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Bill of Complaint.

BILL OF COMPLAINT.

Filed July 6, 1926.

In Chancery of New Jersey

*To His Honor Edwin Robert Walker, Chancellor
of the State of New Jersey:* 10

Complainant, Carolyn C. Jones, residing in Oakland, California, and Arthur B. Chamberlin, residing in Newark, New Jersey, respectfully show:

1. That on June 30, 1921, complainant, Arthur B. Chamberlin entered into an agreement in writing with Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as executors and trustees under the Last Will and Testament of J. Boyce Smith, deceased, under and by which agreement the said executors agreed to convey to the said complainant certain premises in the Borough of Woodcliff Lake, Township of Washington, County of Bergen and State of New Jersey, which premises are more particularly described in the said agreement, a copy of which agreement is annexed hereto and made a part of this bill of complaint. 20

2. In and by said agreement it was agreed that said complainant should deposit with the said J. Boyce Smith, Jr., as security for the payment of the sum of thirty thousand (\$30,000) dollars, being a portion of the purchase price and also as security for the payment of interest and the performance of his other obligations under said agreement, certificates of capital stock of the New York Mexican Oil Co. of the total par value of twenty-five thousand (\$25,000) dollars, duly endorsed in blank. It was also 30 40

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10 provided in said agreement that in payment by said complainant of each installment of three thousand (\$3,000) dollars of the unpaid balance of the purchase price, the said J. Boyce Smith, Jr., should release and deliver to said complainant a certificate or certificates of the capital stock of said company of the par value of five thousand (\$5,000) dollars for each of such payments.

20 3. Subsequently and within a few days after the making of said agreement, said complainant deposited with the said J. Boyce Smith, Jr., voluntarily, additional certificates of the capital stock of the aforesaid company in the further par value of twenty-five thousand (\$25,000) dollars, for which supplemental receipt or agree-
ment was delivered to them by said executors providing that upon the payment of each of the said installments of \$3,000 as provided in the original agreement, the said J. Boyce Smith, Jr. would release and deliver to said complainant additional certificate or certificates of said capital stock to the par value of \$5,000 and in and by said original agreement and supplement receipt or agreement, it was provided that upon the
30 payment of each of said installments of \$3,000 there should be returned and delivered to said complainant the sum of \$10,000 of par value of the capital stock of said company instead of \$5,000 par value as provided in the aforementioned agreement.

40 4. At the time of the delivery by said complainant of the aforesaid \$50,000 par value worth of capital stock, the said capital stock was then and is now of the book value of \$1.25 per share as disclosed by the "Poors Investment Manual,"

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a recognized manual, and the actual value of selling price of the stock of said company delivered at the time of the execution of said first mentioned agreement has never sold for less than \$1.25 per share, so that the said stock has been, at all times, since the execution of the first mentioned agreement, fairly worth \$1.25 per share or \$62,500 in all. 10

5. Since the making of said agreement, said complainant paid to the said executors, the installment falling due July 1, 1922, in the sum of \$3,000 and the installment falling duly on July 1, 1923, in the sum of \$3,000 on the unpaid balance of the purchase price, has paid interest on the first mortgage of \$5,000 up to November 21, 1924, has paid interest on the unpaid balance of said purchase price and has paid all taxes up to the second half of 1924 taxes and has placed lasting and valuable improvements, consisting of repairs to the house and outbuildings to the amount of \$7,000 and has also kept the house fully insured for the benefit of said executors up to the last mentioned date. 20

6. For a number of years prior and subsequent to the making of the said first mentioned agreement, said complainant was engaged in litigation in the courts of New York with his wife, Amelia B. Chamberlin, to affect a legal separation between them, and some time prior to the first of July, 1922, said complainant, being desirous of obtaining title to the premises described in the said agreement without the attaching thereby of any dower interest on the part of his said wife, assigned to the complainant, Carolyn C. Jones, all of his right, title and interest in and to the aforementioned agreement, but in 30
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nowise assigned to her any right, title and interest into the aforementioned shares of capital stock of the New York-Mexican Oil Co. And the said Carolyn C. Jones now has a right in said agreement by virtue of said assignment and joins herein as complainant for that reason.

10 7. That neither on July 1, 1922, or on July
1, 1923, when these complainants paid the re-
spective installments of \$3,000 each, due on each
of these said dates, did said executors nor J.
Boyce Smith, Jr., release and deliver to said
complainant, Arthur B. Chamberlin, any of the
shares of said New York-Mexican Oil Co., not-
withstanding that the said original and supple-
mental agreements heretofore referred to re-
quired that there should have been delivered to
20 said complainant \$20,000 of the par value of said
stock, and the said executor, J. Boyce Smith, Jr.,
at no time and after institution of the fore-
closure suit herein mentioned and the filing of
an answer and counter-claim, setting up the
matters and things herein alleged, delivered any
stock of said company to said complainant, and
said executors and J. Boyce Smith Jr., now
wrongfully detain possession of the par value of
the stock which is to the fair market value of
30 \$50,000.

8. On or about January 1, 1924, complainant,
Arthur B. Chamberlin, became in default in
paying installments and has not since paid any-
thing on account of said agreement, nor has
the complainant, Carolyn C. Jones, since said
date.

9. On October 3, 1924, the said executors,
Margaret Kilpatrick Smith and J. Boyce Smith,
40 Jr., filed a bill of complaint, praying specific

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performance of said agreement and alleging the tender of a deed theretofore made and praying that these complainants be foreclosed of all equity to said premises and the said agreement.

10. Such proceedings were had in said action that these complainants filed an answering counter-claim setting up the matter and things heretofore alleged in said bill, and said executors filed a supplemental bill alleging that the said executors delivered to the complainant, Arthur B. Chamberlin, 10,000 shares of stock of the par value of said capital stock and again praying for foreclosure of all rights of these complainants, and said executors also filed a replication. There is annexed hereto and made a part of this bill of complaint, copies of the bill, answer and counter-claim, replication to answer and counter-claim, supplemental bill, answer to supplemental bill and replication to answer to supplemental bill in said suit.

11. These complainants retained to represent them in the said foreclosure proceedings, Patrick Henry Maley, an attorney of Hackensack, N. J., and a solicitor of this court, who was paid the fee which he demanded in advance of this hearing in the approximate sum of \$800 to represent these complainants throughout the said cause.

12. On September 8, 1925, and on the day fixed for the hearing of said cause, this complainant was confined in the Ludlow Street Jail in the City of New York, in an action instituted by his former wife and while so confined was telephoned to by the said Patrick Henry Maley, who conferred with him about the said case and agreed that he should either arrange for an adjournment thereof or to take the depositions

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of said complainant, Arthur B. Chamberlin, and produce them upon the hearing of said case. Notwithstanding said agreement and notwithstanding the filing by said Patrick Henry Maley on behalf of this complainant, of the answer heretofore referred to, said Patrick Henry Maley, fraudulently appeared in open court and consented to a decree foreclosing all of the right, title and interest of said complainants in and to the aforementioned premises and to any right, title and interest arising out of the aforementioned contract. And a decree was entered in said cause on September 28, 1925.

13. Said Patrick Henry Maley, in consenting to as aforesaid, did not consent to the dismissal of this complainant's counter-claim in this action and the said counter-claim is still pending and undetermined in this court and has never been dismissed, and the said decree was fraudulently consented to as aforesaid and did not in any way dispose of or destroy the said answer and counter-claim and these complainants have never been heard in court upon the same and have been wrongfully deprived of their right and of their day in court.

14. After the making and entry of said decree such proceedings were had in said cause that the Sheriff of Hackensack, N. J., advertised for sale and sold the premises described in the bill of complaint, but did not sell the rights of complainants in said contract and the same now, equitably belongs to these complainants. A copy of the published notice of said sale is attached hereto and made a part of this bill of complaint.

15. On December 15, 1925, the Sheriff of Bergen County, executed and delivered to the

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purchasers at the aforementioned sale, to wit: Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as executors as aforesaid, a deed for the said premises bought by them at said sheriff's sale for the price or consideration of \$5,000 which sum of \$5,000 is a grossly inadequate price for the said premises and less than half the actual cash paid in by these complainants on account of the purchase price and interest for the said premises. 10

16. At the time of the sale in question, the complainant, Arthur B. Chamberlin, was still confined in jail and prior to the time his attorney, the said Patrick Henry Maley, informed him that he, the said Patrick Henry Maley would attend the sale and see that the rights of the complainant were protected, but said complainant charges that the said Patrick Henry Maley did not attend the sale and did not protect the complainant at said sale and shortly before the sale the said Patrick Henry Maley left the State of New Jersey for reasons unknown to complainant and has never returned. 20

17. On December 31, 1925, the said executors together with J. Boyce Smith, Jr., and Harriet I., his wife and Edward J. Sisley and Lucy H., his wife, and Pierre N. Aymar and Helen R. Aymar, his wife, conveyed the said premises to Frances R. Fast, of the Borough of Hillsdale, Bergen County, N. J., for the sum of \$27,000, subject to \$5,000 mortgage. 30

18. On January 11, 1926, the said Frances R. Fast conveyed the said premises to Edward J. Sisley and Lucy H., his wife, and Pierre N. Aymar and Helen R. Aymar, his wife, the said purchasers being two of the heirs of J. Boyce 40

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Smith, deceased. The consideration of said deed was \$27,000 subject to a mortgage of \$5,000.

10 19. The deed from the sheriff first above mentioned was recorded on January 11, 1926, subsequent to the date of the deed from Smith, *et als.*, to Fast, second above mentioned, which was recorded January 12, 1926, the same date as the deed to Sisley and Aymar last above mentioned.

20 20. Complainants believe that the said Fast was what is known as a "dummy" for the purpose of wrongfully getting the property out of the executors' hands and into the hands of the heirs in question.

20 21. These complainants believe and allege that the time for hearing above referred to was consented to by the said Patrick Henry Maley as a result of a fraudulent agreement between the said Maley and J. Boyce Smith, Jr., for the purpose of depriving these complainants of their just and lawful rights in said agreement and of retaining control and possession of the aforesaid stock and the benefit of the moneys deposited by these complainants in the said premises with an inadequate return therefor. And for the further purpose of enabling the said J. Boyce Smith, Jr., to procure the benefit of \$9,000 and interest paid on account of the purchase price, \$7,000 added improvements, \$50,000 worth of the par value of said capital stock and the return of the premises and an additional sum of \$22,000 deficiency without giving to these complainants an opportunity to complete the said agreement or to defend the action or to procure bidders at the said sale who would produce a surplus to
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turn over to these complainants and to procure the delivery of said capital stock.

Complainants are without adequate remedy in the courts of law and therefore pray that:

1. J. Boyce Smith, Jr., and Margaret Kilpatrick Smith, executors of the Last Will and Testament of J. Boyce Smith, deceased, and J. Boyce Smith, Jr., and Harriet I. Smith, his wife, Edward J. Sisley and Lucy S. Sisley, his wife, Pierre N. Aymar and Helen R. Aymar, his wife, and Margaret Kilpatrick Smith, who are the defendants to this action, may answer this bill of complaint and each and every allegation therein contained. 10

2. That the said defendants or one of them may be decreed to deliver to the complainant, Arthur B. Chamberlin, the aforementioned shares of capital stock. 20

3. That the defendants, or one of them, may be compelled to account to these complainants for the amounts received by them on account of the aforementioned agreement and for value of the use of said premises during the time that these complainants have been deprived thereof.

4. That the defendant, Edward J. Sisley and Lucy S. Sisley, his wife, and Pierre N. Aymar and Helen R. Aymar, his wife, may be decreed to convey the said premises to these complainants upon payment of the amount justly due and owing therefor. 30

5. Complainants are ready and willing to pay to these defendants as may be entitled thereof such amount as may be justly due and owing under the aforementioned agreement and that 40

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said defendants or one of them may be decreed to pay such damages as may be justly due to complainants for the detention of the aforesaid stock by the defendants.

6. That the aforesaid decree may be opened and these complainants be afforded the hearing upon their undisposed answer and counter-claim in the aforesaid action and to examine the complainants in said suit with their witnesses upon their cause of action.

7. That a writ of subpoena may issue commanding the defendants to answer this bill and to abide by such decree as this court may make in the premises.

8. That the complainants may have such other and further relief as may be necessary.

And the complainants will ever pray.

DOUGLAS R. TODD,
Solicitor of Complainants.

LIONEL P. KRISTELLER,
Of Counsel with Complainants.

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Filed October 3, 1924.

IN CHANCERY OF NEW JERSEY.

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

Complainants, Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as Executors and Trustees under the Last Will and Testament of J. Boyce Smith, deceased, respectfully show that:

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1. On June 30, 1921, the said complainants, Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as Executors and Trustees under the last Will and Testament of J. Boyce Smith, deceased, were seized in fee simple of a certain tract of land and premises, situate, lying and being in the Borough of Woodcliff Lake, and Township of Washington in the County of Bergen, State of New Jersey, more particularly described as follows:

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BEGINNING at the Southeast corner of the same at an old black oak tree (being an ancient corner tree) standing at the edge of the brook called Bear Brook where another small brook falls into the same; from thence running (1) through the public road North, sixty-nine degrees West, eleven chains and sixty-six links; thence (2) North fifteen and three quarter degrees East, twenty-eight chains and ninety-three links to a stake and land of Peter Van Ryper; thence (3) South seventy-one and one quarter degrees East, three chains and ten links to a corner; thence (4) North twenty-seven and one quarter degrees East, thirteen chains and twenty-six links to a stake; thence (5) North sixty-eight degrees West eight chains and forty-three links to a corner; thence (6) North twenty-six and one half degrees East five chains and seventy-five links to a corner; thence (7) South sixty-three and one half degrees East eight chains and forty-five links to a stake; thence (8) North twenty-seven and one quarter degrees East, five chains and twenty-one links to a stake and land formerly of the Vandelinda farm; thence (9) South sixty-three and one-half degrees East four chains and eighty-eight links to the top of a large rock lying at the edge of Bear Swamp; thence (10) along said Swamp South one and one-half degrees West one chain and sixty links to a small

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brook; thence along said brook to the South Side of Bear Brook; thence along said last mentioned Brook, Easterly to the land late of Albert Wortendyke, deceased; thence along the same South, seventy-nine and one-half degrees West one chain, and fifty-five links to said Brook; thence along said Brook, down stream the several courses thereof to the place of beginning. Containing forty-four acres and ninety-six hundredths of an acre more or less. Excepting out of the above described premises one lot heretofore sold and conveyed to Jacob P. Hopper by Isaac A. Delamater and wife and Abraham Delamater by deed dated September 1, 1864, recorded October 3, 1864 in Book Z5 of deeds, page 100, and also one lot conveyed by John J. Delamater and wife and Susan Jersey to James Bartow by deed dated May 21, 1868, recorded September 30, 1868, in Book Z6, page 403; said two lots together comprising approximately 9 acres and leaving remaining approximately 36 acres.

