issue in this case, and that is all the issue here, and it is for you to say which version is correct. What is the truth, what the defendant says or what the plaintiff says? As you decide that question, of course, you will decide this case. You will decide the case, of course, on your recollection of what the testimony was, not mine. If I have misstated anything in any way you will disregard any misstatements I have made and depend rather entirely on your own recollection of what the testimony was.

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You may retire.

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 DEFENDANT'S EXCEPTIONS.

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The Court: You may take an exception to my refusal to charge as requested, if you wish.

Mr. Herman: All right. I ask an exception.

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*Defendant's Requests.*

## DEFENDANT'S REQUESTS.

1. The most that the plaintiff would be entitled to was money actually advanced by him.

Bliss *v.* Linden Cemetery Assn., 83 N. J. E.  
494.

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2. If you find that the Cemetery was to receive \$1,500.00 from Safir, and did not receive, judgment must be for the defendant.

3. If contract was actually consummated on May 27, 1927, then there was no consideration for the letter of June 17, 1927.

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**Postea.**NEW JERSEY SUPREME COURT,  
PASSAIC COUNTY.

SAFIR  <i>v.</i>  WEST RIDGELAWN.	}	Action at Law.	10
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This case was tried before Judge Newton H. Porter, with a jury at the Passaic Circuit, on the 22nd and 23rd days of October, 1929.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Four thousand, fifty-three dollars and sixty-seven cents (\$4,053.67). 20

NEWTON H. PORTER,  
Judge.

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## New Jersey Court of Errors and Appeals

SHELLEY R. SAFIR,  
*Plaintiff-Respondent,*

*v.*

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

### BRIEF FOR DEFENDANT-APPELLANT.

#### Facts.

The plaintiff, Shelley R. Safir, together with one, Ernest Kurzorak, jointly entered into a contract for the purchase of sixty (60) cemetery lots owned by the defendant, West Ridgelawn Cemetery, for the price of \$6,000, which contract was duly signed by the plaintiff and Kurzorak and the defendant (see State of Case, p. 19, lines 28-40; p. 29, line 21; p. 30, lines 20-40).

Subsequently Kurzorak obtained a letter (marked Exhibit A in the complaint, see State of Case, p. 5) dated June 17, 1927, addressed to Dr. Shelley R. Safir, the plaintiff herein, and on the strength of said letter commenced this action against the cemetery for the return of \$3,000 plus 25% interest.

The action was tried before a jury in the Supreme Court, Passaic Circuit, and judgment was entered in favor of the plaintiff, Shelley R. Safir, and against the defendant, in the sum of \$4,053.67.

**Law.**

Defendant-appellant, West Ridgelawn Cemetery, appeals:

**POINT I.**

**The trial judge erred in denying defendant's motion to dismiss the complaint before the trial, pursuant to the reservation contained in defendant's answer.**

After the plaintiff had opened his case, defendant moved for a non-suit on the pleadings filed in the case and upon the opening of counsel, upon the grounds:

FIRST.—That according to the pleadings (Exhibit A, State of Case, p. 5), the writing upon which plaintiff bases his claim was wholly without consideration in that it alludes to a contract that had been previously executed between the parties, and that the alleged promise is not supported by any legal consideration.

The writing upon which suit is commenced (see State of Case, p. 5):

June 17th, 1927.

“Dr. Shelley R. Safir,  
1646 Weeks Avenue  
Bronx, N. Y. C.

Dear Sir:

It is understood that the contract of 1927, whereon you have paid \$3,000, may at your option be transferred into a loan at one year of said amount, plus 25% interest upon your giving us 90 days previous notice in writing, which may be mailed to this office; in which event the land covered thereby shall revert to this company, and any necessary instruments or cancellation executed between us. Any up-

keep charges during said period are waived, and it is understood that the President of this Company will personally serve as trustee for the collection and turning over to you of said amount.

Yours very truly,

WEST RIDGELAWN CEMETERY

By ADAM FRANK,  
President."

On the face of it, the letter refers to "the contract of 1927, *whereon you have paid \$3,000*," which necessarily indicates a contract already drawn and executed.

For the purpose of this motion admitting everything in the complaint to be true, based upon this exhibit, the plaintiff could not and should not recover.

