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Dear Spring  
East

Summons.

**SUMMONS.**

Filed April 1, 1931.

The State of New Jersey to Henrietta Melchiora Casabianca, Adele  
(SEAL) Coyle and George S. Milazzo, execu- 10  
tors of the Estate of Enrico Casabi-  
anca,, deceased, You Are Summoned  
to answer the annexed complaint of Rose Dona-  
hue, in an action at law in the Essex County  
Circuit Court.

And Take Notice that unless you file your  
answer to said complaint with the Clerk of the  
Essex County Circuit Court, at Newark within  
twenty days after service upon you of this writ,  
and the annexed complaint, the plaintiff may 20  
proceed in the suit and judgment may be entered  
against you.

Witness, Nelson Y. Dungan, Judge of the said  
Court at Newark, this first day of April, Nine-  
teen Hundred and Thirty-one.

MILTON M. UNGER,  
Attorney.

JOHN H. SCOTT,  
Clerk. 30

*Amended Complaint.*

**AMENDED COMPLAINT.**

Filed May 8, 1931.

**Essex County Circuit Court**

10

ROSE DONAHUE,

*Plaintiff,*

*vs.*

HENRIETTA MELCHIORA CASABI-  
ANCA, ADELE COYLE and  
GEORGE S. MILAZZO, Execu-  
tors of Estate of Enrico  
Casabianca, deceased,

*Defendants.*

*Action  
at Law.*

20

Plaintiff, Rose Donahue, residing in the City of Newark, in the County of Essex and State of New Jersey, says that—

1. Defendants are the executors of the Last Will and Testament of Enrico Casabianca, deceased.

30

2. During his lifetime, the said Enrico Casabianca made, executed and delivered to the plaintiff three certain promissory notes dated respectively October 27th, 1930, November 19th, 1930, and November 28th, 1930, true copies of which are annexed hereto and made part hereof.

3. Said notes were not paid at maturity. There is due and owing on each of said notes the sum of \$2000 with interest from the respective dates thereof. Plaintiff is now the owner and holder thereof.

40

*Amended Complaint.*

4. No part thereof has been paid.

5. The said Enrico Casabianca is deceased.

6. The defendants, executors as aforesaid, have disallowed the claim of the plaintiff, which was duly filed with them for payment out of the assets of the testator's estate. 10

Judgment will be claimed in the sum of \$6000 with interest from the date of each note, together with costs of suit.

MILTON M. UNGER,  
Attorney of Plaintiff.

RS-4/8/31

\$2050.00 New York, Oct. 27th, 1930. 20

Three months after date I promise to pay to the order of Rose Donahue

Twenty Hundred and fifty 00/100 Dollars,  
Payable at #284 Washington Street, New York City

Value Received

No..... Due.....

E. CASABIANCA

Endorsed:

Rose Donohue, 30

G. S. Milazzo.

*Amended Complaint.*

\$2050.00 New York, November 19th, 1930  
 Three months after date I promise to pay to  
 the order of Rose Donahue  
 Twenty Hundred and fifty 00/100 Dollars,  
 Payable at #284 Washington Street, New York  
 City

10 Value Received  
 No..... Due.....

E. CASABIANCA

Endorsed:  
 Rose Donahue,  
 G. S. Milazzo.

---

\$2050.00 New York, November 28th, 1930  
 Three months after date I promise to pay to  
 20 the order of Rose Donahue  
 Twenty Hundred and fifty 00/100 Dollars,  
 Payable at #284 Washington Street, New York  
 City

Value Received  
 No..... Due.....

E. CASABIANCA

Endorsed:  
 Rose Donahue,  
 30 G. S. Milazzo.



*Answer to Amended Complaint.*

2. Section 370 of the General Business Laws of the State of New York known as Chapter 25, Laws of 1909, provides as follows:

10 “Rate of interest. The rate of interest upon the loan or forbearance of any money, goods or things, in action, except as otherwise provided by law, shall be Six Dollars upon One Hundred Dollars for one year, and at that rate for a greater or less sum, or for a longer or shorter time.”

3. Section 371 of the General Business Laws of the State of New York known as Chapter 25, Laws of 1909, provides as follows:

20 “Usury forbidden. No person or corporation shall, directly or indirectly, take or receive in money, goods, or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods of things in action, than is above prescribed.”

4. Section 373 of the General Business Laws of the State of New York known as Chapter 25, Laws of 1909, provides as follows:

30 “Usurious contracts void. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void.

40 “Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, con-

*Answer to Amended Complaint.*

veyance, contract, security or any evidence of debt, has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void and enjoin any prosecution thereon, and order the same to be surrendered and canceled."

5. The said notes sued on were given for the loan of the sum of Two Thousand (\$2,000) Dollars each for a period of three months, although the notes were made out for Two Thousand Fifty Dollars (\$2,050).

10

6. Said notes are void because plaintiff took and received on each note as interest for the loan or forbearance for the said sum of Two Thousand (\$2,000) Dollars, for the above specified period, a greater sum than Thirty (\$30.00) Dollars.

20

SECOND DEFENSE DIRECTED TO NOTE  
DATED OCTOBER 27TH, 1930.

1. Defendants repeat the allegations of the First Separate Defense and make them paragraph one of this defense.

2. Note sued on is the last renewal of successive prior notes dating back to January 27th, 1930.

30

3. Said notes were each given for the loan of the sum of Two Thousand (\$2,000) Dollars for a period of three months.

4. The loan which was the basis of this series of successive notes was made in January 27th, 1930 and was in the sum of Two Thousand (\$2,000) Dollars for a period of three months. There is attached hereto and marked as "Schedule A," a list showing the dates of the successive

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*Answer to Amended Complaint.*

notes, the amounts for which the notes were made out and the payments made on each of said notes as interest thereon.

