

An appeal from a decree of  
Chancellor, whose opinion is  
reported in *Gould v. Gould*, 8 *Stew. Eq.*  
Mr. George W. Hubbell for appellants,  
WARD & TICHENOR, Law Case Printers, 832 and 834 Broad St., Newark, N. J.

## N. J. Court of Errors and Appeals.

Between

CHARLES J. GOULD, *et al.*,

*Appellants,*

and

EMMA R. GOULD, *et al.*,

*Respondents.*

An Appeal 10  
from order of  
Chancellor  
overruling de-  
murrer.

### *Brief of GEORGE W HUBBELL, for Appellants.*

The demurrer should be sustained for the following reasons : 20

I. The cause of action disclosed by the bill, is one that should be prosecuted at law, and a Court of Equity has no jurisdiction over the matter.

a The suit is brought by Emma R. Gould as trustee for Jeannette Devine, and the bill alleges that she made the contract with her husband, not as a *feme covert* dealing with her separate estate, but in a representative capacity, as trustee for another.

b. The bill discloses the fact, that a trust was created by Emma R. Gould for Jeannette Devine in the fund loaned, and the trustee and Jeannette Devine are made complainants. 30

c. If this is not true, then there is an evident mis-joinder of complainants, and the bill must be dismissed, as the appellants are liable to have a decree entered against them in favor of Jeannette Devine.

d. A married woman may act as trustee, for by the laws of this State, *Rev. Stat.*, page 637, sec. 5, a married 40

woman may contract as a *feme sole*, and a trust created by act of parties is a contract, and the *cestui que trust* may maintain an action for account against the trustee.

*e.* The money is the money of Jeannette Devine, and her right to recover at law does not depend upon the disability of her trustee, if any. In case of the disability of the trustee, the Court will appoint a trustee capable of maintaining rights of *cestui que trusts*.

10 *O'Kill vs. Campbell*, 3 Gr. Ch., 13.

*f.* There is no objection to the suit being maintained at law, because the note is made payable to the order of Emma R. Gould. She might still bring the action at law and offer proof to show her representative capacity. Or she might endorse the note to herself as trustee.

*g.* If there is in fact any disability preventing Emma R. Gould from acting as trustee, none exists now, as her husband was dead before the bringing of this suit.

20 *h.* The suit at law, mentioned in the bill, was brought by Emma R. Gould alone.)

30 II. If the suit is brought to recover money due only to Emma R. Gould, then the contract being void at law, equity will not enforce the contract against the surviving partners, unless it be shown that the money was not only borrowed by the husband on the credit of the firm, but actually reached the firm or was expended in its business, or for its benefit, or on its behalf.

It is submitted that Emma R. Gould, in making this contract with her husband, on the credit of the firm, was bound to see that the firm received the benefit of the transaction.)

The opinion of the Chancellor in this case concedes this point.

40 The question then remains, does the bill show this equity?

It is only contained in the pretenses, and such a statement of the material part of the case is insufficient.

*Story's Equity Pl.*, page 28, sec. 42.

In *Flint vs. Field*, 2 Anst., 540, it was held that when the whole equity of a case consists in the pretenses the bill is bad on demurrer; the case must be first averred, and then pretenses and charges are properly introduced to support it.

*Flint vs. Field*, *supra*

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(The interrogating part of a bill must not be considered more extensive than the proposition out of which the interrogatories arise.

*6 Vesey, Jun.*, 62, 63.

*Cooper Eq.*, p. 11.)

It is submitted that the fact that the money was used by the firm, or for their benefit, is not averred in the bill so as to call for an answer.

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It is submitted that the demurrer should be sustained.

*Messrs. C. & R. Wayne Parker for respondent*  
*No brief was filed on the part of the*  
*respondents -*

*Per Curiam, this decree unanimous*  
*is affirmed for the reasons given by*  
*the chancellor,*

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## In Chancery of New Jersey.

*Between*

EMMA R. GOULD, *et al.*,  
*Complainants,*

*and*

CHARLES J. GOULD, *et al.*,  
*Defendants.*

*On Bill, &c.*

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*To the Honorable* THEODORE RUNYON, *Chancellor of the*  
*State of New Jersey:*

Humbly complaining, show unto your Honor, your oratrixes, Emma R. Gould and Jeannette Devine, both of the city of Newark, county of Essex, and State of New Jersey :

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1. That your oratrix, Emma R. Gould, is the widow of Joseph Gould, deceased, late of said city of Newark, and said Jeannette Devine, is her mother, widow of Devine, deceased.