2. That being desirous of selling said premises, said complainants, Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as Executors and Trustees under the last Will and Testament of J. Boyce Smith, deceased, entered into an agreement in writing with one Arthur B. Chamberlin, then of the Borough of Manhattan, City, County and State of New York, for the sale and purchase of said premises, of which agreement the following is a true copy:

“THIS AGREEMENT made and entered into this 30th day of June, 1921 between Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as executors and trustees under the Last Will and Testament of J. Boyce Smith late of Woodcliff Lake, Bergen County, N. J., deceased, hereinafter described as the sellers, party of the first part, and Arthur B. Chamberlin of 111 Broad-

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way, Manhattan, New York City, N. Y., hereinafter described as the purchaser, party of the second part,

“WITNESSETH

“That the sellers agree to sell and convey to the said purchaser upon the terms and conditions hereinafter set forth ALL that tract or parcel of land and premises together with the buildings and improvements thereon hereinafter particularly described situate, lying and being in the Borough of Woodcliff Lake and Township of Washington, in the County of Bergen, State of New Jersey. 10

“BEGINNING at the Southeast corner of the same at an old black oak tree (being an ancient corner tree) standing at the edge of the brook called Bear Brook where another small brook falls into the same; from thence running (1) through the public road North, sixty-nine degrees West, eleven chains and sixty-six links; thence (2) North fifteen and three quarter degrees East, twenty-eight chains and ninety-three links to a stake and land of Peter Van Ryper; thence (3) South seventy-one and one quarter degrees East, three chains and ten links to a corner; thence (4) North twenty-seven and one quarter degrees East, thirteen chains and twenty-six links to a stake; thence (5) North sixty-eight degrees West eight chains and forty-three links to a corner, thence (6) North twenty-six and one half degrees East five chains and seventy-five links to a corner; thence (7) South sixty-three and one half degrees East eight chains and forty-five links to a stake; thence (8) North twenty-seven and one quarter degrees East five chains and twenty-one links to a stake and land formerly of the Vandelinda farm; thence (9) South sixty-three and one half degrees East four chains and eighty-eight links to the top of a large rock lying at the edge of Bear Swamp; thence (10) along said Swamp South, one and one-half 30 40

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degrees West one chain and sixty links to a small brook; thence along said brook to the South side of Bear Brook; thence along said last mentioned Brook, Easterly to the land late of Albert Wortendyke, deceased; thence along the same South, seventy-nine and one half degrees West one chain, and fifty-five links to said Brook; thence along said Brook, down stream the several courses thereof to the place of beginning. Containing forty-four acres and ninety-six hundredths of an acre more or less. Excepting out of the above described premises one lot heretofore sold and conveyed to Jacob P. Hopper by Isaac A. Delamater and wife and Abraham Delamater by deed dated September 1, 1864, recorded October 3, 1864 in Book Z5 of Deeds, page 100, and also one lot conveyed by John J. Delamater and wife and Susan Jersey to James Bartow by deed dated May 21, 1868, recorded September 30, 1868, in Book Z6, page 403; said two lots together comprising approximately 9 acres and leaving remaining approximately 36 acres.

“Also the team of bay horses known as “East” and “West” the harness, farm machinery and equipment upon and used in connection with said premises, and the crops planted and growing thereon, a duly executed bill of sale thereof being delivered to the purchaser upon the execution and delivery of these presents.

“The said purchaser agrees to purchase said premises personal property and to pay to the sellers thereof the sum of \$38,000 as follows:

“\$3,000 upon the execution and delivery of this agreement, receipt whereof is hereby acknowledged.

“\$5,000 by taking the property subject to a past due first mortgage in that amount at 6% interest, held by Louise M. Demarest of 266 State Street, Hackensack, N. J., payment of which the purchaser agrees to assume. The purchaser further agrees to assume and pay the interest

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on said first mortgage from May 1, 1921 due semi-annually.

\$30,000 and interest on the balance thereof remaining unpaid from time to time at the rate of 6% per annum, computed from July 1, 1921 and payable semi-annually on January 1st and July 1st of each year, in ten equal installments of \$3,000 each commencing with a payment of \$3,000 on July 1st, 1922 and a like sum upon the first day of July of each year thereafter until the said purchase price and interest shall have been fully paid, provided however that said purchaser shall have the privilege of making additional payments on any interest day of sums of \$1,000 or any multiple thereof and of paying the entire amount and interest thereon remaining unpaid at any time. 10

“The purchaser further agrees to assume and pay one-half of the 1921 taxes assessed to J. Boyce Smith by the Borough of Woodcliff Lake and by the Township of Washington amounting to \$289.57. The purchaser shall be entitled to the possession of the premises from and after July 1st, 1921 and agrees to maintain the promises from and after that date, and to pay any and all charges and expenses in connection therewith, and to pay all taxes and assessments hereafter levied or assessed against said premises, and agrees to keep the same in good repair. The risk of loss or damage to the premises by fire after July 1st, 1921 is assumed by the purchaser and all buildings erected or to be erected upon said premises shall be kept fully insured against loss by fire at the expense of the purchaser with loss payable to the sellers and said insurance shall be effected through the sellers broker until the said purchase price shall have been fully paid, unless the purchaser can effect it at a lower rate elsewhere. 20 30

“It is further agreed that owners liability insurance shall be taken out and kept up at the expense of the purchaser insuring the sellers from any liability as owners and the purchaser hereby agrees to indemnify and save the sellers 40

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harmless from any and all liability or claim whatsoever by reason of their ownership of said premises until the payment of the purchase price and the delivery of the deed.

10 "All sums of money payable hereunder shall be payable at the office of J. Boyce Smith, Jr., 565 Fifth Avenue, New York City. The sellers have deposited in escrow with J. Boyce Smith, Jr., as attorney, a deed of said premises duly executed and acknowledged by them both individually and as executors and trustees aforesaid and by Lucy S. Sisley and Helen R. Aymar, and Edward J. Sisley and Pierre N. Aymar, their husbands, and by Harriet I. Smith, wife of J. Boyce Smith, Jr., containing a warranty of title by Lucy S. Sisley, Helen R. Aymar and J. Boyce Smith, Jr. Upon the full payment by the purchaser of said balance of purchase price of \$30,000 with interest as aforesaid and of any other sums due to the sellers hereunder, the said 20 J. Boyce Smith, Jr. is hereby authorized and directed to deliver said deed to the purchaser, conveying the premises to him, or his nominee.

"The purchaser has deposited with said J. Boyce Smith, Jr., as security for the payment of the aforesaid sum of \$30,000 and interest and the performance of his other obligations hereunder certificates of capital stock of the New York-Mexican Oil Co., a Delaware Corporation of a total par value of \$25,000 duly endorsed in blank. Upon the payment of each installment 30 of \$3,000 due July 1st of each year as aforesaid, J. Boyce Smith, Jr., is hereby authorized and directed to release and deliver to the purchaser a certificate or certificates of capital stock of said New York-Mexican Oil Co. of a par value of \$5,000.

"In consideration of the terms and manner of payment above granted it is expressly agreed that prompt performance is of the essence of this agreement and if default be made in the payment of any of said installments of principal or interest, or in the payment of interest on 40 said prior mortgage, for a period of 30 days

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from the date when the same becomes due, or should the purchaser fail to pay any tax or assessment levied or assessed against the premises within sixty days after the same shall become due or shall fail to pay when due any insurance agreed to be carried at his expense as above, or should any suit be commenced after July 1st, 1926 to foreclose said prior mortgage, or should the purchaser violate any of the terms of this agreement, then the entire amount of the purchase price remaining unpaid shall become and be immediately due and payable at any time thereafter at the option of the sellers and in case of any default of the purchaser the sellers may pay the obligation as to which the purchaser has defaulted and any amount so paid with the legal interest thereon from the time of such payment shall be added to the purchase price of the premises and may be collected as part thereof. It is expressly agreed however that in the event of any default on the part of the purchaser any sums paid on account of said purchase price shall not be deemed forfeited but the purchaser shall have an equity in the property to the extent of the payments made on account of said purchase price, subject to the right of the sellers to collect the unpaid balance of purchase price, until the sellers shall by proper action or suit foreclose the contract for the amount of the unpaid purchase price; and the sellers shall have a lien on said property for the amount of the unpaid purchase price only and any surplus of the proceeds of the sale of the premises over and above what is sufficient to pay said unpaid balance of purchase price and interest and legal costs and fees shall be the property of the purchaser.

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“Recourse shall not be had by the sellers to the security aforesaid consisting of stock of the New York-Mexican Oil Co. until after the conclusion of an action or suit foreclosing the interest of the purchaser in said property and determination that the purchaser is liable for a deficiency.

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10 “The sellers agree that if the holder of said first mortgage of \$5,000 shall demand payment thereof within five years from date and it is not convenient for the purchaser to pay the same that they will take over said mortgage by assignment or otherwise and hold the same until July 1, 1926 with the privilege to the purchaser of paying the same off at any time. If the holder re-

20 “The purchaser shall have the option at any time hereafter provided he shall have paid and satisfied said first mortgage of \$5,000 to take title to said premises in his own name or in the name of his nominee in which case the purchaser agrees upon the delivery of the deed of the premises to execute and deliver his bond and the bond of the person who takes title to the premises for the amount of purchase price then unpaid, secured by purchase money first mortgage on the premises, said bond to be payable at the rate of \$3,000 per annum on July 1st of each year with interest at 6% payable semi-annually on January 1st and July 1st. Any stock of the New York-Mexican Oil Co. which may then remain in the hands of the sellers shall be

30 held on the same terms as security for the payment of any deficiency judgment obtained in an action to foreclose said purchase money bond and mortgage.

“Any delay in exercising any rights of the sellers hereunder shall not operate as any waiver thereof.

“The above stipulations and provisions shall apply to and bind the heirs, executors, administrators and assigns of the respective parties.

“The purchaser shall not be charged for any unexpired insurance now covering the premises.

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“This agreement is executed in duplicate, the original being retained by the purchaser and one original by the sellers.

All agreements and representations affecting this sale are expressed herein and no waiver or modification of this agreement shall be claimed to be of any force or effect unless reduced to writing and signed by all the parties hereto and the agreement between J. Boyce Smith, Jr., individually and as executor and trustee as aforesaid and said Arthur B. Chamberlin dated June 20, 1921 is hereby cancelled and this agreement substituted therefor. 10

“WITNESS the signatures and seals of the above parties.

MARGARET KILPATRICK SMITH (L. s.)
As Executor and Trustee of the Estate
of J. Boyce Smith, Deceased.

J. BOYCE SMITH, JR. (L. s.) 20
As Executor and Trustee of the Estate
of J. Boyce Smith, Deceased.

ARTHUR B. CHAMBERLIN (L. s.)
Purchaser.

Witness as to
all signatures:

(Sgd) ORSON KILBORN.

3. That the said Arthur B. Chamberlin has made the payment of \$3,000 provided for in the contract to be paid on the signing thereof, and has made a further payment of \$900, being the semi-annual interest on the balance of \$30,000 at six per cent. per annum from July 1, 1921 to and including January 1, 1922. 30

4. That on or before July 1, 1922, defendant, Arthur B. Chamberlin, duly assigned to defendant, Carolyn C. Jones, all his right, title and interest in, to and under the aforesaid contract, 40

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of which assignment complainants were duly notified by defendants.

10 5. That said defendant, Carolyn C. Jones, assignee as aforesaid, has made a payment of \$3,000 upon the principal of the purchase price of the property herein due July 1, 1922, as provided for in said contract and has also made a further payment of \$3,000 upon said principal due July 1, 1923, as provided for in said contract, and has made a further payment of \$900, on or about July 1, 1922, and of \$810 on or about January 1, 1923, and of \$810 on or about July 1, 1923, being in each case the semi-annual interest at six per cent. per annum on the balance of said purchase price at each said dates respectively. But that said Carolyn C. Jones has failed to comply with the terms of the aforesaid contract by omitting to pay the sum of \$3,000 on July 1, 1924, and by omitting to pay the semi-annual interest on the balance of said purchase price at the rate of six per cent. per annum, from July 1, 1923, to January 1, 1924, and that the amount so due for such interest on January 1, 1924, was the sum of \$720 and by omitting to pay the semi-annual interest on the balance of said purchase price at the rate of six per cent. per annum from January 1, 1924, to July 1, 1924, and that the amount so due for such interest on July 1, 1924, was the further sum of \$720, being in each case semi-annual interest at the rate of six per cent. per annum on the balance of the principal, to wit, the sum of \$24,000, together with interest on said defaulted sums, and that each and all of said defaults has continued ever since.

40 6. That on the 10th day of September, 1924, the said complainants, through their duly author-

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ized representative, Edward J. Sisley, tendered a deed conveying said premises to said Carolyn C. Jones which in all respects complied with the contract above mentioned and of which the following is a true copy:

“THIS INDENTURE made the 17th day of June, 1921 between Margaret Kilpatrick Smith and J. Boyce Smith, Jr., individually and as executors and trustees under the Last Will and Testament of J. Boyce Smith, late of Woodcliff Lake, Bergen County, N. J., deceased, Lucy S. Sisley and Edward J. Sisley her husband, Helen R. Aymar and Pierre N. Aymar her husband, and Harriet I. Smith, wife of J. Boyce Smith, Jr., parties of the first part, and Carolyn C. Jones, unmarried, of Woodcliff Lake, Bergen County, N. J. party of the second part.

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“WITNESSETH

“That the parties of the first part individually and by virtue of the power and authority to said executors and trustees given in and by said Last Will and Testament, and in consideration of \$38,000 lawful money of the United States to said executors and trustees paid by the party of the second part, do hereby grant, release and convey unto the party of the second part, her heirs and assigns forever all that tract or parcel of land and premises together with the buildings and improvements thereon hereinafter particularly described, situate, lying and being in the Township of Washington and Borough of Woodcliff Lake, in the County of Bergen and State of New Jersey.

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“BEGINNING at the Southeast corner of the same at an old black oak tree (being an ancient corner tree) standing at the edge of the brook called Bear Brook where another small brook falls into the same; from thence running (1) through the public road, North, sixty-nine degrees West, eleven chains and sixty-six links; thence (2) North fifteen and three quarter degrees East, twenty-eight chains and ninety-three links to a stake and

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land of Peter Van Ryper; thence (3) South seventy-one and one quarter degrees East, three chains and ten links to a corner; thence (4) North twenty-seven and one quarter degrees East, thirteen chains and twenty-six links to a stake; thence (5) North sixty-eight degrees West eight chains and forty-three links to a corner; thence (6) North twenty-six and one half degrees East five chains and seventy-five links to a corner; thence (7) South sixty-three and one half degrees East eight chains and forty-five links to a stake; thence (8) North twenty-seven and one quarter degrees East five chains and twenty-one links to a stake and land formerly of the Vandelinda farm; thence (9) South sixty-three and one half degrees East four chains and eighty-eight links to the top of a large rock lying at the edge of Bear Swamp; thence (10) along said Swamp South, one and one half degrees West one chain and sixty links to a small brook; thence along said brook to the south side of Bear Brook; thence along said last mentioned Brook, Easterly to the land late of Albert Wortendyke, deceased; thence along the same South, seventy-nine and one half degrees West one chain, and fifty-five links to said Brook; thence along said Brook, down stream the several courses thereof to the place of beginning. Containing forty-four acres and ninety-six hundredths of an acre more or less. Excepting out of the above described premises one lot heretofore sold and conveyed to Jacob P. Hopper by Isaac A. Delamater and wife and Abraham Delamater by deed dated September 1, 1864, recorded October 3, 1864 in Book Z5 of deeds, page 100, and also one lot conveyed by John J. Delamater and wife and Susan Jersey to James Bartow by deed dated May 21, 1868, recorded September 30, 1868 in Book Z6, page 403; said two lots together comprising approximately 9 acres and leaving remaining approximately 36 acres.

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“Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever both in law and in equity which the said testator had in his lifetime and at the time of his decease and which said parties of the first part have by virtue of the said Last Will and Testament or otherwise of, in and to the above granted premises and every part and parcel thereof with the appurtenances.

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“TO HAVE AND TO HOLD all and singular the above granted premises together with the appurtenances and every part thereof in the said party of the second part, her heirs, and assigns forever.

“SUBJECT nevertheless to a first mortgage thereon upon which the principal sum of \$5,000 is unpaid with interest at 6% from May 1st, 1921 payment of which principal and interest the said party of the second part hereby assumes, said mortgage being now held by Louise M. Demarest of 266 State Street, Hackensack, N. J.

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“SUBJECT ALSO to a purchase money second mortgage executed to Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as trustees as aforesaid parties of the first part by party of the second part in the sum of \$30,000, at 6% to secure part of said purchase price, said mortgage being dated and delivered and intended to be recorded simultaneously herewith.

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“And the said parties of the first part for themselves, their heirs, executors and administrators do covenant, promise and agree to and with the party of the second part that said Margaret Kilpatrick Smith and J. Boyce Smith, Jr., are lawfully the executors and trustees of the Last Will and Testament of said J. Boyce Smith and have power to convey as aforesaid and have authority granted in and by said Last Will and Testament, and that they have not made, done or suffered any act, matter or thing whatsoever since they were executors or trustees as afore-

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Original Bill of Complaint.

said whereby the above granted premises or any part thereof are, shall or may be impeached, charged or encumbered in any manner whatsoever.

