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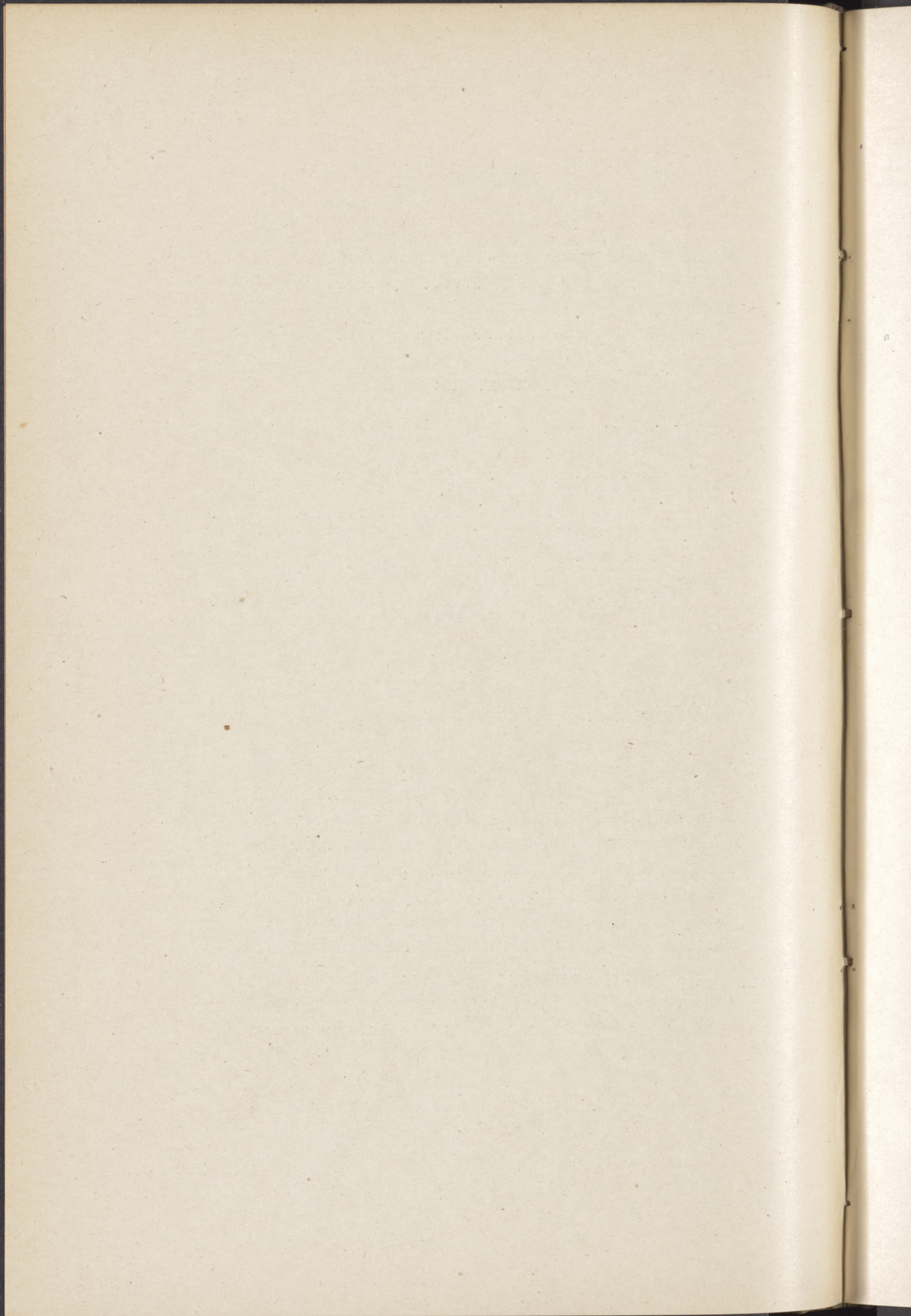
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New Jersey Court of Errors and Appeals

Petition of Appeal

Between
ROBERT A. ROCKHILL,
Complainant,
and
MARY E. HERR, her heirs, dev-
isees and her personal repre-
sentatives, *et als.*,
Defendants.

20

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

The humble petition of Ida M. Backer, Martin R. Herr, H. Burdett Herr, Mary A. Dalley, Sarah E. Herr, Alberta Stiles and Lizzie E. Swackhammer, appellants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by His Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date on the 13th day of February, 1918 wherein the said Robert A. Rockhill was complainant and the said Ida M. Backer, Martin R. Herr, H. Burdett Herr, Mary A. Dalley, Sarah E. Herr, Alberta Stiles and Lizzie E. Swackhammer were defendants in this respect, to wit: "A certain mortgage made

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Petition of Appeal

and delivered by Martin R. Herr to Mary E. Herr and Ida M. Backer for \$1500. dated March 31, 1909 and recorded in the Office of the Registrar of Camden County in Book of Deeds 113, page 370 should be cancelled and removed as a lien upon
10 the land and premises granted and conveyed to the complainant by Martin R. Herr and described in the complainant's bill of complaint, upon the ground that the same is erroneous for that said mortgage was not a lien on said premises prior to the deed of said Robert A. Rockhill at the time it was recorded and from so much of said decree as adjudged and ordered that the defendants, Ida M. Backer and the heirs and personal representatives of Mary E. Herr do pay the costs of this
20 suit to be taxed on the ground that the same is erroneous because the heirs of Mary E. Herr, deceased, had no power to release said mortgaged premises from the lien of said mortgage and there is no evidence in the cause to show that they have been at fault in any way or manner."