10 5. Each of said notes of which note sued on is the last, is void because the transaction upon which it is based is in contravention of the laws above set forth because of the fact that plaintiff took and received as interest, for the loan or forbearance for the said sum of Two Thousand (\$2,000) Dollars for the above specified period, a greater sum than Thirty (\$30.00) Dollars.

THIRD DEFENSE DIRECTED TO NOTE  
DATED NOVEMBER 19, 1930.

20 1. Defendants repeat the allegations of the First Separate Defense and make them paragraph one of this defense.

2. Note sued on is the last renewal of successive prior notes dating back to November 18, 1929.

3. Said notes were each given for the loan of the sum of Two Thousand (\$2,000) Dollars for a period of three months.

30 4. The loan which was the basis of this series of successive notes was made in November 18, 1929 and was in the sum of Two Thousand (\$2,000) Dollars for a period of three months. There is attached hereto and marked as "Schedule "B," a list showing the dates of the successive notes, the amount for which the notes were made out and the payments made on each of said notes as interest thereon.

40 5. Each of said notes of which note sued on is the last, is void because the transaction upon which it is based is in contravention of the laws

*Answer to Amended Complaint.*

above set forth because of the fact that plaintiff took and received as interest, for the loan or forbearance for the said sum of Two Thousand (\$2,000) Dollars for the above specified period, a greater sum than Thirty (\$30.00) Dollars.

FOURTH DEFENSE DIRECTED TO NOTE 10  
 DATED NOVEMBER 28, 1930.

1. Defendants repeat the allegations of the First Separate Defense and make them paragraph one of this defense.

2. Note sued on is the last renewal of successive prior notes dating back to August 28, 1929.

3. Said notes were each given for the loan of the sum of Two Thousand (\$2,000) Dollars for a period of three months. 20

4. The loan which was the basis of this series of successive notes was made in August 28, 1929 and was in the sum of Two Thousand (\$2,000) Dollars for a period of three months. There is attached hereto and marked as "Schedule C," a list showing the dates of the successive notes, the amounts for which the notes were made out and the payments made on each of said notes as interest thereon. 30

5. Each of said notes of which note sued on is the last, is void because the transaction upon which it is based is in contravention of the laws above set forth because of the fact that plaintiff took and received as interest, for the loan or forbearance for the said sum of Two Thousand (\$2,000) Dollars, for the above specified period, a greater sum than Thirty (\$30.00) Dollars.

EDWARDS, SMITH & DAWSON, 40  
 Attorneys of Defendants.

*Answer to Amended Complaint.**Schedule A.*

Date of Note	Amount on Face of Note	Actual Consideration Paid on Note	Date of Payment of Interest on Note	No. of Check	Amount of Check
1/27/30	\$2100	\$2,000	1/27/30	#21798	\$130.00
4/26/30	2050	2,000	4/26/30	#21994	80.00
7/26/30	2050	2,000	7/28/30	#23003	80.00
10/27/30	2050	2,000	10/27/30	#23201	80.00

(Note sued on)

*Schedule B.*

Date of Note	Amount on Face of Note	Actual Consideration Paid on Note	Date of Payment of Interest on Note	No. of Check	Amount of Check
11/18/29	\$2100	\$2,000		Cash	\$130.00
2/18/30	2100	2,000	2/18/30	#21844	130.00
5/19/30	2050	2,000	5/19/30	#22049	80.00
8/18/30	2050	2,000	8/18/30	#23060	80.00
11/19/30	2050	2,000	11/19/30	#23257	80.00

(Note sued on)

*Schedule C.*

Date of Note	Amount on Face of Note	Actual Consideration Paid on Note	Date of Payment of Interest on Note	No. of Check	Amount of Check
8/28/29	\$2100	\$2,000	8/28/29		\$130. Cash
11/27/29	2100	2,000	11/26/29	#21656	\$130.
2/27/30	2100	2,000	2/27/30	#21866	\$130.
5/27/30	2050	2,000	5/27/30	#22072	\$ 80.
8/27/30	2050	2,000	8/26/30	#23076	80.
11/28/30	2050	2,000	11/28/30	#23275	80.

(Note sued on)



*Reply.*

set forth in Schedule "A" were payments of interest.

8. Plaintiff denies paragraph 5 of the second defense.

10 9. Replying to paragraph 1 of the third defense, plaintiff repeats her reply to the allegations of the first defense.

10. Plaintiff admits paragraph 2 of the third defense.

11. Plaintiff denies paragraph 3 of the third defense.

12. Plaintiff admits paragraph 4 of the third defense, except that she denies that the amounts set forth in "Schedule B" were payments of  
20 interest.

13. Plaintiff denies paragraph 5 of the third defense.

14. Replying to paragraph 1 of the fourth defense plaintiff repeats her reply to the allegations of the first defense.

15. Plaintiff admits paragraph 2 of the fourth defense.

30 16. Plaintiff denies paragraph 3 of the fourth defense.

17. Plaintiff admits paragraph 4 of the fourth defense, except that she denies that the amounts set forth in "Schedule C" were payments of interest.

18. Plaintiff denies paragraph 5 of the fourth defense.

40 MILTON M. UNGER,  
Attorney for Plaintiff.

*Judgment.*

**JUDGMENT.**

Filed November 14, 1932.

These actions were tried before Judge Newton H. Porter, with a jury, at the Essex Circuit Court on November 14, 1932.

10

The causes having been heard and submitted to the jury, they returned their verdicts as follows:

They find in favor of the plaintiff, Louise E. Pearce, and against the defendants, Henrietta Melchiora Casabianca, Adele Coyle and George S. Milazzo, executors of the estate of Enrico Casabianca, deceased, for the sum of \$2,208.00 damage in case No. 56560; in favor of the plaintiff, Rose Donahue, and against the defendants, Henrietta Melchiora Casabianca, Adele Coyle and George S. Milazzo, executors of the estate of Enrico Casabianca, deceased, for the sum of \$6,617.61 damage in case No. 56559.

