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New Jersey Court of Errors and Appeals

GABRIELE GIORDANO Complainant-appellant, VS Asbury Park & Ocean Grove Bank Body Corporate, and Harry N. Johnson, Sheriff of Monmouth County, Defendantss-Respondents	PETITION OF APPEAL FROM ORDER OF CHANCERY Sat. below: Walker, C.

TO THE HONORABLE ASSOCIATES JUSTICES OF THE NEW JERSEY COURT OF ERRORS AND APPEALS, THE LAST RESORT IN ALL CAUSES:

The appellant Gabriele Giordano, respectfully shows:

1. That the appellant seek to reverse the Order of the Chancellor filed June 24th, 1927, denying this appelant to file a supplemental bill to set aside the judgment in this cause, as obtained on the ground of fraud and duress, and to set aside the Sheriff-sale, on the ground of fraud, collusion and misconduct, being the said stated Order erroneous for the following reasons:

2. Thus the Chancellor Order filed March 22, 1927, dismissing the bill of complaint is erroneous for the following reasons:

3. That on the 18th day of March, 1927, a notice of motion was allowed by the Chancellor directing the defendant to show Cause before

the Chancellor on March 22nd, why an Injunction should not be issue to prevent the collection of its judgment, and a copy of the bill has been served upon the defendant as ground thereto, as the Court directed; and that on the return day, contrary to the general rule, and contrary to Rule 201, the defendant has failed to file and read an answer and affidavits, stating specifically facts why the Injunction should not issue.

4. Furthermore the Chancellor's Order filed March 22nd, appears inconsistent with its opinion filed March 16th, which among other things said Order states that: "the complainant is not entitled to a Rule to Show Cause why an Injunction should not issue; that the complainant is not entitled to the Injunction prayed for".

5. While the opinion filed March 16th, recites that:

> "In my memorandum in this cause filed March 10,th 1927, I distintly said that when preliminary affirmative relief was desired upon a bill filed, the facts relied upon must be fully verified. That bill did not contain any verification at all, and I denied the prayer on the bill.
>
> "Now the complainant has filed another bill for Injunction which is redrafted of the first somewhat enlarged upon, and appended his affidavit, in which he swears that he is the complainant and that the facts stated in the bill are truly stated to the knowledge and belief of the delonent, the compplainant. This is not enough. A general verification is entarely insufficient. The prayer of this subsepuent bill must also be denied."

And the dismissing Order followed, without

the defendant, on the return day having read and filed his answer and affidavit in reply, according to Rule 90-201, and it was dismissed in violation of the above rules.

The appellant commenting the first paragraph of the above opinion contends, that the original bill was filed to test the validity of the plea, and therefore the verification would be unnecessary at the first instance. The opinion shows that the bill was sustained in Equity, and its proceedings were subjected to its control; and the opinion recites further that: "the complainant is not entitled to file bill after the bill. If the first bill is insufficient an amendement may be asked to properly plead the facts, and supplemental affiidavits may be filed when and where necessary, by leave of the court. This bill, however, will be filed but not subsequent one.

At this point the Chancellor did not direct the complainant to file supplemental affiidavit to cover paragraph for paragraph the bill; and neither at the special circumstance of the case requested as ex part a bond from complainant for issuing the Injunction toward the defendant enjoined, if the Court could eventually decide that the complainant was not entitled to such Injunction, but the Chancellor directed the complainant that a notice of motion be served upon the defendant, annexed a copy of the bill as ground thereto, and the defense having failed, on the return day, to file and read an answer why the Injunction should not issue, the complainant then were entitled to writ of Injuncation, even though upon a common law affiidavit. Instead the bill was dismissed without a reasonable cause, as the record shows.

That the Injuncation would be issue because

the Sheriff was threatening to destroy in selling out 6 parceless of valuable property worth $35, 000 to $40,000 to satisfy a judgment of a mere amount of $500 or $600.

The rule has been frequently laid down broadly, that a preliminary Injuncation will be issue in a clear case of right, (U. S. vs Dominion Oil Co. 241 Fed. 425, and many others.)

That the usual form of verification of a plea containing matter of facts is "And this he is ready to verify" (Sec. Bla. Com. 309 Bouviers law Dictionary).