It appears by the depositions taken in this case upon which the decree is founded that the complainant knew at the time his deed was delivered that the mortgage included the same lots conveyed
30 to him and that it was agreed that the mortgage of complainant should be first recorded and that that was the understanding of all the parties to the transaction and the mistake, if there was one, was on the part of Mr. Tyler, counsel for complainant, his stenographer or the Registrar of Deeds for Camden County.

Your petitioners therefore pray that the said
40 decree or orders of the said Chancellor may be, in the particulars aforesaid, reversed, set aside

Amended Bill For Relief

and for nothing holden and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

H. B. HERR.

Solicitor of Counsel with Appellants.

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Amended Bill For Relief

(Filed Feb. 27, 1917)

IN CHANCERY OF NEW JERSEY

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

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The complainant, Robert A. Rockhill, of Woodlynne, Camden County, New Jersey, respectfully shows that:

1. On March 11, 1909, Martin R. Herr, single man, made, executed and delivered to complainant a deed of conveyance in fee simple, for the following described premises:

All that certain lot of land in the City and County of Camden, and State of New Jersey, known as lot No. 47 in Block 1614, bounded and described as follows;

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Beginning at a point in the Westerly line of Thirty-second Street at the distance of eighty feet nine and three-eighth inches Southwardly from the Southerly line of Fremont Street and extending thence Southwardly along the Westerly line of Thirty-second Street forty feet in front; and extending thence Westwardly at right angles to Thirty-second Street and between parallel lines of that width one hundred feet in depth.

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Amended Bill For Relief

SECOND: All that tract of land in the City and County of Camden, and State of New Jersey, known as lot No. 32 in Block 1615, bounded and described as follows:

Beginning at a point in the Westerly line of
 10 Thirty-third Street four hundred and twenty-seven feet Southwardly from the Southerly line of Freemont Street; and extending thence Southwardly forty feet in front; and extending thence Westwardly at right angles to Thirty-third Street and between parallel lines of that width one hundred feet in depth.

Being the same premises of which William F. Herr died *siezed* and by his last will and testament duly recorded in the office of the Surrogate
 20 of Camden County devised to his wife, Catherine A. Herr, in fee, and the said Catherine A. Herr by the last will and testament duly recorded in the Office of the Surrogate of Camden County devised the same unto her son, Martin R. Herr, in fee, who also is the only heir at law of the said Catherine A. Herr, which said deed was recorded in the office of the Register of Deeds of Camden County, March 31, 1909, at 10:30 a. m. in book 335 of Deeds, page 526, &c.

30 2. On March 30, 1909 (19 days later,) the said Martin R. Herr, single man, made, executed and delivered a mortgage to Mary E. Herr and Ida M. Backer for \$1500.00, upon the above described premises, together with other land, which said mortgage was offered for record in the office of the Register of Deeds of Camden County at the time
 40 of the presentation of complainant's deed for record, and was received and recorded upon the same date and at the same hour as complainant's deed.

Amended Bill For Relief

3. At the time of the execution and delivery of the deed of conveyance to complainant for said premises it was expressly represented to complainant by said Martin R. Herr that said premises were to be free and clear of all encumbrance.

4. At the time of the execution, delivery and record of the mortgage aforesaid, the said Mary E. Herr and Ida M. Backer were informed of the conveyance of the above described premises to complainant, and well knew that said deed was to be free and clear of all encumbrance. 10

5. At the time of the execution, delivery and record of the mortgage aforesaid the mortgagor and mortgagees therein named agreed that said mortgage was to bind other property of the mortgagor which had not been previously conveyed to complainant, but, by mistake of the parties aforesaid, said mortgage included not only the remaining land of said mortgagor, but also the land which he had previously conveyed to complainant, described as aforesaid. 20

6. At the time of the execution and delivery of the mortgage aforesaid it was discovered that said mortgage included the land of complainant whereupon it was agreed between the mortgagees therein and complainant that said mortgage was to be held off the record in the Register of Deeds office until after the recording of the deed to complainant, but, by mistake of the parties said mortgage was concurrently recorded with the deed to complainant, thereby imposing a lien upon complainant's said property. Upon discovering said mistake said mortgagees agreed with complainant to release complainant's land from the lien of 30 40

Amended Bill For Relief

said mortgage, which they promised to do, but which they have wholly failed and neglected to do, and do still neglect and refuse so to do.

7. Mary E. Herr, one of the mortgagees in said mortgage mentioned, departed this life,
 10 intestate, leaving her surviving, so far as complainant upon diligent search and inquiry has been able to learn, the following persons: Ida M. Backer, Flemington, N. J.; H. Burdett Herr, Flemington N. J.; Martin R. Herr, 22 N. Carolina Ave. Atlantic City, N. J.; A. Stehman Herr, Plainfield, N. J., Katherine E. Herr, Plainfield.

And various other persons, whose names and addresses, complainant has been unable to learn after diligent search and inquiry.

20 Complainant is without adequate remedy in the Courts of law, and therefore prays:

1. That said Mary E. Herr, her heirs, devisees, and personal representatives, Ida M. Backer, H. Burdett Herr, Martin R. Herr, A. Stehman Herr, Katherine E. Herr, who are the defendants to this suit, may answer this bill of complaint without oath, and each statement therein made.

