Filed January 14, 1926.

IN CHANCERY OF NEW JERSEY

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey: 10

The petition of Joshua A. Pearson, of the City and County of Philadelphia, State of Pennsylvania, respectfully shows:

1. Petitioner is the General Guardian of the Estate of Cornelia Corlies Earnshaw Tatnall, an infant twenty years of age; petitioner is also General Guardian of the Estate of Warner Gibbs Earnshaw, Jr., an infant seventeen years of age. Said infants now reside in Philadelphia, Pennsylvania. Petitioner was appointed such Guardian by decree of the Orphans' Court of Philadelphia County, Pennsylvania. 20

2. The said Cornelia Corlies Earnshaw Tatnall and the said Warner Gibbs Earnshaw, Jr., are each seized of an undivided one-half part (subject to the dower right of their step-mother, Jessie Porter Earnshaw) of all that tract of land and premises situate, lying and being in the City of Brigantine, County of Atlantic and State of New Jersey, as shown on a map entitled "Map 1A Lands located on Brigantine Beach made for Island Development Company, Revised June 1, 1924, H. I. Eaton, C. E.", designated as Block 104, Lot 10. 30

New Jersey State Library

3. The said Cornelia Corlies Earnshaw Tatnall and the said Warner Gibbs Earnshaw, Jr., are also each seized of an undivided one-half interest (subject to the dower right of their step-mother) in four certain agreements for the sale of lands each made between Island Development Company, a corporation of New Jersey, and Warner G. Earnshaw, each dated November 10, 1924 and providing for the purchase of certain lands situate in the City of East
10 Atlantic City, County of Atlantic, State of New Jersey, designated as Lots Numbers 34, 35, 36 and 37 in Section No. 143 as shown on Map No. 1 on lands located at Brigantine Beach, New Jersey, owned by Island Development Company by Harold I. Eaton, C. E., dated June 15, 1923, scale 150 feet —1 inch. The purchase prices provided in said agreements to be paid by said Warner G. Earnshaw to the Island Development Company for said lots are: for Lot No. 34, $1500.; for Lot No. 35, $1300.; for Lot No. 36, $1200.; for Lot No. 37, $1500.

20

4. The agreements for sale above referred to were made by Warner G. Earnshaw in his lifetime and during his lifetime the said Warner G. Earnshaw made payments as required by the terms of said agreements to an amount totaling $2200. The said Warner G. Earnshaw departed this life on or about September 11, 1925, and thereafter his executor made a payment of $550 in cash as required by the terms of said agreements making a total cash
30 payment under said agreements of $2750. By the terms of the agreements a mortgage or mortgages was to be given for the balance of the purchase price of said lands, to wit: $2750.

5. Upon the death of the said Warner G. Earn-

shaw the lands described in paragraph 2 above, and his interest in said agreements described in paragraph 3 above, descended to said infants as his children and heirs at law, subject to the dower interest of their step-mother, he having died intestate as to said real estate.

6. The lands described in paragraph 2 above are worth approximately $1400 and the interest of the infants in said agreement, including the dower interest of their step-mother, is worth the sum of approximately $2750., and the interest of the infants requires that their estates therein should be sold. 10

7. The lands are unimproved and are productive of no revenue and petitioner believes that the present time is favorable for the sale of said lands.

8. The infant Cornelia Corlies Earnshaw Tatnall is married and her husband's name is Runice L. Tatnall. He is willing to unite in the sale of said lands and of said agreements and to release his inchoate right of curtesy therein. The step-mother of said infants, Jessie Porter Earnshaw, is willing to join in the sale of said lands and agreements and to release her right of dower therein, upon receiving in lieu thereof such sum in gross as shall be approved by this Court. 20

9. Petitioner, acting on behalf of said infants, and the said Jessie Porter Earnshaw have entered into a written agreement for the sale of said lands and said agreements, subject to the approval of this Court of the sale of the interest of the infants therein, to one B. Daniel Rappeport, of Atlantic 30

City, N. J., for the sum of $7,400, the purchaser to pay the sum of $4,650 in cash, and to give his bonds and mortgages to the Island Development Company for $2750 covering Lots Nos. 34 to 37 inclusive, above referred to, thus consummating the agreements of sale entered into by said Warner G. Earnshaw. The Island Development Company has agreed to accept the bonds and mortgages of the said B. Daniel Rappeport. Out of the purchase money are 10 to be paid taxes, etc., apportioned as of the date of passing of title, and a commission of $100 to the broker who negotiated the sale.

10. Petitioner respectfully suggests that West Jersey Trust Company, of Camden, N. J., be appointed the Special Guardian of the infants in this matter to sell the said lands and the interests of the infants in said agreements, with such surety as may be required by this Court.

20 Petitioner therefore prays that the merits of this application may be inquired into and that West Jersey Trust Company, of Camden, N. J., may be appointed the Special Guardian of said infants to sell said lands and the interest of said infants in the agreements in such way and manner and with such restrictions as shall be deemed expedient.

And petitioner will ever pray, etc.

CURRY & PURNELL,
Solictors of Petitioner.

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STATE OF PENNSYLVANIA, } *ss.*
COUNTY OF PHILADELPHIA, }

JOSHUA A. PEARSON, of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read said petition and that the contents thereof are true to the best of his knowledge, information and belief.

JOSHUA A. PEARSON. 10

Sworn and subscribed before me this twelfth day of January, 1926.

WM. R. SPOFFORD,
(Seal). *Notary Public.*
My commission expires March 6th, 1927.

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Filed March 9, 1926.

IN CHANCERY OF NEW JERSEY

In the matter of the application on behalf of CORNELIA CORLIES EARNSHAW TATNALL and WARNER GIBBS EARNSHAW, JR., infants, for the sale of lands.	On Petition, Etc. Order Appointing Guardian and Directing Sale of Lands.