10 “And the said Lucy S. Sisley, J. Boyce Smith, Jr., and Helen R. Aymar individually and their administrators do further covenant and agree to and with the party of the second part, her heirs and assigns that the said land and premises or any part thereof at the time of the sealing and delivery of these presents are not encumbered by any mortgage, judgment or limitation, or by any encumbrances whatsoever by which the title of the said party of the second part hereby made or intended to be made for the above described land and premises can or may be changed, charged, altered or defeated in any way whatsoever except as hereinabove stated; and also that
20 the said Lucy S. Sisley, J. Boyce Smith, Jr., and Helen R. Aymar will warrant secure and forever defend the said land and premises unto the said party of the second part, her heirs and assigns forever against all lawful claims and demands of all and every person or persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

“IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands and seals the day and year first above written.

30 J. BOYCE SMITH, JR. (L. S.)
Individually and as Executor and Trustee of the Will of J. Boyce Smith, Deceased.

MARGARET KILPATRICK SMITH (L. S.)
Individually and as Executor and Trustee of the Will of J. Boyce Smith, Deceased.

40 HARRIET I. SMITH (L. S.)
LUCY S. SISLEY (L. S.)
EDWARD J. SISLEY (L. S.)
HELEN R. AYMAR (L. S.)
PIERRE N. AYMAR (L. S.)

Original Bill of Complaint.

“STATE OF NEW JERSEY }
 “COUNTY OF BERGEN }^{ss.}

“BE IT REMEMBERED that on this 17th day of June, 1921 before me the subscriber personally appeared Margaret Kilpatrick Smith, Lucy S. Sisley, and Edward J. Sisley her husband, Helen R. Aymar and Pierre N. Aymar her husband, who I am satisfied are five of the grantors in the above deed of conveyance named and I having first made known to them the contents thereof they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed, and said Margaret Kilpatrick Smith further acknowledged that she signed, sealed and delivered the same as executor and trustee of the Last Will and Testament of J. Boyce Smith, deceased. 10

“AND the said Lucy S. Sisley and Helen R. Aymar being by me privately examined separate and apart from their said husbands did further acknowledge that they signed, sealed and delivered the same freely as their voluntary act and deed without any fear, threats or compulsion of or from their said husbands. 20

“E. L. KLINGER,
 “Justice of the Peace.
 (SEAL)

“STATE OF NEW JERSEY }
 “COUNTY OF ESSEX }^{ss.} 30

“BE IT REMEMBERED that on this 16th day of June, 1921 before me the subscriber personally appeared J. Boyce Smith, Jr., and Harriet I. Smith, his wife, who I am satisfied are two of the grantors in the above deed of conveyance named and I having first made known to them the contents thereof they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed and for the uses and purposes therein expressed, and the said J. Boyce Smith, Jr., did further acknowledge that 40

Original Bill of Complaint.

he signed, sealed and delivered the same as executor and trustee of the estate of J. Boyce Smith, deceased.

10 "AND the said Harriet I. Smith, being by me privately examined separate and apart from her said husband did further acknowledge that she signed, sealed and delivered the same freely as her voluntary act and deed without any fear, threats or compulsion of or from her said husband.

"C. P. COURD,
"Notary Public."

7. That at the time the said Edward J. Sisley, on behalf of said complainants, presented said deed on said date, he at the same time delivered to said Carolyn C. Jones a letter of which the following is a true copy:

"September 5th, 1924.

20 "Carolyn C. Jones,
Woodcliff Lake,
Bergen County, N. J.
Dear Madam:

"We tender you herewith deed dated September 17, 1921 in which the undersigned and Lucy S. Sisley and Helen R. Aymar and Edward J. Sisley and Pierre N. Aymar, their husbands and Harriet I. Smith, wife of J. Boyce Smith, Jr., are grantors and you Carolyn C. Jones are grantee, conveying the following property.

30 "ALL that tract or parcel of land and premises together with the buildings and improvements thereon hereinafter particularly described situate, lying and being in the Borough of Woodcliff Lake and Township of Washington, in the County of Bergen, State of New Jersey.

BEGINNING at the Southeast corner of the same at an old black oak tree (being an ancient corner tree) standing at the edge of the brook called Bear Brook where another small brook falls into the same; from thence running (1) through the public road North,

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Original Bill of Complaint.

sixty-nine degrees West, eleven chains and sixty-six links; thence (2) North fifteen and three quarter degrees East, twenty-eight chains and ninety-three links to a stake and land of Peter Van Ryper; thence (3) South seventy-one and one quarter degrees East, three chains and ten links to a corner; thence (4) North twenty-seven and one quarter degrees East, thirteen chains and twenty-six links to a stake; thence (5) North sixty-eight degrees West eight chains and forty-three links to a stake; thence (5) North sixty-eight degrees West eight chains and forty-three links to a corner; thence (6) North twenty-six and one half degrees East five chains and seventy-five links to a corner; thence (7) South sixty-three and one half degrees East eight chains and forty-five links to a stake; thence (8) North twenty-seven and one quarter degrees East five chains and twenty-one links to a stake and land formerly of the Vandelinda farm; thence (9) South sixty-three and one half degrees East four chains and eighty-eight links to the top of a large rock lying at the edge of Bear Swamp; thence (10) along said Swamp South, one and one half degrees West one chain and sixty links to a small brook; thence along said brook to the South side of Bear Brook; thence along said last mentioned Brook, Easterly to the land late of Albert Wortendyke, deceased; thence along the same South, seventy-nine and one half degrees West one chain, and fifty-five links to said Brook; thence along said Brook, down stream the several courses thereof to the place of beginning. Containing forty-four acres and ninety-six hundredths of an acre more or less. Excepting out of the above described premises one lot heretofore sold and conveyed to Jacob P. Hopper by Isaac D. Delamater and wife and Abraham Delamater by deed dated September 1, 1864, recorded October 3, 1864 in Book Z5 of deeds

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page 100, and also one lot conveyed by John J. Delamater and wife and Susan Jersey to James Bartow by deed dated May 21, 1868, recorded September 30, 1868, in Book Z6, page 403; said two lots together comprising approximately 9 acres and leaving remaining approximately 36 acres."

10 "We demand, as a condition concurrent to the delivery of the above deed to you, that you pay to the bearer of this letter the sum of \$25,468.80. The tender of the aforesaid deed and the demand for the payment of the aforesaid sum of \$25,468.80, are made in accordance with the terms of a certain contract in writing made and entered into between Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as executors and trustees under the last Will and Testament of J. Boyce Smith, deceased, party of the first part and Arthur B. Chamberlin, party of the second part, dated June 30, 1921, which contract was assigned to you by 20 said Arthur B. Chamberlin, on or about July, 1922, and particularly in accordance with that portion of said contract which provides as follows:

30 " "In consideration of the terms and manner of payment above granted it is expressly agreed that prompt performance is of the essence of this agreement and if default be made in the payment of any of said installments of principal or interest, or in the payment of interest on said prior mortgage, for a period of 30 days from the date when the same becomes due, or should the purchaser fail to pay any tax or assessment levied or assessed against the premises within sixty days after the same shall become due or shall fail to pay when due any insurance agreed to be carried at his expense as above, or should any suit be commenced after July 1st, 1926 to foreclose said prior mortgage, or should the purchaser violate any of the terms of this agreement, then the entire amount of the purchase price remaining unpaid shall become and be im-

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Original Bill of Complaint.

mediately due and payable at any time thereafter at the option of the sellers.' ”

“The undersigned make the aforesaid tender and demand in the exercise of the option as given to them in accordance with the portion as above set forth of the aforesaid contract of June 30th, 1921, the party of the second part to said contract and/or his assignee having failed and defaulted in making payment of installments of principal and interest, as provided in said contract, and as is more particularly set forth in the account hereinafter stated. 10

“The aforesaid sum of \$25,468.80 herein demanded is computed up to and including to-day as follows:

“Purchase price	\$38,000.00	
Less:		
June 30/21 Paid upon execution of contract	\$3,000	
July 1/22 Paid upon principal. 3,000		20
July 1/23 Paid upon principal. 3,000	9,000.00	
	<hr/>	
	\$29,000.00	
Less outstanding mortgage....	5,000.00	
	<hr/>	
	\$24,000.00	
Add:		
Interest due Jan. 1, 1924.....	720.00	
Interest due July 1, 1924.....	720.00	
Interest on interest due Jan. 1, 1924....	25.20	
Interest on interest due July 1, 1924...	3.60	30
	<hr/>	
	\$25,468.80	

“In the event that you fail at this time to pay to the bearer of this letter said sum of \$25,468.80 in consideration of the delivery by him to you of the aforesaid deed, please take notice that this deed will be retained at the office of J. Boyce Smith, Jr., Room 817, 565 Fifth Avenue, Borough of Manhattan, City and State of New York, until twelve o'clock of the noon of September 15th, 1924, and that up to said date and hour the same will be delivered to you or your lawful 40

Original Bill of Complaint.

authorized agent or attorney, upon the payment of the sum of \$25,468.80, computed as above set forth. If you fail to pay said sum within the aforesaid time, the above described opportunity to receive said deed will be withdrawn without further notice and the undersigned will pursue such legal remedies in the premises as they may have.

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J. BOYCE SMITH, JR., (L. S.)
As executor and trustee of the Estate
of J. Boyce Smith, deceased.

MARGARET KILPATRICK SMITH (L. S.)
As executor and trustee of the Estate
of J. Boyce Smith, deceased."

And that said Carolyn C. Jones refused to accept the aforesaid deed so tendered or to carry out the aforesaid contract with complainants.

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8. That on September 14, 1924, said complainants through their duly authorized representative, Edward J. Sisley, delivered to defendant Arthur B. Chamberlin a letter reading as follows:

September 8th, 1924.

"Mr. Arthur B. Chamberlin,
Woodcliff Lake,
Bergen County, N. J.

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"Dear Sir:

"Annexed hereto is a copy of letter delivered by the undersigned or their duly authorized agent to Carolyn C. Jones of Woodcliff Lake, Bergen County, New Jersey, on or about September 8th, 1924.

"Very truly yours,

J. BOYCE SMITH, JR.,
Executor and trustee of the Estate
of J. Boyce Smith, deceased.

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MARGARET KILPATRICK SMITH,
Executor and trustee of the Estate
of J. Boyce Smith, deceased.

Original Bill of Complaint.

and that annexed to the aforesaid letter to defendant Arthur B. Chamberlin was a true copy of the letter delivered to defendant Carolyn C. Jones, as set forth in paragraph "7" of this bill.

9. That the complainants have always been ready and willing to perform their part of the said contract, and, being paid the remainder of said purchase money, to well and sufficiently convey said premises to said Carolyn C. Jones by deed as provided for in said agreement, duly executed and acknowledged, free and clear from all encumbrances, excepting a first mortgage in the sum of \$5,000, and that they have ever been ready and willing with their deed to deliver same at a place mutually to be agreed upon by the parties hereto, and/or in accordance with the aforesaid letter as set forth in paragraph "7" of this bill. That the aforesaid sums of \$12,-420.00 are the only moneys or consideration so far received by the said complainants from the said Carolyn C. Jones and/or Arthur B. Chamberlin on account of said contract and that there remains due and owing to said complainants the sum of \$25,476.00 with interest thereon from September 1, 1924, at the rate of six per cent. per annum, according to the terms of said contract, and that the said Carolyn C. Jones and/or Arthur B. Chamberlin have declined to make any further payments thereon or to perform said agreement although frequently requested so to do, and that the said Carolyn C. Jones has also failed to accept the said deed or to pay the balance of the purchase money aforesaid, and that the said Carolyn C. Jones has occupied said premises since on or about July 1, 1922.

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Original Bill of Complaint.

10. That the said Arthur B. Chamberlin is married and his wife's name is Amelia B. Chamberlin.

The complainants are without adequate remedy in the courts of law, and therefore pray:

10 1. That Carolyn C. Jones, Arthur B. Chamberlin and Amelia B. Chamberlin, who are the defendants to this suit, may answer this bill of complaint and each statement therein made;

2. That an account may be taken of the amount due on complainant's contract;

20 3. That Carolyn C. Jones may be decreed to specifically perform said contract for the purposes of the aforesaid premises, and to pay or cause to be paid to the said complainants the sums so found due, with interest and costs, by a short day, to be appointed by this Court; and that in default of such payment she may be debarred and foreclosed of all equity in redemption in said lands;

30 4. That a decree may be made for the sale of the premises described in said contract to raise and to pay to complainants the amount so found due on said contract, with interest and costs;

5. That a writ of subpoena may issue commanding said defendants, Carolyn C. Jones, Arthur B. Chamberlin and Amelia B. Chamberlin, his wife, to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

J. BOYCE SMITH, JR.,
Solicitor for and of Counsel with Complainants.

Answer and Counter-claim.

Answer and Counter-Claim.

IN CHANCERY OF NEW JERSEY.

Between

MARGARET KILPATRICK SMITH
and J. BOYCE SMITH, JR.,
as executors and trustees
under the last will and
testament of J. Boyce
Smith, deceased,

Complainants,

and

CAROLYN C. JONES, ARTHUR B.
CHAMBERLIN and AMELIA
B. CHAMBERLIN,

Defendants.

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On Bill.

*Answer and
Counter-
claim.*

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The answer of the defendants, Carolyn C. Jones and Arthur B. Chamberlin. These defendants, answering the bill of complaint, say that:

1. Paragraphs 1 to 5, inclusive, are admitted.
2. They admit that on September 10, 1924, one Edward J. Sisley tendered a deed conveying the premises described in the bill of complaint to Carolyn C. Jones, as set forth in paragraph 6, but they deny that said deed complied with the terms of the contract mentioned in the bill of complaint. 30
3. Paragraphs 7 and 8 are admitted.
4. These defendants have no knowledge or information sufficient to form a belief as to the 40

Answer and Counter-claim.

10 statement in paragraph 9, as to the willingness of the complainants to perform their part of said contract and leave the complainants to make proof thereof. They deny that they, or either of them, owe to the complainants the sum of \$25,476, with interest thereon from September 1, 1924, as set forth in said paragraph 9. The said defendant, Carolyn C. Jones, admits that she refused to accept the said deed or pay the said sum of \$25,468.80 on said September 1, 1924, and that she has occupied said premises since on or about July 1, 1922.

5. Paragraph 10 is admitted.

FIRST DEFENSE.

20 On January 30, 1924, the complainant, J. Boyce Smith, Jr., accepted a note of James C. Pratt for \$5,000, to the order of Arthur B. Chamberlin, dated October 16, 1923, and due April 16, 1924, and made payable at the First National Bank of Hartford, in payment of the interest due on January 1, 1924, and to July 1, 1924, and in payment of the installment of \$3,000 on account of the principal due on July 1, 1924.

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SECOND DEFENSE.

Under the terms of the contract entered into by the parties hereto and set forth at length in the bill of complaint, the defendant, Arthur B. Chamberlin, deposited with the said J. Boyce Smith, Jr., as security for the payment of the sum of \$30,000, with interest, and the performance of his other obligations under said contract, certificates of capital stock of the New York-Mexican Oil Company, a Delaware corpo-
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Answer and Counter-claim.

ration, of a total par value of \$25,000, duly endorsed in blank. That under the terms of said contract, the said J. Boyce Smith, Jr., was directed to release and deliver to said Arthur B. Chamberlin a certificate or certificates of said capital stock of the par value of \$5,000, upon the payment of each installment of \$3,000. Three installments of \$3,000 each have been paid by said defendants to said J. Boyce Smith, Jr., but said J. Boyce Smith has failed to release or deliver to said Arthur B. Chamberlin any of said certificates, although requested so to do.

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THIRD DEFENSE.

The deed offered by the complainants, through their representative, Edward J. Sisley, to the defendant, Carolyn C. Jones, did not convey a marketable title to the premises described therein to said defendant, in that said deed was not properly acknowledged under the laws of the State of New Jersey.

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FOURTH DEFENSE.

Said deed did not conform to the terms of the aforesaid contract entered into by the parties hereto, in that it purported to convey the premises described in said agreement "Subject also to a purchase money second mortgage executed to Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as trustees as aforesaid parties of the first part by party of the second part in the sum of \$30,000 at 6% to secure part of said purchase price, said mortgage being dated and delivered and intended to be recorded simultaneously herewith."

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Answer and Counter-claim.

FIFTH DEFENSE.

The amount of interest demanded by the complainants in their letter to the defendant, Carolyn C. Jones, accompanying the deed dated September 17, 1921, and included in the sum of \$25,468.80, demanded as a condition concurrent
 10 to the delivery of the deed to said defendant, Carolyn C. Jones, is usurious and illegal.