See *Sladkin v. Ruby*, Court of Errors and Appeals of N. J., 1926, 103 N. J. L. 449 at page 455:

"The alleged agreement with Ruby, made subsequent to the giving of his notes, that the uncollectible accounts were to be deducted from the notes was void for lack of consideration."

*Freeman v. Robinson*, 38 N. J. L. 383, at page 385:

"The judgment was sought to be sustained upon a promise by the father to pay after the goods were furnished."

At page 386:

"As the plaintiff was bound to make out his case by proof of a consideration which would support the promise, as well as the promise, the cause of action was not established."

SECOND.—Upon the ground that if this letter upon which they rely is in fact a contract, the contract on the face of it would be *ultra vires* and could not be in force.

Under Section 62 of the Cemetery Act, Com. St. 392:

“That in any cemetery in said state, belonging to any incorporated company or association having a board of managers or directors, and whether such corporation shall have been or shall be incorporated under a special act of this state or by the general laws thereof, it shall be lawful for the owner and owners of any lot or lots therein to transfer and convey any such lot or lots to any person or persons, *or to the cemetery association having charge of the cemetery in which such lot or lots are situate*, notwithstanding any restriction or prohibition of the sale of lots contained in the general laws of said state concerning cemeteries, or in the charter of any cemetery company; provided, however, *that before any such transfer and conveyance shall be made the board of managers or directors of such cemetery association shall authorize such transfer and conveyance by a vote of at least three-fifths of the members of such board at a regular meeting of such board*” (P. L. 1890, p. 237).

In Section 4 of the said act, page 373:

“the trustees may sell and convey the lots or plots and parts of lots or plots, designated on such maps, upon such terms as shall be agreed, and subject to such conditions and restrictions as may be imposed upon the use of such lots or plots by rules or regulations now adopted or hereafter to be adopted, by the trustees of such association, *the conveyances to be executed under the common seal of the association and signed by the president, or the vice president, and the treasurer of the association.*”

It is manifest therefore that under Section 4 the contract of June 17, 1927, attached to the complaint is without legal effect and could not be enforced, as it is not executed with the statutory

requirements that conveyances (and necessarily contracts to convey) be executed under the seal of the association and signed by the president, or the vice-president, and the treasurer of the association.

## POINT II.

**The trial judge erred in denying defendant's motion for a non-suit when the plaintiff rested his case.**

At the end of the plaintiff's case, defendant made a motion for non-suit, first, upon the ground that the letter of June 17, 1927, is made without consideration, in that it relates back to a contract which is in evidence and which speaks for itself, dated May 27, 1927.

The Court denied the motion on this ground because it was under the erroneous opinion that the contract dated May 27, 1929, which was put in evidence by the plaintiff, is not a contract, because, as the Court says, it was not executed (see State of Case, p. 48, lines 20-40, marked Exhibit P-2).

On page 19, State of Case, line 36, plaintiff put in evidence contract dated May 27, 1929.

On page 30, State of Case, on cross examination of plaintiff's witness, Kurzorak testified as follows:

"Question: As far as the cemetery was concerned, you and Safir were jointly on that contract? Answer: Yes.

"Question: As far as the cemetery is concerned, they received your check of \$1,000 for the first payment and at that time you accepted the contract? Answer: Yes.

"Question: Yes. Did you deliver that contract to Mr. Safir? Answer: Yes.

"Question: Did he sign it? Answer: Yes.

“Question: He did sign it? Answer: With the understanding—well, not at the original—not the first time I brought the contract.

“The Court: He asked you if he signed it.

“The Witness: He signed it at the second time—when I brought the letter he signed the contract.

“The Court: His answer is he did.

“Question: Did you sign that contract? Answer: Yes.

“Question: Where is that contract now? Answer: That contract must be in Mr. Frank’s possession.

“Question: *As a principal you accepted that contract on May 27th and gave \$1,000; am I right?* Answer: Yes.

“Question: Now, in the letter referred to, dated June 17th—to what contract did that refer? Answer: *It refers to the contract that we—*

“Question: Of May 27th? Answer: Of May 27th.