Upon reading and filing the report of William J. Kraft, one of the Special Masters of this Court dated the twenty-seventh day of February, nineteen hundred and twenty-six, made in pursuance of an Order of Reference in this matter made on the nineteenth day of January, nineteen hundred and twenty-six, by which report it appears that the interest of the said infants will be substantially promoted by a sale of the lands mentioned and described in the petition filed in this cause for reasons stated in said report; that the West Jersey Trust Company, a corporation of New Jersey is a proper institution to be appointed guardian of the infants in this matter; that the value of the lands for the sale of which application is made is seventy-four hundred dollars ($7400); that the value of the interest of each of said infants in said lands and premises is eighteen hundred fifteen dollars

and two cents, ($1815.02); that the West Jersey Trust Company offers itself as its surety on each of its bonds as guardian of said infants and that the West Jersey Trust Company has complied with the laws of the State of New Jersey regarding Trust Companies to become surety on its bonds, and is sufficient surety on its bonds as guardian of said infants and that the West Jersey Trust Company should give security to each of said infants in the penal sum of thirty-six hundred thirty dollars and four cents, ($3630.04). 10

It is thereupon, on this eighth day of March, nineteen hundred and twenty-six, on motion of Curry & Purnell, solicitors of petitioner *ordered,* that the report of the said Master be, and the same is hereby in all things ratified and confirmed, and that the said West Jersey Trust Company be, and it hereby is, appointed guardian in this matter for said infants; and that the said guardian give a bond to each of said infants in the penal sum of Three Thousand Six Hundred Thirty Dollars and four cents, ($3,630.04), without other surety than itself, conditioned for the just and faithful performance of the trust reposed in it for the observance of such orders and directions as the Chancellor shall from time to time make in the premises in relation to such trust. The said bond to be approved by the said Master and filed with the Clerk of this Court. 20

IT IS FURTHER ORDERED, that the said guardian sell all and singular, the right, title and interest of each of said infants in and to the said lands, which lands are described as follows: 30

All that tract of land and premises situate, lying and being in the City of Brigantine, County of Atlantic and State of New Jersey, as shown on a map

entitled "Map 1A Lands located on Brigantine Beach made for Island Development Company, revised June 1, 1924, H. I. Eaton, C. E.", designated as Block 104, Lot 10.

Also certain lands situate in the City of East Atlantic City, County of Atlantic, State of New Jersey, designated as Lots Nos. 34, 35, 36 and 37 in Section No. 143, as shown on Map No. 1 on lands located at Brigantine Beach, New Jersey, owned by Island Development Company by Harold I. Eaton, C. E., dated June 15, 1923, scale 150 feet—1 inch, upon such terms as it shall deem safe and best for the interest of the infants, and that it be left to the sound discretion of said guardian whether such sale be public or private, but that the interest of each of said infants in the said lands be not sold for less than Eighteen Hundred Fifteen Dollars and two cents, ($1,815.02), as provided in the Master's Report; and that before executing any deed of said land to the purchaser or purchasers thereof, the guardian report to the Chancellor the sale and the terms thereof in writing, upon oath to the end that the same may be passed upon by the Chancellor and that he may make such order as he shall deem fit, touching the investment and disposition of the proceeds, if the sale be confirmed.

E. R. WALKER.
C.

Respectfully advised.
BAYARD STOCKTON, A. M.

Filed July 26, 1927.

IN CHANCERY OF NEW JERSEY.

In the matter of the application on behalf of CORNELIA CORLIES EARNSHAW TATNALL and WARNER GIBBS EARNSHAW, JR., infants, for the sale of lands.	On Petition, Etc. Guardian's Report of Sale.

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

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In pursuance of an Order made in the above entitled matter on the eighth day of March, 1926, directing the Subscriber, West Jersey-Parkside Trust Company, formerly West Jersey Trust Company, the Special Guardian appointed in this matter to sell the right, title and interest of the said infants Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., in and to the lands particularly described in the petition filed in this matter, the said West Jersey-Parkside Trust Company, formerly West Jersey Trust Company does hereby report that it has sold the right, title and interest of the said infants in the said lands at private sale to Morris Bloom of the City of Atlantic City, State of New Jersey, upon the following terms, to wit:

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The purchase price $8,250 is to be paid in cash saving $2,000 which is to be paid by a first purchase money bond and mortgage for that amount secured upon that portion of the premises described in the petition known as Lot No. 10, Section 104, Map 1, of the lands of the Island Development Company at Brigantine Beach, New Jersey, payable within two years from the date of settlement. Settlement shall be made within sixty days from the date of
10 confirmation by this Court.

Your petitioner annexes hereto the affidavits of Ben Carroll and of Isaac D. Sinderbrand, real estate brokers of Atlantic City, New Jersey, as to the value of the land upon which the mortgage is to be taken.

IT IS FURTHER REPORTED that the sum of $8,250 subject to deductions as aforesaid is the greatest sum that can now be procured for the said property sold free of the right of dower of Jessie Porter Earnshaw therein, the interest of each of
20 the infants therein being one-half, subject to said dower, and said price is not below the price fixed in the report of William J. Kraft, one of the Special Masters of this Court filed in this matter.

West Jersey-Parkside Trust Company,
formerly
West Jersey Trust Company,
By Wm. S. Casselman,
Vice-Pres. and Trust Officer.

Dated twenty-fifth day of July, A. D. 1927.

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STATE OF NEW JERSEY, } ss.
COUNTY OF ATLANTIC, }

ISAAC D. SINDERBRAND, being duly sworn, on his oath deposes and says:

I am in the real estate business with offices at Michigan and Baltic Avenues, Atlantic City, N. J., and have been engaged in said business for five years last past and during that time have bought and sold properties improved and unimproved in and around Atlantic City and since the recent development at Brigantine Beach I have bought and sold properties at Brigantine Beach and I am, by reason of my experience, familiar with values of properties in Brigantine Beach.

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I am familiar with the location and character of the property known as lot No. 16, section 104, Map No. 1 of lands of Island Development Company at Brigantine Beach. This is an unimproved lot approximately 40 feet by 90 feet in size. In my opinion, this lot is worth not less than $4,100.00 and I believe that it could be disposed of at that figure.

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ISAAC D. SINDERBRAND.

Sworn and subscribed before me this 13th day of July, A. D. 1927.
(Seal)

MAURICE SHAPIRO,
Notary Public for New Jersey.

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STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } *ss.*

BEN CARROLL, being duly sworn, on his oath deposes and says:

I am in the real estate business with offices at 21 South Tennessee Avenue, Atlantic City, N. J., and have been engaged in said business for five years last past and during that time have bought and sold properties, improved and unimproved, in and around Atlantic City and since the recent development at Brigantine Beach I have bought and sold properties at Brigantine Beach and I am, by reason of my experience, familiar with values of properties in Brigantine Beach.

I am familiar with the location and character of the property known as lot No. 10, section 104, Map No. 1 of lands of Island Development Company at Brigantine Beach. This is an unimproved lot approximately 40 feet by 90 feet in size. In my opinion, this lot is worth not less than $4,250.00 and I believe that it could be disposed of at that figure.

BEN CARROLL.

Sworn and subscribed before me this 13th day of July, A. D. 1927.

MAURICE SHAPIRO,
Notary Public of New Jersey.

