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**New Jersey State Library**

18-11-1902

**SUMMONS.**

The State of New Jersey to A. & A.  
Realty Company, a corporation of  
(SEAL) New Jersey: You are summoned to  
answer the annexed complaint of Feist  
& Feist, Inc., a corporation of New Jer- 10  
sey in an action at law in the Essex County Cir-  
cuit Court. And take notice that unless you  
file your answer to said complaint with the Clerk  
of the Essex County Circuit Court, at Newark,  
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.

WITNESS, WORRALL F. MOUNTAIN, Esq., Judge  
of the Essex County Circuit Court, at Newark, 20  
this 3rd day of March, nineteen hundred and  
twenty-seven.

JOHN H. SCOTT,  
Clerk.

PHILIP J. SCHOTLAND,  
Attorney.

30

40

## COMPLAINT.

## Essex County Circuit Court

10	FEIST & FEIST, INC., a corporation of New Jersey, <div style="text-align: right;"><i>Plaintiff,</i></div>	} <i>Action at Law.</i>  } <i>Complaint.</i>
	<div style="text-align: center;"><i>vs.</i></div> A. & A. REALTY COMPANY, a corporation of New Jersey, <div style="text-align: right;"><i>Defendant.</i></div>	

20 FEIST & FEIST, INC., a corporation duly organized and existing under the laws of the State of New Jersey, and having and maintaining its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

30 1. On or about the 13th day of September, 1922, Benjamin Myer and Henry Allsopp, being the then owners of the property known and designated as No. 168 Clinton avenue, in the City of Newark, County of Essex and State of New Jersey, entered into an agreement, in writing, with the plaintiff, wherein and whereby, among  
 40 other things, the said Henry Allsopp and Benjamin Myer engaged the plaintiff, as agent, to take charge of the said premises, and the management and rental thereof, for the term commencing September 15, 1922, to continue for a period of one year, and to continue thereafter from year to year, unless either party shall notify the other that the same is to terminate, by giving three months' written notice prior to the expiration of said agreement, or any renewal

*Summons.*

thereof; and in and by said agreement, said Myer and Allsopp agreed to pay the plaintiff for its services, a commission equal to five per cent. of the total amount of collections from said property, and also to reimburse plaintiff, on demand, for all expenses incurred by it, in connection with the said property, under said agreement. In and by the terms of said agreement, said Allsopp and Myer further agreed with the plaintiff to pay to the said plaintiff, on the date of the cancellation of said agreement, or any renewal thereof, as therein provided for, a commission equal to five per cent. on the full amount of all leases and tenancies existing at the time of the cancellation of said agreement, until the expiration of said leases and tenancies. 10

2. On or about November 18, 1922, A. E. Allsopp, Inc., became the owner of said premises, and continued said agreement originally made by Henry Allsopp, and Benjamin Myer, with the plaintiff, in full force, and notified plaintiff, in writing, to make the checks for the monthly rents after said date, to A. E. Allsopp, Inc. 20

3. On or about January 16, 1923, the defendant, A. & A. Realty Company, became the owner of said premises, subject to said agreement originally made by said Henry Allsopp and Benjamin Myer, and continued said agreement, with the plaintiff, in full force, and notified the plaintiff, in writing, on said date, to send statements and checks for the management and for the rents collected on said premises, to A. & A. Realty Company, instead of A. E. Allsopp, Inc., as theretofore. 30

4. Plaintiff continued to act as agent, and to manage and take full charge of said property 40

*Complaint.*

after said January 16, 1923, in the same manner as theretofore, and paid over monthly to the A. & A. Realty Company, the net proceeds of the rents collected and received, and was allowed its commissions under the terms of said written agreement.

10 5. The original agreement entered into between the plaintiff, and the said Henry Allsopp and Benjamin Myer above referred to, and more fully described in paragraph 1 of this complaint, was signed by A. E. Allsopp, 2d, on behalf of Henry Allsopp; the notice of the change of ownership, on November 18, 1922, sent to the plaintiff, was also signed by A. E. Allsopp, 2d, on behalf of Henry Allsopp; the notice of the change of ownership to the present defendant, 20 dated January 16, 1923, which was sent to the plaintiff, was also signed by A. E. Allsopp, 2d, as President of the A. & A. Realty Company, the defendant herein.

6. The A. & A. Realty Company is the present owner of the said premises, 168 Clinton avenue, in the City of Newark, and has assumed and continued the agreement with the plaintiff, described in paragraph 1 of this complaint, in full force and effect, from January 16, 1923. 30

7. On January 6, 1927, the defendant, A. & A. Realty Company, by A. E. Allsopp, 2d, its president, notified the plaintiff, by letter, as follows:

*Complaint.*

“January 6, 1927.

Messrs. Feist & Feist,  
738 Broad St.,  
Newark, N. J.

Gentlemen:

Attention of Mr. Schwebmeyer. 10

This is to inform you that we have leased the entire property at 168 Clinton Ave. to Mr. Peter Glod, and have assigned the lease of Ann Davis to him. Therefore, commencing February 1, he will collect the rents and take over the general management of the building.

As we understand it, we owe you 5% of the uncollected rent of the Davis lease, which you consummated last October, and if you will render us a bill for same, we will be pleased to send you a check. 20

Very truly yours,

A. & A. REALTY CO.,  
A. E. ALLSOPP, 2d,  
President.”

AEA C

8. The said A. & A. Realty Company, under the terms of the said contract, is indebted to the plaintiff not only for five per cent. of the uncollected rents to the end of the term of the Davis lease, as admitted and set forth in said letter of January 6, 1927, but also for five per cent. of the amount of the uncollected rents under the lease made with the said Peter Glod, referred to in said letter, and which was made while the said agreement with the plaintiff was in full force and effect. Said agreement contains the following provision: 30

*Complaint.*

10 “In the event that this agreement is cancelled as herein provided for, prior to the expiration of any lease or tenancies existing in the above property, the said owner hereby agrees to pay to the said agent on the date of the cancellation of this agreement or any renewal thereof as herein provided for, a commission equal to 5% on the full amounts of all such leases and tenancies.”

Under and by the terms of the said agreement the said defendant, A. & A. Realty Company, is indebted to the plaintiff, in the sum of \$1,025, the items of which are as follows:

20 “To commissions due under management agreement cancelled by you under date of January 6, 1927:

Ann Davis—from February 1, 1927 to October 1, 1927—	
\$1,000 .....	\$50.00
Peter Glod—five (5) years from February 1, 1927 to February 1, 1932—\$19,500.00 .....	975.00
	<hr/>
	\$1,025.00”

30 Judgment will be asked for the sum of \$1,025, together with lawful interest from January 6, 1927, and the costs of suit to be taxed.

PHILIP J. SCHOTLAND,  
Attorney for Plaintiff.

*Complaint.*

TO THE WITHIN NAMED DEFENDANT:

TAKE NOTICE, that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits within ten days of such service, and must file an answer within twenty days of such service; and that in default thereof, judgment will be entered against you. Lawful service upon a corporation is deemed personal service. 10

PHILIP J. SCHOTLAND,  
Attorney for Plaintiff.

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**AFFIDAVIT OF MERITS.**

Filed March 11, 1927.

## ESSEX COUNTY CIRCUIT COURT.

10	FEIST & FEIST, INC., a corporation of New Jersey, <i>Plaintiff,</i>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	A. & A. REALTY COMPANY, a corporation of New Jersey, <i>Defendant.</i>		<i>Affidavit of Merits of A. &amp; A. Realty Company.</i>

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

ALBERT E. ALLSOPP, 2nd, of full age, being duly sworn according to law, on his oath deposes and says that he is the President of the defendant in the above-entitled suit and that he believes that the defendant has a just and legal defense to the action on the merits of the case.

30 Subscribed and sworn to before me  
 this            day of March, A. D. 1927,  
 at Newark, New Jersey.

**ANSWER.**

Filed March 23, 1927.

## ESSEX COUNTY CIRCUIT COURT.

---

FEIST & FEIST, INC., a corpora-  
tion of New Jersey,

*Plaintiff,**vs.*

A. & A. REALTY COMPANY, a cor-  
poration of New Jersey,

*Defendant.*

10

*Action  
at Law.**Answer.*

The defendant, A. & A. Realty Company, a cor-  
poration of the State of New Jersey, with princi-  
pal office in the City of Newark, in the County of  
Essex and State of New Jersey, says that:

20

1. As to the statements in the first paragraph,  
this defendant has no knowledge or information  
thereof sufficient to form a belief.

2. It denies the second paragraph.

3. It admits the third paragraph except so  
far as it denies that the A. & A. Realty Company  
became the owner of said premises subject to  
said agreement made by said Henry Allsopp and  
Benjamin Myer, and continued said agreement  
with the plaintiff, in full force.

30

4. It denies the fourth paragraph except so  
far as it admits that the plaintiff acted as agent  
in the collection of rents.

5. As to the statements in the fifth paragraph,  
this defendant has no knowledge or information  
thereof sufficient to form a belief.

40

*Answer.*

6. It denies the sixth paragraph except so far as it admits that the A. & A. Realty Company is at present owner of the said premises No. 168 Clinton avenue, in the City of Newark.

7. It admits paragraph 7.

10 8. It denies paragraph 8.

#### SPECIAL DEFENSE.

On or about October 1, 1926, the plaintiff, by its agent, notified the defendant that the plaintiff would do nothing further under said alleged contract in respect to leasing said premises, but would, and thereupon did abandon and terminate the said agreement; whereupon the defendant undertook to and did, by its own efforts and  
20 without assistance of the plaintiff, negotiate and consummate the lease to Peter Glod, in said complaint mentioned.

HARRY L. BRITTINGHAM,  
Attorney of Defendant.

30

40

**REPLY.**

ESSEX COUNTY CIRCUIT COURT.

FEIST & FEIST, INC., a corporation of New Jersey, <i>Plaintiff,</i>	} <i>Action at Law.</i>	10
<i>vs.</i>		
A. & A. REALTY COMPANY, a corporation of New Jersey, <i>Defendant.</i>	} <i>Reply.</i>	

Plaintiff denies the allegations contained in the special defense in the answer filed by the defendant in the above-entitled cause. 20

PHILIP J. SCHOTLAND,  
Attorney for Plaintiff.

30

40

*Testimony.*

ESSEX COUNTY CIRCUIT COURT.

Tuesday, November 1, 1927.

10	FEIST & FEIST, INC., <i>vs.</i> A. & A. REALTY CO.	}	<i>Action at Law.</i>
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Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appears Philip J. Schotland.

For the defendant appears Harry L. Brttingham (by George Mulligan).

20 Mr. Mulligan: In the answer that was filed a special defense was set up that the plaintiff notified the defendant that they would do nothing further on the contract and it was set up as on or about October 1, 1926. We have found that it was November 13, 1926, and I move to amend the date.

30 Mr. Schotland: I object to that. I talked to Mr. Mulligan about the case to try to get him to settle, if possible. I told him he was all wrong on his pleading that we had abandoned the contract; that we had correspondence long after the date showing that we were working under the contract trying to get tenants. Now, he finds it was so and he moves to amend.

The Court: What damage can that do you? It is something within your knowledge and not within his; you know whether you did it or not.

40

*Plaintiff's Opening.*

Mr. Schotland: We deny that. We could support our denial by correspondence between those dates, showing that we were working after the date he alleges. Then, when I called the attention to the fact that there was no foundation for the claim, he wants to amend it. I say that is not an amendment your Honor, in his discretion, should allow him to make. 10

The Court: He says it was October 1st, but I assume before the consummation of the lease. Now, he is moving it to a later date, and it is still before the making of the lease. It seems to me it is well within your knowledge.

Mr. Schotland: Of course, it is. 20

The Court: I will allow it.

(A jury is called and sworn.)

(Mr. Schotland opens for the plaintiff as follows:)

If your Honor please, and gentlemen of the jury: This is an action brought by Feist & Feist, a corporation engaged in the real estate and insurance business, to recover a commission owing to them on the management and leasing of a property owned by the A. & A. Realty Company, also a corporation of New Jersey, under the terms of a written contract. By the terms of the contract Messrs. Feist & Feist were to receive commission of five per cent., I believe, on the rentals collected for managing an apartment house on Clinton avenue in this city, and the contract is renewable from year to year, terminable on three months' written notice, 30 40

*Plaintiff's Opening.*

10 with the proviso that at any time the contract is terminated they are to receive five per cent. on the rentals collected under the terms of the contract for the remainder of the term. The contract was terminated by a notice dated January 6, 1927, and under the terms of the contract it goes into effect April 6, 1926.

Mr. Mulligan: If your Honor please, I don't know if you would entertain a motion on counsel's opening. His statement is that it was April 6, 1926, and this suit was started long before April 6th and was prematurely brought. That is one of the grounds. And it seems to me it can be disposed of as a matter of law.