2. That the defendants may be decreed to execute and deliver to complainant a release of the
 30 lands of complainant included in their said mortgage, or, in lieu thereof, that a decree may be made ordering, adjudging and decreeing that said land of complainant shall be freed and discharged from the lien of defendants' said mortgage, and for such other and further relief in the premises as may be equitable and just.

40 3. That a writ of subpoena may issue, command-

Amended Bill For Relief

ing said defendants to answer this bill of complaint, and to abide by such decree as this court may make in the premises.

JOSEPH BECK TYLER.

Solicitor for and of Counsel with complainant.

State of New Jersey }
County of Camden } ss:

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David R. Rose, being duly sworn according to law on his oath says:

I am actually entrusted with the care and management of this cause in behalf of complainant.

I have examined the title to the premises above described, and find that the deed and mortgage above referred to were recorded concurrently.

20

I have made diligent search and inquiry for the addresses of Mary E. Herr and Ida M. Backer, and I have been informed that Mary E. Herr died about a year ago in Union County, New Jersey, intestate, and that no letters of administration have ever been granted upon her estate.

I have also made diligent search and inquiry for the names and addresses of the heirs, devisees, and personal representatives of said Mary E. Herr, and have been informed that she died intestate, leaving the following persons surviving her:

30

Ida M. Backer, Flemington, N. J.

H. Burdett Herr, Flemington, N. J.

Martin R. Herr, 22 N. Carolina Av. Atlantic City,
N. J.

A. Stehman Herr, Plainfield, N. J.

Katherine E. Herr, Plainfield, N. J.

I have also been informed that various other 40

Decree Pro Confesso and Order for Proofs

Herr, H. Burdett Herr, and Martin R. Herr, four of the defendants in the above entitled cause, and due notice of the order of this Court made on the second day of May, 1917, directing the defendants, Mary E. Herr, her heirs, devisees and personal representatives, to appear, plead, answer or demur to the complainant's bill on or before the third day of July, then next, has been duly published, unsuccessful inquiry having been made for the residence of said defendants, in the manner and as in the said order directed and prescribed, and that the said defendants have not nor have any or either of them, appeared, answered or demurred to the said bill within the time limited by law, or any other time, but that they have wholly failed and neglected so to do.

It is thereupon on this 19th day of July in the year of our Lord, nineteen hundred and seventeen, on motion of Joseph Beck Tyler, solicitor for complainant, ordered and decreed that the complainant's bill be and the same is hereby taken as confessed against the said defendants, Ida M. Backer, Katherine E. Herr, H. Burdett Herr, Martin R. Herr, four of the defendants in the above entitled cause, and against Mary E. Herr, her heirs devisees and personal representatives, and that the complainant proceed to take depositions and other evidence to substantiate and prove the allegations of the bill of complaint, and to bring on the hearing of the cause *ex parte*.

E. R. WALKER, C.

Respectfully advised
Bayard Stockton, A. M.

Depositions*(Filed Feb. 13, 1918)*

IN CHANCERY OF NEW JERSEY

10	Between ROBERT A. ROCKHILL, <div style="text-align: right;">Complainant,</div> <div style="text-align: center;">and</div> MARY E. HERR, her devisees, heirs and personal representa- tives, and others, <div style="text-align: right;">Defendants.</div>	}	On Bill, &c.
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20 The following depositions were taken before me, a Master in Chancery of New Jersey, on Thursday, February 7th, 1918, in pursuance of an order for proofs made in the above cause, dated January 30th, 1918.

The said depositions were taken stenographically by Imogene I. Nichols, a stenographer selected by me, who prior to the taking thereof was sworn by me faithfully to take stenographically and reproduce in manuscript or typewriting the
 30 testimony given and I certify that said depositions were taken in my immediate presence and hearing by the said stenographer, and I believe that they accurately state the evidence given.

D. TRUEMAN STACKHOUSE.

Master in Chancery of New Jersey.

40 JOSEPH BECK TYLER, alleging himself conscientiously scrupulous of taking an oath, and being duly affirmed says:

Joseph Beck Tyler—Direct

I am the solicitor for the complainant, Robert A. Rockhill, in the present proceeding, and also I was the solicitor for Mr. Rockhill in March 1909 when he purchased from Martin R. Herr the lots described in the bill of complaint. I attended to the conveyance of these lots for him and prepared the deed. This deed was prepared and dated March 11th, 1909. Settlement was not made at that time but was made on March 31st, 1909. At the time the settlement was made, at the request of the Honorable H. B. Herr of Flemington, New Jersey, who was present at the settlement, I prepared a mortgage from Martin R. Herr to Mary E. Herr and Ida M. Backer. This mortgage is dated March 30, 1909 and recorded March 31st, 1909. It is for \$1500. Both the deed and mortgage are shown upon West Jersey Title and Guaranty Company search #26256, which is offered in evidence.

Said search is marked Exhibit C-1 on the part of the complainant.

The deed to Mr. Rockhill covers two lots in East Camden, 40 feet front by 100 feet deep. One of these lots is on Thirty-second Street and the other is on Thirty-third Street, Camden, New Jersey. The mortgage to Mary E. Herr and Ida B. Backer covers a property at the Southwest corner of Thirty-fourth Street and Central Avenue. This is an improved property.