(Seal)

State of New Jersey, }
County of Camden, } *ss.*

Wm. S. Casselman, of full age, being duly sworn according to law upon his oath deposes and says:

That he is Vice-President and Trust Officer of West Jersey-Parkside Trust Company, formerly West Jersey Trust Company, the Guardian named in the foregoing report of sale, and its agent in this behalf; that he has read the foregoing report of sale and the matters and things therein set forth are true to the best of his knowledge, information and belief.

Wm. S. Casselman.

Sworn and subscribed to before me this 25th day of July, A. D. 1927.

H. K. Lafferty,
Notary Public of New Jersey.

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Filed July 26, 1927.

IN CHANCERY OF NEW JERSEY.

In the matter of the application on behalf of CORNELIA CORLIES EARNSHAW TATNALL and WARNER GIBBS EARNSHAW, JR., infants, for the sale of lands.	On Petition, Etc. Order Confirming Sale.

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Upon reading and filing the report of the West Jersey Trust Company, Special Guardian of the infants, Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., of the sale of the right, title and interest of the said infants in and to the lands and premises described in the petition filed in this matter to one Morris Bloom for the sum of $8,250 less the deductions to be made in accordance with the terms set forth in said report which said sale was made under and by virtue of an order of this Court made on the 8th day of March, 1926, and it appearing that Jessie Porter Earnshaw who was entitled to an estate in dower in said lands and premises has consented in writing to join in said sale and to release her said dower, which consent has been filed with the clerk of this Court, and no reason being alleged or appearing to the contrary.

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IT IS on this 26th day of July, nineteen hundred and twenty-seven, on motion of Curry & Purnell, solicitors of the petitioner herein, ORDERED, that the said sale be and the same is hereby confirmed according to the terms and conditions in the said report mentioned.

IT IS FURTHER ORDERED, that the said Guardian execute and deliver a deed to the said Morris Bloom for the right, title and interest of the said infants, Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., in and to the lands and premises described in the petition filed herein, which lands and premises are described as follows:

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> "ALL that tract of land and premises situate, lying and being in the City of Brigantine, County of Atlantic and State of New Jersey, as shown on a map entitled 'Map 1A Lands located on Brigantine Beach made for Island Development Company, revised June 1, 1924, H. I. Eaton, C. E.' designated as Block 104, Lot 10.
>
> "Also, certain lands situate in the City of East Atlantic City, County of Atlantic, State of New Jersey, designated as lots Numbers 34, 35, 36 and 37 in Section No. 143 as shown on Map No. 1 on lands located at Brigantine Beach, New Jersey, owned by Island Development Company by Harold I. Eaton, C. E. dated June 15, 1923, scale 150 feet—1 inch."

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upon his complying with the terms of the said sale.

IT IS FURTHER ORDERED, that the said guardian pay out of the proceeds of said sale the

expenses thereof and the costs of these proceedings to be taxed which said costs shall include a counsel fee of One Hundred and Fifty Dollars to be paid to Curry & Purnell, solicitors of the petitioner, and,

IT IS FURTHER ORDERED, that so much of the proceeds of sale as shall remain after making the deductions in accordance with the terms of
10 said Guardian's report, after payment of the expenses thereof and of this application, including the taxed costs and counsel fee aforesaid and after deducting such sum in gross, to be approved by the Chancellor and paid to the widow in lieu of her dower, be put at interest by said Guardian under the direction of the Chancellor on good security in investments authorized by law and the rules of this Court for the benefit of said infants; and that the said Guardian as directed by the Statute authorizing such sale make the report as soon as
20 conveniently may be to the Chancellor in writing, to be taken before a Master, of the investment and disposition of the proceeds of said sale.

E. R. Walker, C.

Respectfully advised.
Bayard Stockton, A. M.

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Filed January 10, 1928.

IN CHANCERY OF NEW JERSEY.
59-699

In the matter of the application on behalf of Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., infants, for the sale of lands.	On Petition, &c. Petition to Compel Purchaser to Complete His Purchase.

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

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The petition of Joshua A. Pearson, of the City and County of Philadelphia, State of Pennsylvania, respectfully shows:

1. Petitioner is the petitioner in the petition filed herein which was filed to procure a sale of the interest of certain infants in lands and premises in the petition described which lands and premises are known as Lots Numbers 34, 35, 36 and 37 in Section No. 143 as shown on Map No. 1 on lands located at Brigantine Beach, New Jersey owned by Island Development Company by Harold I. Eaton, C. E., dated June 15, 1923, Scale 150 feet—1 inch;

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and Lot No. 10, block 104, as shown on a map entitled "Map 1-A Lands located on Brigantine Beach made for Island Development Company, revised June 1, 1924, H. I. Eaton, C. E."

2. Such proceedings were had herein that on March 8, 1926, an order was made wherein and whereby it was, among other things, ordered that West Jersey Trust Company of Camden, New Jersey, be the special guardian of the said infants and as such special guardian the said West Jersey Trust Company should sell at public or private sale the interest of the infants in said lands and premises.

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3. Thereafter, the said West Jersey Trust Company received an offer from Morris Bloom to purchase said premises for the sum of $11,000., which sum was not less than the amount fixed by the order as below which said premises should not be sold and West Jersey Trust Company as such special guardian later accepted said offer and reported to this Court the private sale of said premises to Morris Bloom.

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4. Upon said report an order was made on or about the twenty-sixth day of July, 1927, confirming said sale to Morris Bloom and directing the said Special Guardian to execute a good and sufficient conveyance in the law to the said Morris Bloom for the lands and premises so purchased by him.

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5. Petitioner has called upon the said Morris Bloom to complete his purchase and pay the bal-

ance of the purchase price but he has altogether failed to do so although more than three months have elapsed since the date fixed for making settlement.

6. At the time of the offer made by the said Morris Bloom he deposited the sum of $1,250.00 with the West Jersey Trust Company as special guardian as evidence of the good faith of his offer, which sum said special guardian still holds. 10

7. Petitioner annexes hereto a copy of the agreement between the said Morris Bloom and West Jersey Trust Company for the sale and purchase of the said premises.

Petitioner prays that an order may be made requiring the said Morris Bloom to complete his purchase of the lands and premises so sold to him by the said Special Guardian as aforesaid. 20

CURRY & PURNELL,
Solicitors of Petitioner.