20 The Court: I suppose, Mr. Schotland, your opening is based upon your complaint, that is, where there are written provisions as to what the contract was, you are basing it upon those and not upon the phraseology you used to the jury.

Mr. Schotland: Yes, sir.

30 Mr. Mulligan: My contention is that under the contract the cancellation was effective three months after the notice was given, and in accordance with the complaint in paragraph 6, it says that the contract and agreement are in full force and effect from January 16, 1923, to April 6, 1927, and terminated then because of the three months' notice given January 6th. Then we have February, March and April. The contract provides, in accordance with the complaint, that "In the event that this agreement is cancelled as herein provided for, prior to the expiration  
40 of any lease or tenancies existing in the

*Plaintiff's Opening.*

above property, the said owner hereby agrees to pay to the said agent on the date of the cancellation of this agreement or any renewal thereof, as herein provided for, a commission equal to five per cent. on the full amounts of all such leases and tenancies." The cancellation of this agreement in accordance with the cases is three months after notice, and that is the time fixed by this provision. 10

The Court: That is, they can terminate three months after written notice?

Mr. Mulligan: It is in the first paragraph.

The Court: He gave you notice on January 6th, Mr. Schotland?

Mr. Schotland: Not that kind of a notice. He did not live up to the contract. He terminated it by notice on January 6th, and put us out as of February 1st. I was referring to the terms of the contract, and it would have been terminated April 6th, but that is not what took place. 20

The Court: Their contention is that it was not terminated under the terms of the contract.

Mr. Mulligan: They wrote a letter to us—

The Court: You gave him notice on January 6th and stated that commencing the first they were through, is that it? 30

Mr. Schotland: Yes, sir.

Mr. Mulligan: And under the pleadings they say that under the terms of the contract they are indebted to the plaintiff not only for five per cent. of the uncollected rents to the end of the term of the Davis lease, as admitted, and set forth in said letter of January 6, 1927, but also for five per cent. 40

*Plaintiff's Opening.*

10 of the amount of the uncollected rents under the lease made with Peter Glod, containing the following provision: "In the event the agreement is cancelled \* \* \* and so forth. They are suing under this contract, and under the contract their terms are fixed by the provisions of the contract themselves that on a certain day they would be entitled to a certain amount of money.

The Court: I suppose they claim it was a breach of the contract?

Mr. Mulligan: Yes, and under the contract they are entitled to a certain amount.

20 The Court: You allege, as I recall it, a continuing contract which should go on and on subject to three months' termination, and then you allege here that that contract was taken over by the A. & A. Realty Company and was in full force and effect from January 16, 1923, to April 6, 1927. Then you come along and say it was breached. Why do you say it was in full force and effect to April 6, 1927? What was the significance of that?

Mr. Schotland: I make that January 6th.

30 The Court: And continuing in full force and effect from January 6, 1923. You don't want that in, too.

Mr. Schotland: I want to amend it by striking out April 6, 1927.

Mr. Mulligan: What will be substituted for that?

Mr. Schotland: Nothing.

40 The Court: Now, you have an agreement where it says the A. & A. Realty Company took over the managing and rental and it was

*Ralph G. Schwebmeyer, direct.*

in full force and effect until it was terminated by this letter. I assume Mr. Schotland says this letter was a breach of that contract.

Mr. Mulligan opens for the defendant.

RALPH G. SCHWEBMEYER, sworn in behalf of the plaintiff. 10

*Direct examination by Mr. Schotland.*

Q Mr. Schwebmeyer, are you connected with Feist & Feist, Incorporated? A I am.

Q In what capacity? A Secretary of the company.

Q Are you in charge of the details of the business as secretary? A I am.

Q And in charge of the office? A I am. 20

Q I show you an agreement dated September 13, 1922. Is this contract in the possession of Feist & Feist? A It is, yes.

The Court: Is it necessary to prove that contract?

Mr. Mulligan: No, I admit it.

Mr. Schotland: I offer it in evidence.

(The same is received in evidence and marked Exhibit P. 1.) 30

(Mr. Schotland reads Exhibit P. 1 to the jury.)

Q Mr. Schwebmeyer, after that contract, Exhibit P. 1, was executed, did your company take charge of this property? A We did.

Q What did you do in connection with this property? A Managed the property from the viewpoint of the renting of the vacant space as it occurred, and the collection of rents, and 40

*Ralph G. Schwebmeyer, direct.*

the mechanical operation of the property such as the supervision of the suppliance of heat and the rendition of statements periodically, the handling of bills, and the general handling of the property.

Q And hired the help? A Yes, sir.

10 Q And fixed the salaries and paid them? A Exactly.

Q After that contract was entered into did you receive any notice of any change in ownership? A Yes, we did.

Q I show you a letter dated November 18, 1922. Did you receive that letter? A Yes, sir.

Mr. Schotland: I offer it in evidence.

(The same is received in evidence and marked Exhibit P. 2.)

20 (Mr. Schotland reads Exhibit P. 2 to the jury.)

Q After the receipt of Exhibit P. 2, to whom did you render your statements and turn over the net proceeds of the rent collections? A We turned them over as instructed in that letter.

Q Did you receive this letter of January 13, 1923? A Yes, we did.

30

Mr. Schotland: I offer that in evidence.

Mr. Mulligan: No objection to the letter.

(The same is received in evidence and marked Exhibit P. 3.)

(Mr. Schotland reads Exhibit P. 3 to the jury.)

Q I show you a letter dated January 16, 1923. Did you receive that letter regarding the management of this property? A Yes, we did.

40

*Ralph G. Schwebmeyer, direct.*

Mr. Schotland: I offer this in evidence.

Mr. Mulligan: No objection.

(The same is received in evidence and marked Exhibit P. 4.)

(Mr. Schotland reads Exhibit P. 4 to the jury.)

10

Q Was the letter that was enclosed with Exhibit P. 4 the one that I showed you just previously, Exhibit P. 3? A May I see them together?

Q (Mr. Schotland hands paper to the witness.) A It was.

Q After the receipt of Exhibit P. 4 on January 16, 1923, did you continue to manage that property? A We did.

Q To whom did you render your statements? A To the A. & A. Realty Company.

20

Q In accordance with the— A In accordance with the letter.

Mr. Mulligan: I object to what it was in accordance with.

Objection sustained.

Q Why did you render your statements and checks to the A. & A. Realty Company? A Because we were so instructed in a letter which we received.

30

Q Did you continue to manage that property after 1923? A We did.

Q Until when? A Until late in 1926 or early in 1927; I am not sure which.

Q Was it taken out of your hands by means of a written notice? A It was.

Q I show you letter dated January 6, 1927. Did you receive that from the defendant company? A We did.

40

*Ralph G. Schwebmeyer, direct.*

Q Is that the letter you referred to as terminating the management? A It is.

Mr. Schotland: I offer it in evidence.

Mr. Mulligan: No objection.

10 (The same is received in evidence and marked Exhibit P. 5.)

Mr. Schotland reads Exhibit P. 5 to the jury.)

Q After the receipt of this letter, Exhibit P. 5, Mr. Schwebmeyer, did you surrender the premises to anyone? A We did, to the A. & A. Realty Company.

Q When? A Well, there was a slight overlapping of some unfinished ends for some bills  
20 which we had to pay, or had to be reimbursed.

Q How long was it after that? A Within a month.

Q The letter of January 6th says that Mr. Glod will take it over commencing February 1st? A I think even beyond February 1st there was some delay in cleaning up the loose ends.

Q Between 1923 and 1927, when you received Exhibit P. 5, did you have anything personally to do with the work of the management of this  
30 building in question? A Yes.

Q Did you have any correspondence with the A. & A. Realty Company regarding the management of it? A I did.

Q Did you receive any complaints from the A. & A. Realty Company as to the rental situation of that property last fall? A My recollection is that we got a letter complaining about the rental situation.

Q I show you a letter dated October 6, 1926. Is that the letter you refer to? A It is, yes.  
40

*Ralph G. Schwebmeyer, direct.*

Mr. Schotland: I offer it in evidence.

Mr. Mulligan: No objection.

(The same is received in evidence and marked Exhibit P. 6.)

(Mr. Schotland reads Exhibit P. 6 to the jury.)

10

Mr. Schotland: Mr. Mulligan, have you a letter of October 15th?

(Mr. Mulligan produces letter called for.)

Q I show you a letter dated October 15, 1926, with enclosures. Is this the reply of your firm to that complaint of October 6th? A It is, yes.

Mr. Schotland: I offer it in evidence.

Mr. Mulligan: I object to the report attached. It contains a great deal of hearsay evidence and opinions of certain people, as I recollect it. I don't think it ought to go in.

20

Mr. Schotland. It is the correspondence between the parties showing the work done and what was called to the attention of the other side. It is part of the chain. Most of the proof in the case is correspondence.

The Court: Let the letter be marked.

(The letter is received in evidence and marked Exhibit P. 7.)

30

(Mr. Schotland reads Exhibit P. 7 to the jury.)

The Court: I think the enclosures may as well go in.

(The enclosures are included with Exhibit P. 7.)

The Court: You do not need to read the report to the jury. I don't think it is ma-

40

*Ralph G. Schwebmeyer, direct.*

terial at the present time. If you think it needs to be read in the summing up, you may do so. I do not think it bears on the liability one way or the other.

10 Q Did you receive a reply dated October 18th, and is this the reply to the letter of October 18th?

A It is, yes.

Mr. Schotland: I offer it in evidence.

Mr. Mulligan: No objection.

(The same is received in evidence and marked Exhibit P. 8.)

(Mr. Schotland reads Exhibit P. 8 to the jury.)

20 Mr. Schotland: It refers to paragraph 2 of the report attached to Exhibit P. 7. If your Honor please, I think I ought to read the other part. You see, the original contract is made with Meyer & Allsopp, and that is the contract that is continued. The defendant, in his pleadings, denies that he has any contract with us. It is by means of these details and the terms of the contract—

30 The Court: I read that report before and it has nothing to do with what the original contract was or between whom it was.

Mr. Schotland: It all depends. If all we had to do was to collect rents we would not have to take care of the payment of taxes, and so forth.

The Court: You can't hold the purchaser under the original agreement unless you make some agreement about it.

40 Mr. Schotland: Not unless he continues it.

*Ralph G. Schwebmeyer, direct.*

The Court: Unless he affirms the contract. He may continue to let another man manage the property, but he is not bound by the arrangement of the previous owner. You have to prove that that is the contract adopted between them, and there isn't anything in that report that bears on that. If it becomes material, you can read it, but I am not going to take the time to have the report read just to show that the plaintiffs have been industrious in their past work. That is all it goes to show. If there is any particular part of that report you want to call my attention to, that is, an affirmation or adoption of that contract, I will read it, but I do not see anything in it in reading it through except as to the work they had done on it. 10 20

(Mr. Schotland continues reading Exhibit P. 8.)

Q After the receipt of that letter, Mr. Schwebmeyer, what, if anything, did you do regarding the management of that property? A I went personally to call on Mr. A. E. Allsopp.

Q Did you see him? A I did.

Q About when? A It must have been very shortly after our receipt of that letter; within a few days or a week. 30

*By the Court.*

Q Who is that? Is that A. E. Allsopp, second? A Yes, sir.

*By Mr. Schotland.*

Q Where did you see him? A At his office.

Q Give us the conversation. A As I re- 40

*Ralph G. Schwebmeyer, direct.*

10 member it, I had his letter with me and when I called upon him I took up the various points which he raised separately and I said to him we could go on indefinitely and write volumes back and forth about our various points of view, but particularly I wanted to see him with reference to the service which he claimed we advertised and did not render. I asked him to be permitted by them to lease this property as an entity on a net lease over a period of years, which would immediately relieve them of the necessity for meeting the taxes, which he claimed, and assured him of an income, provided the tenant was responsible. I suggested he let us lease the whole property as a unit on a net basis. Following the thought the question naturally arose as to  
20 what the rent would have to be. We then talked about the sales value of that property and I made notes on a piece of paper at the time about the value that he felt he wanted in the event of a sale, although as I remember it, he said he was not anxious to sell it, but would entertain a net lease.

Q Are these the notes that you made at the time (handing papers to witness)? A Yes, they are. Refreshing my memory with this memorandum, the selling price that was discussed was  
30 \$75,000 and Mr. Allsopp—

Mr. Mulligan: I object to an oration by this witness.

Objection sustained.

Q What talk did you have with him about the management?

The Court: Confine yourself to the management.  
40

*Ralph G. Schwebmeyer, direct.*

The Witness: I believe that I was fairly successful in—

The Court: Don't give us the results, but what was said.