By way of counter-claim against the complainant, J. Boyce Smith, Jr., the defendant, Arthur B. Chamberlin, says that no certificate or certificates of the capital stock of said New York-Mexican Oil Company have been released or delivered to the said defendant, Arthur B. Chamberlin, by said complainants, pursuant to
 20 the terms of said contract.

1. This defendant therefore prays that said complainant, J. Boyce Smith, Jr., may answer this counter-claim and each statement herein made.

2. That said complainant, J. Boyce Smith, Jr., may be decreed to deliver to said defendant, Arthur B. Chamberlin, certificates of the capital stock of the said New York-Mexican Oil Company, delivered by said defendant to said complainant, of the par value of \$15,000.
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MALEY & MALEY,
 Solicitors for the Defendants, Carolyn
 C. Jones and Arthur B. Chamberlin.

Replication and Answer to Counter-claim.

**Replication to Answer and Answer to
Counter-Claim.**

Filed January 5, 1925.

IN CHANCERY OF NEW JERSEY.

Between

MARGARET KILPATRICK SMITH
and J. BOYCE SMITH, JR.,
as executors and trustees
under the last will and
testament of J. Boyce
Smith, deceased,
Complainants,

and

CAROLYN C. JONES, ARTHUR B.
CHAMBERLIN and AMELIA
B. CHAMBERLIN,
Defendants.

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On Bill, &c.

*Replication to
Answer and
Answer to
Counter-
Claim.*

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Complainants join issue on the answer of defendants. Answering the counter-claim complainants say:

AS TO THE FIRST DEFENSE.

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1. They admit that a note, as described in the first defense, was delivered to the complainant J. Boyce Smith, Jr., but they say that said note was delivered subject to collection, but that said note was not collected; that on the contrary, it was protested and so returned by the said J. Boyce Smith, Jr., to the said Arthur B. Chamberlin, and by him retained.

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Replication and Answer to Counter-claim.

AS TO THE SECOND DEFENSE.

2. They say that no demand was ever made upon the said J. Boyce Smith, Jr., for return of the stock referred to in the second defense; they say that they are ready and willing to deliver the number of shares of stock to which the said
10 defendants may be entitled under the terms and conditions of said contract, but cannot deliver the same as the stock is represented by certificates of such number of shares as that it is impossible to split up the shares so that a proper amount may be returned. They tender themselves ready and willing to deliver said stock.

AS TO THE THIRD DEFENSE.

3. They deny the statement contained in the
20 third defense.

AS TO THE FOURTH DEFENSE.

4. They deny the statement contained in the fourth defense.

AS TO THE FIFTH DEFENSE.

5. They deny the statement contained in the
30 fifth defense.

ANSWER TO COUNTER-CLAIM.

6. They admit that no certificates of the capital stock of the New York-Mexican Oil Company had been delivered to the defendant, Arthur B. Chamberlin, but they say that no demand was made for the delivery of said stock, and that said stock is represented by certificates of such amount as that it is impossible to comply with the directions of said contract by delivering
40 the number of shares to which the said

Replication and Answer to Counter-claim.

Arthur B. Chamberlin may be entitled; and that said shares will have to be split up at the direction of the said Arthur B. Chamberlin. They tender themselves ready and willing to deliver said shares of stock as the defendant Arthur B. Chamberlin may be entitled to.

7. Further answering the counter-claim, the complainants say that defendants have full and complete and adequate remedy at law, and that the counter-claim does not exhibit any cause of action cognizant in equity. **10**

J. BOYCE SMITH, JR.,
Solicitor of Complainants.

RICHARD STOCKTON,
Of Counsel.

20**30****40**

*Supplemental Bill.***Supplemental Bill.**

Filed April 7, 1925.

IN CHANCERY OF NEW JERSEY.

Between

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MARGARET KILPATRICK SMITH
and J. BOYCE SMITH, JR.,
as executors and trustees
under the last will and
testament of J. Boyce
Smith, deceased,

*Complainants,**and*

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CAROLYN C. JONES, ARTHUR B.
CHAMBERLIN and AMELIA
B. CHAMBERLIN,

*Defendants.**On Bill, &c.**Supplemental
Bill.*

30 Complainants, Margaret Kilpatrick Smith and
J. Boyce Smith, Jr., as executors and trustees
under the last will and testament of J. Boyce
Smith, deceased, formerly of the Borough of
Woodcliff Lake, County of Bergen, and State of
New Jersey, respectfully show:

1. The bill of complaint herein was filed for
the purpose and to secure the relief as therein
stated; answer and counter-claim was filed to
said bill by the defendant, Carolyn C. Jones and
Arthur B. Chamberlin, and to the answer com-
plainants filed a replication and to the counter-
claim an answer.

40 2. That after the filing of the pleadings afore-
said and on or about the 2nd day of February,

Supplemental Bill.

1925, complainants both individually and as executors and trustees under the last will and testament of J. Boyce Smith, deceased, and Lucy S. Sisley and Helen R. Aymar, and Edward J. Sisley and Pierre N. Aymar, their husbands, and Harriet I. Smith, wife of J. Boyce Smith, Jr., executed in due form of law a deed, containing a warranty of title by Lucy S. Sisley, Helen R. Aymar and J. Boyce Smith, Jr., and duly acknowledged by all of the grantors, for the lands and premises mentioned and described in the bill of complaint and in the contract mentioned in the 2nd paragraph of the bill of complaint and thereupon and on or about the 13th day of February, 1925, the said complainants tendered to the said Carolyn C. Jones, said deed and demanded that the said Carolyn C. Jones pay to the said complainants the sum of \$26,608.88, that sum being the amount due to the said complainants under the terms and conditions of the said contract aforesaid and did thereupon serve upon the said Carolyn C. Jones a notice in writing, a copy of which is annexed hereto and made a part hereof and marked Exhibit One.

3. That said Carolyn C. Jones did not pay the sum as aforesaid or any other sum and did not tender or offer to pay any sum to the complainants and has not tendered or offered to pay to the complainants any sum up to the present time and more than a reasonable time has elapsed.

4. That on or about the same date, to wit; the 13th day of February, 1925, the complainants caused to be served upon the said Carolyn C. Jones a notice, a copy of which is annexed hereto and made a part hereof, and marked Exhibit

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Supplemental Bill.

Two, and thereupon and upon the same date served a notice upon the said Arthur B. Chamberlin, a copy of which is annexed hereto and made a part hereof and marked Exhibit Three; that no reply having been received from Arthur B. Chamberlin or Carolyn C. Jones, the said complainants on or about March 6, 1925, caused to be delivered to the said Arthur B. Chamberlin 10,000 shares of stock of the New York-Mexican Oil Company; that since the filing of the original bill herein no payments have been made by the said defendants on account of the contract aforesaid nor have any payments been tendered and complainants further charge that the said defendants failed and neglected to pay the taxes amounting to the sum of \$614.97, levied and assessed upon the said lands and premises becoming due upon or about the 1st of December, 1924, whereupon the said complainants paid said taxes and said defendants have failed and neglected for more than a period of sixty days to make any payment whatsoever for or on account of said taxes, and they have likewise failed and neglected to pay the interest for six months due November 1, 1924, upon the first mortgage of \$5,000 upon said premises, and complainants thereupon were obliged to pay the same and complainants are entitled to add the amounts of said payments with interest to the purchase price as provided for in the aforesaid contracts, and said defendants likewise failed and neglected to pay the semi-annual interest which became due under the terms of said contract upon the balance of the purchase price on the 1st day of January, 1925.

5. Complainants say that by reason of the facts aforesaid and of the facts stated in the

Supplemental Bill.

original bill of complaint under the contract aforesaid the complainants are entitled to elect that the entire principal sum remaining due and unpaid shall become immediately due and payable at any time after default and complainants have elected and do elect that the entire principal sum become due and payable and complainants say that the entire principal sum due under the provisions of the said contract is now due and payable to them and that defendants have failed and refused to pay the same.

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Complainants are without adequate remedy at law and therefore pray:

1. That the defendants who are Carolyn C. Jones, Arthur B. Chamberlin and Amelia B. Chamberlin, may answer this bill of complaint and each statement therein contained without oath.

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2. That an account may be taken of the amount due on complainant's contract, and the defendants, or one of them, directed to pay the amount so found due to complainants.

3. That a decree may be made for the sale of the said premises described in the said contract to pay the said complainants the amount found due on said contract with interests and costs and that the defendants may be debarred and foreclosed from all right and equity in said lands and premises.

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4. That complainants may have such other and further relief as may be necessary.

5. That a writ of subpoena may issue commanding the defendants to answer this supple-

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Supplemental Bill.

mental bill and to abide by such decree as this Court may make in the premises.

J. BOYCE SMITH, JR.,
Solicitor for and of Counsel with Complainants.

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EXHIBIT ONE.

February 13th, 1925.

Carolyn C. Jones,
Woodcliff Lake,
Bergen County, N. J.

Dear Madam:—

We tender you herewith deed dated February
2nd, 1925, in which the undersigned and Lucy S.
20 Sisley and Helen R. Aymar and Edward J. Sisley
and Pierre N. Aymar, their husbands, and Har-
riet I. Smith, wife of J. Boyce Smith, Jr., are
grantors, and you, Carolyn C. Jones, are gran-
tee, conveying the following property:

“All that tract or parcel of land and premises
together with the buildings and improvements
thereon hereinafter particularly described situate,
lying and being in the Borough of Woodcliff Lake
and Township of Washington, in the County of
30 Bergen, State of New Jersey.

BEGINNING at the Southeast corner of the
same at an old black oak tree (being an
ancient corner tree), standing at the edge
of the brook called Bear Brook where an-
other small brook falls into the same; from
thence running (1) through the public road
North, sixty nine degrees West, eleven chains
and sixty-six links; thence (2) North fifteen
and three quarter degrees East, twenty eight
chains and ninety three Links to a stake and
40 land of Peter Van Ryper; thence (3) South

Supplemental Bill.

seventy one and one quarter degrees East, three chains and ten links to a corner; thence (4) North twenty seven and one quarter degrees East, thirteen chains and twenty six links to a stake; thence (5) North sixty eight degrees West eight chains and forty three links to a corner; thence (6) North twenty six and one half degrees East five chains and seventy five links to a corner; thence (7) South sixty three and one half degrees East eight chains and forty five links to a stake; thence (8) North twenty seven and one quarter degrees East five chains and twenty one links to a stake and land formerly of the Vandelinda farm; thence (9) South sixty three and one half degrees East four chains and eighty eight links to the top of a large rock lying at the edge of Bear Swamp; thence (10) along said Swamp South one and one half degrees West one chain and sixty links to a small brook; thence along said brook to the South side of Bear Brook; thence along said last mentioned Brook easterly to the land late of Albert Wortendyke, deceased, thence along the same South seventy nine and one half degrees West one chain and fifty five links to said Brook; thence along said Brook down stream the several courses thereof to the place of beginning. Containing forty four acres and ninety six hundredths of an acre more or less. Excepting out of the above described premises one lot heretofore sold and conveyed to Jacob P. Hopper by Isaac A. Delamater and wife and Abraham Delamater by deed dated September 1, 1864, recorded October 3, 1864, in Book Z 5 of deeds, page 100, and also one lot conveyed by John J. Delamater and wife and Susan Jersey to James Bartow by deed dated May 21, 1868, recorded September 30, 1868, in Book Z 6, page 403; said two lots together comprising approximately 9 acres and leaving remaining approximately 36 acres."

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Supplemental Bill.

We demand as a condition concurrent to the delivery of the above deed to you, that you pay to the bearer of this letter the sum of \$26,608.88. The tender of the aforesaid deed and the demand for the payment of the aforesaid sum of \$26,608.88 are made in accordance with the terms of a certain contract in writing made and entered into between Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as executors and trustees under the last will and testament of J. Boyce Smith, deceased, party of the first part, and Arthur B. Chamberlin, party of the second part, dated June 30, 1921, which contract was assigned to you by said Arthur B. Chamberlin, on or about July, 1922, and particularly in accordance with that portion of said contract which provides as follows:

“In consideration of the terms and manner of payment above granted it is expressly agreed that prompt performance is of the essence of this agreement and if default be made in the payment of any of said installments of principal or interest, or in the payment of interest on said prior mortgage, for a period of 30 days from the date when the same becomes due, or should the purchaser fail to pay any tax or assessment levied or assessed against the premises within sixty days after the same shall become due or shall fail to pay when due any insurance agreed to be carried at his expense as above, or should any suit be commenced after July 1st, 1926, to foreclose said prior mortgage, or should the purchaser violate any of the terms of this agreement, then the entire amount of the purchase price remaining unpaid shall become and be immediately due and payable at any time thereafter, at the option of the sellers.”

The undersigned make the aforesaid tender and demand in the exercise of the option as

Supplemental Bill.

given to them in accordance with the portion as above set forth of the aforesaid contract of June 30th, 1921, the party of the second part to said contract and/or his assignee having failed and defaulted in making payment of installments of principal and interest, as provided in said contract, and as is more particularly set forth in the account hereinafter stated. 10

The aforesaid sum of \$26,608.88 herein demanded is computed up to and including today as follows:

Purchase price	\$38,000.00	
Less:		
June 30/21 Paid upon execution of contract	—\$3000.	
July 1/22 Paid upon principal	3000.	
July 1/23 Paid upon principal	3000.	9,000.00 20
		<hr/>
		29,000.00
Less outstanding mortgage	5,000.00	
		<hr/>
		24,000.00
Add:		
Interest due Jan. 1, 1924	720.00	
Interest due July 1, 1924	720.00	
Interest due Jan. 1, 1925	720.00	30
Nov. 21, 1924, payment to Louise M. Demarest of semi-annual interest to Nov. 6, 1924, upon 1st mortgage of \$5,000. at 6% per annum	150.00	
Nov. 29, 1924, 2nd half of taxes for 1924 due to Borough of Woodcliff Lake	294.93	
Nov. 29, 1924, 2nd half of taxes for 1924, due to Township of Washington	3.95	
		<hr/>
		\$26,608.88 40

Supplemental Bill.

In the event that you fail at this time to pay to the bearer of this letter said sum of \$26,608.88 in consideration of the delivery by him to you of the aforesaid deed, please take notice that if you fail to pay said sum the undersigned will pursue such legal remedies in the premises as they may have.

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MARGARET KILPATRICK SMITH,
As Executor and Trustee of the Estate
J. Boyce Smith, deceased.

J. BOYCE SMITH, JR.,
As Executor and Trustee of the Estate
J. Boyce Smith, deceased.

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EXHIBIT TWO

February 13th, 1925.

Miss Carolyn C. Jones,
Woodcliff Lake,
Bergen County, N. Y.

Dear Madam:

We hereby demand that you furnish to the undersigned or to either of them, a true copy of the assignment by Arthur B. Chamberlin to Carolyn C. Jones of a certain written contract or agreement dated June 30th, 1921, between Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as executors and trustees under the last will and testament of J. Boyce Smith, deceased, parties of the first part, and Arthur B. Chamberlin, party of the second part, which agreement or contract was a contract or agreement for the sale by said parties of the first part to said parties of the second part of certain real property situate in

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Supplemental Bill.

the Borough of Woodcliff Lake, and Township of Washington, Bergen County, New Jersey, and particularly described as follows:

BEGINNING at the Southeast corner of the same at an old black oak tree (being an ancient corner tree) standing at the edge of the brook called Bear Brook where another small brook falls into the same; from thence running (1) through the public road North sixty nine degrees West eleven chains and sixty six links; thence (2) North fifteen and three quarters degrees East twenty eight chains and ninety three links to a stake and land of Peter Van Ryper; thence (3) South seventy one and one quarter degrees East three chains and ten links to a corner; thence (4) North twenty seven and one quarter degrees east thirteen chains and twenty six links to a stake; thence (5) north sixty eight degrees West eight chains and forty three links to a corner; thence (6) North twenty six and one half degrees East five chains and Seventy five links to a corner; thence (7) South sixty three and one half degrees East eight chains and forty five links to a stake; thence (8) North twenty seven and one quarter degrees East five chains and twenty one links to a stake and land formerly of the Vandelinda farm; thence (9) South sixty three and one half degrees East four chains and eighty eight links to the top of a large rock lying at the edge of Bear Swamp; thence (10) along said Swamp South one and one half degrees West one chain and sixty links to a small brook; thence along said brook to the South side of Bear Brook; thence alongside last mentioned brook, easterly to the land late of Albert Wertendyke, deceased; thence along the same South seventy nine and one half degrees West one chain and fifty five links to said Brook; thence along said Brook down stream the several courses thereof to the place of beginning. Containing forty four acres and

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Supplemental Bill.