20

Whereupon, it is adjudged that the plaintiff recover of the defendants the sum of \$2,208 damage, and costs which are taxed as \$115.22, making in the whole the sum of \$2,323.22 in case No. 56560; the plaintiff recover of the defendants the sum of \$6,617.61 damage, and costs which are taxed at \$115.22, making in the whole the sum of \$6,732.83 in case No. 56559.

30

Judgment signed and entered November 14, 1932.

WM. S. GUMMERE,

*C. J.*

40

*Levy.***LEVY.**

Filed January 6, 1933.

## CIRCUIT COURT EXECUTION.

ESSEX COUNTY, ss.

10 THE STATE OF NEW JERSEY, to the  
 Sheriff of the County of Essex,  
 (SEAL) GREETING:

We command you, that of the goods  
 and chattels, rights and credits, of  
 Henrietta Melchiora Casabianca, Adele Coyle,  
 and George S. Milazzo, Executors of the Estate  
 of Enrico Casabianca, deceased, the defendants,  
 in your county, you cause to be paid the sum of  
 Six thousand six hundred seventeen dollars and  
 20 sixty-one cents, which Rose Donahue the plaintiff  
 lately in our Circuit Court, holden at Newark, in  
 and for our said County of Essex, recovered  
 against the said Henrietta Melchiora Casabianca,  
 Adele Coyle, and George S. Milazzo, Executors  
 of the Estate of Enrico Casabianca, deceased,  
 the defendants and also One hundred fifteen dol-  
 lars and twenty-two cents, Eighty-one dollars  
 and twenty cents, Twenty-six dollars and two  
 cents costs thereon, all of which was adjudged to  
 30 said plaintiff by the judgment and determina-  
 tion of said Circuit Court, as appears of record.  
 And if sufficient goods and chattels, rights and  
 credits, of the said defendants in your County,  
 you cannot find whereof to make the said sums  
 of money, then and in that case we command  
 you that you cause the whole or the residue as  
 the case may require, of the said sums of money,  
 to be made of the lands, tenements, heredita-  
 ments and real estate in your County, whereof  
 40 the said defendants as Executors of Estate of

*Levy.*

Enrico Casabianca, deceased were seized on the 14th day of November, in the year One Thousand Nine Hundred and thirty-two or at any time afterwards, in whosoever hands the same may be: And have you those moneys before our Circuit Court aforesaid, at Newark, aforesaid the fourth Tuesday of January, 1933 next, to render unto the plaintiff for recovery and costs aforesaid; and have you then and there this writ. 10

WITNESS WILLIAM A. SMITH, Esquire, a Judge of our said Circuit Court, at Newark aforesaid, the 6th day of January in the year One Thousand Nine Hundred and Thirty-three.

JOHN H. SCOTT,  
Clerk. 20

MILTON M. UNGER,  
Attorney.

On January 11, 1933 at 4 P. M. I served the within writ in the manner required by law in the presence of Frank G. Dreyer, a creditable person as will appear on schedule hereto annexed.

LOUIS E. BATCHELLOR,  
By CHARLES BRUEMMER. 30

(Schedule missing from jacket.)

Filed Jan. 6, 1933 in book J-3 of Executions, page 195.

JOHN H. SCOTT,  
Clerk.

*Levy.*

## ESSEX COUNTY CIRCUIT COURT.

Rose Donahue,

*vs.*

10       Henrietta Melchiora Casabianca, Adele  
           Coyle, George S. Milazzo, Executors  
           of Estate of Enrico Casabianca,  
           deceased.

At Law.

Ret'ble.....Term, 19...

Milton M. Unger, Atty.

Levy.

20	Amount of Recovery.....	\$6,617.61
	Cost taxed at .....	222.44
		<hr/>
		\$6,840.05
	Interest from	
	19           till paid	
		<hr/>
		\$
		<hr/>
30	Besides Sheriff's Execution fees,	\$

*Order to Show Cause.*

**ORDER TO SHOW CAUSE.**

Filed April 4, 1933.

ESSEX COUNTY CIRCUIT COURT.

ROSE DONAHUE,

*Plaintiff,*

*vs.*

HENRIETTA MELCHIORA CASABI-  
ANCA, ADELE COYLE and  
GEORGE S. MILAZZO,

*Defendants.*

10

*Action  
at Law.*

*Order to  
Show Cause.*

Application having been made to the Court on motion of Edwards, Smith & Dawson, attorneys for defendants, for an order to show cause why the execution issued herein and the levy made thereon should not be set aside, and it being represented to the Court that the lands and premises levied upon are held by the defendants as executors of the estate of Enrico Casabianca, and that a sale of said lands and premises is scheduled to take place on March 28, 1933, at two o'clock P. M., and that said sale is claimed to be unlawful;

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30

It is on this 28th day of March, 1933, ORDERED that the plaintiff Rose Donahue show cause before this Court on Friday, April 7, 1933, at ten A. M. or as soon thereafter as the Court can hear counsel thereon why the execution issued herein and the levy made thereon should not be set aside.

It is further ORDERED that said Rose Donahue, her agents and servants and Louis E. Batchelor,

40

*Order to Show Cause.*

Sheriff of the County of Essex, his deputies, agents or servants in the meantime and until further order of this Court desist and refrain from selling the premises levied upon. Said Sheriff may adjourn said sale pending the determination of this motion.

10

WILLIAM A. SMITH,  
Judge.