2. That on the first of May, one thousand eight hundred and seventy-six, your oratrix, Emma R. Gould, then the wife of said Joseph Gould, was possessed in her own right of the sum of about eighteen hundred dollars, which she had on the first day of April, preceding, and which she deposited in the Newark Savings Institution, taking therefrom as evidence of such deposit, a bank book, numbered 80,118, headed thus: "*Dr.*, Newark Savings Institution, in acc. with Mrs. Emma R. Gould, for Mrs. Jeannette Devine;" which bank book your oratrixes have in their possession, and to which they pray leave to refer, if it prove desirable so to do.

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3. That on or about the first day of May, in the year aforesaid, your oratrix, the said Emma R. Gould, was

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applied to by her husband, the said Joseph Gould, in relation to part of said money. He represented to her that his firm, consisting of himself and his two sons, Charles J. Gould and George T. Gould, who were then and for some time before, had been in the partnership named of J. Gould & Sons, in the city of New York, engaged in the business of \_\_\_\_\_, were in want of money, and that he wished to borrow on their behalf, the sum of six hundred and fifty dollars, and that he would give therefor the obligation of said firm. 10 And your oratrix, his then wife, having heard and believing that a wife could not make a legal contract with a husband, but at the same time desirous to comply with any reasonable request, and believing the said firm perfectly responsible, therefore consulted counsel, learned in the law, first alone, and afterwards in company with her said husband, as to whether she could make a legal contract with the said partnership firm through her husband, and was by him advised and informed that she 20 could do so, and that a negotiable instrument made by her husband in the name of his said firm would bind all the partners thereto. Whereupon your said oratrix, her said mother afterwards consenting thereto, agreed to make such requested loan; and thereupon the said counsel then and there drew an instrument, of which the following is a true copy, that is to say:

J. GOULD & SONS, 90 Front street,  
[2 ct. U. S. stamp.] NEW YORK, May 1st, 1876.

30 THE NEWARK CITY BANK,

Pay to the order of Emma R. Gould in one year from the date hereof, six hundred and fifty dollars, value received, and charge the same to account of

J. GOULD & SONS.

Which instrument the said Joseph Gould then and there signed "J. Gould & Sons," being the said partnership name as above stated, and then and there delivered the same to your oratrix, who forthwith drew from said Savings Bank deposit and gave to said Joseph 40

Gould the sum of six hundred and fifty dollars, mentioned in said instrument.

3. And your oratrixes show that when the said instrument fell due according to its tenor and effect, your oratrix, the said Emma, was about to present the same, but her said husband requested her not to do so, giving some reason of an unimportant nature which she does not recollect; and so the same was kept without the payment of any principal or interest thereon until after the death of the said Joseph Gould, when the same was 10  
duly presented, to wit, on the twenty-eighth day of May, one thousand eight hundred and eighty, at the said Newark City Bank, but payment was thereupon refused for want of funds, of which due notice was immediately given to the said defendants, survivors of the said Joseph Gould and of said firm; and your orators charge and allege that no presentment or notice of non-payment of said instrument was ever necessary, because the said firm of J. Gould & Sons had no funds in the hands of said 20  
bank on the fourth day of May, one thousand eight hundred and seventy-seven, nor afterwards, nor had they any funds in said bank for nearly a year prior to the said instrument becoming due.

4. And your oratrixes show, that thereupon your said oratrix, the said Emma R. Gould, applied to the said Charles J. Gould and George T. Gould and requested payment of said money, which being denied, your oratrix, the said Emma R. Gould, brought suit therefor in the Supreme Court of New Jersey against them. And 30  
your oratrixes show that the said defendants pleaded to the said suit, to wit, the general issue with notice of special matter alleged in defense, and the cause was brought to trial before Mr. Justice DEPUE, of the Supreme Court, at a circuit held in the county of Essex, and the above stated facts were duly proved and given in evidence before him, and a jury then and there empanelled. Whereupon the said justice non-suited your said oratrix, upon the ground that because of the marriage relation which subsisted between your said oratrix, 40

Emma R. Gould, and the said Joseph Gould at the time of said transaction, and of the said instrument being signed and delivered and the said money paid, the said contract for the loan of said money, and the said instrument intended to secure the same, were not good in law, nor was either of them, and that no legal action could be founded thereon.