THIS AGREEMENT made the 22nd day of June, A. D. Nineteen hundred and twenty-seven, by and between WEST JERSEY TRUST COMPANY, SPECIAL GUARDIAN OF CORNELIA CORLIES EARNSHAW TATNALL and WARNER GIBBS EARNSHAW, JR., and JESSIE PORTER EARNSHAW, parties of the first part, and Morris Bloom of the City of Atlantic City, New Jersey, party of the second part. 30

WHEREAS, title to lot 10, Section 104, Map 1 of the lands of the Island Development Company at

Brigantine Beach, New Jersey, stands in the name of Warner G. Earnshaw; and

WHEREAS, the said Warner G. Earnshaw had also contracted to purchase from the Island Development Company lots 34 to 37, inclusive, Section 143, of the lands of said company at Brigantine Beach, New Jersey, and had paid various sums on account thereof; and

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WHEREAS, the said Warner G. Earnshaw died September 11, 1925, leaving a last will and testament, which, however, was unwitnessed and therefore of no force and effect as to real estate or interests in real estate in the State of New Jersey, so that the said Warner G. Earnshaw died intestate as to said real estate and interests in said real estate; and

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WHEREAS, the said Warner G. Earnshaw left surviving him his widow, Jessie Porter Earnshaw, and two minor children, Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., and

WHEREAS, proceedings have been instituted in the Court of Chancery of New Jersey to sell the interests of the said infants in the real estate above referred to, in which proceedings West Jersey Trust Company of Camden, New Jersey, has been appointed Special Guardian of said infants with power to make sale of their interests in said real estate;

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NOW, THEREFORE, this agreement witnesseth:

1. The parties of the first part agree to apply to the Court of Chancery of New Jersey to have the confirmation of the sale of said real estate to Edgar V. H. Bell vacated and to have a new order of confirmation entered confirming the sale to Morris Bloom, the party of the second part herein, upon the terms and conditions herein set forth.

2. Subject to the foregoing and to all other provisions of this agreement, the parties of the first part agree to sell and convey to the party of the second part, Lot 10, Section 104, Map 1 of lands of the Island Development Company, at Brigantine Beach, New Jersey, above referred to, and also to assign to the party of the second part the agreements for the purchase of lots 34 to 37 inclusive, Section 143 above recited. The total consideration for said purchase is $11,000. The consideration to be paid by the party of the second part for said lot 10, Section 104 and for the assignments of the agreements for the purchase of lots 34 to 37 inclusive, Section 143, is $6,250.00 in cash to the parties of the first part and the bond of the party of the second part for $2,000.00 secured by a first purchase money mortgage of $2,000., payable in two years upon said Lot 10, Section 104, Map 1, above referred to. The party of the second part is to give his bonds and mortgages to the Island Development Company for a total sum of $2,750.00 covering lots 34 to 37 inclusive, thus completing the agreements made by said Warner Gibbs Earnshaw. The party of the second part undertakes to make all necessary arrangements with the Island Development Company as to its taking of said bonds and mortgages.

3. The sum of $1,250.00 has been deposited with the West Jersey Trust Company as such Special Guardian at or before the execution of this agreement. Settlement shall be made within sixty days from the date of confirmation sale by the Court of Chancery, at the office of the West Jersey Trust Company, Camden, New Jersey, and in case the party of the second part fails for any reason to make settlement as herein provided the
10 total sum of $1,250.00 deposited by the party of the second part shall be retained by the party of the first part without the necessity of tender of a deed, deeds or assignments, as liquidated damages without any further liability of any kind whatsoever, hereunder to the party of the second part.

4. Taxes and other charges, if any, against the land shall be apportioned to the date of settlement. All expenses of settlement, drawing and recording the deed or deeds, title charges, etc., shall be borne
20 by the party of the second part.

5. It is understood that the title of Lot 10, Section 104 to be conveyed is the same title as that received by the said Warner G. Earnshaw, deceased, and that the rights to be conveyed under the contracts of purchase for Lots 34 to 37, inclusive, Section 143, are the same rights as the said Warner G. Earnshaw deceased had under his contracts for the purchase thereof with the Island
30 Development Company.

6. Subject to the terms hereof, the rights and liabilities hereunder shall extend to the heirs, executors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

8. If, for any reason, the party of the first part is unable to convey the title which it hereby agrees to convey whether through failure to secure the confirmation of sale by the Court or otherwise, the party of the first part shall return to the party of the second part the moneys deposited with it hereunder and this agreement shall be at an end and no further or other action shall be taken hereon.

IN WITNESS WHEREOF, the said parties have executed this agreement in due form the day and year first above written. 10

West Jersey Trust Company,
Special Guardian of Cornelia Corlies Earnshaw Tatnall, and Warner Gibbs
(Seal) *Earnshaw, Jr.*
By William S. Casselman,
Vice-President and Trust Officer.
E. J. Williams, *Asst. Sec'y.*
Jessie Porter Earnshaw,
Morris Bloom. 20

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STATE OF NEW JERSEY, } ss.
COUNTY OF CAMDEN, }

GEORGE PURNELL, being duly sworn according to law, on his oath deposes and says:

10 I am a member of the law firm of Curry & Purnell, the solicitors of the petitioner in the above matter and am the person actually in charge of the conduct of said matter. I have read the foregoing petition and the matters and things therein contained are within my knowledge and are true.

The petition in the above matter was filed to procure a sale of the interest of certain infants in lands and premises in the petition described which lands and premises are known as Lots Numbers
20 34, 35, 36 and 37 in Section No. 143 as shown on Map No. 1 on lands located at Brigantine Beach, New Jersey owned by Island Development Company by Harold I. Eaton, C. E., dated June 15, 1923, Scale 150 feet—1 inch; and Lot No. 10, block 104, as shown on a map entitled "Map 1A lands located on Brigantine Beach made for Island Development Company, revised June 1, 1924, H. I. Eaton, C. E."

30 That such proceedings were had therein that on March 8, 1926, an order was made wherein and whereby it was, among other things, ordered that West Jersey Trust Company of Camden, New Jersey, be the special guardian of the said infants and as such special guardian the said West Jersey Trust Company should sell at public or private sale

the interest of the infants in said lands and premises.

That the said West Jersey Trust Company received an offer from Morris Bloom to purchase said premises for the sum of $11,000., which sum was not less than the amount fixed by the order as below which said premises should not be sold and West Jersey Trust Company as such special guardian later accepted said offer and reported to this Court the private sale of said premises to Morris Bloom.

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That upon said report an order was made on the twenty-sixth day of July, 1927, confirming said sale to Morris Bloom and directing the said Special Guardian to execute a good and sufficient conveyance in the law to the said Morris Bloom for the lands and premises so purchased by him.