The Witness: I told him generally, that we had done everything within our power to lease these apartments separately as separate apartments, and that there were conditions really beyond our control that prevented the leasing of the apartments, such as the market for large apartments of that type at that time; and the result of the conversation was that we were to proceed in our efforts to rent the apartments, and that we would, at the same time, entertain a prospect, should we produce one, for the net lease of the building.

10

20

Q What, if anything, was said as to your management at the time? A Nothing that I remember; I don't remember anything with reference to it.

Q After that conversation did you continue to manage the property? A We did.

Q Until you received the letter of January 6th, as you said? A Yes, or shortly thereafter.

Q What is the balance, if any, owing your firm by the A. & A. Realty Company?

30

Mr. Mulligan: I object to that.

Mr. Schotland: I am getting ahead of my thoughts.

Q At the time when the property was taken out of your hands, what tenants were in it?

The Court: What do you mean? Do you want to fix any specific date?

40

*Ralph G. Schwebmeyer, cross.*

Mr. Schotland: Under the notice it is as of February 1st.

Q What tenants were in them? A At the time we received the notice it is my recollection there was one tenant in the building named  
10 Davies.

Q And the lessee referred to was not personally in possession? A Not to my knowledge.

The Court: I suppose it is admitted in the pleadings, by the admission of paragraph 7—that does not show what the terms of the Davies lease were. You had better ask him that.

Mr. Schotland: I don't think this witness  
20 knows.

*Cross examination by Mr. Mulligan.*

Q Mr. Schwebmeyer, what officer of the corporation were you at this time? A Secretary.

Q Did you have full charge of the matter of the contract with Allsopp? A Yes, I did.

Q When you got that letter of January 6th, did you take that as a cancellation under the contract? A I don't remember my mental re-  
30 action to it.

Q Did you write any letter in answer to the letter of the A. & A. Realty Company? A I think a letter was written; I don't remember.

Q I show you a letter and ask you whether that is the letter? A Yes, it is.

Q Will you read that letter and tell me that you did not take that as a cancellation notice under the contract? A (Witness reading letter.)  
40 It is an acceptance of a cancellation subject to a

*Ralph G. Schwebmeyer, re-direct.*

revision of the condition imposed in that notice. In other words, I was willing to accept the notice subject to the terms of the contract.

Mr. Mulligan: I offer it in evidence.

Mr. Schotland: No objection.

(The same is received in evidence and marked Exhibit D. 1.) 10

(Mr. Mulligan reads Exhibit D. 1 to the jury.)

Q Do you recall in your conversation that you have testified about that you told Mr. Allsopp personally all that you had done? A Yes, I have the date on this card, if I may refresh my recollection—October 27, 1926.

Q That was the time you said you had done everything you could? A I said we had been employing everything available to us. 20

Q In other words, you said you had done all you could? A Possibly.

*Re-direct examination by Mr. Schotland.*

Q I forgot on direct examination to ask you about any subsequent conversations with Mr. Allsopp. A I did have several. 30

Q In what connection? A In connection with certain tenancies that we had procured for his 168 Clinton avenue property.

Q When was that? A That was in November, the succeeding month to this conversation.

*By the Court.*

Q November, 1926? A November, 1926, yes, sir. 40

*Ralph G. Schwebmeyer, re-direct.*

*By Mr. Schotland.*

Q What part of November? A Between the 10th and the 20th, as I remember it; the middle of the month.

10 Q Have you any memorandum which would fix the date in your mind? A I have, and I believe they are on the table; I made the memorandums at the time.

Q At the time of the conversations? A Yes, sir; at the time of the conversations.

Q Is this the memorandum you refer to? A That is one of them, yes.

Q Without reading it, when did you make that memorandum? A November 12, 1926.

20 Q I want to know with reference to the occurrences of which it is a memorandum. A May I just refresh my memory?

Q Yes. A This first memorandum concerns—

Q Just a minute. I want to know when you made the memorandum with reference to the time when the events of which it is a memorandum occurred, the same time or later or when? A No, they are the same day or the succeeding day—at the same time.

30 Q Looking at that memorandum, you may refresh your recollection; can you tell me when you had your conversation that you are referring to with Mr. Allsopp? A I can, yes.

Q When? A November 12, 1926.

40 Q What was the subject matter of that conversation? A We had a prospective tenant who was willing to take several floors—three floors, according to the memorandum—and which is correct—of the building at 168 Clinton avenue, at a rental of \$650 a month, which is the same rental

*Ralph G. Schwebmeyer, re-direct.*

that they were asking at the time, and I reached Mr. Allsopp in an effort to get his favorable consideration of the acceptance of the tenancy, because we were quite elated over the fact that we had gotten this tenant after all the criticism—

Mr. Mulligan: I object to that.

10

Objection sustained.

Q The rules of evidence do not allow you to describe your elation. A So I called Mr. Allsopp about the possibility of getting this tenant and he was not receptive to the immediate acceptance—

Q What did he say?

20

*By the Court.*

Q As near as you can recall. You don't have to say the exact words.

*By Mr. Schotland.*

Q You may refresh your recollection by looking at the memorandum. A Mr. Allsopp stated that he would not do anything at the present time as he had a proposition from another broker, namely, rent the entire building at \$3,500 a year, net, for a period of five years. And I stated that I thought Mr. Allsopp was making a mistake and not to tie the place up—

30

Mr. Mulligan: I object to his reading the memorandum.

The Court: I don't know that he is reading it. He is testifying from it to refresh his recollection. Go ahead.

40

*Ralph G. Schwebmeyer, re-direct.*

10 The Witness: For five years at a rental of \$3,500 a year net. He stated on the face of it it was a better proposition by a few hundred dollars a year. He was tying his building up for five years and our proposition was only for twenty months. I told him also that while, in all probability, another broker might have an interested party, the other broker might be stalling Mr. Allsopp and he would be losing out on our proposition. Mr. Allsopp said that if the five-year proposition did not materialize he would not take the rental we submitted. I asked him not to be hasty and to give it thought. He said he would call the other broker and call us back. He called back and stated the proposition now depended on whether he would waive the six months' security, but in any event he would let us know at three o'clock in the afternoon.

20 Q Did he let you know? A At four o'clock I had not heard from him and I called him up. He said he could not do anything until the following day. That was Saturday, November 14, at ten o'clock P. M. I said we might lose our people in the meantime if we pressed them, and he said he could not help it if we lost them. He did not call until ten o'clock the next morning. And then I called his office and I learned that he had left the office—

30 Q Did you learn where he was? A I did not reach him at the office.

40 Q Did you reach him at all? A I reached him finally at a gasoline station where he had stopped en route to a football game, and I told him it was imperative that we get an answer as

*Ralph G. Schwebmeyer, re-cross.*

to whether or not he would accept our tenant, and reiterated the proposition, and he said he would not accept the tenant and the matter was closed. That is to the best of my recollection.

Q Was that the last conversation you had with him? A No, that was on a Saturday. On Monday I called him and again endeavored to gain his sanction to the taking of this tenant and he reiterated his previous stand and said he was not interested. 10

Q Was that the last conversation you had with him? A To the best of my recollection, it is.

At one o'clock P. M., the Court takes a recess of one hour.

20

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AFTER RECESS.

RALPH G. SCHWEBMEYER, resumes the stand.

*Re-cross examination by Mr. Mulligan.*

Q Is this the copy of the bill which was sent with that letter, or was that the bill which was sent with this letter marked Exhibit D. 1? A I think that is the bill or a copy of it. 30

Mr. Mulligan: I offer that in connection with the letter.

40

*Albert E. Allsopp, 2nd, direct.*

ALBERT E. ALLSOPP, 2nd, sworn in behalf of the plaintiff.

*Direct examination by Mr. Schotland.*

10 Q Mr. Allsopp, I show you Exhibit P. 1, the original agreement with Feist & Feist for the management of this property. Did you sign that? A I did.

Q I show you Exhibit P. 2. Did you sign that? A I did.

Q I show you Exhibit P. 4. Did you sign that? A I did.

Q I show you Exhibit P. 5. Did you sign that? A I did.

20 Q I show you Exhibit P. 6. Did you sign that? A I did; yes, sir.

Q I show you Exhibit P. 8. Did you sign that? A I did.

Q And you are the A. E. Allsopp, 2nd, that is the president of the A. & A. Realty Company?  
A Yes, sir.

Q Which owned this property ever since when? A I believe since 1923.

Q And still owns it? A Yes, sir.

30 Q How much did you lease the property for to Mr. Glod? A \$3,900.

Q Per month? A Per annum.

Q What do you mean by \$3,900 per annum?  
A That is the only rent that we received for the property.

Q In addition to what? A In addition to nothing—in addition to the tenants keeping the building in repair.

*Albert E. Allsopp, cross.*

*By the Court.*

Q It is a net rental? A As far as the repairs and any possible assessments are concerned.

*By Mr. Schotland.*

Q What about taxes? A Taxes are included **10**  
in the \$3,900.

Q You pay the taxes? A We pay the taxes.

Q Out of that \$3,900 per year? A Yes, sir.

Q Is the term for five years? A Yes, sir.

Q And it began February 1st? A Yes, sir.

Q The oldest tenant that was in the premises that you refer to in Exhibit P. 5, was paying \$125 a month, wasn't he? A I believe approximately that figure.

Q Now, then, as to the bill that is part of Exhibit D. 1. You admit that \$50 there is correct, don't you? A Yes, sir. **20**

Q And the \$975 would be correct if Feist & Feist were entitled to the commission on the Glod lease? A I should say they would have to deduct the taxes for five years from that.

Q Why should you say that?

The Court: Never mind that. That is for me to say. **30**

*Cross examination by Mr. Mulligan.*

Q When was the lease with Peter Glod delivered? A On the 7th of January.

Q What year? A 1927.

Q Who was the broker who negotiated that lease?

Mr. Schotland: I object to that as immaterial. **40**

*Motion for a Non-suit.*

Objection sustained.

Q Did you pay a commission to a broker for that lease?

Mr. Schotland: I object to that.

10 Objection sustained.

*Re-direct examination by Mr. Schotland.*

Q When you wrote Exhibit P. 5, you had closed on the Glod lease before you wrote that, hadn't you? A Only tentatively.

Q That is, it was not executed? A No, sir.

Q But it was already drawn? A I can't say. We arranged terms and required him to put up additional collateral, and I believe it was closed the next day.

20 Q But it was closed before February 1st, the date fixed in this Exhibit P. 5? A Oh, yes.

PLAINTIFF RESTS.

Mr. Mulligan: I ask for a non-suit on the ground that there is no privity of contract between Benjamin Meyer and Henry Allsopp, and the defendant in this case.

30 The Court: You admitted liability of \$50. I can't grant a non-suit in the face of an admitted liability of \$50.

Mr. Mulligan: No, he has said something about this bill being correct. This case would depend a good deal on the pleadings. Under the pleadings in this case it would not be due at this time. He has not admitted a proposition of law as to whether the money is actually due to the plaintiff on these pleadings. I don't think he could.

40

*Motion for a Non-suit.*

The Court: As I understand it, he owes you five per cent. of the rent.

Mr. Mulligan: Now, the plaintiff is suing on the contract, we claim, and under the contract itself the pleadings are drawn to show a cancellation. All the evidence in the case shows a cancellation of the contract.

10

The Court: I will hear you on both counts.  
(Argument.)

Mr. Mulligan: This contract was made between Benjamin Meyer and Henry Allsopp. The next thing that appears is that the A. & A. Realty Company become the new owners of the property. How many mean conveyances there have been between the two and the various owners who owned it between the contracts, is not shown at all, and whether they took this property subject to this agreement. All that is shown is that Feist & Feist collected some rents and sent them in to the subsequent owners. Now, I say, in order to bring in a contract and ratify it they have to bring it in to the subsequent owner, and adopt it. There has not been anything like that in this case. On those two grounds I ask for a non-suit.

20

30

(Argument.)

The Court: I do not think it is necessary to put in anything more regarding the management. There is no doubt these were the managing agents. It is a question under what terms they were managing agents. I can't see how you can make the new corporation responsible for the contracts for the old unless the new corporation agrees to it.

40

*Motion for a Non-suit.*

Mr. Schotland: Will your Honor permit me to call the defendant to let him testify on that point?

The Court: The case is closed so far as that is concerned.

10 Mr. Schotland: There is nothing to be gained by a non-suit as the evidence stands at present.

The Court: So far as the \$50 is concerned, I could amend it so it could be recovered, but under the circumstances it is so small, and so as to abide by the form of complaint—the form of the complaint is on the written contract—I will hold that the written contract is not binding upon the present defendant, and the plaintiff is restrained from recovering on that contract. On that ground I will grant the non-suit.