“Question: Why, Mr. Kurzorak, if you were a principal, was not that letter addressed to both you and Mr. Safir? Answer: Well, I will tell you, it was this way, during that intervening period certain things arise whereby I found that I could not continue with that carrying out of the contract and I told Mr. Frank so, so I said the best thing for him to do was to address the thing to my brother-in-law and for my brother-in-law to be the sole owner of that property.”

On page 32, State of Case, lines 10-15, testimony of the witness was:

“Question: Were both contracts signed, Mr. Kurzorak? Answer: No; the only—the duplicate that I returned to Mr. Frank was signed.

“Question: You are certain that was signed? Answer: Yes.

“Question: And signed by yourself and Mr. Safir? Answer: Yes, and Dr. Safir.”

It is elementary that the plaintiff must be bound by its own testimony and the testimony clearly indicates the contract dated May 27, 1927, for the purchase of sixty (60) lots for \$6,000, which was signed by all parties and upon which the defendant had received \$2,500 in cash, and in accordance with the testimony \$500 may be considered as a commission to Kurzorak, one of the parties to the contract.

Particular attention is called to the answer at the top of page 31, State of Case:

“Question: Now, in the letter referred to, dated June 17th—to what contract did that refer? Answer: It refers to the contract that we—

“Question: Of May 27th? Answer: Of May 27th.”

The defendant was entitled to a non-suit on that ground.

The defendant further moved for a non-suit on the ground that if the Court found that the letter of June 17th was a contract that included the original contract, such contract was absolutely *ultra vires* and was not binding on the defendant corporation, for the same reasons mentioned in the motion for non-suit on the opening of the case.

It has been held by *Fidelity Union Trust Co. v. Union Cemetery Assn.*, 6 Adv. Rep., page 52 at 58-9:

“the question for decision and the point decided is that the defendant cemetery association had not corporate powers to pledge its lands other than for the payment of the purchase price, etc., and held that a motion beyond the security of the payment of such purchase price is *ultra vires* and void.”

Motion for non-suit was denied on this ground.

Defendant made another motion for a non-suit upon the ground that there was no testimony of any kind; that a president of a cemetery has the power as such president, without the consent of three-fifths of the board, to sign such a letter binding on the corporation (Sec. 62 of Cemetery Act, referring back to argument against the complaint on the opening).

At the close of plaintiff's case which was repeated on a motion for direction of a verdict, defendant moved for a non-suit and direction upon the ground that to the extent of the moneys actually advanced by Safir, which is in the undisputed amount of \$2,500, there is no cause of action for any moneys above that outside the legal rate of interest (see State of Case, p. 43, line 33):

“Question: All you actually put up was \$2,500? Answer: That is right.”

In *Bliss v. Linden Cemetery Assn.*, 83 N. J. Eq. 494, it was held that a cemetery can only be held for moneys actually loaned to and received by the corporation. Also *Fidelity Union Trust Co. v. Union Cemetery Assn.*, 6 Adv. Rep., page 59:

“the mortgage under foreclosure is valid only to the extent of the consideration that actually passed to the association.”

It is also respectfully submitted that the contract proved by the several instruments placed in evidence by the plaintiff, is wholly and totally at variance with the complaint and with the issue raised by the defendant's answer, and for that reason, the motion for non-suit should be granted.

**POINT III.**

**The trial judge erred in denying defendant's motion for a direction of a verdict at the conclusion of the case.**

(State of Case, p. 62): Defendant made a motion for a direction of the verdict for the same reasons as the motions previously made for a non-suit, which the Court erroneously denied. The defendant requested the Court to charge that the most that plaintiff would be entitled to is moneys actually advanced by him. *Bliss v. Linden Cem. Ass.*, 83 N. J. Eq. 495.

The Court granted an exception to his refusal to charge (see State of Case, bottom p. 71).

It may be pertinent to point out at this time that a legal and binding contract, binding upon the cemetery corporation, is still in existence and in the hands of one Kurzorak and Dr. Safir. The said Kurzorak is not a party to this suit.

Appellant respectfully submits that in the event judgment below is sustained in full, or in part, it be conditioned upon the plaintiff delivering to the defendant upon payment a proper cancellation of the said contract.