10 ninety six hundredths of an acre more or less. Excepting out of the above described premises one lot heretofore sold and conveyed to Jacob P. Hopper by Isaac A. Delamater and wife and Abraham Delamater by deed dated September 1, 1864, recorded October 3, 1864, in Book Z 5 of Deeds, page 100, and also one lot conveyed by John J. Delamater and wife and Susan Jersey to James Bartow by deed dated May 21, 1868, recorded September 30, 1868, in Book Z 6, page 403; said two lots together comprising approximately 9 acres and leaving remaining approximately 36 acres.

20 The purpose of the undersigned in making the demand herein is that they are desirous of tendering certificates for 10,000 shares of the capital stock of the New York-Mexican Oil Co. to either Arthur B. Chamberlin or to Carolyn C. Jones, in accordance with the terms of the aforesaid contract or agreement, and the undersigned are uncertain as to whether in view of the assignment by said Arthur B. Chamberlin to said Carolyn C. Jones of said contract or agreement of June 30, 1921, they should surrender said certificates for 10,000 shares of said stock to Arthur B. Chamberlin or Carolyn C. Jones.

30 Unless the undersigned receive a true copy of the aforesaid assignment on or before February 19, 1925, they will, without further notice, deliver said certificate or certificates for said 10,000 to said Arthur B. Chamberlin.

Yours very truly,

MARGARET KILPATRICK SMITH
 Executor and Trustee under the Last Will
 and Testament of J. Boyce Smith, deceased.

J. BOYCE SMITH, JR.
 Executor and Trustee under the Last Will
 and Testament of J. Boyce Smith, deceased.

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HDB:D

Supplemental Bill.

EXHIBIT THREE

February 13th, 1925.

Arthur B. Chamberlin, Esq.
Woodcliff Lake,
Bergen County, N. Y.

Dear Sir:

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We hereby demand that you furnish to the undersigned or to either of them, a true copy of the assignment by Arthur B. Chamberlin to Carolyn C. Jones of a certain written contract or agreement dated June 30th, 1921, between Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as executors and trustees under the last will and testament of J. Boyce Smith, deceased, parties of the first part, and Arthur B. Chamberlin, party of the second part, which agreement or contract was a contract or agreement for the sale by said parties of the first part to said parties of the second part of certain real property situate in the Borough of Woodcliff Lake, and Township of Washington, Bergen County, New Jersey, and particularly described as follows:

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BEGINNING at the Southeast corner of the same at an old black oak tree (being an ancient corner tree) standing at the edge of the brook called Bear Brook where another small brook falls into the same; from thence running (1) through the public road North sixty nine degrees West eleven chains and sixty six links; thence (2) North fifteen and three quarter degrees East twenty eight chains and ninety three links to a stake and land of Peter Van Ryper; thence (3) South seventy one and one quarter degrees East three chains and ten links to a corner; thence (4) North twenty seven and one quarter degrees east thirteen chains and twenty six links to a stake; thence (5) north sixty eight

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Supplemental Bill.

degrees West eight chains and forty three links to a corner; thence (6) North twenty six and one half degrees East five chains and Seventy five links to a corner; thence (7) South sixty three and one half degrees East eight chains and forty five links to a stake; thence (8) North twenty seven and one quarter degrees East five chains and twenty one links to a stake and land formerly of the Vandelinda farm; thence (9) South sixty three and one half degrees East four chains and eighty eight links to the top of a large rock lying at the edge of Bear Swamp; thence (10) along said Swamp South one and one half degrees West one chain and sixty links to a small brook; thence along said brook to the South side of Bear Brook; thence along said last mentioned brook, easterly to the land late of Albert Wertendyke, deceased; thence along the same South seventy nine and one half degrees West one chain and fifty five links to said Brook; thence along said Brook down stream the several courses thereof to the place of beginning. Containing forty four acres and ninety six hundredths of an acre more or less. Excepting out of the above described premises one lot heretofore sold and conveyed to Jacob P. Hopper by Isaac A. Delamater and wife and Abraham Delamater by deed dated September 1, 1864, recorded October 3, 1864, in Book Z 5 of Deeds, page 100, and also one lot conveyed by John J. Delamater and wife and Susan Jersey to James Bartow by deed dated May 21, 1868, recorded September 30, 1868, in Book Z 6, page 403; said two lots together comprising approximately 9 acres and leaving remaining approximately 36 acres.

The purpose of the undersigned in making the demand herein is that they are desirous of tendering certificates for 10,000 shares of the capital stock of the New York-Mexican Oil Co. to either

Supplemental Bill.

Arthur B. Chamberlin or to Carolyn C. Jones, in accordance with the terms of the aforesaid contract or agreement, and the undersigned are uncertain as to whether in view of the assignment by said Arthur B. Chamberlin to said Carolyn C. Jones of said contract or agreement of June 30, 1921, they should surrender said certificates for 10,000 shares of said stock to Arthur B. Chamberlin or Carolyn C. Jones.

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Unless the undersigned receive a true copy of the aforesaid assignment on or before February 19, 1925, they will, without further notice, deliver said certificate or certificates for said 10,000 to said Arthur B. Chamberlin.

Yours very truly,

MARGARET KILPATRICK SMITH,
 Executor and Trustee under the Last Will
 and Testament of J. Boyce Smith, deceased.

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J. BOYCE SMITH, JR.
 Executor and Trustee under the Last Will
 and Testament of J. Boyce Smith, deceased.

STATE OF NEW JERSEY }
 COUNTY OF ESSEX } ss.

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J. BOYCE SMITH, JR., of full age, being duly sworn according to law, upon his oath deposes and says:

I am one of the executors and trustees under the Last Will and Testament of J. Boyce Smith. I have full knowledge of the matters and things stated in the foregoing bill of complaint. The documents therein mentioned and the papers therein referred to as having been served were prepared and served under my direction, the

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Replication.

statements contained in the said supplemental bill of complaint are true.

J. BOYCE SMITH, JR.

Sworn to and subscribed to before
me this 27th day of March, 1925.

10 HENRY D. BULKLEY,
Attorney at Law of New Jersey.

Replication.

IN CHANCERY OF NEW JERSEY.

Between

20 MARGARET KILPATRICK SMITH
and J. BOYCE SMITH, JR.,
as executors and trustees
under the last will and
testament of J. Boyce
Smith, deceased,
Complainants,

and

30 CAROLYN C. JONES, ARTHUR B.
CHAMBERLIN and AMELIA B.
CHAMBERLIN,
Defendants.

On Bill, &c.

Replication.

The complainants join issue on the answer of the defendants Carolyn C. Jones and Arthur B. Chamberlin.

J. BOYCE SMITH, JR.,
Solicitor of Complainants.

Final Decree.

Final Decree.

Filed October 5, 1925.

IN CHANCERY OF NEW JERSEY.

Between

MARGARET KILPATRICK SMITH
and J. BOYCE SMITH, JR.,
as executors and trustees
under the last will and
testament of J. Boyce
Smith, deceased,

Complainants,

and

CAROLYN C. JONES, ARTHUR B.
CHAMBERLIN and AMELIA B.
CHAMBERLIN,

Defendants.

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On Bill, etc.

Final Decree.

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This cause coming on to be heard before the Court, in the presence of Messrs. Perkins & Drewen, solicitors for and of counsel with the complainants, and Messrs. Maley & Maley, solicitors for and of counsel with the defendants, Carolyn C. Jones and Arthur B. Chamberlin; and it appearing that the complainants' bill has been heretofore taken as confessed against the defendant, Amelia B. Chamberlin; and the solicitors of the defendants, Carolyn C. Jones and Arthur B. Chamberlin, having admitted in open court that the complainants are entitled to the relief sought and prayed for in their supplemental bill of complaint foreclosing all the right, title and interest of the said defendants, Carolyn C. Jones and Arthur B. Chamberlin, in and to

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Final Decree.

the premises described in the bill of complaint, and in and to, and arising out of a certain contract described in said bill of complaint, and made on the 30th day of June, 1921, between the said Margaret Kilpatrick Smith and J. Boyce Smith, Jr., as executors and trustees under the last will and testament of J. Boyce Smith, deceased, with the said Arthur B. Chamberlin, which contract was afterward assigned by the said defendant Arthur B. Chamberlin to the said defendant Carolyn C. Jones, on or about the first day of July, 1922.

And it further appearing to the Court that there is due to the complainants upon said contract the sum of \$27,628.88, with lawful interest thereon to be computed from the 15th day of September, 1925, and no cause appearing or being shown to the contrary,

It is, on this 28th day of September, 1925, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor, by virtue of the power and authority of this Court, doth hereby ORDER, ADJUDGE and DECREE, that the complainants are entitled to have the said sum of \$27,628.88, with lawful interest thereon from the 15th day of September, 1925, together with their costs of suit, raised and paid out of the said premises;

And it is accordingly further ORDERED, ADJUDGED and DECREED that so much of the said premises described in said bill of complaint, and contracted to be sold by the complainants to the said Arthur B. Chamberlin, as will be sufficient to raise the said debt, interest and costs, be sold, and a writ of *feri facias* do issue for that purpose out of this Court, directed to the

Final Decree.

Sheriff of the County of Bergen, commanding him to make sale according to law, of so much of the said premises as will be sufficient to satisfy the said debt, interest and costs, and that he pay the same to the complainants, or to their solicitors; and that in case more money should be raised by the sale than shall be sufficient to answer such payment, such surplus money shall be brought into this Court and deposited with the clerk, to abide the further order of the Court, unless otherwise previously disposed of by an order of the Court; and the Sheriff is to make return to this Court of his proceedings by virtue of the said writ. 10

And it is further ORDERED, ADJUDGED and DECREED, that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to so much of said mortgaged premises as shall be sold, as aforesaid, by virtue of this decree; 20

And it is further ORDERED, ADJUDGED and DECREED, that there be allowed to the complainants' solicitors a counsel fee of \$350.00, and that the same be included in the taxed bill of costs and collected with the other items of said bill.

E. R. WALKER,
C. 30

Respectfully advised,

JAMES F. FIELDER,
V.-C.

*Publication of Notice of Sale.***Publication of Notice of Sale.**

IN CHANCERY OF NEW JERSEY.

Between Margaret Kilpatrick Smith and J.
 Boyce Smith, Jr., as executors and trustees
 under the last Will and Testament of J. Boyce
 10 Smith, deceased, complainants, and Carolyn
 C. Jones, Arthur B. Chamberlin and Amelia
 B. Chamberlin, defendants. Fi. fa. Return-
 able January 6th, A. D. 1926.

PERKINS & DREWEN,
 Sol'rs.

BY virtue of the above stated writ to me di-
 rected and delivered, I have levied upon and will
 expose for sale at public vendue at the Sheriff's
 20 office, in the village of Hackensack, on

WEDNESDAY, NOVEMBER 18, 1925

at two o'clock in the afternoon, all that certain
 tract of land and premises, situate, lying and
 being in the Borough of Woodcliff Lake, and
 Township of Washington, in the County of
 Bergen, State of New Jersey, more particularly
 described as follows:

BEGINNING at the southeast corner of the
 same at an old black oak tree (being an
 30 ancient corner tree) standing at the edge of
 the brook called Bear Brook where another
 small brook falls into the same; from thence
 running (1) through the public road north,
 sixty-nine degrees west, eleven chains and
 sixty-six links; thence (2) north fifteen and
 three-quarter degrees east, twenty-eight
 chains and ninety-three links to a stake and
 land of Peter Van Ryper; thence (3) south
 seventy-one and one-quarter degrees east,
 three chains and ten links to a corner; thence
 (4) north twenty-seven and one-quarter de-
 40 grees east, thirteen chains and twenty-six

Publication of Notice of Sale.

links, to a stake; thence (5) north sixty-eight degrees west eight chains and forty-three links to a corner; thence (6) north twenty-six and one-half degrees east five chains and seventy-five links to a corner; thence (7) south sixty-three and one-half degrees east eight chains and forty-five links to a stake; thence (8) north twenty-seven and one-quarter degrees east five chains and twenty-one links to a stake and land formerly of the Vandellinda farm; thence (9) south sixty-three and one-half degrees east four chains and eighty-eight links to the top of a large rock lying at the edge of Bear Swamp; thence (10) along said swamp south one and one-half degrees west one chain and sixty links to a small brook; thence along said brook to the south side of Bear Brook; thence along said last mentioned brook, easterly to the land late of Albert Wortendyke, deceased; thence along the same south seventy-nine and one-half degrees west one chain, and fifty-five links to said brook; thence along said brook, down stream the several courses thereof to the place of beginning. Containing forty-four acres and ninety-six hundredths of an acre more or less. Excepting out of the above described premises one lot heretofore sold and conveyed to Jacob P. Hopper by Isaac A. Delamater and wife and Abraham Delamater by deed dated September 1, 1864, recorded October 3, 1864, in Book Z5 of Deeds, page 100, and also one lot conveyed by John J. Delamater and wife and Susan Jersey to James Bartow by deed dated May 21, 1868, recorded September 30, 1868, in Book Z6, page 403; said two lots together comprising approximately 9 acres and leaving remaining approximately 36 acres.

Together with all and singular the rights, liberties, privileges, hereditaments and appurtenances, thereunto belonging or in anywise apper-

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Publication of Notice of Sale.

taining, be sold, to pay and satisfy in the first place unto the said complainant the sum of \$27,628.88 with lawful interest thereon.

JACK L. FOX,
Sheriff.

10 Fees \$34.44

(1920)

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Stipulation.

STIPULATION.

Filed August 27, 1926.

IN CHANCERY OF NEW JERSEY.

Between

ARTHUR B. CHAMBERLIN, *et*
al.,

Complainants,

and

J. BOYCE SMITH, JR., *et als.*,
Defendants.

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On Bill, etc.

Stipulation.

It is hereby consented that the motion in the
above-entitled case be adjourned until Monday,
the 27th day of September, 1926.

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DOUGLAS R. TODD,
Solicitor for Defendants.

PERKINS & DREWEN,
Solicitors for Defendants.

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Notice of Motion to Strike Out Bill.

**NOTICE OF MOTION TO STRIKE OUT
BILL OF COMPLAINT.**

Filed September 27, 1926.

IN CHANCERY OF NEW JERSEY.

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Between

CAROLYN C. JONES and
ARTHUR B. CHAMBERLIN,
Complainants,

and

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J. BOYCE SMITH, JR., and
MARGARET KILPATRICK
SMITH, executors of the
Last Will and Testament
of J. Boyce Smith, de-
ceased; J. BOYCE SMITH and
HARRIET I. SMITH, his wife;
EDWARD J. SISLEY and LUCY
S. SISLEY, his wife; PIERRE
N. AYMAR and HELEN R.
AYMAR, his wife, and
MARGARET KILPATRICK
SMITH,

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Defendants.

On Bill, etc.

*Notice of
Motion to
Strike out
Bill of
Complaint.*

To Douglas R. Todd, Esq., solicitor for complainants, 810 Broad street, Newark, N. J.

SIR:

TAKE NOTICE, that on Monday, the 20th day of September, 1926, at ten o'clock in the forenoon (Daylight Saving Time) or as soon thereafter as counsel can be heard, we shall apply to the

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Chancellor, or such Vice-Chancellor as may be

Notice of Motion to Strike Out Bill.

sitting for him, at the Chancery Chambers, 1 Exchange Place, Jersey City, New Jersey, for an order striking out the bill of complaint filed in the above-entitled cause, on the following grounds:

(1) That the matters and things therein alleged are not properly the subject of an original bill, but of a bill of review. 10

(2) That said bill of complaint is filed without order first had and obtained granting leave to file the same.

(3) That said bill of complaint does not set forth a cause of action in equity.

Dated: September 8, 1926.

PERKINS & DREWEN, 20
Solicitors for and of Counsel with Defendants.

Service of the within notice is hereby acknowledged this day of September, 1926.

DOUGLAS R. TODD,
Solicitor for Complainants.

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Order Striking Out Bill of Complaint.