The said Morris Bloom has been called upon to complete his purchase and pay the balance of the purchase price but he has altogether failed to do so, although more than three months have elapsed since the date fixed for making settlement.

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That at the time of the offer made by the said Morris Bloom he deposited the sum of $1,250., with the West Jersey Trust Company as special guardian as evidence of the good faith of his offer, which sum said special guardian still holds.

Annexed to the petition is a copy of the agreement between the said Morris Bloom and West Jersey Trust Company for the sale and purchase of the said premises.

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George Purnell.

Sworn and subscribed before me this ninth day of January, A. D. 1928.

MARION K. RANDLES,
Notary Public of New Jersey.

(Seal)

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Filed January 10, 1928.

IN CHANCERY OF NEW JERSEY.
59-699

In the matter of the application on behalf of Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., infants, for the sale of lands.	On Petition, &c. Order To Show Cause.

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This matter being opened to the Court by Curry & Purnell, solicitors of the petitioner in the above entitled cause and it appearing that the interest of certain infants in the real estate mentioned and described in said petition has been sold in proceedings taken in this cause to Morris Bloom by West Jersey Trust Company as special guardian of said infants and it further appearing that after the date fixed for settlement of said sale the said Morris Bloom has for a space of more than three months failed to complete his purchase.

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IT IS on this 10th day of January, 1928, on motion of Curry & Purnell, solicitors as aforesaid, ORDERED that the said Morris Bloom show cause before the Chancellor at Chancery Chambers, in the City of Atlantic City, on Tuesday the 24th day

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of January, 1928, at ten o'clock A. M., or as soon thereafter as counsel can be heard why the prayer of the petition filed herein should not be granted and an order made requiring the said Morris Bloom to complete his purchase of the lands and premises so sold to him by the special guardian and pay the balance of the consideration therefor.

10

IT IS FURTHER ORDERED that a copy of the petition upon which this order is made and of this order, which copies need not be certified, be served upon the said Morris Bloom at least five days before the return date hereof, by delivering the same to the said Morris Bloom personally, either within or without this state.

E. R. WALKER,
C.

Respectfully advised.
R. H. INGERSOLL, V. C.

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Filed April 3, 1928.

IN CHANCERY OF NEW JERSEY.

In the matter of the application on behalf of CORNELIA CORLIES EARNSHAW TATNALL and WARNER GIBBS EARNSHAW, JR., infants, for the sale of lands.	On Petition, &c. Conclusions.

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MESSRS. CURRY & PURNELL *for the Petitioners.*

MR. MORRIS BLOOM *for the Defendant.*

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INGERSOLL, V. C.

Proceedings were had in this Court, which resulted in an order dated March 8th, 1926, making a special guardian and directing him to sell certain real estate. By virtue thereof, negotiations were entered into with one Morris Bloom, which resulted in the execution of an agreement, wherein said guardian agreed to sell certain lands and premises, and the purchaser agreed to make certain payments therein mentioned.

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Clause 3 and Clause 8 of the agreement are as follows:

"3. The sum of $1,250.00 has been deposited with the West Jersey Trust Company as such Special Guardian at or before the execution of this agreement. Settlement shall be made within sixty days from the date of confirmation sale by the Court of Chancery, at the office of the West Jersey Trust Company, Camden, New Jersey, and in case the party of the second part fails for any reason to make settlement as herein pro-
10 vided the total sum of $1,250.00 deposited by the party of the second part shall be retained by the party of the first part without the necessity of tender of a deed, deeds or assignments, as liquidated damages without any further liability of any kind whatsoever, hereunder to the party of the second part.

"8. If, for any reason, the party of the first part is unable to convey the title which it hereby agrees to convey whether through failure to secure the confirmation of sale by the Court or
20 otherwise, the party of the first part shall return to the party of the second part the moneys deposited with it hereunder and this agreement shall be at an end and no further or other action shall be taken hereon."

I can do no better than to quote Vice Chancellor Leaming in Nolan v. Kirchner, 98 N. J. Eq., 452:

"Since *Crane v. Peer, 43 N. J. Eq. 553,* it has been uniformly held in this state that the mere
30 presence of a stipulation for liquidated damages for breach of a contract of this nature does not make the contract an alternative one. As expressed by Vice-Chancellor Reed in *Avon-by-the-Sea Land Improvement Co. v. Thompson, 60 N.*

J. Eq. 207, 211, "there must be something apart from the fact that there is a provision for liquidated damages to show that its payment is to be the equivalent for performance." The general view is that the primary object of contracts of this nature is deemed to be performance not non-performance, and it is not to be presumed that stipulated damages for non-performance is intended to defeat that primary object in the absence of terms of the contract or its relation to the subject-matter which adequately disclose the contrary to have been the intent of the parties. The cases in this state supporting that view are the following: *Crane v. Peer, supra; Brown v. Norcross, 59 N. J. Eq. 427; Avon-by-the-Sea Land Improvement Co. v. Thompson, supra; Myers v. Steel Machine Co., 67 N. J. No. 300; Resnick v. Campbell, 68 N. J. Eq. 348; American Ice Co. v. Lynch, 74 N. J. Eq. 298; Porter v. Williams, 93 N. J. Eq. 88; affirmed, Ibid. 505; Rittenhouse v. Swiecicki, 94 N. J. Eq. 36; Coltinuk v. Hockstein, 95 N. J. Eq. 513; Randolph v. General Investment Co., 96 N. J. Eq. 227.* An extended review of authorities in other states will be found in *32 A. L. R. 584, et seq.*"

The question then, as in that case, is, does the 3rd clause above quoted, adequately disclose an intent to give to the damage clause a force, the reverse of that ordinarily attributed to clauses of that nature?

The wording is specific that "in case the party of the second part fails for any reason to make settlement * * * the total sum of $1,250, shall be retained * * * as liquidated damages, without any further liability of any kind whatsoever, here-

under to the party of the second part." Could language be clearer that it was meant that "liability" was not limited to the amount of damages to be sustained, but extend to any liability whatsoever.

The party of the first part agreed in the event that it was "unable to convey, whether through failure to secure the confirmation of sale by the Court or otherwise, the party of the first part shall return the money deposited, and this agreement shall be at an end, and no further or other action shall be taken thereon."

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It is manifest that both parties to this agreement meant it to be one not subject to a bill for specific performance.

The application will be dismissed.

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Filed August 16, 1928.

IN CHANCERY OF NEW JERSEY.

In the matter of the application on behalf of CORNELIA CORLIES EARNSHAW TATNALL and WARNER GIBBS EARNSHAW, JR., infants, for the sale of lands.	On Petition, &c. Order of Dismissal.