**It is therefore respectfully submitted that the judgment complained of in favor of the plaintiff be reversed; that a judgment in favor of the defendant be ordered against the plaintiff, together with lawful costs against the plaintiff.**

Respectfully submitted,

ABRAHAM M. HERMAN,  
*Attorney for Defendant-Appellant.*

ABRAHAM M. HERMAN,  
*Of Counsel.*



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## New Jersey Court of Errors and Appeals

SHELLEY R. SAFIR,  
Plaintiff-Respondent,

*vs.*

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

### BRIEF FOR PLAINTIFF-RESPONDENT.

#### Facts.

This is an appeal from the Supreme Court (Passaic Circuit). The plaintiff contracted with the defendant to purchase thirty cemetery lots for Three Thousand (\$3,000.00) Dollars. As part of the agreement and executed simultaneously therewith the defendant agreed in writing to give plaintiff an option of transferring the Three Thousand (\$3,000.00) Dollars consideration into a loan for one year, plus interest agreed upon, provided written notice to that effect was given to the defendant within a specified time.

Plaintiff elected to exercise the option, and served the necessary written notice upon defendant. Defendant refused to comply with the terms of the agreement, and plaintiff brought suit for the recovery of the Three Thousand (\$3,000.00) Dollars, plus the interest specified in the contract.

The case was tried with a jury and resulted in a verdict for the plaintiff for the full amount, plus interest. Defendant appeals from that verdict.

## POINT I.

**The letter (Exhibit P-4) or Exhibit A (p. 5, Case), and Exhibit P-2 constituted one agreement.**

The option to redeem and the contract were both executed simultaneously (page 39, Case, lines 12-20; pages 40 and 41, Case) and were supported by identical consideration, bringing them within the rule of the *North Bergen Board of Education vs. Jager*, 67 Law, page 39; *Monmouth Park Association vs. Warren*, 55 Law 598; *Ingersoll-Lent Co. vs. Fidelity Guarantee*, 105 Atla. 236; *McGerragle vs. Bromel*, 53 Law 59. The rules of construction applicable to cases of this sort have been laid down by the Courts of this State in the above cases with fullness and precision. These cases were referred to and had been relied upon as authorities by Williston in his treatise on contracts, section 628:

“Where a writing refers to another document, that other document, or so much of it as is referred to in it, is to be construed as part of the writing. Even when a writing does not refer to another writing, if such other writing was made as part of the same transaction the two should be construed together. It is usually said that the two writings together form one contract.”

On the 27th day of May, 1927, Kurzorak, acting as agent for the cemetery, delivered the contract of sale to Dr. Safir (Case, page 19, line 36), and respondent refused to sign until the counterpart (page 5, Case, Exhibit “A”) was signed by Frank and delivered to Safir with the contracts for the purchase of the lots, so that both instruments were executed simultaneously.

On page 23, Case, Kurzorak, the witness, testifies (line 15):

“Q. What did Frank say? A. Well, he said, Kurzorak, I will do anything to appease your brother-in-law, and I will give him an option for the return of his money when he wants it.

Q. Then what did Frank do? A. Then he dictated a letter to the stenographer, and I gave him the check.”

On page 24, Case, line 18:

“Q. When did you get that option or whatever you call it, that other letter? A. Upon my giving him the check he told his stenographer to draw up the letter.

Q. I show you a paper dated June 17th, 1927, signed by West Ridgelawn Cemetery, by Adam Frank, President, and ask you if you ever saw that before? A. Yes.

Q. When? A. Why, when I gave him the check.

Q. Was that letter delivered to you when you gave him the check? A. Yes, sir.”

On page 30, Case, line 30:

“The Court: He asked you if he signed it.

The Witness: He signed it at the second time—when I brought the letter he signed the contract.”

The Court: His answer is he did.”

Dr. Safir, testifies on page 38, Case, line 40 through page 39, line 36:

“Q. What conversation, if any, took place with reference to this transaction? A. He brought me the contract or a statement which you call a contract and I read that contract and not finding, as I remember—not finding the second condition, namely, that I could return the land to the corporation and get my money back plus a certain percentage that we

had agreed upon, I told him that I would not sign it until that clause was contained in the contract.