5. And your oratrixes show unto your Honor, and charge that the said loan of money to the said firm  
 10 created in equity a debt from the same to your oratrix, the said Emma R. Gould, for the use of your said oratrix, the said Jeannette Devine, although the same was actually given to her, the said Emma R. Gould's, husband; and that by the rules of equity, as administered in this Honorable Court, payment of said money with interest will be decreed to be made by the said defendants hereto, surviving partners of J. Gould & Sons, and of her said husband, the said Joseph Gould, deceased; and they  
 20 further show; that nevertheless, the said defendants resist the payment of said money, and refuse to recognize your oratrixes' right in the premises, and make various false and fraudulent pretences as justifying their conduct therein; and sometimes they allege and pretend that the money aforesaid was not the money of the said Emma R. Gould, but procured from her said husband, whereas, your oratrixes charge that said pretence is false, and that said money was parts of moneys obtained by mortgage of real estate to her belonging, and to her conveyed before  
 30 her marriage; and sometimes they pretend that the money was paid by said Joseph Gould, in his lifetime, to your oratrix, his said widow, either in cash or by the conveyance to her of real estate, whereas your oratrixes charge that such pretence is likewise untrue, and that no part of said money, or the claim thereof, has been paid or satisfied to her in any manner; and sometimes they pretend that your oratrix, the said Emma R. Gould, did not lend said money to the said firm, but only to her husband, and that, with her knowledge, he used the said money  
 40 for his own personal benefit, and not for the use of

said firm; whereas your oratrixes show that each of these pretences is untrue, and that she refused to lend said money to her husband for his own use, and only consented to lend the same to his firm, on the advice and counsel aforesaid; and they further say that if the said Joseph Gould did not use said money for said firm, but for his own use only, which they deny, neither the said Emma R. Gould nor the said Jeannette Devine had at any time, or have, any knowledge thereof.

And the said defendants make divers other false or fraudulent pretences, all of which are contrary to equity and good conscience; in tender consideration whereof, and forasmuch as your oratrixes have no relief except, in this Honorable Court, and that the said defendants may answer the premises, but not under oath, which answer, under oath, your oratrixes hereby waive, and they may be decreed to pay and satisfy, unto your oratrixes, the said sum of six hundred and fifty dollars, with lawful interest thereon, and that your oratrixes may have such further and other relief as to your Honor shall seem meet and agreeable to equity and good conscience. 10  
 May it please your Honor, the premises considered, to grant unto your oratrixes the State's gracious writ of subpoena to be directed to the said defendants, and each of them, thereby commanding them, at a certain day, and under a certain penalty therein to be named, to appear before your Honor in this Honorable Court, then and there to answer the premises, and to stand to, abide by, and perform such decree in the premises as to your Honor shall seem meet and agreeable to equity and good conscience. 20  
 And your oratrixes, as in duty bound, will pray. 30

CORTLANDT & R. WAYNE PARKER,

*Solicitor for and of Counsel with Complainants.*

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General demurrer, in usual form.

## In Chancery of New Jersey.

FEBRUARY TERM, 1882.

10	<p style="text-align: center;">EMMA R. GOULD, <i>et al.</i>,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CHARLES J. GOULD, <i>et al.</i></p>	<p style="font-size: 3em; line-height: 1;">}</p> <p><i>Bill for Relief.</i></p> <p><i>On General</i></p> <p><i>Demurrer.</i></p>
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MR. G. W. HUBBELL, *for demurrant.*

MR. C. PARKER, *Contra.*

THE CHANCELLOR :

The bill is filed by Emma R. Gould, widow of Joseph Gould, deceased, and her mother Jeannette Devine, against Charles J. and George T. Gould, surviving partners of the late firm of Joseph Gould & Sons, of the city of New York. That firm was composed of the defendants and Joseph Gould, before mentioned. The object of the suit is to obtain re-payment of a loan of \$650 made by Mrs. Gould to the firm, at the solicitation of her husband, on the first of May, 1876. The bill charges that the money lent was part of certain money obtained by her from the mortgage of real estate belonging to her and conveyed to her before her marriage. It appears to have been deposited by her in a savings bank, to the account of "Mrs. Emma R. Gould, for Mrs. Jeannette Devine," and hence the latter is joined as complainant as *cestui que trust*, with the former as her trustee. The money was borrowed by Joseph Gould, for the firm, and a written obligation of the firm, payable to the order of Mrs. Gould, was given by him to her therefor at the time. After his death, she brought suit at law against the defendants in this suit, his surviving partners, upon the obligation, but was nonsuited on the ground that the contract was made by her with her husband. A wife