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30

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*Stipulation of Facts.***STIPULATION OF FACTS.**

## ESSEX COUNTY CIRCUIT COURT.

ROSE DONAHUE,

*Plaintiff,*

10

*vs.*

HENRIETTA MELCHIORA CASABIANCA, ADELE COYLE and GEORGE S. MILAZZO, Executors of the Estate of Enrico Casabianca, deceased,

*Defendants.**Action**at Law.**Stipulation  
of Facts.*

In view of the fact that the Order of the Essex County Circuit Court dated April 11th, 1933, and which is the subject matter of this appeal, was not predicated upon any petition filed by the defendants, but was argued on an oral stipulation as to facts before Judge Mountain, the following is hereby stipulated to be the pertinent facts with respect thereto. 20

1. Enrico Casabianca died on January 21st, 1931, a resident of the State of New Jersey, County of Essex, and City of Newark. 30

2. The Will of said Enrico Casabianca directed the Executors to pay "all my just debts and funeral expenses as soon after my decease as conveniently can be done"; it bequeathed six legacies to relatives totaling \$6,000.00; it provides that "all the rest, residue and remainder of my property, real and personal, of every kind and description, and wheresoever situate, which shall belong to me or be subject to my disposal 40

*Stipulation of Facts.*

at the time of my death, is to be divided by my Executors into three equal shares, one share to be paid to each of my wife, Henrietta Melchiora Casabianca, my daughter, Adele Coyle, and my daughter, Olga, share and share alike." The Will provides, however, that the provisions for the widow are in lieu of her right of dower and the Executors are authorized and empowered to "mortgage, lease, sell and convey"—"any and all real property wherever situate, and to make, execute and deliver good and sufficient instruments therefor."

3. Henrietta Melchiora Casabianca, widow of said Enrico Casabianca, deceased, has renounced the benefit of said devise to her and has elected to accept in lieu thereof her right of dower in the lands and real estate of the deceased.

4. The principal assets of the Estate consist of two parcels of real estate, one located in the Borough of Manhattan, State of New York, and one in the City of Newark, State of New Jersey. The New York parcel has been appraised at \$250,000.00, and the Newark parcel has been appraised at \$10,000.00. The New York parcel is encumbered by a mortgage in the amount of \$160,000.00, and the Newark parcel is encumbered by a mortgage in the amount of \$7,000.00, leaving a total equity of approximately \$83,000.00 in favor of the Estate.

5. Liabilities of the Estate total approximately \$45,000.00.

6. On February 6th, 1931, the Will of said Enrico Casabianca was probated in the Surrogate's Court of New York County, State of New

*Stipulation of Facts.*

York, and letters of administration were granted to defendants by the Surrogate of New York County.

7. On March 30th, 1931, an exemplified copy of the proceedings in the Surrogate's Court of New York County was filed with the Register of the Prerogative Court of the State of New Jersey. 10

8. On or about March 18th, 1931, Rose Donahue, the plaintiff herein, filed a claim with defendants as Executors of the Estate of Enrico Casabianca, claiming that Enrico Casabianca, at the time of his death, was indebted to her in the sum of \$6,137.00 on three promissory notes.

9. On or about March 20th, 1931, the claim of said Rose Donahue was rejected, and subsequently said Rose Donahue instituted a suit against the Executors in the Essex County Circuit Court of the State of New Jersey based on said notes, and the Executors defended said suit on the grounds that said notes were usurious and therefore void under the Laws of the State of New York. At the trial a verdict resulted in favor of the defendants. Said verdict was thereafter set aside by the Court of Errors and Appeals of the State of New Jersey. 20 30

10. On November 14th, 1932, this case came on for re-trial and the jury returned a verdict in favor of Rose Donahue in the sum of \$6,617.61. This case was tried together with the case of Louise E. Pearce against the defendants herein. The case of Louise E. Pearce is not involved in this appeal.

11. On November 14th, 1932, the Clerk of the Essex County Circuit Court entered a general 40

*Stipulation of Facts.*

judgment in favor of the plaintiff and against the defendants. This judgment is recorded in judgment book 118, at pages 36 and 37. The judgment record reads as follows:

10       “These actions were tried before Judge Newton H. Porter, with a jury, at the Essex Circuit Court on November 14, 1933.

      “‘The cases having been heard and submitted to jury, they returned their verdicts as follows:

      “‘They find in favor of the plaintiff, Louise E. Pearce, and against the defendants, Henrietta Melchiora Casabianca, Adele Coyle and George S. Milazzo, Executors of the Estate of Enrico Casabianca, deceased, for the sum of \$2,208.00 damage in case #56560; in favor of the plaintiff, Rose Donahue, and against the defendants, Henrietta Melchiora Casabianca, Adele Coyle and George S. Milazzo, Executors of the Estate of Enrico Casabianca, deceased, for the sum of \$6,617.61 damage in case #56559.

      “‘Whereupon, it is adjudged *that the plaintiff recover of the defendants* the sum of \$2,208 damage, and costs which are taxed at \$115.22, making the whole sum the sum of \$2,323.22 in case #56560; *the plaintiff recover of the defendants* the sum of \$6,617.61 damage, and costs which are taxed at \$115.22, making the whole sum the sum of \$6,732.83 in case #56559.”

12. On January 6, 1933, the plaintiff, Rose Donahue, caused an execution to be issued out of the Essex County Circuit Court, directing the Sheriff to cause to be paid out of the goods and chattels, rights and credits of the defendants, as executors, the sum of \$6,617.61, and in the event sufficient goods and chattels, rights and credits could not be found, the execution provided that said sum or the residue be made of the lands,

40

*Stipulation of Facts.*

tenements, hereditaments and real estate "whereof the said defendants as executors of the estate of Enrico Casabianca, deceased, were seized on November 14, 1932 or at any time afterwards."