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This matter being opened to the Court by Curry & Purnell, Solicitors of the petitioner, in the presence of Morris Bloom, Solicitor pro se on the return of an order to show cause why the said Morris Bloom should not be compelled to complete his purchase in accordance with the terms of an agreement heretofore entered into, providing for the sale to him of the interest of infants in certain lands and premises at Brigantine, Atlantic County, New Jersey, and the Court having heard and considered the arguments of counsel, and being satisfied that the petitioners' application should be dismissed.

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IT IS, on this 16th day of August, nineteen hundred and twenty-eight, on motion of Morris Bloom, Solicitor pro se, ORDERED that the petition filed herein, seeking to compel the said Morris Bloom

to complete his purchase of the said lands and premises in accordance with the agreement entered into between West Jersey Trust Company as Special Guardian for Cornelia Corlies Earnshaw Tatnall and others, and the said Morris Bloom be and the said petition is hereby dismissed, and the relief therein prayed for by the petitioner be and the same is hereby denied.

E. R. Walker.
C.

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Respectfully advised.
R. H. Ingersoll, V. C.

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Filed Auust 22, 1928.

IN CHANCERY OF NEW JERSEY.
59-699

In the matter of the application on behalf of CORNELIA CORLIES EARNSHAW TATNALL and WARNER GIBBS EARNSHAW, JR., infants, for the sale of lands.	On Petition, &c. Notice of Appeal.

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The petitioner, Joshua A. Pearson, general guardian of the estates of Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., infants, hereby appeals from the final decree made in the above entitled cause on the 16th day of August, 1928, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in All Causes.

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Dated August 20, 1928.

CURRY & PURNELL,
Sol'rs for and of Counsel with Pet'r.

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

GEORGE PURNELL,
Of Counsel with Pet'r,
Joshua A. Pearson, Etc.

Filed August 22, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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In the matter of the application on behalf of Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., infants, for the sale of lands.	On Appeal from the Court of Chancery. Petition of Appeal.

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

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The Petition of Joshua A. Pearson, general guardian of the estates of Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., infants, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by the order of dismissal made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 16th day of August, 1928, in a certain cause in said Court of Chancery entitled, "In the matter of the application on behalf of Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., infants,

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for the sale of lands" in this respect, to wit: that the said order adjudges that the petition filed by petitioner in said cause, seeking to compel one Morris Bloom to complete his purchase of the lands and premises of the said infants in accordance with the terms of the agreement entered into between West Jersey Parkside Trust Company, as Special Guardian for said infants, and the said Morris Bloom, be and the said petition was thereby dismissed, and the relief therein prayed for by the petitioner was denied. 10

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

1. The Chancellor should have decreed that the said Morris Bloom complete his purchase of the said lands and premises and in all respects fulfil and comply with the terms of the said agreement between the West Jersey Parkside Trust Company, Special Guardian, as aforesaid, and the said Morris Bloom. 20

2. The said decree was based on the finding by the Chancellor that the said agreement between West Jersey Parkside Trust Company, Special Guardian, as aforesaid, and the said Morris Bloom, was an alternative contract, permitting the said Bloom to perform the contract or to forfeit his deposit money as liquidated damages, as he might elect, whereas the Chancellor should have found and held that said agreement was not an alternative contract and should have decreed that said Morris Bloom should specifically perform the same. 30

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

CURRY & PURNELL,
Sol'rs for and of Counsel with Appellant.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

In the matter of the application on behalf of CORNELIA CORLIES EARNSHAW TATNALL and WARNER GIBBS EARNSHAW, JR., infants, for the sale of lands.	On Appeal from the Court of Chancery. Acknowledgment of Service of Petition of Appeal.

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Service of a copy of the Petition of Appeal in the above entitled cause is acknowledged this twenty-third day of August, 1928.

MORRIS BLOOM,
Pro Se.

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Filed September 8, 1928.

IN CHANCERY OF NEW JERSEY.
59-699

In the matter of the application on behalf of CORNELIA CORLIES EARNSHAW TATNALL and WARNER GIBBS EARNSHAW, JR., infants, for the sale of lands.	On Petition, &c. Amended Notice of Appeal.

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The petitioner, Joshua A. Pearson, general guardian of the estates of Cornelia Corlies Earnshaw Tatnall and Warner Gibbs Earnshaw, Jr., infants, hereby appeals from the final decree made in the above entitled cause on the 16th day of August, 1928, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in All Causes. The said decree was made by the Chancellor on the advice of Vice-Chancellor R. H. Ingersoll.

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Dated August 27, 1928.

CURRY & PURNELL,
Sol'rs for and of Counsel with Pet'r.

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

GEORGE PURNELL,
Of Counsel with Pet'r,
Joshua A. Pearson, Etc.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the matter of the application on behalf of CORNELIA CORLIES EARNSHAW TATNALL and WARNER GIBBS EARNSHAW, JR., infants, for the sale of lands.	Brief on Behalf of Appellant.

This is an appeal from an order of the Court of Chancery advised by Vice-Chancellor Ingersoll dismissing appellant's application for an order requiring the purchaser of certain lands belonging to infants to complete his purchase by accepting conveyance of the land and paying the consideration.

FACTS.

Cornelia Corlies Earnshaw Tatnall and Warner G. Earnshaw, Jr., infants, were seized of certain land at Brigantine, Atlantic County, New Jersey, subject to the dower interest of their step-mother. Proceedings were instituted in the Court of Chancery for the sale of this land resulting in an order appointing West Jersey-Parkside Trust Company, of Camden, as Special Guardian of the infants, and directing the Trust Company to sell the property.

Morris Bloom offered to buy the property and

an agreement was entered into between Bloom and the Trust Company providing for the sale of the property to and purchase by Bloom upon the terms and conditions set forth in the agreement, a copy of which appears in the State of the Case at page 19. To cover her dower interest, Mrs. Earnshaw, the stepmother of the infants, joined in this agreement. The husband of one of the infants, Mr. Tatnall, had previously expressed his willingness to join in the conveyance. (See case p. 3, line 21.) Bloom paid the deposit of $1250. mentioned in the agreement and then, after some delay, refused to settle and pay the balance of the consideration. Upon such refusal appellant filed a petition in the cause, reciting the above facts, and obtained an order on Bloom to show cause why he (Bloom) should not be required to complete his purchase and make settlement under the agreement. After hearing, the Vice-Chancellor determined that the appellant was not entitled to the relief prayed for in his petition, that Bloom was not legally obliged to make settlement, and an order was entered accordingly, from which order this appeal is taken.