20

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

40

**EXHIBIT P. 1.**

THIS AGREEMENT, made the thirteenth day of September in the year One Thousand Nine Hundred twenty-two, between Benjamin Myer and Henry Allsopp owners of the property number 168 Clinton Avenue in the City of Newark, County of Essex and State of New Jersey, hereinafter referred to as owner, and FEIST & FEIST, INC., a Corporation of the State of New Jersey, hereinafter referred to as Agent,

10

WITNESSETH:

The said owner employs the said agent to take charge of the above property and the said agent agrees to take the charge and management thereof, on the following terms and conditions:

1st. To make all reasonable efforts to collect all rent due; and the owner hereby authorizes and empowers the said agent to receive, collect and receipt for, and ask and demand and sue for, any and all rentals and other charges which may at any time be or become due to the said owner, from any person or persons in respect to the premises, and to institute summary proceedings in its own name or in the name of the owner to recover possession of said premises or any part or parts thereof.

20

30

2nd. Subject to the right of the owner from time to time to give written directions with respect to any of the following matters, the agent shall have and is hereby empowered in the name of the owner or otherwise.

(A) To let, hire or lease any or all portions of the above property which may from time to time be for rent. To advertise and use all other proper means to procure tenants for the said properties. To facilitate col-

40

*Exhibit P. 1.*

10                   lections and summary proceedings, all leases and agreements effecting the rights of the tenants or referring to the operating of said building shall be left in the possession of the agent during the term of this agreement. Should, however, the owner make a written demand on the agent for said leases and agreements as it may have the said agent is to deliver to the said owner, said leases and agreements.

(B) To engage and pay all help which the agent may deem necessary to properly maintain the said properties.

20                   (c) To cause such repairs from time to time as the agent may deem necessary, including plumbing, carpenter work, decorating, steam fitting, and necessary repairs to all other parts of said properties. The agent, however, shall not make extraordinary repairs without the written consent of the owner.

(D) To purchase coal for the property for heating purposes and hot water from Tegen & Wiebke Co.

30                   3rd. The agent agrees on or about the last day of each month to render to the owner an itemized account of its collections and expenditures in connection with the said properties. All expenditures made under the terms of this agreement and the agent's commission as hereinafter provided for shall be deducted from the amounts collected, and the net balance shall be remitted to the owner simultaneously with said itemized account. And said accounts shall stand as approved unless objections are made prior to the last day of the succeeding month.

40

*Exhibit P. 1.*

4th.

5th. The agent agrees to use care in performing its part of this agreement, and to use its efforts to maintain maximum rentals with minimum expenses.

6th. In consideration of the above covenants on the part of the agent, the said Benjamin Myer and Henry Allsopp appoint the said FEIST & FEIST, INC., as their agent in their name and stead to take charge of and manage the above mentioned property, and agree to pay the said agent for its services a commission equal to 5% of the total amount of collections from the said properties, and also to reimburse it on demand for all expenses incurred by it in connection with the said property under this agreement, and to indemnify and hold harmless the agent against any claim arising out of its management. In the event the monthly collections are insufficient to pay such disbursements, then the same or any deficiency therein shall be paid by the owner to the agent at the end of each month.

7th. The said agency shall commence on the fifteenth day of September, 1922, and shall continue for a period of 1 year, and will continue thereafter from year to year, unless either party shall notify the other that the same is to terminate by giving three months' written notice prior to the expiration of this agreement or any renewal thereof. In the event that this agreement is cancelled as herein provided for, prior to the expiration of any lease or tenancies existing in the above property, the said owner hereby agrees to pay to the said agent on the date of the cancellation of this agreement or any renewal

10

20

30

40

*Exhibit P. 1.*

thereof as herein provided for, a commission equal to 5% on the full amounts of all such leases and tenancies.

10 IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals and the party of the second part has caused these presents to be signed by its president, attested by its secretary and the corporate seal affixed, the day and year first above mentioned.

BENJAMIN MEYER (SEAL)

HENRY ALLSOPP (SEAL)

By A. E. Allsopp, 2d

Witness Louis Nass.

20 FEIST & FEIST, INC.,

By A. H. FEIST, Pres. (SEAL)

Management Agreement

Between

Benjamin Myer & Henry Allsopp

And

FEIST & FEIST, INC.

Expires

30 September 15th, 1923.

FEIST & FEIST, INC.

(Abe Feist, Pres.)

Real Estate

Insurance

Loans

738 Broad Street Newark, N. J.

*Plaintiff's Exhibits.*

**EXHIBIT P. 2.**

FIDELITY-PHENIX  
 Fire Insurance Company  
 of New York  
 C. R. Street President  
 A. E. Allsopp Inc., Agents **10**  
 790 Broad St. Newark, N. J.

November 18, 1922.

Feist & Feist,  
 738 Broad St.,  
 Newark, N. J.

Gentlemen: Attention of Mr. Nass.

This will authorize you to issue check each month in payment of rents 168 Clinton Ave. to A. E. Allsopp, Inc., instead of Henry Allsopp as **20** heretofore.

Very truly yours,

A. E. ALLSOPP, 2d  
 for Henry Allsopp

HC

*Plaintiff's Exhibits.*

**EXHIBIT P. 3.**

Belleville  
2565

A. & A. REALTY COMPANY  
Real Estate

10 291 Cortlandt St., Belleville, N. J.

JAN. 13, 1923

To whom it may concern

This is to notify you that there has been a re-organization of the A. & A. Realty Company, effective January 10th. The headquarters have been moved to the office of the president, Mr. Albert E. Allsopp, 2nd, Kinney Bldg., 790 Broad street, Newark, N. J.

20 Please refer all future inquiries to the president at the above address, from which office payments and collections will be handled.

Also wish to announce my resignation from the company, and withdrawal of my holdings complete.

Signed Henry Allsopp

30

40

*Plaintiff's Exhibits.***EXHIBIT P. 4.**

Belleville 2565

A. & A. REALTY COMPANY  
Real Estate291 Cortlandt St., Belleville, N. J. 10  
New address—620 Kinney Bldg., Newark, N. J.

Attention of Mr. Nass.

January 16, 1923.

Messrs. Feist & Feist, Inc.,  
738 Broad St.,  
Newark, N. J.

Gentlemen: Re: 168 Clinton Ave., Newark, N. J.

In the future will you kindly send the state-  
ment for 168 Clinton Ave. in duplicate? 20Also, this will authorize you to make the check  
from now on payable to the A. & A. Realty Co.,  
instead of to A. E. Allsopp, Inc., as per letter  
enclosed.

Very truly yours,

A. E. ALLSOPP, 2d  
President.

HC

30

40

*Plaintiff's Exhibits.*

**EXHIBIT P. 5.**

A. & A. REALTY COMPANY  
Real Estate  
Kinney Bldg, 790 Broad Street,  
Newark, New Jersey.

10

January 6, 1927.

Messrs. Feist & Feist,  
738 Broad St.,  
Newark, N. J.

Attention of Mr. Schwebmeyer.

Gentlemen:

This is to inform you that we have leased the entire property at 168 Clinton Ave. to Mr. Peter Glod, and have assigned the lease of Ann Davis to him. Therefore, commencing February 1, he will collect the rents and take over the general management of the building.

20

As we understand it, we owe you 5% of the uncollected rent of the Davis lease, which you consummated last October, and if you will render us a bill for same, we will be pleased to send you a check.

30

Very truly yours,

A. & A. REALTY CO.

A. E. Allsopp 2d  
President

AEA C

40

*Plaintiff's Exhibits.*

**EXHIBIT P. 6.**

A. & A. REALTY COMPANY  
Real Estate  
Kinney Building, 790 Broad Street,  
Newark, New Jersey.

October 6, 1926

10

Mr. Abe Feist,  
738 Broad St.,  
Newark, N. J.

Dear Mr. Feist:

We are not at all satisfied with the situation concerning our apartment house at 168 Clinton Avenue, now being managed by your organization. This building only contains four apartments and yet we are advised that three of them are now vacant and the October first renting season already past.

20

Considering that each apartment contains seven rooms and two baths our rents have been decidedly cheap, in fact, far too cheap for the type of property and location involved.

Since this situation appears to rest largely with the management, or lack of management, of the building, it will be necessary for us to give other real estate men a chance unless you can change the situation by November 1st. Please advise.

30

Very truly yours,  
A. & A. REALTY CO.,  
A. E. Allsopp 2d

AEA:MJ

President.

P. S. Incidentally, I wouldn't have known anything about this vacancy condition had I not written to inquire. This should eliminate any alibis being made now.

40

AEA 2d

**EXHIBIT P. 7.**

FEIST & FEIST  
(Inc.)

Abram Feist, Pres.

10

Real Estate and Insurance  
738 Broad Street, Newark, N. J.  
Telephone 9600 Market

October Fifteenth  
Nineteen Twenty-six.

A & A. Realty Company  
790 Broad Street  
Newark, New Jersey.

*Attention:— Mr. A. E. Allsopp*

20

Gentlemen:—

I have investigated the matter referred to in your letter of October 6th. and enclose herewith for your information a copy of the report on the situation as it came to me. I cannot reconcile your complaint regarding our service with the facts disclosed by the report.

30

If there are any misstatements or misunderstandings on the report as filed, or if there is any misconception on my part of the contents of the report, I will be glad to have your further advices on the matter.

Very truly yours,

FEIST & FEIST. INC.

Abram Feist  
President.

*Abram Feist.*  
encl.

40

*Exhibit P. 7.*

To Mr. A. Feist

From Mr. L. J. Nass

Date October 9, 1926.

Subject: Report on Mr. Allsopp's apartment house—

168 Clinton Avenue, Newark.

10

In the early part of August, 1926 Mr. Grotta and I went up to see Mr. A. E. Allsopp with reference to the leasing of the entire building at 168 Clinton Avenue to the Y. W. C. A. for a period of five years at a rental of \$4,200.00 per year, the Y. W. C. A. to do all the work and to pay all the upkeep including janitor service in the building, with the exception of insurance and taxes which Mr. Allsopp was to pay.

20

We showed Mr. Allsopp that for the last three years his net income (on an average) after paying taxes, insurance and upkeep was \$2,000.00 more or less, per year; and that on this proposition he would have a yearly net income of approximately \$3,000.00. Mr. Allsopp definite turned down this proposition but stated that if we could get him \$5,000.00 per year he would entertain the proposition. We went back to the "Y" secretary and the \$5,000.00 proposition was turned down.

30

In the meantime we only had a few days to definitely get the proposition in shape as most of the members of the "Y" board were leaving on their vacations and if the matter was not closed in a few days it would have to be held up until September 25th (their next meeting)

40

*Exhibit P. 7.*

We then held a meeting with Mr. Allsopp and his brother who had just come up from Florida. We urged Mr. Allsopp to decide definitely that day to either give the proposition to the Y. W. C. A. for \$4,200.00 per year or to drop the proposition entirely. We felt quite certain that the  
10 Y. W. C. A. would not pay any more than \$4,200.00 per year as they had a certain budget and the Board had approved this figure as the maximum.

Mr. Allsopp refused to accept the \$4,200.00 proposition. Even his brother urged him and told him that he was making a mistake in trying to get the last dollar out of the proposition; that in his experience in the real estate business you had to act quickly and decide definitely one  
20 way or the other.

We then suggested to Mr. Allsopp that he give a lease to the Y. W. C. A. for a period of five years at \$4,200.00 per year, he reserving the right to cancel the lease after the second year by serving a three month notice. Even this proposition he turned down.

Mr. Allsopp then stated that he would give consideration to the following proposition: Lease the house at 168 Clinton Avenue to the Y. W.  
30 C. A. for a period of five years at \$4,500.00 per year with a cancellation clause whereby he could cancel the lease after the second year.

I asked Mr. Allsopp to give me the authority to close a lease for \$4,200.00 per year for a period of five years with a three month cancellation clause after the second year, but to leave the matter entirely up to me and I would try to get the \$4,500.00 rental.

I again told Mr. Allsopp that time was of the  
40 essence and that if we did not decide that day

*Exhibit P. 7.*

the proposition might fall through entirely because the secretary of the Y. W. C. A. and other members of the Board were leaving on their vacations.

Mr. Allsopp refused the above proposition, he still believing that we could get the \$4,500.00 figure. 10

We submitted the \$4,500.00 proposition to the "Y" secretary. She took it up with the few remaining members of the Board and the Board members felt that since they had a maximum figure of \$4,200.00 per year and had no authority to pay any more they would have to leave the entire proposition drop until the next meeting of the Board which would be in September.

Sheet No. 2 20

While these negotiations were going on, we informed Mr. Allsopp that Mrs. Townsend, tenant—3rd floor apartment—had advised us that she would not renew her lease at the expiration, September 30, 1926. We also told Mr. Allsopp that she had a party who desired to take over her apartment. This was naturally turned down because of the activity with the Y. W. C. A.

