

IN THE
Court of Errors and Appeals
OF THE STATE OF NEW JERSEY.

ELIAS N. MILLER, <i>Receiver, &c.,</i> <i>against</i> JOHN M. MACKENZIE, and others.	}	<i>Points for</i> <i>Appellant.</i>
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As is shown by the case agreed on, the sole question presented for consideration on this appeal, is :

Can a person appointed in a proceeding for discovery in aid of execution (under Section 26 of Title Execution, page 292 of the Revised Statutes of 1874) "Receiver of the property and things in action belonging to, or due or held in trust for" a judgment debtor "at the time of the issuing said execution, or at any time afterwards" maintain an action in equity as such receiver to have declared void a conveyance made by the judgment debtor in fraud of creditors and contrary to the Statute against fraudulent conveyances.

The Vice-Chancellor decided that the action could not be maintained on the strength of the case

of *Higgins v. Gillesheimer*, 11 C. E. Green, 308, previously decided by him, and this appeal is therefore substantially a review of that decision.

POINTS.

I.—In the opinion of the Vice-Chancellor in *Higgins v. Gillesheimer*, no case is cited in support of the decision, and following authorities, although not therein referred to, are in direct contradiction to it.

High on Receivers, p. 307, § 454.

Bump on Fraudulent Conveyances, p. 532.

Porter v. Williams, 9 N. Y., 142.

Hamlin v. Wright, 23 Wisc., 491.

II.—The analogy of the rights of action possessed by persons in similar representative characters show that this action is maintainable.

Thus, for example, such an action as the one here may be maintained by a receiver of an insolvent corporation.

High on Receivers, p. 205, § 320.

Gillett v. Moody, 3 N. Y., 479.

Gillett v. Phillips, 13 N. Y., 114.

By an executor or administrator when the estate is insolvent.

Welsh v. Bekey, 1 Penrose & Watts, 57, 61.

Buehler v. Gloninger, 2 Watts, 226.

Minor v. Mead, 3 Conn., 289.

By a sheriff who has levied an attachment.

Kelly v. Lane, 42 Barb., 594, S. C. 18. Abb. Pr., 229, and 28 How. Pr., 128.

By an assignee for benefit of creditors under the assignment laws of this State which contain no special provision giving such action.

Garretson v. Brown, 26 N. J. Law R. 425,
per *Potts J.*, arguendo at page 48.

By an assignee under the insolvent laws of Pennsylvania, (Act of March 24th, 1818), which does not specially allow it.

Englebert v. Blanot, 2 Wharton, 240.

By an assignee in bankruptcy under the United States Bankrupt Act of 1842, which contained no special provision allowing such action.

Carr v. Gale, 3 Woodb. & M. 38.
Carr v. Hilton, 1 Curtis, Circ. Ct. 230.

By an assignee under the English Insolvent Act, (1 Geo. 4, c. 119), which contained no special provision allowing such action.

Doe d. Grimsby v. Ball, 11 M. & W.
531, s. c. 12 L. J. Exch. 328.

And see same principle decided in

Butcher v. Harrison, 4 B. & Ad. 129
s. c. 1 N. & M. 677.

III.—The plaintiff not only represents the judgment debtor, but also the creditors, at whose instance he was appointed, and can therefore bring any action that they could maintain.

In addition to the cases above cited, see

Bostwick v. Menck, 40 N. Y. 383.
Kennedy v. Thorp, 51 N. Y. 124.

Thus, he represents the creditors, so that whatever would estop them, will estop him, as is held in the last case above cited.

IV.—To deny the plaintiff this right of action would defeat the very object of the statute under which he was appointed.

The provisions of the Revised Statutes of 1874, under which he was appointed, are simply a re-enactment of the Act of March 7th, 1850, which was entitled “An act to prevent fraudulent trusts and assignments.”

V.—The order sustaining the demurrer should be reversed with costs, and the demurrer overruled.

R. GILCHRIST,
Of Counsel.

No 31
Submitted on Brief

BENJ. H. TYRREL, LAW PRINTER, 74 MAIDEN LANE.

NEW JERSEY COURT of APPEALS.