That the Order filed June 24th, denying the filing a supplemental bill is erroneous because refuse to reconsider and confute additional facts pleaded by complainant on its application for filing it.

That the purpose of a supplemental bill is to present new matter arising after the original bill was filed, or new facts discovered.

In case where an amendement is not available a supplemental bill, may be resorted to. (Bullen Bar examination).

If new matter arises, which did not exsist before, he (the plaintiff) must set it forth by a supplemental bill. (Blackstone Commentaries).

And that the memorandum filed June 12th, allowing to complainant to file an original bill to set aside the Sheriff-sale is not adequate for the relief sought; and that the supplemental bill would be allowed for reasons of special circumstance deriving therefrom.

And that the Sheriff of Monmouth County, consequently, by collusion fraud and misconduct, on May 31, 1927, has sold all the complainant's lands and premises, (worth as apprised $35,000.00 to $40,000..00) to this defendant-creditor in execution for the sum of One Hund-

red Dollars, ($100.) Certificate of apprisiment annexed).

And that the violation of Sec. 6 Comp. Statute, governing the sale of lands, and many others preceedents clearly establishes the above charges against the defendants.

And that the Sheriff has failed to acts as a discret man desiderous of effecting a sale of his property for the greatest advantage. (Cummins v. Little 16 E. 58)

That the Sheriff has conducted the sale in violation of the spirit of policy of law, and so in fact to defect, and greatly prejudice and injure the rights of the defendants in execution. (Commins v. Little 16 E. 58).

The Sheriff has failed to observe the general rule to sale the land in parcelles. (Corles v. Lashley; Marwin v. Smith; Schilling v. Lintel; Johnson v. Garret. 16 E, 31).

And that the complainant have sufficient ground to sustain, that he, thus, has been misleoded by such course, and was unware of the sale, or purpose to mislead . . . adjourning without advertising.

And that from the Order of the Chancellor filed March 22nd, dismissing the bill or complainant, jointly with the order filled June 24th, denying to file a "Supplemental bill" this appeal was taken; and that these defendants had failed to answer the petition of appeal, provided by the rule: this Respectfully Court therefore are prayed to reverse the aforesaid Orders, directing the Court below to enter a Decree pro. confesso, as prayed and sought in the bill of complainant, to set aside a judgment, and to set aside the Sheriff-sale.

Respectfully,
Gabriele Giordano.

THE FOLLOWING DESCRIBED PROPERTY WAS SOLD BY THE SHERIFF OF THE MONMOUTH COUNTY, ON MAY 31, 1927, TO THE ASBURY PARK & OCEAN GROVE BANK FOR THE SUM OF ONE HUNDRED DOLLARS ($100.)

I, GEORGE B. SOMERS, of the Somers & Somers, Real Estate Brokers CERTIFY That the property owned by Gabriele Giordano, beginning at the Northeasterly corner of Garfield Avenue, (now Mattison Avenue) and First Avenue, (now Atkins Avenue); thence (1) easterly,, along the northerly side of Mattison Avenue, one hundred and twenty-two (122) feet; thence (2) northerly, at right angle to Mattison Avenue One Hundred and Seventeen (117) feet; thence (3) Westerly parallel with Mattison Avenue One Hundred and twenty-two (122) feet; to the easterly line of Atkins Ave.; thence (4) Southerly along the Easterly line of Atkins Avenue One Hundred and Seventeen (117) feet to the place of beginning; in Asbury Park, New Jersey.

With FOUR (4) Dwelling Houses, vacant lo on side, and vacant Corner lot on it, bringing the yearly rental of over Two Thousand and Three Hundred ($2,300) Dollars, has been APPRISED BY ME said property and MY OPINION in the matter it has been APPRISED to worth the SUM OF THIRTY-FIVE THOUSAND ($35,000) DOLLARS.

Dated June 7th, 1927.

(Signed) Somers & Somers,
GEO. B. SOMERS

P. S. The above certificate of apprisiment was further indorsed orally by the Brawer & Smith, Real Estate Agency, and by the William Begly, Real Estate Agency.