Q. I show you Exhibit P-2 and ask you if that is the document you refer to? A. It is.

Q. That bears the signature of the West Ridgelawn Cemetery and not yours? A. No; I refused to sign it because it did not contain the clause that I have mentioned.

Q. What did you then say to Mr. Kurzorak with reference to this? A. I told Mr. Kurzorak that if he would bring me the statement that we had agreed upon that I would then proceed with the deal, not otherwise.

Q. What did Kurzorak say? A. He said he was sure he would do so and asked me for a check of \$1,500 which would discharge my half of the contract \* \* \*.

Q. When did you next see Mr. Kurzorak after that? A. About the 17th—I believe on the 17th of June he came, or perhaps it was the morning of the 18th of June he came to me with a letter from Mr. Frank.”

See also page 40, Case, lines 18-25:

“Q. Please tell us the circumstances under which this was given (Exhibit P-3)? A. When he assured me that he would bring me the statement that I asked for, I gave him the check, but told him not to deliver that check to Mr. Frank until I had the statement saying that I could return the land before a year was up and get my money back plus twenty-five per cent. interest.”

And then when the letter, Exhibit P-4, was delivered to Safir, he signed the contract, page 41, Case, line 25:

“Q. Did you at that time sign the contract? A. Yes, sir.

Q. What you had previously not signed? A. Yes, sir.”

Where two written instruments are executed at on and the same time touching on a single subject

matter and having identical consideration, then it is conceded at law to be a single transaction and the two must be read together and construed as one instrument *ex antecedentibus et consequentibus* and according to the reasonable sense and construction of the whole. 13 *Corpus Juris*, Section 487, *Owens vs. Owens*, 23 Equity, page 60; *Canadian, etc. Co. vs. Lee*, 69 Atl., 455, thus, the option to transfer the sale into a loan is founded upon valuable consideration and is valid and subsisting.

## POINT II.

### **The motion for a non-suit was properly denied.**

Appellant lays stress upon excerpts of testimony on the part of respondent's witness, Kurzorak, tending to show that respondent has failed to make out a *prima facie* case, and that the motion for a non suit should have been granted. He bases his argument on the ground that the contract was not executed. This is contrary to all the proof of the case. Reference to the testimony and argument in Point I clearly establishes beyond any question that when Dr. Safir, the respondent, received what he wanted from the appellant, he signed the contract and delivered his check.

Appellant stresses the point on page 7 of his brief that Kurzorak, the agent of the appellant, was a party to the contract. On page 31, Case, lines 9-40, the witness Kurzorak clearly explains that he was not a party to the contract for the sale of the plots, his name having been stricken therefrom by and with the consent of the appellant's president, Mr. Frank.

After the plaintiff-respondent had rested his case (this is corroborated on page 47, Case, lines

1-15, by Dr. Safir), there was proof before the jury of the following facts:

(1) Plaintiff had paid defendant \$3,000 (page 41, Case, lines 1-15).

(2) That simultaneously plaintiff-respondent signed the contract for the sale of the plots, with the delivery to him of the option to transfer that contract as a loan for one year (page 41, Case, lines 25-30).

(3) That the notice that plaintiff-respondent would exercise his option (Exhibit B, page 6, Case) was duly served upon, and received by defendant-appellant.

(4) That defendant-appellant refused upon demand to return the money mentioned in the contract (page 42, lines 1-25).

(5) Proof of the exact amount due (page 42, Case, lines 25-40).

Thus a complete *prima facie* case was established and the motion for the non-suit was properly denied.

### POINT III.

#### **This agreement was not an *ultra vires* instrument.**

If the contract were *ultra vires* then the question might arise, but the defendant concedes, as of course it must, that it has the power to convey plots (Compiled Statutes, page 373, Section 4 of the Cemetery Act).

Where there is authority to sell land then it is fundamental law that all acts necessary or convenient to the attainment of the object thereof are

permitted by Section 2 of the General Corporation Act. In *Cohen vs. Colgan*, 97 Equity, page 9, the doctrine was formulated that the provisions of this act (Corp. Act), are not restricted to corporations formed under its provisions but apply to all corporations so far as they are necessary and convenient. If the defendant were permitted to sell this land then it is implied that all the incidental acts necessary to complete the transaction are authorized by the statute. For example it would have the authority to have counsel represented in the transfer and sale of land and would have the implied power to procure suitable quarters for the transaction of its business. Similarly the price, terms, covenants and warranties to sell are all parts of the implied power under the express grant by the State, so that if the major power, namely, the authority to sell the land, is within the scope of the corporate powers all the incidental details would be implied therefrom.