At the time this mortgage was prepared it was not the intention of Martin R. Herr or of H. B. Herr, representing Mary E. Herr and Ida M. Backer that it should cover the two lots which were then being conveyed to the complainant, Robert A. Rockhill. There was some question as

Joseph Beck Tyler—Direct

to just what the descriptions did cover at the time the mortgage was prepared and it was decided by myself, representing Mr. Rockhill, and by H. B. Herr, representing the mortgagees, that the proper thing to do would be to let the mortgage stand as prepared, but to have the deed recorded first
10 in point of time, so that the deed from Martin R. Herr to Robert A. Rockhill should be a prior conveyance and then if the mortgage did happen to cover any of the property referred to in the deed, it would not affect the conveyance to Mr. Rockhill. It was understood and expressly agreed between the parties that the conveyance to Mr. Rockhill was to be free and clear of any lien or encumbrance by reason of the mortgage.

20 In pursuance of this, I sent my stenographer with the two papers to the office of the Register of Deeds of Camden County, New Jersey, with instructions to record the deed first in point of time and supposed that that had been done. It was not until several months later, when Mr. Rockhill came to me again to convey the lots that it was discovered that the deed and mortgage had been recorded at exactly the same time.

The above deed is marked Exhibit C-2 on
30 the part of the complainant.

Later, and on or about June 16th, 1909, Martin R. Herr conveyed the property at Thirty-fourth and Central Avenue, which is covered by the \$1500 mortgage to Mary E. Herr and Ida M. Backer, to Edith A. Keeley and I attended to that settlement. I represented the purchaser, Edith A. Keeley and the property was sold by Martin R. Herr and purchased by Edith A. Keeley, subject
40 to the \$1500 mortgage which both parties assumed

Joseph Beck Tyler—Direct

to be a lien for the full amount, upon the property then being conveyed and was so treated by me in the settlement. The said purchaser afterwards conveyed it to Martha E. Brower, who has since died, and the heirs of Martha E. Brower have been paying interest on the full amount of this mortgage. 10

After it was discovered that this mortgage covered the lots conveyed to Mr. Rockhill, I took the matter up personally on several occasions with Honorable H. B. Herr who represented the mortgagees, with the idea of having a release executed by the mortgagees. This Mr. Herr agreed to do but informed me that a difficulty had arisen because Mary E. Herr had since died and no letters of administration had been taken out on her estate. He promised me that he would have this attended to so that a release could be executed, but the matter has been delayed from time to time and he has never had it done. In fact, I agreed to pay the cost of taking out letters of administration to facilitate the matter and obtain the release, and on May 13th, 1915, he wrote me as follows: 20

“Our term of court has just been finished and I have tried my last case, I hope, until fall comes. I have been exceedingly busy all Spring and could not attend to that matter of administration. I will try and do so as soon as I am free. I have a Chancery suit to argue a week from next Tuesday which will require all my spare time to get ready. After that is over, I think I can take up the matter. I haven't used your check yet and will not until I use it for the purpose for which it was sent. I think it will be in about 30 40

Joseph Beck Tyler—Direct

two weeks I can take up the matter without serious inconvenience to my other business.”

Above letter is offered in evidence and marked Exhibit C-3 on the part of the complainant.

10

The matter of getting a release was pending for nearly two years and I then filed a bill in the proceedings and again wrote Mr. Herr about the matter and received the following letter in reply.

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“Ida M. Backer is a sister of mine and lives in the State of New Jersey. You need not make her a party to your bill as I will get her release if the mortgage has been paid, without any difficulty. Mary E. Herr is the mother of Ida M. Backer and also my mother. There are a number of heirs and to make them all parties would be quite expensive.

30

We have neglected to take out letters of administration for quite sometime as you well know. I suppose I am principally at fault because they were all anxious that I should administer and I have been very much averse to doing so. However, I will take the appointment myself or have a trust company administer so that you will be saved all cost and bother in the matter.”

The above letter is offered in evidence and marked Exhibit C-4 on the part of the complainant.

Mr. David R. Rose, who is connected with my office attended to making inquiries as to the present owners of all the property covered by the mort-

40 gage.

Robert A. Rockhill—Direct

Affirmed before me this 7th day of February,
1918.

D. TRUEMAN STACKHOUSE.
Master in Chancery of New Jersey.

10

ROBERT A. ROCKHILL, of full age, being
duly sworn according to law, on his oath says:

I am the complainant in this proceeding and
the person named as grantee in the deed which
has been offered in evidence as Exhibit C-2.

The settlement for this property was made
in the office of Joseph Beck Tyler, #522 Mar-
ket Street, Camden, New Jersey, on March 31st,
1909. There was present at the settlement, the
grantor, Martin R. Herr, Honorable H. B. Herr,
representing Ida M. Backer and Mary E. Herr,
Joseph Beck Tyler and myself. 20

The deed to me covered two vacant lots in
East Camden, one on Thirty-second Street and
one on Thirty-third Street and it was understood
and agreed that the deed to me conveyed these
lots, clear of encumbrance. It appeared at the
settlement that Martin R. Herr had given a
blanket mortgage for \$1,500 to Mary E. Herr
and Ida M. Backer, which covered a property in
Woodlynne, the two lots then being conveyed to
me, and a property at Thirty-fourth Street and
Central Avenue, Camden, New Jersey. I had
previously bought from Mr. Herr the Woodlynne
property and Mr. H. B. Herr came to the set-
tlement for the purpose of looking after the new
mortgage and having the old mortgage cancel-
led and a new mortgage placed upon the prop- 40

Robert A. Rockhill—Direct

erty still owned by Martin R. Herr. That was the Thirty-fourth and Central Avenue property. It was the intention that the new mortgage should cover the property still held by Martin R. Herr, but was not to cover the property which
10 had been or was being conveyed to me and in drawing the new mortgage the Woodlynne property was left out but by mistake the lots being conveyed to me were included. Just as we were about to make settlement and I was examining the papers I discovered that the lots being conveyed to me were included in the mortgage. I called this to the attention of Mr. Tyler and Judge Herr. Mr. Tyler immediately directed the stenographer to prepare a new mortgage and
20 leave out these lots, but Judge Herr said that he was in a hurry to get away and that the matter could be taken care of by recording the deed first and if any question should come up later and it was found that the mortgage covered my lots, then he would get a release of mortgage. It was expressly agreed that the deed for the lots to me were to be clear of encumbrance and that the mortgage would be recorded afterwards so that it should not be an encumbrance or lien upon the lots being conveyed to me.