STATEMENT OF THE CASE

On March 8, 1927, Gabriele Giordano, the appellant, herein had filed a bill of complaint in Court of Chancery to en-joining the defendant to collect its judgment, and to set it aside, alleging to have it been recovered on ground of mistake of facts, upon certain promissory note, obtained by fraud and duress, and without consideration.

The Equity Court sustained the bill, but thereafter it was dismissed without reasonable ground, and by an order inconsistent with the prior opinions filed by the Court in Case.

An appeal was taken to this Court to review the order below on assignmeent of error, and specification for rveersal.

The necessary record is annexed herein.

BRIEF FOR THE PLAINTIFF APPELLANT

This action grew out from a judgment on note for $402.68, rendered by the First Judicial District of Monmouth County on September 6, 1922, upon which complainant was a mere indorser and certain Aquilino, maker and debtor.

The appellant Gabriele Giordano oppose to valid point as reasons to discharge him from any liability upon said judgment:

1st. point as matter of fact, valid in law.
2nd. point as matter of law.

First point as a matter of fact: At the end of August, complainant conferred with E. Newman Ass't. Cashier of defendant, and thereafter with its President (paragraph 3 of the bill) where it was decided and agreed to start suit proceedings recovers judgment and force payment against

the maker of said note; and the defendants had wilfully and maliciously failed to perform its OBLIGATION previously made, (paragraph 7 of the bill) with intention to defraud.

SECOND POINT AS MATTER OF LAW.

The maker of said note, Aquilino was the primarily liable, and complainant as indorser was secondary l able, and the defendant has failed to direct the execution according to N. J. Negotiable Instrument-Law. (paragraph 5 of the bill). Both point aforesaid never has been contraddicted.

By the unlawful acts of defendant the complainant thereafter was urged to execute new note and to secure payment of said note was urged to execute a mortgage upon part of his real estate, (paragraph 11 of the bill) to have assigned said judgment; then such note and mortgage must be says were procured by duress and fraud and without consideration, as the result of conspiracy planned.

On February 4, 1925, defendant had sued complainant, and obtained judgment on aforesaid note, (paragraph 15 of the bill) complainant at the trial court pleaded as defense, as at common law that: having gave a mortgage to secure payment of said note, this court of law have no jurisdiction, being the mortgage first be foreclosed and the defense on its merits will be pleaded in Court of Equity. And that court ruled adversary in giving judgment upon said note (paragraph 14-15-16 of the bill).

An appeal was taken thereby, but it was discovered thereafter through opinion rendered by the Supreme Court on May 20, 1925, that:

> "The act of 1880 requiring prior foreclosure applies to bonds and mortgages and does not apply to notes."

Appellant discovered its error and attempted to plead on merits before the Supreme Court, arguing the want of consideration upon said note; but the Court justly retorted that

> It is suggested now that the note and mortgage were procured by duress but there is no such point mentioned in the state of case and we cannot consider it.

And the judgment of the court below has been affirmed, for reason of the above error made by appellant at the trial court.

The defendant on January 15, 1927 has docked its judgment with the Clerk of the Common pleas Court, and an execution was thereby issued directing the Sheriff to seize all complainants lands and premises and selling it at the highest bidder. (paragraph 18 of the bill).

The appellant at this very point filed a bill and invoked the extraordinary power of the court of equity to be relieved from an injust judgment suffered by an excusable mistake of facts. (paragraph 19 of the bill).

The Court of Equity tested the validty of the plea and took jurisdiction sustaining the bill. (opinion filed March 12 p.)

The Court thereafter erred in its proceedings for the reasons stated in the petition or appeal.

It is respectfully submitted that the order dismissing the bill be reversed, directing the court below to enter the final decree, pro. confesso, to set aside the judgment and to set aside the Sheriff-sale.

Respectfully submitted,
GABRIELE GIORDANO

NEW JERSEY COURT OF ERRORS
AND APPEALS.

GABRIELE GIORDANO,
Complainant-Respondent,

-vs-

THE ASBURY PARK & OCEAN GROVE BANK, Body Corporate, and THE SHERIFF OF MONMOUTH COUNTY, HARRY N. JOHNSON,

Defendants-Appellees,

ON APPEAL FROM THE COURT
OF CHANCERY.
ANSWER TO PETITION OF APPEAL.