13. On January 11, 1933, Louis E. Batchelor, as Sheriff of Essex County, at the direction of Rose Donahue, by his duly appointed Deputy Sheriff, one Charles Breummer, attached the rents due and/or to grow due defendants as Executors of the Estate of Enrico Casabianca. 10

14. The Sheriff of Essex County, at the direction of plaintiff, Rose Donahue, thereafter advertised for sale the premises held by plaintiffs as Executors of the Estate of Enrico Casabianca, deceased, known as 22 Nairn Place, located in the City of Newark, N. J., and said sale was scheduled to take place on March 28th, 1933. 20

15. On March 28, 1933 an order was issued calling upon the plaintiff, Rose Donahue, to show cause why the execution issued and the levy made thereon should not be set aside, and on April 11, 1933 the Court having heard and considered the argument of counsel for the respective parties, and being of the opinion that the execution issued and levy made thereon were unlawful, it was ordered that the execution issued be set aside and for nothing holden, and that the levy made be set aside. It is this order which plaintiff is now appealing from. 30

16. It is further stipulated that in conjunction with the appeal from the order made by the Essex County Circuit Court on April 11th, 1933, the defendants move to amend the judgment record to make the judgment payable 40

*Stipulation of Facts.*

10 in due course of administration, on the ground that the object of this suit was to establish and prove a disputed claim to be paid in due course of administration, and not to obtain a general money judgment, and on the ground that a general money judgment in favor of plaintiff would give the plaintiff an unlawful priority and preference over other creditors of the estate.

MILTON M. UNGER,

Attorney for Plaintiff.

EDWARDS, SMITH & DAWSON,

Attorneys for Defendants.

Dated: Oct. 18, 1933.

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30

40

*Order.***ORDER.**

## ESSEX COUNTY CIRCUIT COURT.

ROSE DONAHUE,

*Plaintiff,**vs.*HENRIETTA MELCHIORA CASABIANCA, ADELE COYLE and  
GEORGE S. MILAZZO, Executors of Estate of Enrico  
Casabianca, deceased,*Defendants.*

10

*Action  
at Law.**Order.*

Application having been made to the court on motion of Edwards, Smith & Dawson, attorneys for defendants, for an order to show cause why the execution issued herein and a levy made thereon should not be set aside, and the court having heard and considered the argument of counsel for the respective parties, and being of the opinion that the execution issued herein and a levy made thereon is unlawful,

20

It is, therefore, on this 11th day of April, 1933, ORDERED that the execution issued herein be set aside and for nothing holden; that the levy made herein be and the same is hereby set aside; that Louis E. Batchelor, Sheriff of the County of Essex and/or his deputies, direct the tenant in possession of the premises levied upon to continue paying rent to the defendants.

30

WORRALL F. MOUNTAIN,

Judge.

40

*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed June 2, 1933.

ESSEX COUNTY CIRCUIT COURT.

10 ROSE DONAHUE,

*Plaintiff,*

*vs.*

HENRIETTA MELCHIORA CASABIANCA, ADELE COYLE and  
GEORGE S. MILAZZO, Executors of Estate of Enrico  
Casabianca, deceased,  
*Defendants.*

*Action  
at Law.*

*Notice  
of Appeal.*

20

Sat Below: MOUNTAIN, *C. C. J.*

To Messrs. Edwards, Smith & Dawson, attorneys  
of defendants.

Sirs:

PLEASE TAKE NOTICE that the plaintiff in the  
above entitled cause, hereby appeals to the New  
Jersey Court of Errors and Appeals from the  
order made on April 11, 1933 setting aside an  
execution previously issued in this cause and  
the levy made thereon and directing the Sheriff  
of Essex County to direct the tenant in possession  
of the premises levied upon to continue  
paying rent to the defendants.

Respectfully yours,

MILTON M. UNGER,  
Attorney for Plaintiff.

Dated May 16, 1933.

40

*Grounds of Appeal.*

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

MILTON M. UNGER,  
Of Counsel with Plaintiff.

10

**GROUNDS OF APPEAL.**

Filed June 6, 1933.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

ROSE DONAHUE, <i>Plaintiff-Appellant,</i>  <i>vs.</i> HENRIETTA MELCHIORA CASABI- ANCA, ADELE COYLE and GEORGE S. MILAZZO, Execu- tors of Estate of Enrico Casabianca, deceased, <i>Defendants-Respondents.</i>	}	<i>Action at Law.</i>  <i>On Appeal from Essex County Cir- cuit Court.</i>  <i>Grounds of Appeal.</i>	20
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Sat Below: MOUNTAIN, *C. C. J.* 30

To Messrs. Edwards, Smith & Dawson, attorneys  
for defendants-respondents.

The plaintiff-appellant respectfully states the following grounds of appeal upon the appeal in the above entitled cause:

1. The court below erred in making and entering the order of April 11, 1933, appealed from, in that the said order is contrary to the provisions of an act of the Legislature of the 40

*Grounds of Appeal.*

State of New Jersey, entitled: "An act concerning judgments," 3 Compiled Statutes, 2955, Sec. 1.

10 2. The court below erred in making and entering said order in that the execution and levy mentioned in said order in all respects complied with the provisions of the law applicable thereto and rested upon proceedings supported by law and regular in all respects.

20 3. The court below erred in making and entering said order in that the said order violates the provisions of Paragraph 3 of Section 7 of the Constitution of this State, the effect of said order being to impair the obligation of a contract and to deprive the appellant of a remedy to enforce a contract which existed when the contract was made.

4. The court below erred in making and entering said order in that the said order violates Section 1 of the 14th Amendment of the Constitution of the United States of America, by depriving the appellant of property without due process of law.

30 5. The court below erred in making and entering said order in that said order is contrary to law.

MILTON M. UNGER,  
Attorney for and of Counsel  
with Appellant.