30 In pursuance of this Mr. Tyler handed the papers to his stenographer and directed her to have them recorded and gave her instructions to have the deed recorded first in point of time and the mortgage afterwards. I supposed this had been done until about seven months later I undertook to convey the lots and the purchaser obtained a title search showing that the deed
40 and the mortgage had been recorded at the same

David R. Rose—Direct

time and were concurrent liens upon the property. I then put the matter in the hands of Mr. Tyler again to obtain the release of mortgage, which matter has been pending since that time, and I finally directed that a bill be filed in this suit.

10

Sworn before me this
7th day of February, 1918,
D. Trueman Stackhouse,
Master in Chancery of New Jersey.

DAVID R. ROSE, of full age, being duly sworn according to law, on his oath says:

I am associated with Mr. Tyler in the practice of law. I have the actual management of this case. I have examined the title to the premises covered by the search of the West Jersey Title and Guaranty Company marked Exhibit C-1 in this case.

20

I find of record in the office of the Register of Deeds of Camden County, a deed made by Martin R. Herr, single man, to Robert A. Rockhill, item #8 on said search. I find also a mortgage for \$1,500 made by Martin R. Herr, single man, to Mary E. Herr and Ida M. Backer, item #9 on said search, which covers the premises conveyed to Robert A. Rockhill, together with other premises. The mortgage made by Martin R. Herr to Mary E. Herr for \$1,500, covers five tracts of land, lying and being in the City and County of Camden and are bounded and described as follows:

30

FIRST: BEGINNING at a point on the West side

40

David R. Rose—Direct

of Thirty Second Street at the distance of eighty feet Southward from the South side of Central Avenue, containing in front or breadth on the West side of said Thirty Second Street forty feet and extending in length or depth Westward
 10 between lines parallel with Clinton Avenue one hundred feet. Being lots Nos. 8 and 10, Section 2 on said survey and map.

SECOND: BEGINNING at a point on the West side of Thirty-Third Street at the distance of forty feet Northward from the North side of Clinton Avenue, containing in front or breadth on the West side of said Thirty-Third Street forty feet and extending in length or depth Westward between lines parallel with said Clinton
 20 Avenue one hundred feet. Being lots 42 and 45 Section 5 on said survey and map.

THIRD: BEGINNING at a point on the Southwest corner of Thirty-Fourth and Central Avenues; then Southward on the West side of said Thirty-Fourth Street seventy feet; thence in a line Westward one hundred feet, then in a line Northward forty-five feet to the south side of said Central Avenue; thence Eastward on the South side of said Central Avenue one hundred
 30 and five feet to the place of beginning. Being lots Nos. 2 and 4, Section 6 on said survey and map.

FOURTH: BEGINNING at a point on the Northeast corner of Thirty-Sixth Street and Highland Avenue. Containing in front or breadth eastward in the north side of said Highland Avenue forty feet extending in length or depth Northward between lines parallel with the said
 40 Thirty-Sixth Street one hundred feet, Being

David R. Rose—Direct

lots Nos. 18 and 20, Section 9 on said survey and map.

FIFTH: BEGINNING at a point on the South side of Highland Avenue twenty feet and extending in length or depth between lines parallel with said Thirty-Third Street one hundred feet. Being lot No. 15, Section 13, on said survey and map. 10

I find of record in the office of the Register of Deeds a deed made by Martin R. Herr to Edith A. Keeley dated June 16th, 1909, recorded in book 338 of deeds, page 500 conveying premises described as tract #3 in the mortgage aforesaid.

I also find a deed made by Edith A. Keeley widow, to Martha E. Brower, of Farmingdale, Monmouth County, New Jersey, dated August 12th, 1915, recorded in book 400 of deeds, page 174 etc., conveying tract #3 above described. 20

I do not find any deed or mortgage made by the said Martha E. Brower from August 12th, 1915, to the date of filing the bill of complaint and the amendment in this cause, nor did I find of record in said office any other deed or conveyance by Martin R. Herr for any of the other tracts described in said mortgage, except, of course, the deed to Robert A. Rockhill, above referred to. 30

On February 9th, 1917, I wrote a letter to H. Burdett Herr, Flemington, New Jersey; Martin R. Herr, 22 North Carolina Avenue, Atlantic City, New Jersey; Mrs. Ida M. Backer, Flemington, New Jersey, c/o H. B. Herr, attorney; A. Stehman Herr, Principal Plainfield Business College, Plainfield, New Jersey; Catherine E. Herr, 40

David R. Rose—Direct

Plainfield, New Jersey; Dougal Herr, attorney at law, Hoboken, New Jersey; Charles F. Herr, attorney at law, 772 Broad Street, Newark, New Jersey. The letter is as follows:

10 "I am filing a bill in the Court of Chancery for Robert A. Rockhill to remove a mortgage made by Martin R. Herr to Mary E. Herr and Ida M. Backer, upon premises in the city of Camden.