Mr. Eden, of our office, at the same time had a proposition for the ground floor and had to hold that in abeyance until the result of the "Y" negotiations. 30

After the matter was turned down by the "Y" I 'phoned Mr. Allsopp and told him that the proposition was postponed until the meeting of the "Y" Board was held, which would be in the month of September. I furthermore told him that it was necessary for him to decide whether we should renew the leases of the tenants who were in the building at the time or whether we 40

*Exhibit P. 7.*

10 should wait until after the "Y" meeting. Mr. Allsopp stated that he would take this chance and wait for the meeting, he feeling that the tenants who were in his building for a number of years would undoubtedly stay; that the space was renting very reasonable and would be easily rented.

On September 25th we were notified by two of the tenants that they were vacating the premises and were going out of town.

In the meanwhile the two other active prospects had leased space elsewhere.

20 The "Y" meeting was held on September 27th. Other propositions were presented to them and there was dissension in the Board and only about a week ago the Y. W. C. A. leased an apartment house on High Street.

We have been doing everything in our power to lease the space for Mr. Allsopp.

30 When the building was turned over to us about 4 years ago, there were three vacancies. From Mr. Allsopp's own report from 1920 to 1922 when he had managed the property himself there was a loss each year, as outlined below. From our own records from 1923 to the present year we have showed a substantial gain. This, itself, shows that under our management we have turned the property from a loss into a gain and that the expenses were decreasing yearly.

Year	Income	Expenses	Gain	Loss
1920	\$2,657.61	\$3,422.03		\$ 764.42
1921	3,413.18	5,003.53		1,590.35
1922	4,534.96	4,805.77		270.81
1923	5,429.97	3,651.96	\$1,778.01	
1924	5,480.00	3,192.37	2,287.63	
1925	5,205.00	3,121.98	2,083.02	

**EXHIBIT P. 8.**

A. & A. REALTY COMPANY  
Real Estate  
Kinney Building, 790 Broad Street,  
Newark, New Jersey

October 18, 1926

10

Mr. Abe Feist,  
738 Broad St.,  
Newark, N. J.

Dear Mr. Feist:

The report you have sent me is essentially correct as to certain events, but the application of this report to my complaint is neither correct nor fair. As an illustration, take the seventh paragraph of your report.

20

The understanding was that your men were to make a counter-proposition as outlined, reporting back to me if not acceptable, which was never done, my inference being that the Y. W. C. A. were not alone interested in our building, as your report would indicate, but had several other locations in mind (as would be natural) and when our building lost out in the selection your office attempted to place the entire responsibility on my refusal to accept a figure which they artificially arrived at without any reference to my wishes or judgment. You must admit that, as the owners of the premises in question, the right to reject or accept any proposition rests with us, and your men are not authorized to make deals for us or to set prices without consultation and approval. The \$4200 figure was set by your office without any knowledge of mine, and had actually been discussed with the proposed lessees before I knew anything about it. It was this

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40

*Exhibit P. 8.*

procedure to which I objected most strongly, and still do. However, all this aside, your office had no positive guarantee that our building would be rented, and so it is not fair to make this the basis of the excuse for the building now being idle.

10 ~~Saw A. E. Allsopp & adjusted with him personally—Oct. 27/26~~

~~R. C. S.~~

A. & A. REALTY COMPANY  
Real Estate  
Kinney Building, 790 Broad Street,  
Newark, New Jersey  
October 18, 1926

20

*Page*  
*—2—*

Mr. Abe Feist

Last year you rented the first floor apartment to a Dr. Klein, who vacated in June, since which I have heard nothing further unless at my own initiative. As the Managing Agents, I expected your office to keep me posted.

30 All the above leads to the following: you advertise an advisory service pertaining to any phase of real estate management. Why haven't we had some of it? Surely, with a building only one-quarter occupied, it should offer an admirable opportunity for an analysis of the situation, yet we have never had one. I repeat what I said in my first letter to you—"considering each apartment contains seven rooms and two baths our rents have been decidedly cheap and yet, with only four apartments, three of them are vacant." If the building is no longer suitable for an  
40 apartment house, what shall we do with it?

*Exhibit D. 1.*

Please make a complete and thorough investigation of the situation and let us have your early report, remembering that the taxes on this property are \$1517.54, and considering the restrictions, if any.

Very truly yours,

10

A. & A. REALTY CO.,

A. E. ALLSOPP, 2d  
President.

AEA:MJ

**EXHIBIT D. 1.**

FEIST & FEIST  
(Inc.)

20

Abram Feist, Pres.

Real Estate and Insurance  
738 Broad Street, Newark, N. J.  
Telephone 9600 Market

January Thirteenth,  
Nineteen Twenty-seven.

A. & A. Realty Co.,  
790 Broad Street,  
Newark, N. J.

30

*Att'n—Mr. A. E. Allsopp, Jr.*

Gentlemen:—

We acknowledge receipt of your letter of January 6th in which you apprise us of the fact that your building at No. 168 Clinton Avenue, Newark, was rented to one tenant in its entirety and that you desire to cancel our management

40

*Exhibit D. 1.*

agreement. Your understanding, as outlined in your letter, to the effect that you owe us five percent (5%) of the uncollected rents under the Davis tenancy is only partially correct, as a perusal of your copy of the management agreement will show. Under it we are entitled to a  
10 commission to the expiration of any leases made during the term of the agreement. Interpreted, this would mean that we are entitled to five percent (5%) of the aggregate rentals provided in the Davis lease plus five percent (5%) of the aggregate rentals of the lease made with Peter Glod, to the date of their expiration.

From previous correspondence with us on the subject and interviews with the writer personally, you are aware of the fact that we have  
20 made a strenuous effort over a long period of time to rent the premises at rentals which you named. You are also aware of the fact that this effort resulted in our having produced one prospective tenant who was ready, willing and able to take a lease on the entire building, one prospective tenant for the three vacant apartments, and a number of tenants for the apartments individually, none of which, however, you saw fit to accept although the rentals which they were  
30 ready to pay and the responsibility of the various prospects involved were up to the standard which you yourself had set.

Under these circumstances and in view of our efforts and accomplishments on your behalf over the long period in which we managed this property during which our compensation was disproportionate with the amount of time and effort which we expended, and in view of the fact that you elect to terminate our agreement, we feel  
40 that we are not only technically but morally en-

*Exhibit D. 1.*

titled to the commissions set forth on the bill  
which we enclose for your early attention.

Very truly yours,

FEIST & FEIST, INC.

R. G. SCHWEBEMEYER,  
Secretary.

10

R. G. Schwebemeyer.  
Enclosure—Bill

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40

## NOTICE OF APPEAL.

ESSEX COUNTY CIRCUIT COURT.

10	FEIST & FEIST, INC., <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> A. & A. REALTY CO., <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law.  Notice of Appeal.</i>
----	--	---	--

To Harry L. Brittingham, Esq., attorney for  
defendant.

SIR:

20 PLEASE TAKE NOTICE, that the plaintiff 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 judgment of the  
Essex County Circuit Court entered in this cause  
on the following ground:

1. That the Judge of the Essex County Circuit  
Court erred in granting a non-suit in favor of  
the defendant in the above-entitled cause.

Dated, February 15, 1928.

30

Yours respectfully,

PHILIP J. SCHOTLAND,  
Attorney for Plaintiff.

Service of a true copy of the within notice of  
appeal is hereby acknowledged this 15th day of  
February, 1928.

40

H. L. BRITTINGHAM,  
Attorney for Defendant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

FEIST & FEIST, INC., a corpora-  
tion of New Jersey,  
*Plaintiff-Appellant,*

*vs.*

A. & A. REALTY COMPANY, a cor-  
poration of New Jersey,  
*Defendant-Appellee.*

*Action  
at Law.*

*On Appeal  
from Essex  
County Cir-  
cuit Court.*

### BRIEF FOR DEFENDANT-APPELLEE.

#### Facts.

This is an action brought by the plaintiff, Feist & Feist, Inc., a corporation of New Jersey, engaged in the real estate business, to recover from defendant, so-called commissions or damages alleged to be due and owing to it under the terms of a written contract (Exhibit P. 1, page 37) which it entered into on September 13, 1922, with Henry Allsopp and Benjamin Myer. This contract provided for the management by Feist & Feist, Inc., of certain premises located at No. 168 Clinton avenue, Newark, New Jersey, which premises were at that time owned by the said Henry Allsopp and Benjamin Myer. The plaintiff alleges that this contract was adopted by the defendant, A. & A. Realty Company, a subsequent owner of said premises.

The claim for damages in this case is based solely and entirely upon a penalty imposed for cancellation in paragraph 7 of said contract, which reads as follows:

“The said agency shall commence on the Fifteenth day of September, 1922, and shall continue for a period of 1 year, and will con-

tinue thereafter from year to year, unless either party shall notify the other that the same is to terminate by giving three months' written notice prior to the expiration of this agreement or any renewal thereof. In the event that this agreement is cancelled as herein provided for, prior to the expiration of any lease or tenancies existing in the above property, the said owner hereby agrees to pay to the said agent on the date of the cancellation of this agreement or any renewal thereof as herein provided for, a commission equal to 5% on the full amounts of all such leases and tenancies."

This suit is not brought for compensation for services actually performed by the plaintiff under this contract or under an implied contract of hire.

On the trial of the case, plaintiff introduced both oral and documentary evidence in an effort to establish the adoption of this contract by the defendant corporation. At the close of the plaintiff's case, on motion of defendant's counsel, the Court directed a judgment of non-suit for the reason that the plaintiff had failed to offer any evidence tending to show that the defendant corporation had adopted or affirmed the contract and that, therefore, the defendant corporation was not bound by the terms of the said contract.

### **ARGUMENT.**

We respectfully submit that the non-suit by the trial court was proper because the plaintiff had failed to offer evidence to establish the adoption or affirmation of the contract in question, by the defendant.

The theory on which this suit is brought is that the defendant corporation was substituted for Henry Allsopp and Benjamin Myer, the parties

of the second part to the original contract. The burden of proving this novation rested on the plaintiff in the case and the maxim, "a novation is not presumed" is applicable.

The plaintiff's case discloses that the contract in question was made with Henry Allsopp and Benjamin Myer, at a time when they owned the premises therein mentioned. It further discloses that the premises subsequently came into the ownership of the defendant corporation. It does not, however, appear from the plaintiff's case how many mesne conveyances intervened before the defendant corporation took title thereto.

In an effort to establish that the defendant corporation had affirmed and adopted the contract made with Henry Allsopp and Benjamin Myer, the plaintiff introduced evidence of conversations between Ralph G. Schwebmeyer, Secretary of the plaintiff corporation and Albert E. Allsopp, 2nd, President of the defendant corporation. Mr. Schwebmeyer testified to the management of the property in question by the plaintiff corporation, for Henry Allsopp and Benjamin Myer, and to receiving notices of change of ownership, and to the subsequent payment of the proceeds of rents collected after deducting its fee, to the various subsequent owners. He further testified to conversations with Albert E. Allsopp, 2nd, relative to efforts made by the plaintiff corporation to lease the premises. But, nowhere, in any of these conversations is the contract in question mentioned and we must therefore assume that the contract was never discussed between the parties to this suit. We respectfully submit that there is nothing in these conversations tending to establish the adoption of this contract by the defendant corporation.

The plaintiff further introduced in evidence, correspondence which passed between the plaintiff corporation and the defendant corporation, concerning the leasing and management of the premises, but nowhere in this correspondence does it appear that the defendant corporation mentioned the former contract or adopted or affirmed it.

We respectfully submit therefore, that the plaintiff succeeded merely in establishing the fact that the plaintiff corporation managed the property for the defendant, after the defendant corporation had assumed title, and that the plaintiff corporation received its compensation from time to time for services rendered, by deducting from the rents received from the premises, its expenses and commissions.

The former contract was an arrangement solely between the plaintiff corporation and Henry Allsopp and Benjamin Myer. In the very nature of its terms, it could exist only so long as Henry Allsopp and Benjamin Myer continued as owners of the premises or until cancelled as provided therein. That contract ceased to be operative and ceased to exist when the subject matter of the contract, *i. e.*, the property to be managed—was transferred by Henry Allsopp and Benjamin Myer to a new owner. The plaintiff was notified of the various transfers of the property and although it continued to manage the property for the new owners, so far as the plaintiff's case discloses, it made no effort to renew or continue the life of the written contract. It was content to render the services required of it and to receive its compensation therefor by deducting the same from the rents collected.

It is the defendant's contention that when it became the owner of the premises in question

and permitted the plaintiff to continue to manage the property, the defendant made itself liable to pay to the plaintiff reasonable commissions for the services actually rendered. It did not thereby become a party to or bound by the terms of a written contract which a prior owner had entered into with the plaintiff, the covenants and penalties of which the defendant corporation knew nothing about and to which it had not assented.