Durand, Ivins & Carton,
Solicitors for Appellee
Asbury Park & Ocean Grove
Bank,
Asbury Park, N. J.

DURAND, IVINS & CARTON
COUNSELORS-AT-LAW
ASBURY PARK, N. J.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

GABRIELE GIORDANO,	)	
-vs-	)	ON APPEAL FROM THE COURT OF CHANCERY.
THE ASBURY PARK & OCEAN GROVE BANK, Body Corporate, and THE SHERIFF OF MONMOUTH COUNTY, HARRY N. JOHNSON,	)	ANSWER TO PETITION OF APPEAL.
Defendants-Appellees,	)	

The answer of the Asbury Park & Ocean Grove Bank, Body Corporate, one of the above named appellees, to the petition of appeal of Gabriele Giordano, the above named appellant,

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that an Order was on the 24th day of ~~July~~ June, 1927, made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purpose in said petition mentioned and as therein set forth; but as to the substance and form of said order, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said order is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

Solicitors for Asbury Park & Ocean Grove Bank, Appellee.

Of Counsel.

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IN CHANCERY OF NEW JERSEY

Between GABRIELE GIORDANO Complainant and Asbury Park & Ocean Grove Bank Defendant	On Bill. Etc. Memorandum (Not to print)

THIS MEMORANDUM IS NOT TO BE PUBLISHED IN THE OFFICIAL OR UNOFFICIAL REPORTS

ON BILL FOR INJUNCTION AND RELIEF.

MR. GABRIELE GIORDANO, Plaintiff, pro. se.

WALKER, Chancellor.

In my memorandum in this case filed March 10, 1927, I distinctly said that when preliminary affiirmative relief was desired upon a bill filed, the facts relied upon must be fully verified. That bill did not contain any verification at all, and I denied the prayer of the bill.

Now the complainant has filed another bill for injunction which is a redraft of the first somewhat enlarged upon, and appended his affidavit, in which he swears that he is complain ant and that the facts stated in the bill are truly stated to the knowledge and belief of the deponent, the complainant. This is not enough The cases cited by me in my former memorandum distinctly hold that the statements of the bill which are relied upon as grounds for granting the writ, must be specifically verified. A

general verification is entirely insufficient. The prayer of this subsequent bill must also be denied.

The complainant is not entitled to file bill after bill. If the first bill is insufficient an amendment may be asked for to properly plead the facts, and supplemental affidavits may be filed when and where necessary, by leave of the court. This bill, however, will be filed but no subsequent one.

If a man not a member of the bar, as the complainant, Mr. Giordano is undertakes to practice law and practice of the court to properly plead and prove his case.

WALKER C.

IN CHANCERY OF NEW JERSEY

Between GABRIELE GIORDANO Complainant and Asbury Park & Ocean Grove Bank Defendant	On Bill. Etc. Order Denying Injunction

This caus coming on to be heard on Notice of Motion for a Rule to Show Cause why Injunction should not issue, and in the presence of Gabriele Giordano, Complainant as a Solicitor pro. se. and Joseph R. Megill, of the firm of Durand, Ivins and Carton, Solicitors of the defendant and the Court having examined the pleadings, and having in open Court heard and considered the arguments of Complainant and counsel of the defendant thereon.

And it appearing to the satisfication of the Court that Complainant is not entitled to the relief prayed for.

It is, on this 22nd day of March 1927 ORDERED ADJUDGED and DECREE that the complain is not entitled to a Rule to Show Cause why an Injunction should not issue; that the complainant is not entitled to the injunction prayed for and

It is further ORDERED ADJUDGED AND DECREED that the motion for a Rule to show

IN CHANCERY OF NEW JERSEY

Between GABRIELE GIORDANO Complainant and Asbury Park & Ocean Grove Bank Defendant	On Bill. Etc. Memorandum (Not to print)

THIS MEMORANDUM IS NOT TO BE PUBLISHED IN THE OFFICIAL OR UNOFFICIAL REPORTS

On alleged supplemental bill to set aside Sheriff's sale and for injunction and relief.

MR. GABRIELE GIORDANO, Plaintiff, pro. se.

WALKER, Chancellor.