I am told that Mary E. Herr is deceased and that no letters of administration have ever been granted upon her estate and that you are a relative of hers.

20 I am also told that Ida M. Backer is a sister of Mary E. Herr and that Mrs. Backer lives in Pennsylvania. I would be much obliged if you would send me her post office address if you know it so that I may be able to send her a notice of this suit. I would also be obliged if you would let me know the names and addresses of the heirs or next of kin of Mary E. Herr and whether you have any interest in her estate, so that I may know whether to make you a party to the suit. Of course, if you have no interest in the matter I would appreciate it if you would drop me a line to that effect. I desire very much to obtain the names and post office addresses of all the heirs of Mary E. Herr and would esteem it a favor for such information as you have in respect of them "

30 Above letter is offered in evidence and marked Exhibit C-5 on the part of the complainant.

40

David R. Rose—Direct

I received a letter from H. B. Herr, which has been marked Exhibit C-4 in this case.

I also received from Martin R. Herr, in reply to said letter, the following letter:

“Replying to your favor of the 9th inst., I beg to state that your impression is correct relative to Mary E. Herr. She died over a year ago and was my grandmother. I have not seen any of my immediate relatives for several years, excepting an uncle living at Flemington, N. J., and, therefore, am not in a position to give you much information about the Herr family.” 10

H. B. Herr, Esq., a member of the New Jersey Bar, practicing at Flemington, N. J., has for years looked after the business affairs of the members of our family living up the State, and if you will communicate with him, I am sure he will be very glad to assist you in any way within his power.” 20

The above letter is offered in evidence and marked Exhibit C-6 on the part of the complainant.

I have also examined the directories of the City of Camden, Atlantic City and Philadelphia for the names and addresses of the heirs and devisees of Mary E. Herr but have not been able to find anything therein concerning them. 30

I have also written to the Surrogate of Union County, New Jersey, the county in which Mary E. Herr died, asking for the name and address of the executor or administrator of the said Mary E. Herr, deceased, and have been informed by him that none has been appointed. 40

David R. Rose—Direct

I have exhausted every means within my power to obtain the names and addresses of the said heirs, devisees and personal representatives of the said Mary E. Herr, deceased, and the only persons I have been able to find who have any interest in the estate of Mary E. Herr are Ida M. Backer, H. Burdett Herr, Martin R. Herr, A. Stehman Herr and Catherine E. Herr, all of whom were made parties defendant to the bill of complainant in this cause.

Sometime after the filing of the bill of complaint in this cause I was informed that Martha E. Brower the person to whom tract #3 above described was conveyed, had departed this life intestate. I learned that Mr. George P. Brower, 18 West Fordham Road, Bronx, New York, was one of the heirs. I wrote him a letter requesting him to give me the names and addresses of all the heirs, devisees and personal representatives of the said Martha E. Brower, deceased, and received from him the following letter in reply thereto:

“Your letter of the 11 inst., regarding proceedings in Court of Chancery for Mr. Rockhill received. I conferred with my brothers yesterday about the matter and I can assure you that we as administrators of our mothers’, Martha E. Brower estate, are favorably inclined to sign some sort of release to free the property of the Herr mortgage. But however we would like to have more particulars regarding the matter, such as the location of Rockhill property, etc. Does it lie in the rear of our property or does it adjoin same on the side or East? My brothers & I will

David R. Rose—Direct

be in Camden about the 28th of this month, at which time we will probably be ready to straighten out the matter. Has Mrs. Herr been notified about the proceedings? If not you may address her at #78 Sandford Avenue, Plainfield, N. J.

10

Our addresses are as follows:

Wm. I. Brower, Farmingdale, N. J.
 Charles C. Brower, 1604 Park Ave., Asbury Park, N. J., George P. Bower, 18 W. Fordham Rd., Bronx, N. Y. Should you have any communications to forward you may send same to me. You might forward the document or release we are to sign and perhaps the matter could be straightened out before we come down to Camden."

20

Above letter is offered in evidence and marked Exhibit C-7 on the part of the complainant.

Sometime later Mr. Brower called at Mr. Tyler's office in reference to the matter and informed him in my presence that he and his two brothers, William I. Brower and Charles C. Brower, were the only children and heirs at law of the said Martha E. Brower deceased, and that there were no children of any deceased children of the said Martha E. Brower, and that no letters of administration or letters testamentary had ever been granted upon her estate. At the time Mr. Brower informed Mr. Tyler that his mother had bought the premises described as tract #3 in the said mortgage to Mary E. Herr and Ida M. Backer, subject to the full amount of said mortgage and had been paying interest on the full amount of said mortgage up

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David R. Rose—Direct

to the then present time, and that he and his
brothers had conferred with each other in refer-
ence to the matter and had agreed to execute a
consent in writing to be filed in this cause, re-
moving the lien of said mortgage from the land
10 and premises of the complainant, and remis-
ing, releasing, quit-claiming and forever discharging
the land of the said Robert A. Rockhill and his
heirs from said mortgage, and I was requested
at that time to prepare a paper which would
effectuate the wishes of Mr. Brower, which I
did and sent to him at his address in the Bronx,
New York. The matter appears to have been
dropped by him without the paper being executed
and I have heard nothing further from him since
20 that time. At the time Mr. Brower was in Mr.
Tyler's office I asked him whether or not he and
his brothers were married and he informed me
that William I. Brower was married and that
his wife's name is Frances Brower, and that
they both reside in Farmingdale, New Jersey;
that Charles C. Brower is married and that his
wife's name is Catherine Brower and that they
reside at 1604 Park Avenue, Asbury Park, New
Jersey and that he, himself, George P. Brower,
30 was unmarried. All of said parties were made
defendants in the amendment to the bill of com-
plaint in this cause and decree *pro confesso* has
been entered against all of the defendants, and in
accordance with the orders of publication here-
tofore allowed in this cause, notices have been
sent to all of the heirs and devisees of the said
Mary E. Herr, and Martha E. Brower, deceased.