**ORDER STRIKING OUT BILL OF
COMPLAINT.**

Filed September 27, 1926.

IN CHANCERY OF NEW JERSEY.

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Between

CAROLYN C. JONES and
ARTHUR B. CHAMBERLIN,
Complainants,

and

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J. BOYCE SMITH, JR., and
MARGARET KILPATRICK
SMITH, executors of the
Last Will and Testament
of J. Boyce Smith, de-
ceased; J. BOYCE SMITH and
HARRIET I. SMITH, his wife;
EDWARD J. SISLEY and LUCY
S. SISLEY, his wife; PIERRE
N. AYMAR and HELEN R.
AYMAR, his wife, and
MARGARET KILPATRICK
SMITH,

30

Defendants.

On Bill, etc.

*Order
Striking Out
Bill of
Complaint.*

This matter coming on to be heard on motion of Perkins & Drewen, solicitors for and of counsel with defendants, in the presence of Douglas R. Todd, Esq., solicitor for complainants, and the Court having examined the bill of complaint and having heard the argument of the respective counsel and considered the same; and it appearing to the Court that the matters

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Order Striking Out Bill of Complaint.

and things alleged in the said bill of complaint are not properly the subject of an original bill but of a bill of review, and further that the said bill of complaint has been filed without order first had and obtained on petition for leave to file the same;

It is, on this 27th day of September, 1926, 10
ORDERED and ADJUDGED that the bill of complaint be and the same hereby is struck out.

E. R. WALKER,
C.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

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Notice of Appeal.

NOTICE OF APPEAL.

Filed November 5, 1926.

IN CHANCERY OF NEW JERSEY.

10 *Between*

CAROLYN C. JONES and
ARTHUR B. CHAMBERLIN,
Complainants,

and

20 J. BOYCE SMITH, JR., and
MARGARET KILPATRICK
SMITH, executors of the
Last Will and Testament
of J. Boyce Smith, de-
ceased; J. BOYCE SMITH and
HARRIET I. SMITH, his wife;
EDWARD J. SISLEY and LUCY
S. SISLEY, his wife; PIERRE
N. AYMAR and HELEN R.
AYMAR, his wife, and
MARGARET KILPATRICK
SMITH,

Defendants.

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On Bill, &c.

*Notice of
Appeal.*

To Messrs. Perkins & Drewen, solicitors of de-
fendants, 921 Bergen Ave., Jersey City, N. J.

GENTLEMEN:

40 TAKE NOTICE that the complainants, Carolyn C.
Jones and Arthur B. Chamberlin, hereby ap-
peal from the whole and every part of the order
made in this Court on September 27, 1926, by
the Chancellor, on the advise of Vice-Chancellor
James F. Fielder, in the above-entitled cause, to

Notice of Appeal.

the Court of Errors and Appeals, in the last resort of all causes.

Dated November 4, 1926.

Respectfully,

DOUGLAS R. TODD,
Solicitor for Complainants. 10

I conceive that there is good cause for the within appeal.

HOMER D. SMITH,
A Counsellor-at-Law of New Jersey.

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Petition to Dismiss Appeal.

PETITION TO DISMISS APPEAL.

New Jersey Court of Errors and Appeals

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Between

CAROLYN C. JONES and
ARTHUR B. CHAMBERLIN,
Complainants-Appellants,

and

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J. BOYCE SMITH, JR., and
MARGARET KILPATRICK
SMITH, executors of the
Last Will and Testament
of J. Boyce Smith, de-
ceased; J. BOYCE SMITH and
HARRIET I. SMITH, his wife;
EDWARD J. SISLEY and LUCY
S. SISLEY, his wife; PIERRE
N. AYMAR and HELEN R.
AYMAR, his wife, and
MARGARET KILPATRICK
SMITH,

Defendants-Respondents.

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*On Appeal
from Court
of Chancery
Petition.*

To the Judges of the Court of Errors and Appeals of New Jersey.

The petition of Margaret Kilpatrick Smith, of the Borough of Woodcliff Lake, in the County of Bergen, and State of New Jersey, respectfully shows:

1. Your petitioner is the respondent in the above-entitled cause.

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Petition to Dismiss Appeal.

2. The appellants Carolyn C. Jones and Arthur B. Chamberlin have failed and neglected to serve the State of the Case within the time prescribed by the rules of this Court.

3. Petitioner therefore prays that the said appeal may be dismissed with costs.

PERKINS & DREWEN,
Solicitors for and of Counsel
with Petitioner.

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

JOHN DREWEN, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a counsellor-at-law of the State of New Jersey, and a member of the firm of Perkins & Drewen, solicitors for the respondents.

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2. No State of the Case has been served upon me by the appellants Carolyn C. Jones and Arthur B. Chamberlin, or any other person for them or in their behalf as prescribed by the rules of this Court.

JOHN DREWEN.

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Subscribed and sworn to before me
this 25th day of January, 1927.

JOHN NUGENT,
Atty. at Law of N. J.

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Petition of Appeal.

PETITION OF APPEAL.

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

Between

10 CAROLYN C. JONES and
ARTHUR B. CHAMBERLIN,
Complainants-Appellants,

and

J. BOYCE SMITH, JR., and
MARGARET KILPATRICK
SMITH, executors of the
Last Will and Testament
of J. Boyce Smith, de-
20 ceased; J. BOYCE SMITH and
HARRIET I. SMITH, his wife;
EDWARD J. SISLEY and LUCY
S. SISLEY, his wife; PIERRE
N. AYMAR and HELEN R.
AYMAR, his wife, and
MARGARET KILPATRICK
SMITH,
Defendants-Respondents.

*On Appeal,
&c.*

Petition.

30 To the Honorable, the Court of Errors and Ap-
peals in the last resort in all causes:

The petition of the complainants-appellants in
the above-stated cause, respectfully shows:

1. That your petitioners find themselves ag-
grieved by a certain order made in the Court of
Chancery, by his Honor, Edwin Robert Walker,
Chancellor of the State of New Jersey, bearing
40 date the 27th day of September, 1926, wherein

Petition of Appeal.

the said Carolyn C. Jones and Arthur B. Chamberlin were complainants and the said J. Boyce Smith, Jr. and Margaret Kilpatrick Smith, executors of the Last Will and Testament of J. Boyce Smith, deceased, and J. Boyce Smith and Harriet I. Smith, his wife, Edward J. Sisley and Lucy S. Sisley, his wife, Pierre N. Aymar and Helen R. Aymar, his wife, and Margaret Kilpatrick Smith were defendants, which order strikes out the bill of complaint herein in this respect, to wit:

(a) That the order adjudges that said bill was not properly the subject of an original bill, but of a bill of review.

(b) That said order adjudges that said bill of complaint was filed without order first had and obtained on petition for leave to file same.

(c) That the matters and things in said bill of complaint set forth were properly cognizable by the Court of Chancery and that said matters and things were not the proper subject of a bill of review.

(d) That said bill of complaint was an original bill to set aside a decree of the Court of Chancery for fraud in its procurement, and as such properly cognizable, as presented, by the Court of Chancery.

(e) That said bill of complaint was an original bill to set aside a decree of the Court of Chancery, entered and procured by fraud and violation of instructions by the complainants to their solicitor, and as such properly cognizable by the Court of Chancery.

(f) That said bill of complaint was an original bill to set aside a decree of the Court of Chancery, improvidently entered, and which did not dispose of the issues before said Court lead-

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Petition of Appeal.

ing to said decree, in that no disposition was made by said decree of the counter-claim filed by the complainants-appellants, and as such properly cognizable by the Court of Chancery.

10 (g) That said bill of complaint was an original bill to set aside a decree of the Court of Chancery, obtained by the collusion, fraud, and violation of instructions of the solicitor of complainants, and as such properly cognizable by the Court of Chancery.

Your petitioner therefore prays that the said order of the said Court of Chancery may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

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DOUGLAS R. TODD,
Solicitor of Complainants-Appellants.

HOMER D. SMITH,
Of Counsel with Complainants-Appellants.

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Formal answer to petition of appeal filed.

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Substitution of Attorney.

SUBSTITUTION OF ATTORNEY.
IN CHANCERY OF NEW JERSEY.

Between

ARTHUR B. CHAMBERLIN, *et*
als.,

Complainants,

and

J. BOYCE SMITH, JR., *et als.,*
Defendants.

On Bill, &c. 10

Substitution
of Attorney.

I, DOUGLAS R. TODD, solicitor for the complainant, do hereby consent to the substitution of HOMER D. SMITH, as solicitor in my place and stead in the above-entitled cause.

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DOUGLAS R. TODD.

Dated November 24th, 1926.

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Substitution of Attorney.

SUBSTITUTION OF ATTORNEY.
IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>ARTHUR B. CHAMBERLIN, <i>et</i> <i>als.,</i></p> <p style="text-align: center;"><i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>J. BOYCE SMITH, JR., <i>et als.,</i> <i>Defendants.</i></p>	<p><i>On Bill, &c.</i></p> <p><i>Substitution</i> <i>of Attorney.</i></p>
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I hereby consent to the substitution of Pitney,
 Hardin & Skinner as solicitors of record in the
 above-entitled cause.

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HOMER D. SMITH.

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~~FEB. 1. 1927~~

25 May T. 1927

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

New Jersey Court of Errors and Appeals

Between

CAROLYN C. JONES and AR-
THUR B. CHAMBERLIN,
Complainants-Appellants,

and

J. BOYCE SMITH, JR., and
MARGARET KILPATRICK
SMITH, executors, etc., *et*
als.,

Defendants-Respondents.

*On Appeal
from Court
of Chancery.*

BRIEF FOR APPELLANTS.

The appellants are seeking to secure relief from a decree in a suit brought by the respondents against the appellants in the Court of Chancery of New Jersey, to foreclose the equity of the appellants in a certain contract between the appellants and the respondents and from the subsequent proceedings had under the decree. The decree foreclosed the appellants of their rights under this contract and directed a sale of the property covered by the contract. The facts appear from the decree (Record, pp. 55 to 57). The appellants in that suit filed an answer and counter-claim (Record, pp. 33 to 36). The decree was made on the consent of the appellants' solicitor in that cause (Record, pp. 55 to 57). The appellants contend that this consent was procured by fraud without their knowledge and they now seek an opportunity to establish the facts constituting this fraud and to be given an opportunity to defend the suit brought by the

respondents, of which defense they contend that they have been deprived by the fraudulent acts. The facts constituting the alleged fraud are set up in the appellants' bill of complaint (Record, pp. 1 to 10). On motion of the respondents, the Court below struck out the appellants' bill of complaint on the ground that the relief sought could not be by an original bill, but must be by a bill of review and only after leave of the Court first obtained (Order striking out bill of complaint, Record, pp. 64, 65). It is from this order that the appeal is taken.

The narrow question presented is whether relief from a decree which is alleged to have been secured by fraud can be obtained by an original bill or whether it must be by a bill of review addressed to the Court making the decree after leave first obtained.

We see no need of discussing the merits of the controversy. The facts upon which the appellants rely as constituting fraud are fully set out in the bill of complaint, and if they are established, it is submitted, they constitute fraud in the procurement of the decree and the appellants have by such fraud been deprived of an opportunity to defend the suit brought by the respondents on the merits (Record, pp. 1 to 10). For the purpose of this argument, these facts properly pleaded must be taken as admitted.

After this Court granted the respondents' motion to dismiss the appeal (Petition, Record, pp. 68, 69), this Court reinstated the cause at the opening of the present term on our application.

POINT I.

The bill of complaint was properly filed as an original bill.

The bill seeks to secure relief from the decree entered in a suit brought by the respondents against appellants on the ground of fraud in the procurement of that decree (Decree, Record, pp. 55 to 57). The facts constituting this fraud are set up in the appellants' bill of complaint (Record, pp. 1 to 10).

Relief from a decree secured by fraud is properly sought by original bill.

Storey on Equity Pleadings, 10 Ed. sec. 426:

“Bills impeaching decrees for fraud. A bill of this sort is an original bill in the nature of a bill of review. There is no doubt of the jurisdiction of Courts of Equity to grant relief against a former decree, where the same has been obtained by fraud and imposition; for these will infect judgments at law and decrees of all Courts; but they annul the whole in the consideration of Courts of Equity. This must be done by an original bill; and there is no instance of its being done by petition; although it seems once to have been thought, that a decree, as well as any interlocutory order, could be set aside for fraud by petition only. Where a decree has been so obtained, the Court will restore the parties to their former situation, whatever their rights may be. This kind of bill may be filed without leave of the Court being first obtained for the purpose, the fraud used in obtaining the decree being the principal point in issue, and being necessary to be established by proof, before the propriety of the decree can be investigated.”

Mussell v. Morgan, 3 Brown's Chan. Cas. 74, 29 Eng. Rep. 416, at 419, where the Lord Chancellor held that relief from a decree obtained by fraud could not be secured by petition, but only by original bill.

Whittemore v. Coster, 4 N. J. E. 438.

Dringer v. Receiver of Erie Railway, 42 N. J. E. 573, where the Court on demurrer sustained an original bill brought to secure relief from a decree obtained by the defendant against the complainant in another suit on the ground of fraud.

At page 581:

“A simple statement of the ground upon which jurisdiction in such cases (*i. e.* of judgment obtained by fraud) rests show that, unless the decree assailed is shown to be the sole and direct product of the fraud charged, this Court has no authority whatever either to annul or change it, for its jurisdiction is unalterably limited to the simply undoing of what fraud has done. It is, therefore, clear that, if this decree has any other foundation than the fraud here charged, this Court, even if convinced that the decree is unjust according to the real right of the case, cannot disturb it.”

U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, where the Court in distinguishing between an original bill and other remedies to secure relief from judgments or decrees, says at page 95:

“If the Court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a

suit in chancery, on proper showing, a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

“But there is an admitted exception to this general rule, in cases where, by reason of some thing done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See *Wells, Res Adjudicata*, sec. 499; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. DeZoya*, 7 Ill. (2 Gilm.) 385; *Kent v. Ricards*, 3 Md. Ch. 392; *Smith v. Lowry*, 1 Johns (N. Y.) Ch. 320; *DeLouis, et al. v. Meek*, 2 Green (Iowa) 55.

“In all these cases and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against

the judgment or decree, that party has been prevented from presenting all of his case to the court.’’

All of these authorities recognize the distinction between a bill brought to secure relief from a decree in another suit secured by fraud and a bill or proceeding brought to secure relief from a decree on the ground of error apparent on the record or newly discovered evidence.

In *Daniel's Chan. Plead. & Prac.*, 6th Am. Ed. Vol. 2, the distinction is made between bills of review or bills in the nature of bills of review and bills to impeach decrees for fraud. As set forth at *page 1575*, the object of a bill of review and of a bill in the nature of a bill of review is to procure the reversal, alteration or explanation of a decree made in a former suit and the rule is laid down that a decree taken by consent (as in the instant case) cannot be set aside by a bill of review or a bill in the nature of a bill of review unless by clerical error something has been inserted in the order which has not been consented to, and the author says that a bill of this character can only be brought upon error in law appearing on the face of the decree without further examination of matters of fact or upon some new matter which has been discovered after the decree and which could not possibly have been used when the decree was made.

At page 1584, in discussing bills to impeach decrees for fraud, the author says:

“If a decree has been obtained by fraud, it may be impeached by original bill, without the leave of the Court; the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof, before the propriety of the decree can be investigated. Where a decree

has been so obtained, the Court will restore the parties to their former situation, whatever their rights may be."

And further at page 1585:

"When a decree has been made by consent and the consent has been fraudulently obtained, the party aggrieved can only be relieved by original bill."

Metford & Tyler's Plead. & Prac. in Eq., p. 190:

"If a decree has been obtained by fraud, it may be impeached by original bill without the leave of the Court; the fraud used in obtaining the decree being the principal point in issue and necessary to be established by proof before the propriety of the decree can be investigated."