In a case such as this where the benefits have been retained by the cemetery, the doctrine of *Ellerman vs. The Railroad Company*, 23 Atl. 287, and 49 Eq. 217, ought to be followed.

“The doctrine of *ultra vires* ought to be reasonably and not unreasonably, understood and applied, and whatever may be fairly regarded as incidental to and consequential upon the things which are authorized by the charter of the company ought not, unless expressly prohibited, to be held, by judicial construction, *ultra vires*.”

*Pomeroy vs. N. Y. Smelting Co.*, 48 Atl. 395.

A corporation having authority to execute bonds, and its proper officers having actually executed and delivered them and it having received, retained and used the consideration for the bonds,

and paid interest on the bonds for years, omission of a formal resolution authorizing their execution is no defense thereto.

#### POINT IV.

**The cemetery corporation is estopped from denying that they are not bound by the acts of Adam Frank, its President.**

During its entire existence the corporation has permitted Adam Frank, its President, to negotiate, sell, transfer and convey and take all action which might in the ordinary course of business require ratification or authorization by the Board of Directors or trustees.

This case comes clearly within the rule of *Murphy vs. Cane*, in which the Supreme Court fixed the responsibility of a corporation for the acts which it had permitted an officer to perform.

*Murphy vs. W. H. & F. W. Cane, Inc.*, 82 Atl., p. 854, on p. 856.

In *Stokes vs. New Jersey Pottery Co.*, 46 N. J. Law, 237, 242, Mr. Justice Depue, speaking for the Supreme Court, said:

“There are cases in which the powers of an officer of a corporation and his authority to act for the company, are enlarged beyond those powers which are inherent in his office: but those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the control and direction of the business of the company. Taylor on Corp. 202, 236-244; Ang. & Ames on Corp., pars. 299-302. Thus, when, in the usual course of business of a corporation, an officer has been allowed in his official

capacity to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to manage its business. *Martin vs. Webb*, 110 U. S. 7 (3 Sup. Ct. 428), (28 L. Ed. 49). These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent, a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations.”

This language was reiterated by the same distinguished jurist in delivering the opinion of this Court in *Fifth Ward Savings Bank vs. First National Bank*, 48 N. J. Law, 513, 517, 7 At., 318, and has since been treated as an authoritative statement of the law upon this subject. It is not correct, we think, to confine the application of this doctrine to cases of strict estoppel. At least, where a third party seeks to charge a corporation with a contract made by it through the agency of one of its officers, it is not incumbent on such a third party to show that the previous course of business was known to and relied upon by him. As was correctly pointed out by Vice-Chancellor Emery in *Blake vs. Domestic Mfg. Co.*, 64 N. J. Eq. 493, 494, 38 Atl. 241, the principle of technical estoppel as between parties is not involved in such cases, and could not be for the reason that an estoppel of the principal toward the third person dealing with the agent must depend upon the representation made by the principal to the third party. A representation made by the principal to the agent would not, generally speaking, give rise to a technical estoppel.

**POINT V.**

**The motion for direction of a verdict was properly denied.**

At the close of the case the jury had before it the testimony of the plaintiff-respondent and that of the defendant-appellant. The *prima facie* case having been established by the respondent, the defendant's denial raised an issue, and the Court properly submitted that issue to the jury, page 71, Case, lines 12-20.

**CONCLUSION.**

**It is therefore respectfully submitted that the judgment of the Supreme Court should be affirmed.**

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## POINT V.

The motion for direction of a verdict was properly denied.

At the close of the case the jury had before it the testimony of the plaintiff respondent and that of the defendant-appellant. The prima facie case having been established by the respondent, the defendant's denial raised an issue, and the Court properly submitted that issue to the jury, page 71, Case, lines 13-20.

## CONCLUSION.

It is therefore respectfully submitted that the judgment of the Supreme Court should be affirmed.

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