ARGUMENT.

The contention of appellant is that the agreement is one which should be specifically enforced.

The contention of the respondent is that the agreement cannot be specifically enforced against him, as it is, he claims, an alternative contract, giving him the right either to perform the contract, or to refuse to perform it and forfeit his deposit money as liquidated damages. The pertinent provision in the contract is the 3d clause

(see case p. 22, l. 1 to 15) and reads as follows:

> "The sum of $1,250.00 has been deposited with the West Jersey Trust Company as such Special Guardian at or before the execution of this agreement. Settlement shall be made within sixty days from the date of confirmation of sale by the Court of Chancery, at the office of the West Jersey Trust Company, Camden, New Jersey, and in case the party of the second part fails for any reason to make settlement as herein provided, the total sum of $1,250.00 deposited by the party of the second part shall be retained by the party of the first part without the necessity of tender of a deed, deeds or assignments, as liquidated damages without any further liability of any kind whatsoever hereunder to the party of the second part."

The leading case in New Jersey on this subject is that of *Crane v. Peer, 43 N. J. Equity 553* where the matter is treated exhaustively by Vice-Chancellor Henry C. Pitney sitting in that case as Advisory Master. The Court held that the presence in a written contract of a provision for liquidated damages in case of its breach does not of itself necessarily render the contract an alternative one nor give to the party bound the option to pay the damages and break his contract. On page 563 the Advisory Master cites Suth. on Damages as follows:

> "Alternative Contracts.—These are such as by their terms may be performed by doing either of several acts at the election of the party from whom performance is due. Performance in one

of the modes is a performance of the entire contract, and no question of damages arises. Such a contract, therefore, is not one for liquidated damages. * * * Stipulating the damages and promising to pay them in case of default in the performance of an otherwise absolute undertaking, does not constitute an alternative contract. The promisor is bound to perform his contract, though there is generally a practical option to violate it and take the consequence, but he is entitled to no election to pay the liquidated damages and thus discharge himself."

Crane v. Peer has been uniformly followed in this State in a long line of cases, to wit:

Brown v. Norcross, 59 Eq. 427.
Improvement Company v. Thompson, 60 Eq. 207.
Myers v. Steel Machine Co., 67 Eq. 3.
Resnick v. Campbell, 68 N. J. Eq. 348.
American Ice Co. v. Lynch, 74 Eq. 298.
Porter v. Williams, 93 Eq. 88; Affirmed 93 Eq. 505.
Rittenhouse v. Swiecicki, 94 Eq. 36.
Coltinuk v. Hockstein, 95 Eq. 513.
Randolph v. General Investment Co., 96 Eq. 229.
Nolan v. Kirchner, 98 Eq. 452.

In *Improvement Company v. Thompson, 60 Eq. 207*, it was held that the agreement for the sale and conveyance of lands providing that either party failing to perform the same shall pay the sum of $5,000.00 as liquidated damages does not constitute such agreement an alternative contract, so as to release the vendor from performance, without a bona fide effort to perform, upon the

payment of the damages stipulated in the agreement.

In *Resnick v. Campbell, 68 Eq. 348,* Vice-Chancellor Stevenson says

"My conclusion was that the agreement set forth in the bill does not suggest any alternative; that the parties merely undertook to liquidate the damages which would be assessed in case damages were sued for in a Court of Law; that nothing in the agreement, under the authorities which control this Court, affected the right of the complainants to a decree of specific performance."

In *American Ice Co. v. Lynch, 74 Eq. 298,* Vice-Chancellor Leaming referring to the argument that a contract was alternative because of a provision for liquidated damages, said

"The contention of the defendant finds support in a considerable number of adjudicated cases; but this Court is now firmly committed to the opposite view. The specific agreement of defendant is not to engage in the business. Had it been the intention of the parties to also provide that the defendant should be privileged to purchase his liberty to perform the act which he specifically agreed not to perform, that intention should have been expressed in language equally clear."

In *Rittenhouse v. Swiecicki, 94 Eq. 36,* the clause in question read as follows:

> "Deposit shall be forfeited to the said party of the first part as liquidated damages in case of the default by the said party of the second part in the performance of the terms of this agreement."

The Vice-Chancellor said

> "The rule is well defined to the effect that there must be something apart from the fact that there is a provision for liquidated damages to show that its payment is to be the equivalent for performance. There must be found in the engagement a contemplated alternative whereby the parties are given an option to perform or to refuse to perform and pay the specific damages. That alternative engagement is easily expressed and if relied upon should appear with reasonable clearness and certainty."

In *Randolph v. General Investment Co., 96 Eq. 229,* the provision in the contract was as follows:

> "And for the performance of all and singular the covenants and agreements aforesaid the said parties to bind themselves and their heirs, executors, administrators and successors respectively, and they hereby agree to pay upon failure to perform the same the sum of two thousand dollars which they hereby fix and settle as liquidated damages therefor, but any payment made by the second party on account of the purchase price hereunder shall not be construed or taken as part of said sum so agreed upon as liquidated damages."

In construing this provision Vice-Chancellor

Church followed the rule of *Crane v. Peer,* held the contract not to be alternative.

In *Nolan v. Kirchner, 98 Eq. 452,* the clause in the contract was as follows:

> "It is further understood and agreed that each of the parties makes this agreement only upon the express agreement and understanding that in the event of default of the other party in performing the terms of this agreement the defaulting party shall be bound to pay unto the other party the sum of $2,000.00, as liquidated damages, and not as a penalty, to cover all damages for said breach."

In this case Vice-Chancellor Leaming said

> "The general view is that the primary object of contracts of this nature is deemed to be performance, not non-performance, and it is not to be presumed that stipulated damages for non-performance is intended to defeat the primary object, in the absence of terms of the contract or its relation to the subject-matter which adequately disclose the contrary to have been the intent of the parties."

In the late case of *Kleim v. Sisters of Charity, 5 N. J. Adv. Rep. 1575, 139 Atlantic 174,* decided by the Court of Errors and Appeals, October 17, 1927, it was held

> "that a definite sum was named in the contract as ascertained or liquidated damages for

> every violation does not undertake that the grantee or the defendant who claims under him was given the option to violate the restriction and pay the specific damages in lieu of performance."

If language is to be found anywhere in the agreement to support respondent's position, it must be sought for in the 3d clause. The pertinent part of clause 3 reads as follows:

> "in case the party of the second part fails for any reason to make settlement as herein provided the total sum of $1,250 deposited by the party of the second part shall be retained by the party of the first part without the necessity of tender of a deed, deeds or assignments, as liquidated damages."