In *Watkinson v. Watkinson*, 68 N. J. E. 632, this Court in discussing the functions of bills of review, refers with approval to the above citations from Daniels' Chanc. Prac. and Metford & Tyler's Plead. & Prac. in Eq. (at p. 634). In that case the Court held insofar as this point is concerned, that inasmuch as the facts constituting the alleged fraud had occurred prior to the entry of the decree, it would not be the basis for a bill of review, but should have been set up as a defense. This distinguishes that case from the instant case, where the fraud related to the entry of the decree and was not known to the appellants at the time the decree was made. While the Court in the *Watkinson* case may have recognized that in some cases relief from a decree secured by fraud could be obtained by a bill of review, it did not hold that such relief could not be obtained by an original bill and the authorities cited above and by the Court in the *Watkinson* case establish the law that where the fraud relates to the entry of the decree and is

unknown to the defendant at that time, relief can be secured by original bill. While it may well be that a bill of review to secure relief from a decree obtained by fraud, or a petition in the cause, may lie in some cases, this does not preclude the right to file an original bill. This is expressly recognized by the Court in *Kearns v. Kearns*, 70 N. J. E. 483, where the Court held that though an original bill to set aside the decree because of fraud could have been brought, this did not preclude the complainant from electing to file a bill of review bringing in other matters not properly the subject of an original bill to secure relief on the ground of fraud.

At page 486:

“Admitting that the bill sufficiently alleges this sort of a fraud, and that this sort of a fraud, being collateral to the litigation in which the decree complained of was obtained, and not being one of the matters at issue in that cause and decided therein, presents a sufficient basis for an original bill to impeach the decree for fraud, it still remains that this ground for attack on the decree is combined with these other grounds, and that all of the grounds may be presented, investigated and disposed of upon a bill of review. In this state of the case the election of the complainant to file a bill of review is an important consideration. The allegations of matters which properly may be considered on a bill of review, but which cannot be properly considered on an original bill to impeach a decree for fraud, certainly cannot be rejected as surplusage in determining the character of the bill.”

POINT II.

It is not necessary in the case of an original bill to first secure the leave of the Court to file it.

There is no statutory requirement or rule of court which requires a complainant to first secure the leave of the Court to file an original bill and citation of authorities seems unnecessary.

Such a requirement is imposed only in the case of a bill of review on the ground of newly discovered evidence and the reason is obvious. Even in the case of a strict bill of review to correct errors evident on the face of the record, it has been held that it may be filed without leave. *Buckingham v. Corning*, 29 N. J. E. 238; *Webb v. Pell*, 1 Paige 564 (N. Y.).

Where a bill is good, either as a bill of review or an original bill, if it is bad as a bill of review because of failure to first obtain leave of Court, it should be considered as an original bill and not as a bill of review. *Hill v. Bowyer*, 59 Va. 364.

A suit brought to secure relief from a decree on the ground that the decree was procured by fraud, calls for the investigation of new facts not before the Court which rendered the decree and not relating to the issues before that court, but relating to the charge of fraud in procuring the decree and depriving the defendant of an opportunity to have the issues in that suit fairly tried. From this aspect the bill is clearly an original bill.

POINT III.

The facts pleaded in the appellants' bill of complaint do not relate to newly discovered evidence or error on the face of the record, but to fraud in the procuring of the decree, and therefore are the proper subject matter of an original bill.

The facts alleged by the appellants' bill of complaint relate to fraud on the part of the appellants' solicitor in the suit in which the decree was entered and in the subsequent proceedings relating to the sale. These facts are set forth in the appellants' bill of complaint (Record, pp. 1 to 10). There is, therefore, no need to discuss these facts at length. If the facts charged are true, the appellants have been fraudulently deprived of an opportunity to present the defenses raised in their answer to the respondents' bill of complaint in the original suit. The motion to strike out this bill of complaint was a demurrer to the bill and for the purpose of this argument the facts alleged in the bill of complaint must be taken as true. The decree in the court below disposed of all of the issues including the appellants' counter-claim, although not expressly referring to the counter-claim. What the appellants seek at this time is an opportunity to present the facts which they claim constituted fraud in the making of the decree. If they establish these facts, they should be given an opportunity to defend the suit brought by respondents, on the merits.

The appellants are entitled to their day in court on this question.

POINT IV.

The order striking out the appellants' bill of complaint should be reversed.

Respectfully submitted,
PITNEY, HARDIN & SKINNER,
Solicitors for Appellants.

WILLIAM H. OSBORNE, JR.,
CARL A. FEICK,
Of Counsel.

[Faint, illegible text covering the majority of the page]

120 FEB. T. 1927

25 MAY. T. 1927

New Jersey Court of Errors and Appeals

Between:

CAROLYN C. JONES and ARTHUR
B. CHAMBERLIN,
Complainants-Appellants,

and

J. BOYCE SMITH, JR., and
MARGARET KILPATRICK SMITH,
executors, etc., *et als.*,
Defendants-Respondents.

On Appeal from
the Court of
Chancery.

**BRIEF FOR THE DEFENDANTS-
RESPONDENTS.**

A study of the precedents and texts on the question here presented to the Court shows clearly that it is difficult, in such a case, to lay down any absolute rules of general application. The determination must depend largely upon the peculiar facts and circumstances of each case.

It is therefore important at the outset, clearly to note the facts attending the question now presented, and thus to define the precise nature and extent of the controversy between the parties on this appeal.

The appeal is taken from an Order of the Chancellor, advised by Vice Chancellor Fielder, and made September 27th, 1926. That order appears in the Printed Case page 64, and its effect is to strike out a bill of complaint filed by the appellants, on the ground:

“That the matters and things alleged in the said bill of complaint are not properly

the subject of an original bill, but of a bill of review; and further that the said bill of complaint has been filed without order first had and obtained on petition for leave to file the same.”

The bill which was struck out was filed for the purpose of setting aside a decree obtained by the respondents as complainants in a prior suit against the appellants. The facts antecedent to the filing of the bill *sub judice* are:

Facts.

On October 3, 1924, the respondents filed their bill of complaint against the appellants. This bill was filed for the purpose of obtaining a decree for the specific performance of a contract for the purchase by appellants of a parcel of real estate, and praying also that in default of such performance the appellants (then defendants), be debarred and foreclosed of all equity of redemption in said lands, and from all rights under the contract.

Under the terms of the contract thus in suit, the appellants had deposited with the respondents as security for the payment of the purchase price, certificates of capital stock of the New York-Mexican Oil Co., of the total par value of \$25,000.00, and it was further provided in the contract that:

“Upon the payment of each installment of \$3,000.00 due July 1st, of each year as aforesaid, J. Boyce Smith, Jr., is hereby authorized and directed to release and deliver to the purchaser a certificate or certificates of capital stock of said New York-Mexican Oil Co., of a par value of \$5,000.00.”

The appellants filed an answer and counterclaim in the prior suit. And from what appears hereafter it is respectfully submitted that whatever importance that pleading had attaches to the counterclaim. (The answer was practically an admission of the bill.) In this counterclaim it is alleged that for such payments as the appellants (defendants) had made under the contract (three payments of \$3,000.00 each), there was not returned to them the requisite number of certificates of the New York-Mexican Oil Co. stock, as the contract provided, and under the counterclaim it was prayed that the Court decree that there be delivered over to them such capital stock amounting to the par value of \$15,000.00, that is to say, \$5,000.00 in stock for each payment of \$3,000.00 made under the contract. For such return of stock the contract plainly provided.

To this counterclaim an answer was filed, in which it was admitted that the requisite amount of stock for each payment made was not delivered, and for the reason that this could not be done due to the denomination of the certificate delivered by the then defendant A. B. Chamberlin as security for his payments, and to the fact that the certificate could be split up only at the direction of the said Chamberlin himself, in whose name the stock stood. The then complainants further tendered themselves ready and willing to deliver such shares of stock as the defendants may be entitled to.

Issue was joined and the cause was duly set down for hearing before Vice Chancellor Fielder.

The hearing was adjourned from time to time until September 28th, 1925. On the latter date ~~none of the defendants in the cause~~ ^{James} appeared. A decree *pro con* had been taken in the suit against the defendant Amelia Chamberlin. The defend-

ant Arthur Chamberlin now says his non-appearance was due to his confinement in jail in New York. ~~The non appearance of the other defendant Carolyn C. Jones, to whom the said Arthur Chamberlin had assigned the contract in suit, is not explained.~~

But at the hearing the present complainants were represented by counsel retained by them; and at the hearing a decree was made in which the following recital appears (Final Decree, Printed Case, page 55):

“And the solicitors of the defendants Carolyn C. Jones, and Arthur B. Chamberlin having admitted in open Court that the complainants are entitled to the relief sought and prayed for,” etc.

The decree thereupon establishes the amount due under the contract, orders the sale of the premises to make the amount due, and forecloses the defendants of and from all equity of redemption. *It should be noted that this decree makes no mention whatever of the counterclaim above referred to.* The effect of this omission on the present question, and what the complainants now allege concerning it will be noted later.

The appellants on July 6th, 1926, filed the bill of complaint *sub judice* for the purposes, among other things, of opening and setting aside the former decree. Simply stated, the allegations of the bill are that:

- (a) The contract above referred to was made with the defendants.
- (b) The terms of the contract are set forth.
- (c) Stock was delivered as security under and pursuant to the contract.
- (d) Three payments were made under the contract aggregating \$9,000.00; complainants

paid taxes and made improvements to the property.

(e) The complainant Chamberlin was engaged in New York in litigation with his wife and assigned the contract to the complainant Carolyn C. Jones.

(f) Though payments were made by the complainants as aforesaid, no stock was returned.

(g) THAT ON OR ABOUT JANUARY 1ST, 1924, THE COMPLAINANTS BECAME IN DEFAULT UNDER THE INSTALLMENTS AND THAT NEITHER CHAMBERLIN NOR THE SAID CAROLYN C. JONES HAVE SINCE MADE ANY PAYMENTS ON ACCOUNT OF SAID AGREEMENT.

(h) That on October 23, 1924, the defendants filed their bill for the specific performance of the contract, and for the foreclosure of complainants' rights in the premises.

(i) That further pleadings were filed bringing the prior cause to issue.

(j) That the complainants retained as their solicitors Maley & Maley.

(k) That on September 8, 1925, on the day fixed for the hearing of the prior cause, complainant Chamberlin was confined in the Ludlow Street Jail and while there his solicitor conferred with him and agreed that the hearing should be adjourned, or that he would have the depositions of the said Chamberlin taken in New York. That notwithstanding this the solicitor "fraudulently appeared in open Court" and consented to the decree.

(l) That said Maley DID NOT CONSENT TO THE DISMISSAL OF THE COUNTERCLAIM; THAT SAID COUNTERCLAIM IS STILL PENDING AND UNDETERMINED IN THIS COURT AND HAS NEVER BEEN DISMISSED; THAT SAID DECREE DID NOT IN ANY WAY DISPOSE OF OR DESTROY SAID ANSWER AND COUNTERCLAIM.

(m) That after the decree the property was duly advertised for sale and sold by the Sheriff of Bergen County; that the said Maley agreed to attend the sale and to "see that the rights of the complainants were protected", but that the said Maley, notwithstanding, did not attend the sale and did not protect the complainants.

The only part of the prayer that is important is paragraph 6:

"That the aforesaid decree may be opened and these complainants be afforded the hearing upon their *undisposed answer and counterclaim* in the aforesaid action, and to examine the complainants in said suit with their witnesses upon their cause of action."

Now, the complainants contend that this bill is properly an original bill. Our contention on the other hand is that under the circumstances of the case the proper course for the complainants to pursue was to apply to the Court below on a petition in the cause for the opening of the decree; or to apply to the Court for leave to file a bill of review; and that in any case it is not proper for the complainants to attack the decree, under all the circumstances here presented, by the filing of an original bill without leave and without first apprising the Court of the facts upon which the decree is claimed to be invalid.

POINT I.

The purpose and nature of the bill of complaint, viewed in the light of all the circumstances of the case, is a bill of review, or a bill in the nature of a bill of review. Both kinds of bills are governed by the same general principles, and cannot be filed without leave of the Court.

“A bill to impeach a decree on account of matters not involved in, or covered by, the decree but which relate to its validity or to a party’s right to claim any benefit thereunder is an original bill *in the nature of a bill of review.*”

21 Corpus Juris, page 769, Sec. 925,

and

“Bills of review and bills in the nature thereof are controlled by the same general principles.”

21 Corpus Juris, page 725, Sec. 887.

“A bill of review proper is a bill to procure the explanation, alteration, or reversal of a final decree by the court which rendered it, after its enrollment or the equivalent thereof. Aside from original bills in the nature of bills of review, it is the only proceeding in which a court of equity can substantially change its final decrees after the time for the filing of a motion or petition in the cause has passed, and generally it does not lie where a rehearing is available.”

21 Corpus Juris, page 722, Sec. 886, and cases cited.

See also

Watkinson v. Watkinson, 68 N. J. Eq. 632.

We respectfully submit that the most that can be claimed for the appellants is that their bill, if not an out and out bill of review is at best in the

nature of a bill of review. And we contend that as hereafter shown, if it is so much as in the nature of a bill of review there is no established practice in this state for the filing of such a bill without first obtaining leave therefor from the Court. Beyond a doubt is this so, if the bill is one of review.

The appellants' brief seems to indicate one thing clearly. It is that they did not permit themselves to be bothered by difficulties inherent in this question and which our Courts have long recognized and coped with. They would maintain their bill as an original bill by argument all too simple. In *Kearns vs. Kearns*, 70 Equity, 483, at 484, Vice Chancellor Stevenson, in an opinion which embraces a thorough consideration and study of the jurisprudence of this whole question, says:

“The distinction between *bills of review alleging fraud* from original bills to impeach a decree on account of fraud, has not always been sharply drawn.”

And the distinction thus observed by Vice Chancellor Stevenson is directly pertinent to this argument. The present bill comes fairly within the class of bills first referred to by the Vice Chancellor, that is, “bills of review alleging fraud.” This is so because in the present bill the complainants do not seek definitely “to impeach a decree on account of fraud”. Their bill alleges fraud and it asks by reason of the fraud that the cause be reviewed, *in that the decree be opened and the complainants be permitted to be heard on their answer and counterclaim, and that they be permitted to do certain other things in the cause.* What else could the bill possibly require to make it a bill of review?

In the Kearns case, *Supra*, the Court observes, on page 486, that in the bill there considered, there were certain allegations which related to facts outside of those upon which the decree was based, i. e. facts which might be the subject of an original bill, and that there were other allegations in the bill relating to matters *in the cause*, and that these latter allegations were properly the subject of a bill of review, and not of an original bill. As to this double character of the allegations embraced in the bill the Court says:

(On page 486)

“The allegations of matters which properly may be considered on a bill of review, but which cannot be properly considered on an original bill to impeach a decree for fraud, *certainly cannot be rejected as surplusage in determining the character of the bill.*”

And the Court held accordingly that the inclusion in the bill, of allegations properly the subject of a bill of review, regardless of the presence also of allegations of another kind, determined the character of the bill and made it one of review.

A similar situation presents itself in the instant case. They allege, for example, that their solicitor fraudulently consented to the decree. This may be an extrinsic and collateral fact. But they also particularly allege that the decree did not dispose of their counterclaim, *and they are careful to allege further that the failure to dispose of the counterclaim was no part of their solicitor's fraud, and was not induced by it.* What we have, therefore, is simply a case which the Court did not complete; it did not dispose of a counterclaim in the cause before it. This counterclaim, taking the complainants' allegations, is still a thing in the prior cause and related to the cause in which the

decree was made, and with reference to which the decree should have pronounced judgment. The complainants certainly cannot be heard to say that the counterclaim which has so prominent a part in their bill of complaint, was collateral and extrinsic to the cause that they seek by an original bill to reopen. Therefore, it is, we respectfully submit, that without anything else, the complainants' bill is clearly of the character of a bill of review.

POINT II.

In considering whether the complainants should be required to make a preliminary showing to the Court below before filing a bill to reopen the decree, it is important to note what complainants are required to establish before they become, in any case, entitled to the relief they ask in their present original bill. The allegations of their present bill do not even assert the facts which must exist to entitle them to the relief sought.

The cases clearly establish the law that suitors who seek the setting aside of decrees on account of fraud must first establish *prima facie* (a) that they had a meritorious defense to the prior suit, and (b) that the decree was entirely induced by the fraud independent of all other causes.

Now as to the meritorious defense. Nowhere in the present bill is it alleged that the complainants have or had a good defense in the prior suit. As stated above, they admit categorically (in paragraph 8) their complete default under the contract in suit. One of the conditions required for the allowance of a bill like the present is:

“That the complainant must have a good claim or defense which he has been prevented from presenting in the original suit.”