may maintain a suit in equity against her husband on a contract made by him with her in reference to her separate estate. While this proposition is not denied by the defendants, they insist that inasmuch as the contract in question was made by the husband, and therefore is void at law, equity will not enforce it against his surviving partners, unless it appears that the money was not only borrowed by him on the credit of the firm, but actually reached the firm or was expended in its business, or for its benefit, or on its behalf. The bill is sufficient 10 in its averments. It states that Joseph Gould applied to his wife to borrow the money for his firm, and on the security of the firm's obligation to be given to her therefor, and that she being satisfied of the responsibility of the firm was willing to lend the money if she could safely do so, and therefore consulted counsel on the subject, and was by him advised that she could make a legal contract with the firm through her husband, and that a negotiable instrument made by him in the name of the firm, would bind all the partners, and she thereupon 20 lent the money accordingly. In the statement of pretences, it is said that the defendants allege that she lent the money not to the firm, but in fact to her husband, and that he with her knowledge applied it to his own use, and not to the use of the firm, but the complainants deny that this allegation is true, and aver that she refused to lend the money to him for his own use, but lent it to the firm, and only consented to lend it to them on the advice of counsel, as before mentioned; and they further say that if he did not use the money 30 for the firm, but applied it to his own use, they did not know it. The substance of all which is, that the money was in good faith lent by her to the firm, and was not in any way lent to her husband individually. On the statements of the bill, the transaction in question appears to have been in good faith. Equity will impose no condition to recovery in such a case as this, which the law would not impose, were the suit maintainable there. The demurrer will be overruled.

## In Chancery of New Jersey.

10	<i>Between</i>	EMMA R. GOULD, <i>et al.</i> , <i>Complainants,</i> <i>and</i> CHARLES J. GOULD, <i>et al.</i> , <i>Defendants.</i>	}	<i>On Bill, &amp;c.</i>
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This cause coming on to be heard upon bill and demurrer, and having been argued by Mr. George W. Hubbell for the defendants, and Mr. Cortlandt Parker for complainants, It is now, on this twenty-first day of March, one thousand eight hundred and eighty-two, on motion of Cortlandt and R. Wayne Parker, solicitors for said complainants, ordered that said demurrer be overruled, with costs, and that the defendants file their answer within the time limited by law.

THEODORE RUNYON, *C.*

## In Chancery of New Jersey,

EMMA R. GOULD, <i>et al.</i> ,	}	<i>Notice of Appeal.</i>	10
<i>vs.</i>			
CHARLES J. GOULD, <i>et al.</i>			

The defendant hereby appeals from the interlocutory order made by the Chancellor in the above stated cause, overruling the demurrer filed by the defendants to the complainant's bill of complaint, to the Court of Errors and Appeals in the last resort of all causes.

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Dated May 2d, A.D. 1882.

GEORGE W. HUBBELL,

*Sol. for and of Counsel with Defts.*

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

G. W. HUBBELL,

*Of Counsel.*

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## N. J. Court of Errors and Appeals.

	<p style="text-align: center;"><i>Between</i></p> <p style="text-align: center;">CHARLES J. GOULD, <i>et al.</i>,</p> <p style="text-align: center;"><i>Appellants,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">EMMA R. GOULD, <i>et al.</i>,</p> <p style="text-align: center;"><i>Respondents.</i></p>	}	<i>Petition of Appeal.</i>
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*To the Honorable, the Court of Errors and Appeals in the last resort of all causes :*

The humble petition of Charles J. Gould and George T. Gould, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor THEODORE RUNYON, Chancellor of New Jersey, bearing date the twenty-first day of March, in the year eighteen hundred and eighty-two, wherein the said Emma R. Gould and Jeannette Devine were complainants, and Charles J. Gould and George T. Gould were defendants, in this respect, to wit: That the said order adjudged and directs, that the demurrer filed by the said Charles J. Gould and George T. Gould, defendants, to the bill of complaint of the said Emma R. Gould and Jeannette Devine, complainants, be overruled, with costs, and your petitioners humbly appeal from the whole of the order of the Chancellor, which orders that said demurrer be overruled, with costs, as aforesaid, upon the ground that the same is erroneous.

Your petitioners therefore pray that the said order of the said Chancellor may be reversed, set aside and for nothing holden; and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

GEORGE W. HUBBELL,

*Solicitor for and of Counsel with Appellants.*