The judgment of non-suit should be affirmed if it can be sustained on any ground.

We respectfully submit that the suit was prematurely brought. The summons (page 1) discloses that this suit was started March 3, 1927. Under the terms of the contract in question, a cause of action for cancellation would not accrue until April 6, 1927.

Paragraph 7 of the contract in question provides for cancellation as follows:

“The said agency shall commence on the Fifteenth day of September, 1922, and shall continue for a period of 1 year, and will continue from year to year, unless either party shall notify the other that the same is to terminate by giving three months' written notice prior to the expiration of this agreement or any renewal thereof. In the event that this agreement is cancelled as herein provided for, prior to the expiration of any lease or tenancies existing in the above property, the said owner hereby agrees to pay to the said agent on the date of the cancellation of this agreement or any renewal thereof as herein provided for, a commission equal to 5% on the full amounts of all such leases and tenancies.”

The complaint, as originally filed, alleged that contract was terminated by notice effective April

6, 1927. Counsel for plaintiff, in his opening statement to the jury (page 14) said "the contract was terminated by notice dated January 6, 1927, and under the terms of the contract it goes into effect April 6, 1927." At the conclusion of the opening statement and after motion by the defendant for non-suit, based on said statement, counsel for plaintiff amended that portion of the complaint by striking out the words, "April 6, 1927." A reading of the complaint in this case as amended, however, will disclose that the claim for damages is based solely upon an alleged cancellation as provided for in paragraph 7 above set forth. This cancellation, is alleged to have been effected, by virtue of letter of the defendant dated January 6, 1927 (Exhibit P. 5, page 44). Under the terms of the contract, the cancellation is accomplished by the giving of a three months' written notice. That the plaintiff interpreted the letter of January 6, 1927 (Exhibit P. 5), as such notice is borne out by the language of the complaint throughout.

The first paragraph of the complaint contains the following language (page 2):

"In and by the terms of said Agreement said Allsopp and Myer further agreed with the plaintiff to pay to the said plaintiff on the date of the *cancellation of said agreement*, or any renewal thereof, *as therein provided for*, a commission equal to 5% on the full amount of all leases and tenancies existing at the time of the cancellation of said agreement until the expiration of said leases and tenancies."

Paragraph 8 of the complaint quotes from the contract as follows (page 6):

"In the event that this agreement is cancelled as herein provided for, prior to the expiration of any lease or tenancies existing in the above property, the said owner hereby

agrees to pay to the said agent on the date of the cancellation of this agreement or any renewal thereof as herein provided for, a commission equal to 5% on the full amounts of all such leases and tenancies.”

We submit that the plaintiff's case establishes conclusively the fact that plaintiff relies upon the letter of January 6, 1927, as notice of cancellation, as provided for in the contract, and under such notice, the contract was terminated on April 6, 1927. If the contract was not terminated until April 6, 1927, then the penalty provided for in paragraph 7 of the contract would not have been due and owing until on and after that date; and this suit having been started more than thirty days before was prematurely brought.

Counsel for plaintiff on page 5 of his brief contends that the letter of the defendant (Exhibit P. 6, page 45) is evidence that the defendant had adopted the written contract because of the use of the following language:

“Since this situation appears to rest largely with the management or lack of management of the building it will be necessary for us to give other real estate men a chance, unless you can change the situation by November 1st. Please advise.”

On the contrary, we respectfully submit that this language plainly indicates that the defendant did not consider itself bound by any written contract. No mention is made of the contract and the defendant, when it said, “it will be necessary for us to give other real estate men a chance” plainly expressed its judgment that it was not bound to retain the plaintiff in its employ any longer than its interests justified such retention.

Again counsel for plaintiff on page 6 of his brief quotes from a letter of the defendant (Ex-

hibit P. 5) and contends that this language "very clearly and very strongly states that it (the defendant) was bound by the terms of the written contract." That letter in its entirety reads as follows:

"This is to inform you that we have leased the entire property at 168 Clinton Avenue to Mr. Peter Glod, and have assigned the lease of Ann Davis to him. Therefore, commencing February 1, he will collect the rents and take over the general management of the building.

"As we understand it, we owe you 5% of the uncollected rent of the Davis lease, which you consummated last October, and if you will render us a bill for same, we will be pleased to send you a check."

There is no mention made in that letter of the written contract and the language contained in the first paragraph clearly indicates that the defendant did not have a written contract in mind and did not consider that it was bound by any such contract, but was terminating the services of plaintiff corporation as its agent, as it considered it had a right to do. In the second paragraph of that letter mention is made by the defendant of commissions remaining due on the so-called "Davis Lease," which lease had been consummated by the plaintiff and a portion of which commissions had been theretofore received by the plaintiff by way of deductions from rents collected by it. This commission was due for services *actually performed* by the plaintiff and not due as a part of the penalty imposed by paragraph seven of the contract.

The amount of this commission remaining unpaid, amounting to \$50.00, was claimed to be due under the written contract. The trial court decided that the written contract was not binding

on the defendant and therefore there could be no damages assessed against the defendant on account of the contract.

Again on page 8 of plaintiff's brief, it is contended that the defendant corporation is bound by the terms of the written contract on the theory that the original makers of the contract, Henry Allsopp and Benjamin Myer afterward conveyed this property to the defendant corporation of which he assumes they were members. This assumption is not borne out by any proof in the plaintiff's case. So far as the plaintiff's case discloses, Henry Allsopp and Benjamin Myer have absolutely no connection with or interest in the defendant corporation. The mere fact that Albert E. Allsopp, 2nd, who signed Henry Allsopp's name to the written contract afterwards became president of the defendant corporation, and, that the defendant corporation afterwards became the owner of the property in question, as far as the plaintiff's case discloses, was a mere coincidence and does not justify charging the defendant corporation with any responsibility under the contract itself.

We respectfully submit therefore, that the plaintiff did not offer any evidence which would have justified the Court in submitting the case to the jury; that the plaintiff failed to establish the adoption of the written contract by the defendant corporation and that, therefore, the judgment of the trial court directing a non-suit should be affirmed.

Respectfully submitted,

HARRY L. BRITTINGHAM,  
Attorney for Defendant-Appellee.

GEORGE D. MULLIGAN,  
Of Counsel for Defendant-Appellee.



## New Jersey Court of Errors and Appeals

FEIST & FEIST, INC., a corporation of New Jersey,  
*Plaintiff-Appellant,*

*vs.*

A. & A. REALTY COMPANY, a corporation of New Jersey,  
*Defendant-Appellee.*

*Action  
 at Law.*

*On Appeal  
 from Essex  
 Circuit.*

### BRIEF FOR PLAINTIFF-APPELLANT.

#### Facts.

On the 13th day of September, 1922, Benjamin Myer and Henry Allsopp owned a four-family apartment house located at 168 Clinton avenue in the City of Newark, County of Essex and State of New Jersey, and employed plaintiff by a written contract to take full charge of and manage the said property including the leasing, the collection of rents, the making of repairs, of hiring and discharging of help, the purchase and supply of coal for heat and hot water, etc. Allsopp and Myer agreed to pay the plaintiff by the terms of said contract five per cent. of the total amount of collections from the property and also to reimburse plaintiff on demand for all expenses incurred in connection with the property. The contract provided that it shall commence September 15, 1922, and continue for a period of one year and thereafter from year to year until either party shall notify the other that the same is to terminate by three months' written notice prior to the expiration of the contract or any

renewal thereof. Said contract contains the further provision:

*“In the event that this agreement is cancelled as herein provided for prior to the expiration of any lease or tenancies existing in the above property, the said owner hereby agrees to pay to the said agency on the date of the cancellation of this agreement or any renewal thereof as herein provided for a commission equal to five per cent. on the full amounts of all such leases and tenancies.”*  
(See State of the Case, Exhibit P. 1, pp. 37-41.)

The plaintiff pursuant to the terms of the written contract which was signed by Benjamin Myer, personally and by A. E. Allsopp, 2d, on behalf of Henry Allsopp entered upon said employment and took charge of said building until February 1927, when the agency was terminated by the A. & A. Realty Co., by a notice signed by A. E. Allsopp, 2d, as president, which company had become the owner of the property.

During the period when the written contract was in effect, September 15, 1922, to February 1, 1927, the plaintiff continued in the management and care of said property under the terms of the contract without interruption, but on November 18, 1922, by a notice (See Exhibit P. 2, p. 41) signed by A. E. Allsopp, 2d, the plaintiff was notified thereafter to issue the checks for the rents collected to A. E. Allsopp, Inc., instead of Henry Allsopp as theretofore, and on January 16, 1923, by another notice on the letterhead of the A. & A. Realty Company, the plaintiff was notified thereafter to send the statements for said property in duplicate and to make the checks from then on payable to the A. & A. Realty Company instead of to A. E. Allsopp, Inc. (See Exhibit P. 4, p. 43). This notice it

will be noted is during the period when the original written contract was still in force and is dated only a few months after the making of the original written contract.

After the receipt of that letter, the plaintiff continued to manage the property the same as from the beginning of the original contract until February 1, 1927, when it was terminated by the A. & A. Realty Company by written notice dated January 6, 1927 (See Exhibit P. 5, p. 44 and testimony of Ralph G. Schwebemeyer, p. 19, ll. 30 to 40 and top of p. 20).

All of the notices and the original contract were signed by A. E. Allsopp, 2d, who is the president of the defendant company and who had *actual personal knowledge of the terms of the contract* under which the plaintiff worked and managed the property. In the notice terminating the plaintiff's employment for the management of the property defendant states: "As we understand it, we owe you five per cent. of the uncollected rent of the Davis lease." (Exhibit P. 5, p. 44.) The plaintiff refused to accept the tendered payment, but demanded in addition to the five per cent. tendered on the Davis lease, five per cent. on the lease to Peter Glod, which the defendant company had entered into during the continuance of the management agreement. Upon defendant's refusal to pay same this action was brought. Notwithstanding the fact that the plaintiff was entitled at least to recover the five per cent. on the unexpired term of the Davis lease, which was admitted, which amounts to \$50, and that it was entitled to recover \$975 on the Glod lease by the terms of the contract, the learned judge presiding at the Circuit granted a non-suit against the plaintiff and in favor of

the defendant, to which exception was duly taken and noted as ground of appeal, giving as his reason

“I will hold that the written contract is not binding upon the present defendant and the plaintiff is restrained from recovering on that contract. On that ground, I will grant the non-suit.”

From this decision and judgment based thereon, plaintiff has taken this appeal.

#### ARGUMENT.

The question in this case is, whether the defendant is bound to plaintiff on the contract which was originally made by plaintiff with Benjamin Myer and Henry Allsopp.

The proof is clear that the defendant is the successor in title to Myer and Allsopp as testified to by Albert E. Allsopp, 2d, the president of the defendant corporation, on page 32, lines 1 to 30, as follows:

“Q Mr. Allsopp, I show you Exhibit P. 1, the original agreement with Feist & Feist for the management of this property. Did you sign that? A I did.

Q I show you Exhibit P. 2. Did you sign that? A I did.

Q I show you Exhibit P. 4. Did you sign that? A I did.

Q I show you Exhibit P. 5. Did you sign that? A I did.

Q I show you Exhibit P. 6. Did you sign that? A I did; yes, sir.

Q I show you Exhibit P. 8. Did you sign that? A I did.

Q And you are the A. E. Allsopp, 2nd, that is the president of the A. & A. Realty Company? A Yes, sir.

Q Which owned this property ever since when? A I believe since 1923.

Q And still owns it? A Yes, sir.”

It is equally clear from an inspection of the exhibits referred to in Mr. Allsopp's testimony that the defendant corporation became the owner of the property before the expiration of the original term of the written contract. When, on January 16, 1923, the defendant company notified the plaintiff that it was the one entitled to receive the statements and the checks (Exhibit P. 4, p. 43), it was a notice to plaintiff that defendant from that time on was its employer under the contract instead of Myer and Allsopp. When the plaintiff thereafter continued to manage the property on behalf of the defendant, it was an express assent to the substitution of defendant for Myer and Allsopp as the other party to the contract Exhibit P. 1. When the defendant wrote the letter Exhibit P. 6, in which among other things it states:

"Since this situation appears to rest largely with the management or lack of management of the building it will be necessary for us to give other real estate men a chance, unless you can change the situation by November 1st. Please advise,"

it was further evidence that the defendant had adopted the original contract and was giving vent to criticism as a party to it. It is clear that the plaintiff accepted the defendant company as its employer and continued to perform and endeavored to perform its duties under the terms of the written contract and that the defendant having actual knowledge of the written contract with the plaintiff, accepted plaintiff's services under the terms of the contract and substituted itself for the original owners of the property in question. Furthermore, the defendant in Exhibit P. 5 appearing on page 44 of the case, says:

“As we understand it, we owe you five per cent of the uncollected rent of the Davis lease, which you consummated last October, and if you will render us a bill for same, we will be pleased to send you a check.”