## New Jersey Court of Errors and Appeals

ROSE DONAHUE,  
*Plaintiff-Appellant,*

*vs.*

HENRIETTA MELCHIORA CASABI-  
ANCA, ADELE COYLE and  
GEORGE S. MILAZZO, Executors  
of the Estate of Enrico Casa-  
bianca, deceased,  
*Defendants-Respondents.*

*On Appeal  
from Essex  
County  
Circuit  
Court.*

### BRIEF FOR ROSE DONAHUE, PLAINTIFF-APPELLANT.

#### Statement of Facts.

The plaintiff-appellant appeals from an order made by the Honorable Worrall F. Mountain, Judge of the Essex County Circuit Court, on April 11th, 1933. Inasmuch as this order was not predicated upon any petition filed by the defendants below, but was argued on an oral stipulation as to facts, the following are agreed points with respect thereto:

The defendants-respondents are the Executors of the Estate of Enrico Casabianca, deceased, who died on January 21st, 1931, a resident of Newark, Essex County, New Jersey. He left a will which the Executors probated on February 6th, 1931, in the Surrogate's Court of New York County, State of New York, and letters testamentary were granted to the defendants by the Surrogate of New York County. The will of the decedent directed the Executors to pay "all my just debts and funeral expenses as soon after my decease as conveniently can be done;" it

bequeathed legacies totaling \$6,000.00 to relatives; it provides that "all the rest, residue and remainder of my property, real and personal, of every kind and description, and wheresoever situate, which shall belong to me or be subject to my disposal at the time of my death, is to be divided by my Executors into three equal shares, one share to be paid to my wife, Henrietta Melchiora Casabianca; my daughter, Adele Coyle, and my daughter Olga, share and share alike." The will provides, however, that the provisions for the widow are in lieu of her right of dower and the Executors are authorized and empowered "to mortgage, lease, sell and convey" \* \* \* "any and all real property wherever situate, and to make, execute and deliver good and sufficient instruments therefor."

The principal assets of the Estate consist of two parcels of real estate, one located in the Borough of Manhattan, New York State, appraised at \$250,000 and one located in Newark, Essex County, New Jersey, appraised at \$10,000. The New York parcel is encumbered by a mortgage of \$160,000 and the Newark parcel by a mortgage of \$7,000. Liabilities of the Estate total approximately \$45,000.

As appears from the complaint herein, Rose Donahue filed a claim with the defendants as Executors which claim was rejected. She instituted suit against the Executors in the Essex County Circuit Court on March 20th, 1931. The Executors defended on the ground that the notes were usurious and void under the laws of the State of New York. The trial court directed a verdict in favor of the defendants as Executors. This verdict was set aside by the Court of Errors and Appeals of the State of New Jersey.

The second trial resulted in a verdict in favor of the said Rose Donahue.

Upon the recovery of said verdict, Rose Donahue issued an execution thereon out of the Essex County Circuit Court, directed to the Sheriff of Essex County, to make said judgment out of the goods and chattels, rights and credits of the defendants and for want thereof out of real estate of which the defendants as Executors were seized on November 14th, 1932 or at any time afterwards. Pursuant to the directions of said execution, the Sheriff levied on the real estate located in Newark, above referred to, and advertised the same for sale on March 14th, 1933. The defendants then applied to the Essex County Circuit Court for an order restraining the Sheriff from selling and the Essex County Circuit Court made an order on April 11th, 1933, setting aside the execution and levy. It is this order which is appealed from.

#### POINT ONE.

The Court below erred in making the order of April 11th, 1933, appealed from, in that the order is contrary to the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act concerning Judgments," 3 Compiled Statutes, 2955, Section 1.

The above section contemplates an unfettered judgment upon which an execution may issue, and provides a remedy in the event of a failure of personal estate to satisfy the amount due a judgment creditor by giving him recourse to the decedent's real estate. It provides:

"That all lands, tenements, hereditaments and real estate shall be and hereby are made liable to be levied upon and sold by execu-

tions to be issued on judgments, which are or shall be obtained in any court of record of this state (except justices' court constituted for the trial of small causes) for the payment and satisfaction of the debt, damages, sum of money and costs so recovered or to be recovered; provided, that no lands, tenements, hereditaments, or real estate, of any testator or intestate, shall be sold or in any wise affected by any judgment or execution against executors or administrators (Rev. 1877, p. 520)."

It is only in this manner that a judgment can be given any effect. Were the rule to be otherwise, a judgment creditor would be obliged to sit idly by, while a debtor's estate which was legally subject to the creditor's judgment, might disappear.

There is an additional factor present which requires consideration upon the appeal from this order, upon its merits. The Legislature in enacting the above had as its primary intent the purpose of giving a creditor some tangible means of satisfying a judgment. The proviso clause contained therein,

"\* \* \* that no lands, tenements, hereditaments, or real estate, of any testator or intestate, shall be sold or in any wise affected by any judgment or execution against executors or administrators (Rev. 1877, p. 520)."

was for another purpose. That purpose was to prevent the hampering or retarding of an estate during the course of administration. There would be no necessity for a judgment creditor doing so where a *New Jersey Estate* was being administered by *Resident Executors*. He would be secured in the fact that the administration of the estate was in this *Forum*. Further, the Executors would be under the control and direc-

tion of the laws of this State with reference to the disposition of personalty and realty of their decedent's estate. This would be giving full effect to the statute and at the same time preserving a judgment creditor's rights.

However, a different situation exists in the instant case. It will be noted that the defendants who are the Executors of the estate of Enrico Casabianca are all *Non-Residents*. The judgment is one *in personum*. The *res* is within the jurisdiction of this State. The present plaintiff-appellant has established her claim by judgment against the Executors. The entire administration of the present estate is under the guidance of the laws of a foreign State. The Executors are not and cannot be held accountable in this jurisdiction for any wrongdoing. *The plaintiff-appellant has no recourse in this forum whatsoever for any laxity or wrongdoing in the administration of the estate by the non-resident Executors*. She has not the comfort or security which the Legislature intended to give a judgment creditor. In view of these facts certainly the statute could not have been intended for the protection of these *foreign Executors in the administration of a foreign estate* when in every respect our courts would be powerless to properly deal with the administration of that very estate here.

In passing, casual reference must be made to two facts which appear in the stipulation of facts in the state of case which are not really before the court on appeal, and therefore should not be taken into consideration on this appeal. Neither point has been alluded to by the defendants-respondents or passed upon by the lower court in the deciding of the order appealed from.