Can it be said that this language expresses, "with reasonable clearness and certainty," an "alternative engagement" apart from the provision for liquidated damages? It is clear that it does not. It expresses nothing apart from the provision for liquidated damages. The above is the whole of paragraph 3 as far as it relates to this subject. The remainder of the paragraph reading "without any further liability of any kind whatsoever, hereunder to the party of the second part" is surplusage. It merely states what would necessarily be the case even if these words were omitted. In no event could this latter wording enlarge in any way the rights of Bloom. If it can be said to have any force at all, it is rather in restriction of the rights of Bloom, as it limits, or rather eliminates, the liability of the party of the first part to the

party of the second part in the event that the deposit shall be forfeited.

The Vice-Chancellor in his opinion (case p. 31, l. 30) says, referring to the agreement:

> "The wording is specific that 'in case the party of the second part fails for any reason to make settlement * * * the total sum of $1,250 shall be retained * * * as liquidated damages, without any further liability of any kind whatsoever, hereunder to the party of the second part.' Could language be clearer that it was meant that 'liability' was not limited to the amount of damages to be sustained, but extend to any liability whatsoever."

We submit that the language quoted by the Vice-Chancellor does not and cannot have the meaning which he attributes to it. The liability referred to is not "any liability whatsoever." It is only the liability of the seller to Bloom in the event the seller acquiesces in Bloom's default and retains the liquidated damages. The language does not refer and cannot by any construction, however strained, be made to refer to any liability of Bloom to the seller.

If it had been the intention of the parties to permit Bloom to have the option of forfeiting his deposit and escaping performance, a provision to that effect could have been readily drafted and included in the contract, but no draftsman would have used the language quoted above from clause 3 to accomplish that purpose. The cases cited above, particularly *Rittenhouse v. Swiecicki, 94 Eq. 36,* hold that such a provision is easily expressed,

and if relied upon must appear in the contract with reasonable clearness and certainty. No such provision can be found in clause 3 of this agreement expressed with reasonable clearness and certainty, nor is there any such provision anywhere else in the agreement. If the latter part of clause 3 had read "without any further liability of any kind whatsoever hereunder to the party of the *first* part," or if it had read "without any further liability of any kind whatsoever hereunder *on* the party of the second part," perhaps the result contended for by Bloom and the decree dismissing appellant's petition would be justified; but the language of the agreement as it stands does not justify these things, and without doing some violence to the agreement by changing this language, thus making a new agreement for the parties which they never made for themselves, we contend that Bloom's contention and the decree we are now appealing from cannot be justified, either on the facts appearing in the agreement or on the law applicable to those facts.

It appears to us that the theory of the Courts in the many and uniform decisions on this subject is that all agreements for the sale of real estate under which the buyer has made a deposit to be forfeited in case of his default are alternative as regards the seller in case the buyer defaults, and under such an agreement the seller has the option of retaining the deposit as liquidated damages or requiring specific performance of the contract. If the seller elects to take the damages, the matter is ended, and he (the seller) is "without any further liability of any kind whatsoever" to the buyer, as has been provided in the agreement in this cause (case p. 22, l. 14); if he elects to require

specific performance, the clause in the contract respecting liquidated damages becomes of no importance and the contract is enforced without regard to it and as if it did not exist. So in this case, as the appellant has elected to require specific performance, that portion of the 3d clause which is so stressed by the Vice-Chancellor, has nothing to do with the case, as it refers entirely to liquidated damages and to the liability of party of the *first* part, (not the *second* part) in the event such damages are claimed.

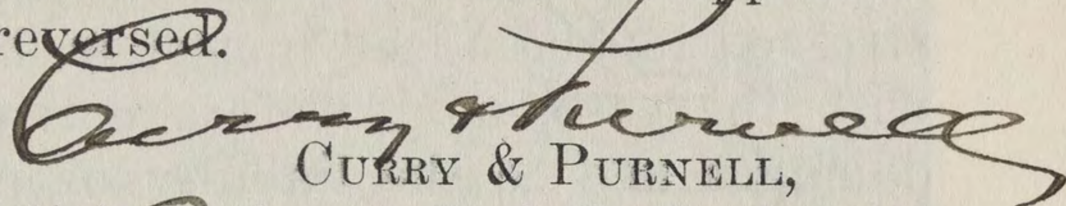
Reference is made by the Vice-Chancellor to the 8th clause of the agreement (case p. 23, l. 1-10) and the respondent also relied somewhat on this clause in the Court below—It reads as follows:

> "If, for any reason, the party of the first part is unable to convey the title which it hereby agrees to convey whether through failure to secure the confirmation of sale by the Court or otherwise, the party of the first part shall return to the party of the second part the moneys deposited with it hereunder and this agreement shall be at an end and no further or other action shall be taken hereon."

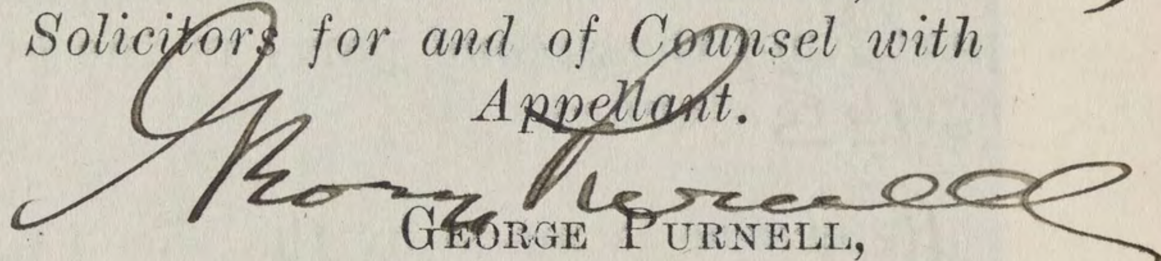
It is a common practice to include in a contract for the sale of real estate a provision that the seller shall convey a good and marketable title to the buyer, and in the event that seller cannot convey such a title, that the buyer's deposit be returned and that the agreement be at an end. The 8th clause is a provision of this kind. Its only effect is to permit the buyer to receive his deposit money in case the seller is unable to convey. It

does not deprive the buyer of his right to specific performance of the contract if the seller is able, but unwilling to convey. It has no application or force where, as in this case, the seller is able and willing and anxious to convey.

We respectfully submit that the decree appealed from should be reversed.



CURRY & PURNELL,
Solicitors for and of Counsel with Appellant.



GEORGE PURNELL,
of Counsel.