BETWEEN ELIAS N. MILLER, RE-
CEIVER, &c.,

Appellant,

and

JOHN M. MACKENZIE, and others,

Respondents.

On Appeal. 20

Case agreed upon by and between the solicitors of the respective parties upon which the above appeal is to be argued.

1. The complainant filed his bill in this cause as a receiver appointed under the act entitled, "an act respecting executions," approved March 27, 1874, by the Essex County Circuit Court, after proceedings duly had for that purpose by the plaintiffs in a certain judgment set forth in the bill in this cause. 30

2. The following is a copy of the order by which he was appointed such receiver.

ESSEX CIRCUIT COURT.

10	WILLIAM L. HOLCOMB and CHES- TER P. LEWIS, <i>Plaintiffs and Petitioners.</i> <i>vs.</i> JOHN M. MACKENZIE, <i>et al.</i> , <i>Defendant.</i>	<i>In case. As- sumpsit on pe- tition and sup- plemental peti- tion. order.</i>
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The examination of the above defendant, and of
 the witnesses produced by the above plaintiffs and
 petitioners, being certified to me under the hand of
 William S. Gummere, the Supreme Court Com-
 missioner, before whom said defendant was hereto-
 fore ordered to appear and make discovery concern-
 ing his property and things in action. And it
 appearing that the execution issued in the above
 cause, was issued on the 13th day of September,
 A. D. 1875, and after considering the evidence of
 said party and witnesses, it further appearing to
 me that a receiver should be appointed as herein-
 after he is hereby appointed. It is thereupon on
 this 29th day of May, A. D., 1876, on motion of
 Gilchrist, McGill and Gillmore, attorneys of above
 petitioners, ordered by the Court, that Elias N.
 Miller, of the city of Newark, be and he is hereby
 appointed receiver of the property and things in
 action belonging to or due to, or held in trust for
 said defendant as aforesaid, at the said time of the
 issuing of the said execution, issued in the above
 cause, to wit, the 13th day of September, A. D.,
 1875, or at any time afterwards, and said Elias N.
 Miller, is hereby given authority to possess, re-
 ceive, and if need be, in his own name, sue for such
 property or things in action. And it is ordered
 that the above petitioners do recover out of the

property, their costs of this proceeding to be taxed.

DAVID A. DEPUE.

3. The bill sets forth several alleged chattel mortgages, and assignments and conveyances of goods and chattels made by the defendant, John M. Mackenzie, to the other defendants, prior to the date of said receiver's appointment as such, and alleges that said mortgages, assignments and conveyances, were made in trust for the use of the said John M. Mackenzie, and were contrived in fraud, covin and collusion, with intent to hinder, delay and defraud the said judgment creditors of their judgment debt, and that the said judgment creditors were hindered, delayed and defrauded thereby. Wherefore, the bill prays that the said mortgages, conveyances and assignments may be declared void as to the complainant, and the judgment creditors, at whose instance he was appointed, and that they may be set aside, and the goods and chattels covered thereby delivered up to the complainant.

4. The defendants demurred to the bill, and the Court adopted as its opinion herein its former opinion in the case of *Higgins vs. Gillesheimer*, 11 C. E. Green, p. 308, and ordered that demurrer should be sustained, and the bill dismissed.

From this order the present appeal is taken.

GILCHRIST, Mc GILL & GILLMORE,
Solicitors of Complainant.

WALTER M. LYON,
Solicitor for Defendants.

IN CHANCERY OF NEW JERSEY.

10	Between ELIAS N. MILLER, Re- ceiver, &c., <div style="text-align: right;"><i>Complainant,</i></div> <div style="text-align: center;"><i>and</i></div> JOHN M. MACKENZIE, and others, <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Order.</i>
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This cause coming on to be heard before the Court upon a demurrer filed by the defendants to the complainant's bill of complaint, and the Court being of opinion that the said complainant cannot maintain this action in the capacity in which he sues in this case :

20 It is ordered by the Court, on motion of the solicitor of the defendants, that the demurrer be sustained, and that the bill of complaint of the said complainant be and the same is hereby dismissed with costs.

Dated June 11, 1877.

I respectfully advise the foregoing order.

A. V. VAN FLEET,
V. C