Sworn before me this

7th day of February, 1918,

40 D. Trueman Stackhouse,
Master in Chancery of New Jersey.

Final Decree

further appearing that the complainant is entitled to the relief prayed for by him in said bill.

It is thereupon, on this 13th day of February, nineteen hundred and eighteen, by his honor Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed that
 10 the said mortgage hereinbefore referred to be cancelled and removed as a lien upon the land and premises granted and conveyed to the complainant, above referred to, and described as follows:

All that certain lot of land in the City and County of Camden, and State of New Jersey, known as lot No. 47 in Block 1614, bounded and described as follows:

BEGINNING at a point in the Westerly line of
 20 Thirty-second Street at the distance of eight feet nine and three eighth inches Southwardly from the Southerly line of Freemont Street; and extending thence Southwardly along the Westerly line of Thirty-second Street forty feet in front; and extending thence Westwardly at right angles to Thirty-second Street and between parallel lines of that width one hundred feet in depth.

SECOND: ALL that tract of land in the City and County of Camden, and State of New Jersey, known as lot No. 32 in Block 1615, bounded and
 30 described as follows:

BEGINNING at a point in the Westerly line of
 40 Thirty-third Street four hundred and twenty-seven feet Southwardly from the Southerly line of Freemont Street; and extending thence Southwardly forty feet in front; and extending thence Westwardly at right angles to Thirty-third Street and between parallel lines of that width one hundred feet in depth.

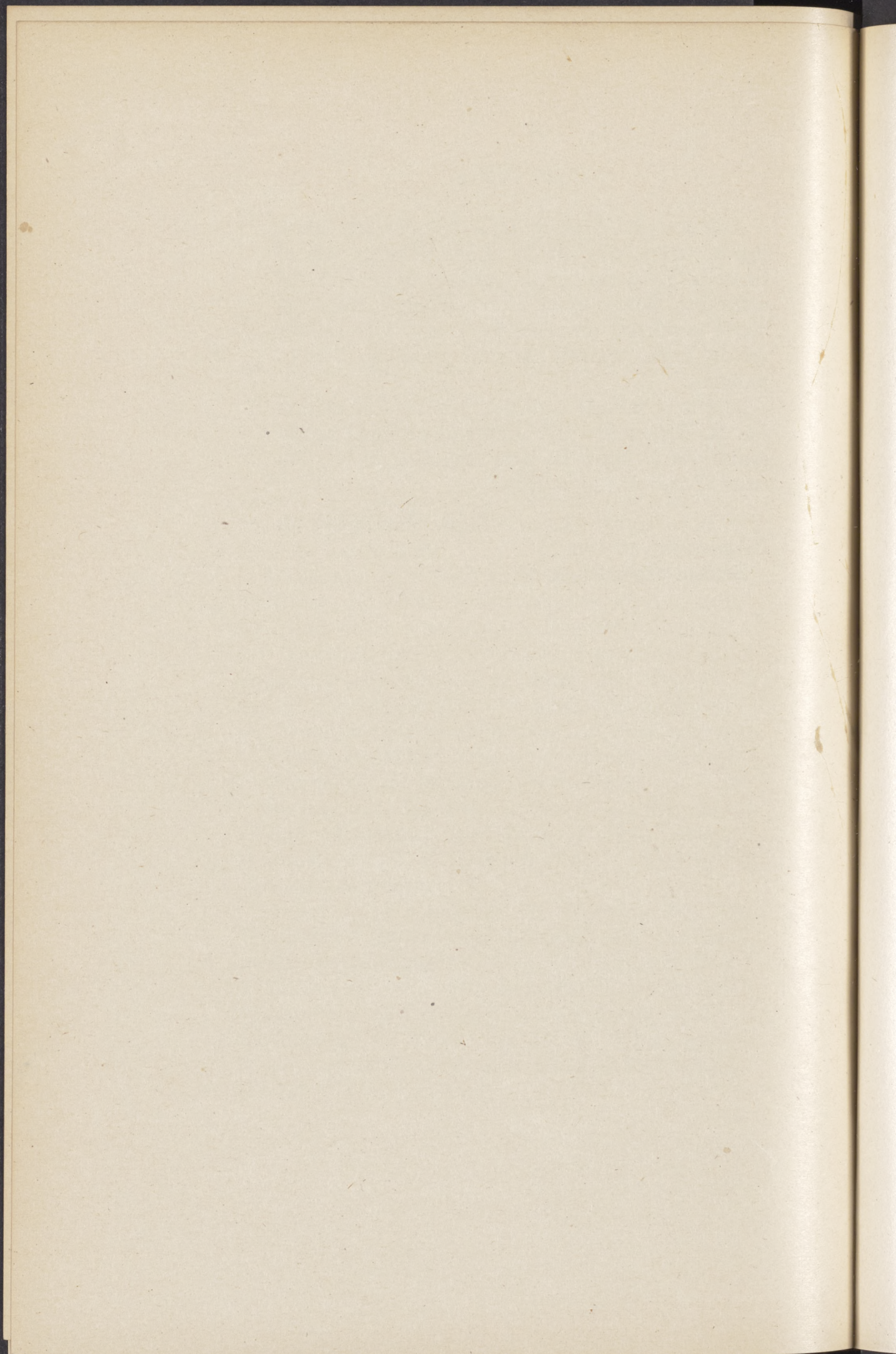
Final Decree

And that said defendants, and all persons claiming by, from, through or under them or any of them, be debarred and perpetually enjoined from collecting money upon said mortgage, from the above described premises or in any wise setting up the same against the said premises of complainant. 10