On March 11, 1927, complainant filed a bill to set aside a judgment. The prayer was denied. On March 14, 1927 he filed a supplemental bill for the same injunction and gave notice of a hearing on the application. Again it was denied. In the meantime a sheriff's sale appears to have taken place, and he now presents what he calls a supplemental bill to set aside the sale and for injunction and relief.

After the hearing above mentioned an order was made and filed denying the motion. It adjuged "that the complainant is not entitled to a rule to show cause why an injunction should not issue." If the order stopped there the only thing that would be **res judicata** would doubtless be the property of a preliminary injunction: but it does not, it goes on and adjudges in addition "that the compplainant is not entitled to the injunction prayed for." The parties submitted the whole case on the question of injunct-

ion, and it was decided. The order then properly went on and adjudged that the order to show cause be denied, with costs.

That is not all. In my memorandum filed March 16, 1927, I said that complainant was not entitled to file bill after bill, and no subsequent one would be allowed.

The bill before me has only a common verification attached, and is not sworn to at large as to facts which are relied upon by complainant. All this was pointed out in my first memorandum filed March 11, 1927.

The supplemental bill before me will not be received. If it were filed it would be stricken out on motion.

A supplemental bill cannot be filed without leave of the court. Leave in this case must be denied.

If the complainant desires to file an original bill attacking the present sale may of course do so. And if he desires a preliminary injunction he must have it properly verified. He is warned as he has been before.

E. R. WALKER,
C.

IN CHANCERY OF NEW JERSEY

Between GABRIELE GIORDANO Complainant and Asbury Park & Ocean Grove Bank Defendant	On supplemental Bill Order

Upon reading a Supplemental Bill, submitted to the Court. in the above stated cause, and the Court after considering the same in connection with the order filed on March twenty-second

It is thereupon on this 24th day of June, A. D. 1927, ORDERED that the application to file a supplemental bill and grant an Injunction thereon its be denied, appearing to the court that it is res judicata;

E. R. WALKER,
C.

Between GABRIELE GIORDANO Complainant and Asbury Park & Ocean Grove Bank Defendant	On Bill

IN CHANCERY OF NEW JERSEY

ON BILL FOR INJUNCTION AND RELIEF.

TO THE HONORABLE EDWIN ROBERT WALKER, Chancellor of the State of NEW Jersey.

The complainant, Gabriele Giordano, of Asbury Park, New Jersey, respectfully shows that:

On May 23, 1921, complainant sold to Nicola Aquilino, of Asbury Park, New Jersey, an electric Machine, with Finishing and Stitching Machine attachment therewith, in good order, for the sum of $350.00, and said Aquilino gave a promissory Note, in pamyent thereof, payable monthly at the Asbury Park & Ocean Grove Bank, which note, the said complainant indorsed and discounted thereto.

2. That, thereafter Aquilino used the said Machine from May, 1921 to September, 1922, and by his neglect, in meantime broke the stitching clutch, in said Machine, other parts missing and paid no attention to the Note, which after the same has been renewed several times without any payment, was protested in June, 1922.

3. At the end of August, 1922, complainant conferred with Irving Newman, Ass't. Cashier of the defendant, and later with its President, where it was decided, and AGREED to instruct its Attorneys to start suit proceedings, obtain judgment, and force payment against the maker of said Note.

4. On September 6, 1922, defendant in the District Court of the First Judicial District of the County of Monmouth recovered a judgment on the aforesaid Note for the sum of $356.05, against complainant as endorser and Aquilino as a maker.

merits will be pleaded into Court of Equity."

16. And the Court ruled that in giving judgment to defendant upon the aforesaid note.

17. But above all, complainant should confess, praying this Honorable Court to consider as excusable mistake of facts for having pleaded jurisdiction as defense in Court of law, as at common law, instead to have pleaded duress and fraud as defense; being disclosed thereafter through an opinion rendered by the Supreme Court on its appeal, filed May 20, 1925, among other things said that:

> "The act of 1880 requiring prior foreclosure applies to bonds and mortgages for the same indebtedness and does not apply to notes.
>
> It is suggested now that the note and mortgage were procured by duress but there is no such point mentioned in the state of case and we cannot consider it.

And the judgment of the court below has been affirmed.