21 Corpus Juris, page 779.

To the same effect is the New Jersey case of *Day vs. Allaire*, 31 N. J. Eq., page 303.

As to the fraud alleged:

There is nothing presented to the Court by the complainants' bill to show that the decree was the result exclusively of the fraud alleged.

“It must appear that the decree in question had no other foundation than the fraud complained of, and that if there had been no fraud a different result would, in all probability, have been reached.”

21 Corpus Juris, page 930, citing, etc.
(Citing *Dringer v. Erie Railroad*, 42 N. J. Eq., 573.)

In the case of *Dringer vs. Erie*, *supra*, a bill was filed to obtain relief against a decree entered in the Court of Chancery. The relief was asked on the ground of fraud. The charge of the complainant being that if there had been no fraud there would have been no decree. And Vice Chancellor Van Fleet cogently sets forth the reason for requiring that the complainant in a case like the present, set forth sufficient facts to show that the fraud complained of is really and *of itself*, the cause of the condition against which he seeks relief. And if what Vice Chancellor Van Fleet says concerning the necessity for such showing is sound, then it must follow that suitors in these cases should be required to take that course which will compel them to apprise the Court in a preliminary way of the facts which they claim entitle them to the relief asked. Vice Chancellor

Van Fleet says in *Dringer vs. Erie, supra*, at pages 575-581.

“I take it to be entirely clear that unless the bill shows plainly and distinctly that *but for the frauds alleged there would have been no decree*—in other words, that the frauds alleged *produced the decree*—the complainant has no case . . . A court of equity may unquestionably annul a judgment or decree which has been obtained by fraud, but, in order to justify such an exercise of power it must be made clearly to appear that the judgment or decree has *no other foundation than fraud*; in other words, it must be made to appear that *if there had been no fraud there would have been no judgment or decree*. An attempt to exercise a wider or more liberal jurisdiction, in cases of this class, would, it will be perceived, necessarily enlarge the jurisdiction of courts of equity, so as to make them, practically, courts for the review of judicial acts of other tribunals, and not tribunals with just sufficient power to redress frauds by undoing what fraud has been done. . . . A simple statement of the ground upon which jurisdiction in such cases rests shows that, unless the decree assailed is shown to be the *sole and direct product of the fraud charged*, this court has no authority whatever either to annul or change it, for its jurisdiction is unalterably limited to the simple undoing of what fraud has done. It is, therefore, clear that if this decree has any other foundation than the fraud here charged, this court even if convinced that the decree is unjust according to the real right of the case, cannot disturb it.”

The charge of fraud in the bill has all the appearance of the arbitrary and gratuitous; nothing else. There is not so much as the suggestion of a single circumstance which gives the charge the least color of probability. We would not have

the court overlook that. But we discuss the question of fraud under this point along with that of the preliminary showing of a meritorious defense, in order to present the clear requirements of our law for a suit or proceeding brought to open a decree; and to point out that by the filing of an original bill the complainants avoid a compliance with these requirements, and that therefore the filing of such a bill in a case like this should not be countenanced.

POINT III.

The procedure for which the complainants contend in a case like the present has never been adopted or countenanced in New Jersey. We can find no case in which an original bill was employed in a suit to open a decree in a former cause, and as between the same parties. On the other hand the counsel and reasoning of our courts against such procedure has now long been sanctioned.

The procedure that the complainants would follow in the present case has been viewed again and again with emphatic disapproval by our courts. What seems to be a leading case on the subject in this jurisdiction is that of *Kearns vs. Kearns, supra*. And the opinion of Vice Chancellor Stevenson partakes of the nature of a treatise on the general philosophy of new causes to set aside decrees in former ones and the related question of the Court's control over its own decrees.

We quote from Vice Chancellor Stevenson's opinion in the Kearns case, at page 483:

“In the present case there seems to be three charges of fraud contained in the bill.

Two of these charges, which may be considered together, are in effect that the defendant in his original suit falsely represented that he had been a resident of New Jersey for two years, when in fact he was a resident of New York, and that the defendant also falsely alleged that the complainant had deserted him, whereas in fact the defendant had deserted the complainant by driving her away from their place of abode. These charges of fraud, it must be conceded, are not distinctly made. The bill does not allege that the complainant was sworn in the cause and falsely testified to these things. *A close examination of this bill illustrates the propriety of the rule which requires the party desiring to file a bill of review to submit his case to the court on petition and obtain an order permitting the bill to be filed, which order is to a large extent within the discretion of the court, and is based upon the finding of the court that a meritorious case for a rehearing has been made out prima facie.*"

The vagueness of the charges made in the case before Vice Chancellor Stevenson is certainly not more striking than the like quality in the charges here. And if the former case "illustrates the propriety of the rule" referred to by the Vice Chancellor, certainly the present case is a parallel.

And again the Vice Chancellor observes:

"Of course, upon applications by petition, the court can exercise the same discretion as upon applications to file a bill of review, and in the same way recognize and protect all new interests. Where the party aggrieved by a fraudulent or unjust decree is able to obtain full relief upon a petition for the vacation of the enrollment and the opening of the decree, it seems to me that in many if not all cases, an application for leave to file a bill of review ought to be denied. *If this bill should be regarded as an original bill to im-*

peach a decree for fraud, the court would lose this wholesome control over the case.

In my opinion, the application by petition in the cause to vacate the enrollment and open the decree is to be encouraged, if not exclusively prescribed in all cases where such procedure will accomplish justice. I am also of opinion that the bill of review is to be preferred to the original bill, filed as of right without leave, and this last-named bill should be left to that comparatively small class of cases, perhaps not as yet fully defined, in which the remedy by an application in the cause for a rehearing or a new trial and the remedy by a bill of review are inapplicable or inadequate."

Can there be any doubt that the present case does not come within that

"comparatively small class of cases * * * in which the remedy by an application in the cause for a rehearing or a new trial and the remedy by a bill of review are inapplicable or inadequate?"

If the complainants could have presented to the Court a *prima facie* case of the fraud of their solicitors, and of the other things necessary to establish their right to the relief they seek, the way was open for them. There is nothing in the case that justifies their immediate recourse to the one form of procedure that Vice Chancellor Stevenson deprecates and which he would allow only in that as-yet-not-fully-defined extremity to which he refers.

In the same opinion Vice Chancellor Stevenson refers to the procedure for which we contend, as the "present policy of the law." And he considers the virtues of that policy:

"In the case of judgments and decrees of our own courts the *present policy of the law*,

in accordance with considerations of simplicity, cheapness and common sense, should be, I think, to require the party alleging that the judgment or decree is tainted by fraud to seek his remedy in the action at law or suit in equity *in which the judgment or decree was rendered*, when that remedy is adequate, *rather than to commence an independent, original and expensive suit in this court.*"

If suitors are to be permitted, as a matter of course, to file original bills and to institute new suits looking toward the opening of prior decrees, then it may well be that upon the hearing of such original bills there is nothing for the Court to determine except that there is not fraud sufficient, or of the character to justify the opening of the decree, or that notwithstanding fraud, the suitor was without meritorious defense to the bill in the original suit. And all this after the complainant in the former suit has been subjected to the delay and the expense and burden of new litigation.

In *Emery vs. Downing*, 13 N. J. Eq., 59, a decree *pro confesso* was entered for default in the filing of answer within time. At the expiration of time the defendant obtained an order extending the period for the filing of his answer. Notice of this, however, was not given to the complainant. Complainant in the meantime proceeded to execute decree, and the defendant after filing an answer moved to open the decree, and to be permitted to answer. The decree was opened but the Court held that on examination of the answer it was apparent that it contained no valid ground of defense, therefore the motion to set aside the decree was denied.

In *Boyer vs. Boyer*, 77 Equity, 144, the court held:

“Where an application to open a final decree is made before the period for appeal has expired, the modern practice is to apply by petition and order to show cause, and not by bill of review; but, after the period for appeal has expired, or after an appeal has been taken and has been affirmed, the chancery court cannot entertain a petition to open the decree, which can be challenged only by a bill of review.”

So that under the holding of the Boyer case it is apparent that the Court does not even consider the filing of an original bill as matter of right for the opening of a former decree.

The decree in the present case was entered September 28th, 1925. The bill to review was filed July 6th, 1926, approximately two and a half months short of one year.

In *Boyer vs. Boyer, supra*, the Court says, at page 145, relative to the proceeding by petition and order to show cause, that such “procedure simplifies the practice and procures an early determination.” And it quotes with approval the opinion as expressed in *Kearns vs. Kearns*, 70 N. J. Eq., 484, that such practice “*should be encouraged if not exclusively prescribed.*” And it cites a number of cases in this state wherein that view is sanctioned.

While the case of *Ostrum vs. Ferris*, 134 Atlantic, 305, is not cited in the brief of our adversaries, it should be called to the Court’s attention so that the obvious point of distinction between that case and the line of authorities, otherwise cited and referred to under this head, may be indicated. In *Ostrum vs. Ferris*, the bill was filed as an original bill to set aside a decree for fraud in its procurement. Vice Chancellor Backes held that it was properly filed as an original bill, and that the

fraud alleged was *extrinsic and collateral to matter on which the decree rests*. The Vice Chancellor especially points out the circumstance that in the cause before him a third party—a stranger to the former suit—had acquired an interest and that permission to file the bill was not necessary. Upon a reading of the case the conclusion cannot be avoided that the intervening interest of the third party is the real basis of the Court's determination that the bill was properly filed without leave. At any rate, that circumstance is a real and vital point of distinction between *Ostrum vs. Ferris*, and the otherwise consistent line of authorities on the point in this jurisdiction. To this line of authority Vice Chancellor Backes has himself made contribution. This was in the case of *Jones vs. Jones*, 82 N. J. Eq., 588. In the latter case the Vice Chancellor adhered to what he styles the "modern practice of proceeding by petition". And he goes so far as to expressly repudiate even the bill of review which he describes as "ancient, cumbersome and expensive."

In the present case not only is the course selected by complainants without authority, but it was altogether unnecessary. There is no excuse whatever for their not having petitioned in the cause for the opening of the decree, setting forth all the facts and circumstances upon which that opening was asked. Or, at the very least, complainants should have petitioned the Court for leave to file a bill of review. In either of these events the Court could, in the first instance, have investigated the facts set forth as the case for the opening of the decree, thus determining the complainants' standing without further delay or expensive litigation, and not allowing a bill of review without the prior *prima facie* establishment by the complainants of the facts entitling them to such a bill. Between such procedure and

that simply of filing an original bill, it is needless to say, there are distinctions of vital consequence. By no means is it matter merely of formality. For example, on a petition by the complainants either for the opening of the decree or for leave to file a bill of review, the Court would be afforded an opportunity to inquire into the merits of the defense to the original suit. And likewise the present defendants would have been afforded an opportunity to be heard on their side, with the result that the delay and protracted uncertainty as to the binding force of the former decree would not be rendered possible by the sham, pretentious or futile allegations contained in unverified pleadings filed in an entirely new suit. In other words, to use the language of Vice Chancellor Stevenson in the Kearns case, *supra*, the Court would not be deprived of its "*wholesome control over the case.*"

This preliminary inquiry, for which we here contend, could be accomplished, in large part, by nothing more than an examination of the facts accompanying the petition. And if the petition and affidavits did not set forth more than the present complaint does, we submit that the Court would have been justified in promptly denying the complainants' petition. But the hazard which the law, by its requirement of proof, imposes on the complainants, has all been avoided by them in the simple filing of what they deem an original bill and the institution of a new litigation. It is this consideration that renders pertinent to the present argument, what the Courts of this State have said in the cases above cited relative to the use of an original bill in seeking the reopening of decrees.

POINT IV.

The present suit is in effect a new cause brought to complete an old one. The former decree did not dispose of the complainants' counterclaim in that suit. This omission they allege, was in no way the result of fraud or wrongdoing. The fact that the present bill prays for a determination on the counterclaim in the former suit conclusively shows that the relief which the complainants ask by original bill should properly be the subject of a proceeding in the former cause.

The real grievance on the part of the present complainants seems to be that their counterclaim was not disposed of. So far as the making of the decree granting the affirmative relief prayed for by the complainants in the prior suit is concerned, it is clear from all that appears in the pleadings that the present complainants have no real grievance. This would seem to be conclusive from the fact that in their answer in the prior suit *they admit their default under the contract*. (Case, page 33, line 29.) And in the complaint filed to set aside the former decree *they affirmatively allege their default in paragraph 8*. (Case, page 4.) This admission is made without any extenuation whatever, nor does the bill set up or suggest that the complainants have a good defense on the merits to the complainants' bill in the prior cause. These plenary admissions leave open only the question as to the disposition of the complainants' counterclaim in the prior cause. And as to that they allege in their present bill (in paragraph 13) that Maley, the solicitor:

“Did not consent to the dismissal of this complainant's counterclaim in this action and

the said counterclaim is *still pending and undetermined in this Court and has never been dismissed*, and the said decree was fraudulently consented to as aforesaid and *did not in any way dispose of or destroy* the said answer and counterclaim." etc.

From this it clearly appears that if the complainants' allegations are to be taken on their face, the prior cause was never completely adjudicated as between the parties. And, what is more, that such failure to accomplish a complete adjudication was not in any sense the result of wrongdoing. We respectfully submit that this state of affairs admits of no argument of the proposition that what the complainants should be required to do is to institute a proceeding in the prior cause, bringing to the Court's notice the failure to adjudge the case entirely, and at the same time presenting such facts as would warrant the Court in opening the decree for the purpose of incorporating therein its judgment on the counterclaim. The institution of a new suit for the purpose of concluding an old one is unheard of.

In addition to all that has thus far been said under this heading concerning the counterclaim, it should be noted too, that the counterclaim itself is of such a nature as to particularly require that any attempt now to seek relief under it be made in the cause and not in an independent suit. The counterclaim is for the return of the stock. In their pleadings in the former suit the present defendants tendered the return of the stock, and gave for the non-return of the stock what fairly appears to be a valid and sufficient reason (Case page 38, line 1-15, etc.)

The part that this stock as collateral plays in the contract, and the respective rights of the parties thereto, are clearly defined in the contract.

And the contract is expressly admitted in its entirety by the present complainants. (Paragraph 1 of the Answer, page 33 of the Case.) The contract provides:

“It is expressly agreed however that in the event of any default on the part of the purchaser any sums paid on account of said purchase price shall not be deemed forfeited but the purchaser shall have an equity in the property to the extent of the payments made on account of said purchase price, subject to the right of the sellers to collect the unpaid balance of purchase price, until the sellers shall by proper action or suit foreclose the contract for the amount of the unpaid purchase price; and the sellers shall have a lien on said property for the amount of the unpaid purchase price only and any surplus of the proceeds of the sale of the premises over and above what is sufficient to pay said unpaid balance of purchase price and interest and legal costs and fees shall be the property of the purchaser.

Recourse shall not be had by the sellers to the security aforesaid consisting of stock of the New York-Mexican Oil Co. *until after the conclusion of any action or suit foreclosing the interest of the purchaser in said property and determination that the purchaser is liable for a deficiency.*”

In view of the unequivocal admissions of default by the complainants the counterclaims would seem to contain whatever there is of importance in the complainants' alleged grievance. And as to this counterclaim the point we would make is that in it they allege no fact which under the contract could possibly have established any right in the complainants *at the time of the former suit*. The complainants expressly separate their counterclaim from any question of fraud and since the

counterclaim, as we have stated, is the only element of their cause which might seem to require decision, their bill, it can properly be said, is based not on fraud or facts extrinsic to the decree but deals with facts in the cause and relating to the issues between the parties under their contract.

We have not considered in this brief the allegations of the bill relating to the charge that the solicitor Maley failed to attend the Sheriff's sale, etc. We need not say that if there was any default on the part of the solicitor in this regard, that could not possibly affect the decree previously made. What the solicitor could or should have done at the Sheriff's sale, or what he was expected to do, nowhere appears. Therefore, we confine ourselves to the simple charge that the solicitor wrongfully consented to the decree and to the averments relating to the Court's failure to dispose of the counterclaim.

The order of the Chancellor striking out the Complainant's Bill should be affirmed.

Respectfully submitted,

PERKINS & DREWEN,
Solicitors for and of Counsel
with Defendants-Respondents.