Defendant thereby very clearly and very strongly states that it was bound by the terms of the written contract because its offer to the plaintiff is to pay according to the terms of the written contract, except that the defendant in its own interest attempts to exclude the five per cent. commission on the Glod lease, which it had entered into before it terminated the contract with the plaintiff by means of the notice contained in the same Exhibit P. 5.

If therefore, the plaintiff was not managing the property in question for the defendant from January 16, 1923, until February 1, 1927, under the terms of the written contract, which was in force on January 16, 1923, under what contract was the plaintiff working and managing the plaintiff's property? With the performance of what contract did the defendant find fault in its letter of October 6, 1926? (Exhibit P. 6). Under the terms of what contract did the defendant understand that it owed the plaintiff five per cent. for the balance of the term of the existing Davis lease? Any attempt to answer these questions, demonstrates *that the contract between the parties is Exhibit P. 1*. That is the only contract of which there is any evidence in the case, and the only contract that was ever entered into by the plaintiff for the management of the property in question.

Notwithstanding this situation, the learned Court below granted a non-suit against the plaintiff.

The law applied to this state of facts is:

That there was a novation by the acts of the parties, and that defendant having accepted the benefits of the contract, also assumed the liabilities thereunder.

*Seacoast R. R. Co. v. Wood*, 65 N. J. Eq. 530; affirmed 78 N. J. Eq. 298.

In *Parsons Manufacturing Co. v. Hamilton Ice Manufacturing Co.*, 78 N. J. L. 309; 73 Atl. 254, Justice Minturn, speaking for the Supreme Court, says:

“Novation consists of a bilateral agreement for the substitution of one obligation for another, *and may take place either by the substitution of a new for an old party, or by the substitution of a new agreement between the same parties, or by a change of parties and agreement at the same time.*” 29 Cyc. 1134, and cases; *Lattimor v. Harsen*, 14 Johns. (N. Y.) 330; *Munroe v. Perkins*, 9 Pick. (Mass.) 298; 20 Am. Dec. 475. *Whether or not the novation in fact existed was a question under the testimony, and the circumstances for the jury to pass upon.*

\* \* \*

It was also perfectly competent for the corporation, through its agents, to ratify the agreements of those agents; and this ratification, which is substantially another method of estoppel *in pais*, may be evidenced from the facts and circumstances and the acts of the parties and the nature of the subject-matter involved. *Fifth Ward Bank v. First National Bank*, 48 N. J. Law, 513; 7 Atl. 318; *State v. M. & E. R. R. Co.*, 23 N. J. Law, 360; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; 3 Atl. 162. While this doctrine of estoppel is equitable in its origin, it is equally available in an action at law in order to subserve the ends of justice. *Kirk v. Hamilton*, 102 U. S. 68; 26 L. Ed. 79.

There is ample authority also to support the proposition that the defendant, having taken over the assets of the former company for the purpose of carrying on its business, without apparent change in the personnel of the concern, is liable for the payment of the debts of the former concern. It is held to take the benefits and advantages *cum onere*. 10 Cyc. 1111, and cases; *DuVivier v. Gallice*, 149 Fed. 118; 80 C. C. A. 556; *Hibernia Fire Ins. Co. v. St. Louis R. Co.* (C. C.) 10 Fed. 600."

In the instant case, the evidence is so clear that there was a novation by substituting the defendant, the successor in title for Myer and Allsopp the previous owners, that the Court below could very well have directed a verdict in favor of the plaintiff on that point; but to say the least, it certainly should have been left to the jury.

In *Brautigam v. Dean & Co.*, 86 N. J. L. 549, affirmed by the Court of Errors on the Supreme Court opinion in 86 N. J. L. 676, Justice Kalisch, speaking for the Supreme Court, where the question was whether or not a corporation is bound by the terms of the contract made with the persons that afterwards formed the corporation, but before it came into existence held:

"The three brothers are the corporation. Now, from the facts that the company received and accepted the two checks for \$5,000 each of the plaintiff for the stock issued to him after the formation of the company, and took the plaintiff into its employ, and paid him \$40 per week, a jury might reasonably have found that the defendant company ratified the contract termed the 'short contract.' "

Paraphrasing Justice Kalisch's decision, we may say A. E. Allsopp is the corporation in that, his knowledge is its knowledge. From the fact

that the company accepted the benefits of the contract by receiving the monthly statements and checks from the plaintiff as income from the management of the property by the plaintiff and found fault with the plaintiff's management, and paid the plaintiff five per cent. commission on all collections in accordance with the terms of the written contract, and tendered payment of the amount owing to the plaintiff for the balance of the term of the Davis tenancy, upon a termination of the contract, a jury might reasonably have found that the defendant company ratified the contract.

In *Pratt v. Oshkosh Match Company*, 89 Wis. 406; 62 N. W. 84, the facts are that plaintiff sold lumber to a partnership known as Jones & Wyman. Before delivery of the lumber, Jones, who carried on all the negotiations with the plaintiff, notified the plaintiff that Jones & Wyman were incorporated and would want the corporation to have the lumber. After the corporation was formed, plaintiff received various orders from Jones; on one occasion to change the dimensions of the lumber, on another occasion to hold it, on another occasion to wait for payment. The lumber was destroyed by fire before delivery, but after title had passed, and plaintiff sued defendant, the corporation for the amount of the bill. Defendant pleaded that it had entered into no contract with the plaintiff. The Court below non-suited the plaintiff. On appeal the lower court was reversed and it was held to be a jury question as to whether or not the corporation was liable on the contract of purchase for the lumber by adopting it after it came into existence.

Plaintiff therefore respectfully submits for the reasons above stated and upon the authorities referred to that even if the fact that defendant was bound by the contract sued upon was not so clear as to make it a court question, it should have been left to the jury, and therefore, the judgment of non-suit should be reversed and a new trial ordered.

Respectfully submitted,

PHILIP J. SCHOTLAND,  
Attorney for and of Counsel  
with Plaintiff-Appellant.

## New Jersey Court of Errors and Appeals

FEIST & FEIST, INC., a corpora-  
tion of New Jersey,  
*Plaintiff-Appellant,*

*vs.*

A. & A. REALTY COMPANY, a cor-  
poration of New Jersey,  
*Defendant-Appellee.*

*Action  
at Law.*

*On Appeal  
from Essex  
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### BRIEF FOR DEFENDANT-APPELLEE.

#### Facts.

This is an action brought by the plaintiff, Feist & Feist, Inc., a corporation of New Jersey, engaged in the real estate business, to recover from defendant, so-called commissions or damages alleged to be due and owing to it under the terms of a written contract (Exhibit P. 1, page 37) which it entered into on September 13, 1922, with Henry Allsopp and Benjamin Myer. This contract provided for the management by Feist & Feist, Inc., of certain premises located at No. 168 Clinton avenue, Newark, New Jersey, which premises were at that time owned by the said Henry Allsopp and Benjamin Myer. The plaintiff alleges that this contract was adopted by the defendant, A. & A. Realty Company, a subsequent owner of said premises.

The claim for damages in this case is based solely and entirely upon a penalty imposed for cancellation in paragraph 7 of said contract, which reads as follows:

“The said agency shall commence on the Fifteenth day of September, 1922, and shall continue for a period of 1 year, and will con-

tinue thereafter from year to year, unless either party shall notify the other that the same is to terminate by giving three months' written notice prior to the expiration of this agreement or any renewal thereof. In the event that this agreement is cancelled as herein provided for, prior to the expiration of any lease or tenancies existing in the above property, the said owner hereby agrees to pay to the said agent on the date of the cancellation of this agreement or any renewal thereof as herein provided for, a commission equal to 5% on the full amounts of all such leases and tenancies."

This suit is not brought for compensation for services actually performed by the plaintiff under this contract or under an implied contract of hire.

On the trial of the case, plaintiff introduced both oral and documentary evidence in an effort to establish the adoption of this contract by the defendant corporation. At the close of the plaintiff's case, on motion of defendant's counsel, the Court directed a judgment of non-suit for the reason that the plaintiff had failed to offer any evidence tending to show that the defendant corporation had adopted or affirmed the contract and that, therefore, the defendant corporation was not bound by the terms of the said contract.

### **ARGUMENT.**

We respectfully submit that the non-suit by the trial court was proper because the plaintiff had failed to offer evidence to establish the adoption or affirmation of the contract in question, by the defendant.

The theory on which this suit is brought is that the defendant corporation was substituted for Henry Allsopp and Benjamin Myer, the parties

of the second part to the original contract. The burden of proving this novation rested on the plaintiff in the case and the maxim, "a novation is not presumed" is applicable.

The plaintiff's case discloses that the contract in question was made with Henry Allsopp and Benjamin Myer, at a time when they owned the premises therein mentioned. It further discloses that the premises subsequently came into the ownership of the defendant corporation. It does not, however, appear from the plaintiff's case how many mesne conveyances intervened before the defendant corporation took title thereto.

In an effort to establish that the defendant corporation had affirmed and adopted the contract made with Henry Allsopp and Benjamin Myer, the plaintiff introduced evidence of conversations between Ralph G. Schwebmeyer, Secretary of the plaintiff corporation and Albert E. Allsopp, 2nd, President of the defendant corporation. Mr. Schwebmeyer testified to the management of the property in question by the plaintiff corporation, for Henry Allsopp and Benjamin Myer, and to receiving notices of change of ownership, and to the subsequent payment of the proceeds of rents collected after deducting its fee, to the various subsequent owners. He further testified to conversations with Albert E. Allsopp, 2nd, relative to efforts made by the plaintiff corporation to lease the premises. But, nowhere, in any of these conversations is the contract in question mentioned and we must therefore assume that the contract was never discussed between the parties to this suit. We respectfully submit that there is nothing in these conversations tending to establish the adoption of this contract by the defendant corporation.

The plaintiff further introduced in evidence, correspondence which passed between the plaintiff corporation and the defendant corporation, concerning the leasing and management of the premises, but nowhere in this correspondence does it appear that the defendant corporation mentioned the former contract or adopted or affirmed it.

We respectfully submit therefore, that the plaintiff succeeded merely in establishing the fact that the plaintiff corporation managed the property for the defendant, after the defendant corporation had assumed title, and that the plaintiff corporation received its compensation from time to time for services rendered, by deducting from the rents received from the premises, its expenses and commissions.

The former contract was an arrangement solely between the plaintiff corporation and Henry Allsopp and Benjamin Myer. In the very nature of its terms, it could exist only so long as Henry Allsopp and Benjamin Myer continued as owners of the premises or until cancelled as provided therein. That contract ceased to be operative and ceased to exist when the subject matter of the contract, *i. e.*, the property to be managed—was transferred by Henry Allsopp and Benjamin Myer to a new owner. The plaintiff was notified of the various transfers of the property and although it continued to manage the property for the new owners, so far as the plaintiff's case discloses, it made no effort to renew or continue the life of the written contract. It was content to render the services required of it and to receive its compensation therefor by deducting the same from the rents collected.

It is the defendant's contention that when it became the owner of the premises in question

and permitted the plaintiff to continue to manage the property, the defendant made itself liable to pay to the plaintiff reasonable commissions for the services actually rendered. It did not thereby become a party to or bound by the terms of a written contract which a prior owner had entered into with the plaintiff, the covenants and penalties of which the defendant corporation knew nothing about and to which it had not assented.

The judgment of non-suit should be affirmed if it can be sustained on any ground.

We respectfully submit that the suit was prematurely brought. The summons (page 1) discloses that this suit was started March 3, 1927. Under the terms of the contract in question, a cause of action for cancellation would not accrue until April 6, 1927.

Paragraph 7 of the contract in question provides for cancellation as follows:

“The said agency shall commence on the Fifteenth day of September, 1922, and shall continue for a period of 1 year, and will continue from year to year, unless either party shall notify the other that the same is to terminate by giving three months' written notice prior to the expiration of this agreement or any renewal thereof. In the event that this agreement is cancelled as herein provided for, prior to the expiration of any lease or tenancies existing in the above property, the said owner hereby agrees to pay to the said agent on the date of the cancellation of this agreement or any renewal thereof as herein provided for, a commission equal to 5% on the full amounts of all such leases and tenancies.”