Paragraph 3 sets forth:

“Henrietta Melchiora Casabianca, widow of said Enrico Casabianca, deceased, has renounced the benefit of said devise to her and has elected to accept in lieu thereof her right of dower in the lands and real estate of the deceased.”

There was no mention made of this in the court below; hence, it is not a proper issue to be considered on this appeal.

Paragraph 16 sets forth:

“It is further stipulated that in conjunction with the appeal from the order made by the Essex County Circuit Court on April 11th, 1933, the defendants move to amend the judgment record to make the judgment payable in due course of administration, on the ground that the object of this suit was to establish and prove a disputed claim to be paid in due course of administration, and not to obtain a general money judgment and on the ground that a general money judgment, in favor of the plaintiff would give the plaintiff an unlawful priority and preference over other creditors of the estate.”

These facts were the basis of a separate motion made by the present defendants-respondents which was *denied* and *dismissed* in the court below. While it appears in the agreed statement of facts, it is something injected into the case by the defendants-respondents. It is not before the court on appeal at all. The only thing appealed from is the validity of the order of Judge Mountain in setting aside the execution and levy herein.

For the foregoing reasons, it is urged that the court below erred in making the said order; that the order is contrary to law and should be set aside.

Respectfully submitted,

MILTON M. UNGER,  
Attorney for and of Counsel  
with Plaintiff-Appellant.

The following is a list of the names of the persons who have been appointed to the various positions in the office of the Secretary of the Board of Education, for the year 1900-1901.

MILTON E. TUNGER

Secretary for and of Board of Education

1. Chairman of the Board of Education  
2. Secretary of the Board of Education  
3. Treasurer of the Board of Education  
4. Superintendent of Schools  
5. Director of the Bureau of Statistics  
6. Director of the Bureau of Hygiene  
7. Director of the Bureau of Physical Education  
8. Director of the Bureau of Vocational Education  
9. Director of the Bureau of Technical Education  
10. Director of the Bureau of Agricultural Education  
11. Director of the Bureau of Domestic Science Education  
12. Director of the Bureau of Manual Education  
13. Director of the Bureau of Commercial Education  
14. Director of the Bureau of Art Education  
15. Director of the Bureau of Music Education  
16. Director of the Bureau of Dramatic Education  
17. Director of the Bureau of Physical Education  
18. Director of the Bureau of Hygiene  
19. Director of the Bureau of Statistics  
20. Director of the Bureau of Vocational Education  
21. Director of the Bureau of Technical Education  
22. Director of the Bureau of Agricultural Education  
23. Director of the Bureau of Domestic Science Education  
24. Director of the Bureau of Manual Education  
25. Director of the Bureau of Commercial Education  
26. Director of the Bureau of Art Education  
27. Director of the Bureau of Music Education  
28. Director of the Bureau of Dramatic Education

29. Director of the Bureau of Physical Education  
30. Director of the Bureau of Hygiene  
31. Director of the Bureau of Statistics  
32. Director of the Bureau of Vocational Education  
33. Director of the Bureau of Technical Education  
34. Director of the Bureau of Agricultural Education  
35. Director of the Bureau of Domestic Science Education  
36. Director of the Bureau of Manual Education  
37. Director of the Bureau of Commercial Education  
38. Director of the Bureau of Art Education  
39. Director of the Bureau of Music Education  
40. Director of the Bureau of Dramatic Education

## New Jersey Court of Errors and Appeals

ROSE DONAHUE,  
Plaintiff-Appellant,

*vs.*

HENRIETTA MELCHIORA CASABI-  
ANCA, ADELE COYLE and GEORGE  
S. MILAZZO, Executors of the  
Estate of Enrico Casabianca,  
deceased,  
Defendants-Respondents.

On Appeal  
from the  
Essex County  
Circuit Court.

### BRIEF FOR DEFENDANTS-RESPONDENTS.

#### Statement of Facts.

Enrico Casabianca died testate on January 21, 1931, a resident of Newark, N. J. On February 6, 1931, the will of the decedent was probated in the Surrogate's Court of New York County, State of New York, and Letters of Administration were granted to the defendants-respondents herein. On March 30, 1931, exemplified copy of the proceedings of the Surrogate's Court of New York County was filed with the Register of the Prerogative Court of the State of New Jersey (Case, p. 21).

The principal assets of the Estate consist of two parcels of real estate, one located in New York City and the other in the City of Newark, N. J. (Case, p. 20).

On March 4, 1931, plaintiff-appellant herein filed a claim with defendants as executors of the Estate of Enrico Casabianca, deceased, claiming

that said decedent at his death was indebted to her in the sum of Six Thousand One Hundred and Thirty-seven Dollars (\$6,137) on three promissory notes. Said claim was rejected by said executors on March 20, 1931 and subsequently plaintiff-appellant herein instituted a suit against such executors in the Essex County Circuit Court of the State of New Jersey based on said notes. Said executors, defendants-respondents herein, defended said suit on the ground that said notes were usurious and void under the laws of the State of New York which said laws were applicable to said notes. At the trial, a verdict was directed by the Court against the plaintiff and in favor of the defendants. The judgment entered on said directed verdict was thereafter reversed by this Court on appeal (*Donahue v. Casabianca*, 109 N. J. L. 425).

The case came on for retrial on November 14, 1932 and resulted in a verdict in favor of plaintiff and against defendants in the sum of Six Thousand Six Hundred Seventeen Dollars and Sixty-one Cents (\$6,617.61). Judgment was entered on said verdict (Case, p. 22).

Thereafter plaintiff-appellant caused to be issued on said judgment a writ of execution out of the Essex County Circuit Court (Case, p. 22).

The Sheriff to whom the writ was directed, at the direction of the plaintiff-appellant levied execution on the Newark real estate aforesaid known as No. 22 Nairn Place, Newark, N. J., which said real estate was held by defendants-respondents as executors of the Estate of Enrico Casabianca, deceased; and also attached the rents due and/or to grow due out of said real estate to defendants as such executors.