And it is further ordered, that the defendants Ida M. Backer and the heirs and personal representatives of Mary E. Herr deceased do pay the costs of this suit to be taxed.

E. R. WALKER, C.

Respectfully advised
Bayard Stockton, A. M.



Court of Chancery of New Jersey

ROBERT A. ROCKHILL,
Complainant,
Against
MARY E. HERR, THE HEIRS
AND DEVISEES OF MARY
E. HERR, DEC'D,
Defendants.

On Bill for Relief.

BRIEF FOR APPELLANT

The bill of complaint states that on March 11th, 1909, Martin R. Herr made, executed and delivered to complainant a deed of conveyance for the premises therein described. This deed was executed and delivered on the 30th day of March, 1909. On the 30th day of March, 1909, Mr. Tyler, the solicitor of the complainant drew a mortgage from Martin R. Herr to Mary E. Herr and Ida M. Backer to secure \$1,500. This mortgage covered other premises of Martin R. Herr described in the bill of complaint. The testimony showed that Mary E. Herr died in 1913 or 1914, leaving a number of heirs and no will has been probated or letters of administration

granted upon her estate. The depositions of Mr. Robert A. Rockhill and of Joseph Beck Tyler, his solicitor, show, that by agreement with H. Burdette Herr, attorney for Ida M. Backer and Mary E. Herr, the mortgagees, the Rockhill deed was to have been recorded before the mortgage, and that both deed and mortgage were left with Joseph Beck Tyler, attorney of Rockhill, to be recorded. By some inadvertence on the part of Mr. Tyler or his clerk the deed and mortgage were recorded concurrently. They discovered this about seven months afterward and now say that H. Burdette Herr agreed with them at the time of the execution of the papers that in case there was any difficulty in the matter he would get the Rockhill lots released. This was not done and on the twenty-third day of August, 1917, a bill was filed against Martin R. Herr and Ida M. Backer and others, praying that the deed in question should be first recorded. No answer was filed by the defendants. A decree pro confesso was taken and the final decree entered as appears by reference to the final decree and that the defendants, Ida M. Backer and the heirs and personal representatives of Mary E. Herr, deceased, should pay the costs of the suit.

The appellants claim, first, that there is no authority in law or equity by which the heirs-at-law of Mary E. Herr can be compelled to release said mortgaged premises from the lien of said mortgage and that they were not proper parties to the suit.

2. No one but the administrator of Mary E. Herr together with Ida M. Backer could have executed or released said mortgaged premises that would have had any effect either in law or equity.

3. No demand appears to have been made upon any of the defendants that they should individually release said premises from said mortgage.

4. Neither Martin R. Herr nor any of the other heirs of Mary E. Herr had made any contract affecting said mortgage. If any promise was made to

release said mortgage it appears to have been made through the attorney of Mary E. Herr and Ida M. Backer, the owners of the mortgage, and if made, was made without the slightest consideration so far as the testimony shows and for the accommodation of the complainant.

5. The proper course for the complainant would have been to have had an administrator appointed upon the estate of Mary E. Herr and a bill filed against him claiming relief.

6. At common law no action can be brought against an heir upon a contract made by his ancestor.

14th Cyc., p. 207, 208.

41st N. J. Law, p. 212.

The liability of an heir for the engagements of his ancestor is enforceable only at law.

Mutual Life Insurance Co. vs. Elizabeth Hopper, 16th Stewart, p. 387; id 17th Stewart, p. 604.

Edwards vs. McClave, 55th Equity, 10th Dickinson, p. 151; id p. 822.

McCarthy, et. al., vs. Mullen, 82nd Atlantic, p. 51.

As to costs. The decree charges the defendants with costs of this proceeding. A mistake, if any, was the mistake of the complainant. The defendants were innocent of any wrong doing and it was not their duty to hunt up the complainant and rectify his mistakes even if they could have done so. The deed was dated previous to the mortgage and as it stood on the record was a first lien under the statute which provides, Conveyances, Section 32, "If two or more deeds, mortgages or conveyances of or for the same lands, tenements or hereditaments or other instruments shall be offered to or come to the hands of the clerk at one and the same time to be recorded then it shall be the duty to register or record the same according to the priority of their dates."

It is true that if the deed and the mortgage were executed at the same time and there was no understanding as to which, was to be recorded first then

they would be concurrent in lien. In this case, however the understanding was that they would not be concurrent in lien but the deed would be a first lien so that if the clerk had recorded them as he was ordered to the mortgagees could have found no fault. It was the duty of the complainant to rectify his own mistake at his own charges and not at the expense of the heirs-at-law of Mary E. Herr.

I respectfully submit that this decree should be reversed.

Respectfully,

H. B. HERR,
Counsel of Appellant.



WAMER