The complaint, as originally filed, alleged that contract was terminated by notice effective April

6, 1927. Counsel for plaintiff, in his opening statement to the jury (page 14) said "the contract was terminated by notice dated January 6, 1927, and under the terms of the contract it goes into effect April 6, 1927." At the conclusion of the opening statement and after motion by the defendant for non-suit, based on said statement, counsel for plaintiff amended that portion of the complaint by striking out the words, "April 6, 1927." A reading of the complaint in this case as amended, however, will disclose that the claim for damages is based solely upon an alleged cancellation as provided for in paragraph 7 above set forth. This cancellation, is alleged to have been effected, by virtue of letter of the defendant dated January 6, 1927 (Exhibit P. 5, page 44). Under the terms of the contract, the cancellation is accomplished by the giving of a three months' written notice. That the plaintiff interpreted the letter of January 6, 1927 (Exhibit P. 5), as such notice is borne out by the language of the complaint throughout.

The first paragraph of the complaint contains the following language (page 2):

"In and by the terms of said Agreement said Allsopp and Myer further agreed with the plaintiff to pay to the said plaintiff on the date of the *cancellation of said agreement*, or any renewal thereof, *as therein provided for*, a commission equal to 5% on the full amount of all leases and tenancies existing at the time of the cancellation of said agreement until the expiration of said leases and tenancies."

Paragraph 8 of the complaint quotes from the contract as follows (page 6):

"In the event that this agreement is cancelled as herein provided for, prior to the expiration of any lease or tenancies existing in the above property, the said owner hereby

agrees to pay to the said agent on the date of the cancellation of this agreement or any renewal thereof as herein provided for, a commission equal to 5% on the full amounts of all such leases and tenancies.”

We submit that the plaintiff's case establishes conclusively the fact that plaintiff relies upon the letter of January 6, 1927, as notice of cancellation, as provided for in the contract, and under such notice, the contract was terminated on April 6, 1927. If the contract was not terminated until April 6, 1927, then the penalty provided for in paragraph 7 of the contract would not have been due and owing until on and after that date; and this suit having been started more than thirty days before was prematurely brought.

Counsel for plaintiff on page 5 of his brief contends that the letter of the defendant (Exhibit P. 6, page 45) is evidence that the defendant had adopted the written contract because of the use of the following language:

“Since this situation appears to rest largely with the management or lack of management of the building it will be necessary for us to give other real estate men a chance, unless you can change the situation by November 1st. Please advise.”

On the contrary, we respectfully submit that this language plainly indicates that the defendant did not consider itself bound by any written contract. No mention is made of the contract and the defendant, when it said, “it will be necessary for us to give other real estate men a chance” plainly expressed its judgment that it was not bound to retain the plaintiff in its employ any longer than its interests justified such retention.

Again counsel for plaintiff on page 6 of his brief quotes from a letter of the defendant (Ex-

hibit P. 5) and contends that this language "very clearly and very strongly states that it (the defendant) was bound by the terms of the written contract." That letter in its entirety reads as follows:

"This is to inform you that we have leased the entire property at 168 Clinton Avenue to Mr. Peter Glod, and have assigned the lease of Ann Davis to him. Therefore, commencing February 1, he will collect the rents and take over the general management of the building.

"As we understand it, we owe you 5% of the uncollected rent of the Davis lease, which you consummated last October, and if you will render us a bill for same, we will be pleased to send you a check."

There is no mention made in that letter of the written contract and the language contained in the first paragraph clearly indicates that the defendant did not have a written contract in mind and did not consider that it was bound by any such contract, but was terminating the services of plaintiff corporation as its agent, as it considered it had a right to do. In the second paragraph of that letter mention is made by the defendant of commissions remaining due on the so-called "Davis Lease," which lease had been consummated by the plaintiff and a portion of which commissions had been theretofore received by the plaintiff by way of deductions from rents collected by it. This commission was due for services *actually performed* by the plaintiff and not due as a part of the penalty imposed by paragraph seven of the contract.

The amount of this commission remaining unpaid, amounting to \$50.00, was claimed to be due under the written contract. The trial court decided that the written contract was not binding

on the defendant and therefore there could be no damages assessed against the defendant on account of the contract.

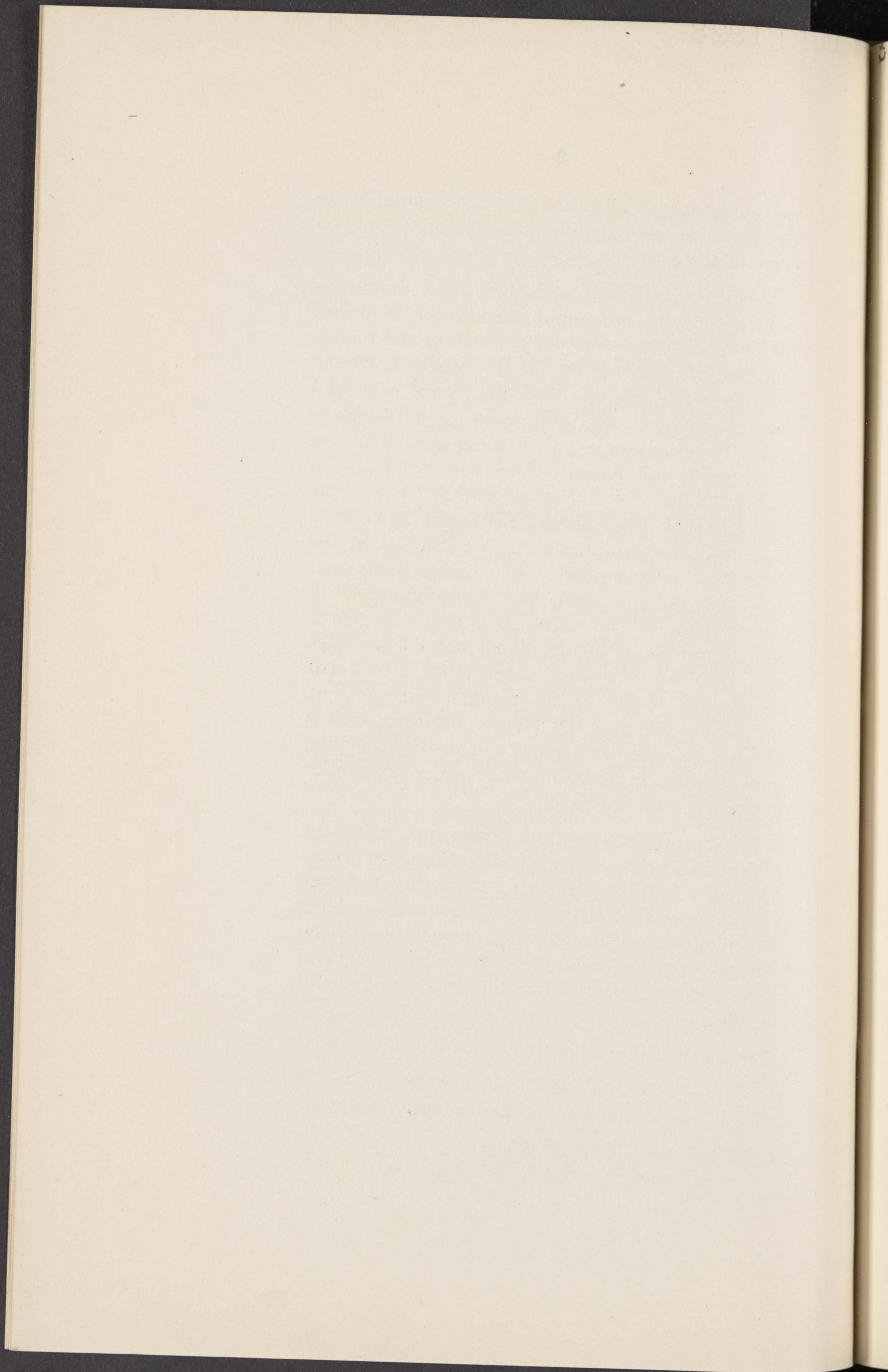
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We respectfully submit therefore, that the plaintiff did not offer any evidence which would have justified the Court in submitting the case to the jury; that the plaintiff failed to establish the adoption of the written contract by the defendant corporation and that, therefore, the judgment of the trial court directing a non-suit should be affirmed.

Respectfully submitted,

HARRY L. BRITTINGHAM,  
Attorney for Defendant-Appellee.

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The claim for damages in this case is based solely and entirely upon a penalty imposed for cancellation in paragraph 7 of said contract, which reads as follows:

“The said agency shall commence on the Fifteenth day of September, 1922, and shall continue for a period of 1 year, and will con-

tinue thereafter from year to year, unless either party shall notify the other that the same is to terminate by giving three months' written notice prior to the expiration of this agreement or any renewal thereof. In the event that this agreement is cancelled as herein provided for, prior to the expiration of any lease or tenancies existing in the above property, the said owner hereby agrees to pay to the said agent on the date of the cancellation of this agreement or any renewal thereof as herein provided for, a commission equal to 5% on the full amounts of all such leases and tenancies."

This suit is not brought for compensation for services actually performed by the plaintiff under this contract or under an implied contract of hire.

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We respectfully submit that the non-suit by the trial court was proper because the plaintiff had failed to offer evidence to establish the adoption or affirmation of the contract in question, by the defendant.

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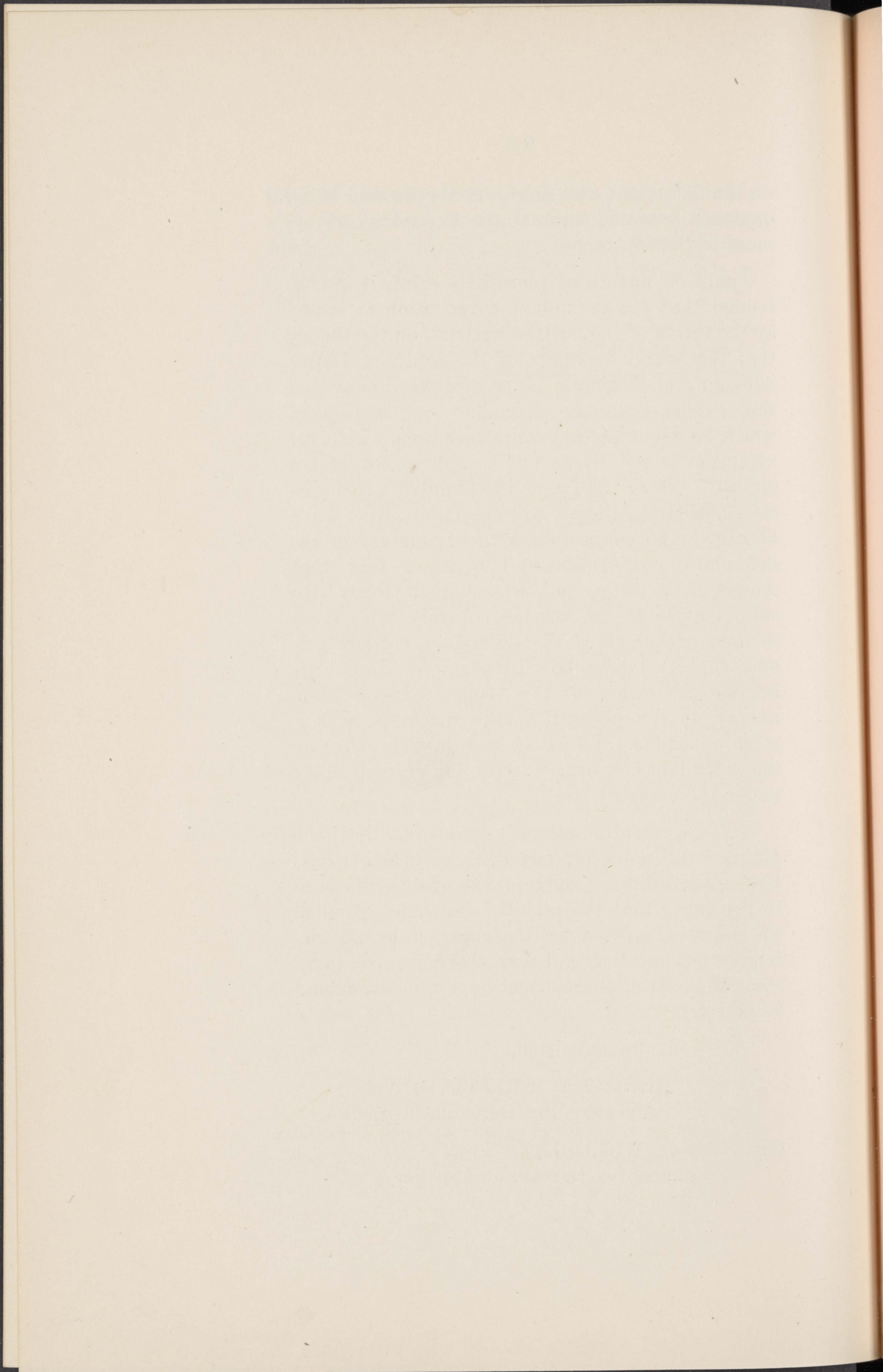
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