18. Defendant on January 15, 1927, has docked its judgment, which was recovered on February 4, 1925, as stated in paragraph 14 of this complaint, with the Clerk of the Common Pleas Court of Monmouth County, on Book 6, p. 389, for the sum of $534.90; and an execution was thereafter issued on it, commanding the Sheriff to seize all complainant's lands and premises for selling it at the highest bidder, at the 29th day of March, 1927, which property to day worth, as apprised the sum of $35,000 to $40,000.

19. Complainant have no more adequate remedy in Court of laws and therefore invoke the extraordinary powers of this court of Chancery to obtain relief from an injust judgment suffered by reasons of excusable mistake of facts.

was necessity, from which there was no escape, for the complainant to decide on the situation. . . . . and few days thereafter, on December 15, 1922, the defendant through its Attorneys and President had assigned said judgment to complainant, and complainant was induced to executed a new Note for such assigment, and to secure the payment of said Note it was urged to executed a motgage upon part of his real estate for the amount of $402.68; and complainant did it as indorser and forced by defendant to do so.

12. That and since than complainant has lost his credit with defendant, which credit helped complainant to build up a fair position under the late President of the defendant, in the last 16 years.

13. Complainant avers that at that time defendant recovered a judgment against maker and endorser of said note, the maker, (real bebtor) was in position of $1,000 in personal estate; then in meantime, complainant as endorser was forced by defendant to execute new Note and mortgage, then the maker sold out his estate and diappeared, (April 10, 1923) before complainant could obtain judgment against it. (May 17, 1923) Complainant disclosed that it has been defrauded.

14. That on February 4, 1925 defendant in the First Judicial District Court of the County of Monmouth has sued the complainant on the aforesaid Note, as stated in paragraph II. of this complainant for the sum of $420.70.

15. That complainant entered only one defense to it declaring that: "to secure a payment of said Note a mortgage was executed upon part of his real estate, and that this court of law could not have jurisdiction, being that the mortgage should first be foreclosed, and the defense on its

5. At the end of November, 1922, an execution was issued against Aquilino, but by countermand of the defendant's Attorneys and its President the Constable returned the execution unsatisfied.

6. Another execution was issued against a complainant, escorted by the following explicit and perentory order.

7. That "the matter has been arranged between Aquilino's Attorney and the defendant's Attorneys". Aquilino was to pay in full settlement $200 with the understanding that complainant was requested to pay the balance in $202. 68, then withdraw the Aquilino's claim; and that in refusal to assent to it then the Attorneys of the defendant instructed the Constable to make a levy upon complainant estate, and sell him out for full amount of $402.68.

9. Complainant said that two days thereafter' on December 2, 1922, the President of the defendant furthermore bitterly excited appeared in public Bank where complainant has been called, and in presence of several persons his declaration directed against complainant was "slanderous per se" that "the bank its ready to sell you out Giordano".

10. Complainant avers that the aforesaid words were false and malicious, and were used in defamatory sense to writ: meaning thereby that, complainant attempted to extract from the maker of said Note, Aquilino, over $400., which note was obtained through an unfair transaction for an old machinery, negotiating it through the Bank, but the Bank were decided to sell him out as endorser, if it was still persisting in refusing the Attorney's decision, that $200 in settlement thereof.

11. That, then in view of such proceedings it

And therefore prays:

1. That an Order may be issued restraining the Sheriff to advertise further for selling the above mentioned complainant's property.

2. That a writ of Injunction may issue enjoining the defendant to enforce its judgment, as obtained, by corollary-way, on ground of fraud and duress.

3. And that a decree may be made, that said judgment may be set aside, as without consideration.

4. That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint, and to abide by such decree as this court may make in the premises.

GABRIELE GIORDANO,
Solicitor for the complainant pro. se.

State of New Jersey,
County of Monmouth,
ss.

Gabriele Giordano, being duly sworn, on his oath says, that he is the complainant pro. se.. in the above state cause.

2. That the facts state in 19 paragraphs herein set forth, are truly stated, to the knowledge and belief of the deponent, and that he belief to be entitled to the relief sought.

Sworn and subscribed before me this 12th day of March, A. D. 1927.

Caleb D. Loveman,
Notary Public of New Jersey,

(L. S.) My Commission expires
June 1st, 1928.

GABRIELE GIORDANO