The said Sheriff thereafter, at the instance of the plaintiff-appellant, advertised said real estate for sale under said levy of execution (Case, p. 23).

Defendants-respondents thereupon procured from the Essex County Circuit Court an Order to Show Cause why said said execution and levy made thereon should not be set aside (Case, p. 23). After hearing had thereon, the Court ordered that execution be set aside and for nothing holden, and that the levy made thereunder be likewise set aside (Case, pp. 23, 25). Appellants now seek to have this Court set aside said order.

### **Ground of Appeal Argued by Appellant.**

Appellant in its brief urges as a basis for reversal one of the grounds set up in the Grounds of Appeal (Case, p. 27), to wit, Ground No. 1, that the Court below erred in making and entering the order of April 11th, 1933, appealed from, in that the said order is contrary to the provisions of an act of the Legislature of the State of New Jersey entitled "An Act Concerning Judgments," 3 Comp. Stat. 2955, Sec. 1.

### **Answer to Ground of Appeal Argued By Appellant.**

The rule of law governing the establishment of a claim against a decedent's estate by way of judgment at law is stated at 24 Corpus Juris, 878:

"Where a judgment establishes a claim against the estate, the creditor should be remitted to the Probate Court for satisfaction, and hence the general rule is that such a judgment should not be in the form of a general money judgment against the representative, but should direct that payment be made in due course of administration, although entry of the judgment in the usual form is not ground for reversal."

In New Jersey this rule of law is effected by statute in "An Act Concerning Judgments," 3 Comp. Stat. 2955, Sec. 1, which provides as follows:

"That all lands, tenements, hereditaments and real estate shall be and hereby are made liable to be levied upon and sold by executions to be issued on judgments, which are or shall be obtained in any court of record of this state (except justices' court constituted for the trial of small causes) for the payment and satisfaction of the debt, damages, sum of money and costs so recovered or to be recovered; provided, that no lands, tenements, hereditaments, or real estate, of any testator or intestate, shall be sold or in any wise affected by any judgment or execution against executors or administrators."

This rule was recently alluded to in the case of *Cranmer v. Cole*, 11 N. J. Misc. Reports, page 578, wherein the Court held:

"A creditor, by obtaining a judgment against the executor, acquires no lien upon real estate of which testator died seized."

We assert that the language in the statute is unequivocal and admits of no other interpretation than that *no* lands or real estate of *any* testator or intestate shall be sold or in any wise affected by *any* judgment or execution against executors or administrators.

The purpose of this restriction is clear. It is to prevent creditors who establish their claims as against a decedent's estate by way of judgment from procuring a priority and preference over creditors whose claims have been duly allowed by the executors or administrators without the necessity of a judgment at law. A claimant who presents a claim against an estate to executors or administrators becomes ordinarily, upon the allow-

ance of said claim, a general creditor. Appellant's contention would constitute such claimant, if his claim be disallowed and he ultimately sues thereon and procures judgment, a preferred creditor.

We assert that the proviso in the statute was meant to prevent the very thing which appellant here seeks to do. It was meant to place claims against executors and administrators which are established by judgment in the same category as those which are allowed without the necessity of judgment.

The Probate Courts of this State afford such creditors, whether they be creditors whose claims have been allowed, or creditors who have established their claims by judgment, a full and adequate remedy should they have any grievance against the executors or administrators.

Appellant's argument that the proviso of the statute merely applies to New Jersey executors and not to executors who have qualified in another State is made in the face of the specific language of the proviso that "no lands, tenements, hereditaments, or real estate, of any testator or intestate, shall be sold or in any wise affected by any judgment or execution against executors or administrators."

Appellant argues that the purpose of the proviso, with respect to judgments as against executors and administrators, was to prevent the hampering or retarding of an estate during the course of administration. We assert that this was not the purpose of the statute, but even if it were, appellant's effort here is to defeat that very stated purpose. Appellant is urging this Court to hold that a judgment creditor as against executors or administrators of a decedent's estate has the right to levy upon and sell real property owned by that estate; that the statute is meant to

prevent the hampering and retarding of the administration of a decedent's estate *during* the course of administration. But we see nothing in the statute which would limit such hampering or retarding *during* the course of administration. If appellant's contention is sound, to wit, that it is entitled to execution and sale of the real property in this case, then it was entitled to such sale at any time after the establishment of the judgment, whether a day after decedent's death, or a year after decedent's death.

Again appellant argues that "the statute could not have been intended for the protection of these foreign executors in the administration of a foreign estate." Apparently appellant means that the statute was intended for the protection of New Jersey executors but not for the protection of executors who have qualified as such in any other state. Appellant errs because the statute is not intended for the protection of executors but rather for the protection of creditors of decedent's estates, in that it relegates creditors of such estates whether they be judgment creditors or otherwise, to the proper forum.

The definite language of the statute clearly demonstrates the fallacy of appellant's contention. The statute in using the expression "any testator" excluded the distinction which appellant seeks to make.

Appellant argues without right or warrant "that plaintiff-appellant has no recourse in this forum whatsoever for any laxity or wrongdoing in the administration of the estate by the non-resident executors." There is not the slightest suggestion in this record or on the record of these respondents anywhere which would warrant the innuendo here made. Appellant by attempting to levy upon and sell the real estate in this case did so in the face of the statute which expressly for-

bids this and did so in an attempt to procure for itself an advantage by way of priority over other creditors of the estate.

The order of the Circuit Court in setting aside such execution and levy on the ground that the same was unlawful, should be affirmed.

Respectfully submitted,

EDWARDS, SMITH & DAWSON  
Attorneys for and of Counsel with  
Defendants-Respondents.

RAYMOND DAWSON,  
CHARLES M. JAMES,  
Of Counsel.