

and the dismissal of the suit now pending by it against the said Campbell in the district court of Brazoria county for said indebtedness, and the release of all liens held by Simpson, Hartwell & Stoppel on the property herein conveyed." The deed further provided that it was made "subject to such valid and prior liens as may now exist against the same." It is conceded that the indebtedness referred to in the deed was that to secure which appellant held the trust deed and lien for material. That the notes sued on were secured by a valid vendor's lien on the lots is not disputed. The court below held that by this conveyance, the indebtedness of Campbell to appellant was satisfied and the liens discharged, leaving the property in appellant's hands charged with the vendor's lien, and in this holding we concur. The machinery was a part of the realty, and became, when so attached, subject as part of the lots to the vendor's lien. It may be conceded that appellant's lien on the machinery was not divested by the fact that the latter was attached to the land, and that, as to the machinery, such lien had priority over that of the vendor. It was not enforced, but was satisfied and discharged by the conveyance of other property, as well as the machinery, which was accepted by appellant subject to other liens. Its debt being thus paid and its lien discharged, appellant stands as would any other purchaser of the property holding it subject to the lien for purchase money. The judgment is affirmed.

YOUNGSTOWN BRIDGE CO. v. NORTH GALVESTON, H. & K. C. RY. CO.

(Court of Civil Appeals of Texas. May 2, 1895.)

RECEIVERSHIP PROCEEDINGS—JUDGMENT ON CLAIM—MOTION TO SET ASIDE—FRAUD AND COLLUSION—COLLATERAL ATTACK.

1. Upon proof of their claims, judgment was rendered for certain creditors of an insolvent. Afterwards appellant creditor moved to set aside those judgments on the ground that they were fictitious, and procured by collusion and fraud, and requested that the claims be referred to the master, and evidence thereof be produced. *Held*, that the judgment creditors were not bound to reproduce evidence in support of the judgments until testimony sustaining the charges against them was produced.

2. The facts that claims on which judgment was entered against an insolvent were not referred to a master in chancery, but were passed on by the court, and that a receiver appointed by the court of another state was allowed to intervene, are not grounds for collateral attack upon the judgment.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Motions by the Youngstown Bridge Company against the North Galveston, Houston & Kansas City Railway Company to set aside judgments rendered in favor of certain creditors of the railway company. From a judgment overruling the motions, plaintiff appeals. Affirmed.

J. M. Coleman, for appellant. M. E. Kleberg, for appellees.

WILLIAMS, J. R. A. Reese was appointed receiver of the North Galveston, Houston & Kansas City Railway Company by the district court of Galveston county on the 7th day of July, 1893, at the suit of J. H. Taylor and others, who were creditors of the company. Reese was also appointed by the same court receiver of the Galveston Trust Company on the 10th day of July, 1893. After the appointment of the receiver of the railway company, various interventions were filed by creditors, seeking judgments on their claims and a participation in the distribution of the assets. On the 27th day of January, 1894, R. A. Reese, as receiver of the Galveston Trust Company, filed in its behalf a plea of intervention, setting up an indebtedness due to it from the defendant railway company of \$90,029.88. On same day the Minneapolis Trust Company, a corporation of Minnesota, as the receiver appointed by a court in that state of the property of the Northwestern Guaranty Loan Company, also a corporation of the same state, filed its plea of intervention, claiming an indebtedness due from the defendant railway company to the Northwestern Guaranty Loan Company of \$79,353.99. Both of these interventions were filed with leave of the court. On the same day the court, without referring these claims to the master in chancery, who had been previously appointed and was acting, heard evidence upon them, the defendants appearing and being represented by counsel, and rendered judgment in favor of these interveners for substantially the sums claimed by them. Judgment was also at same time given for the original plaintiffs for the sums claimed by them. The judgment provided for a sale of the property and a distribution of the proceeds among the various claimants, giving precedence, after the payment of costs and expenses and receiver's certificates, to the claims of the original plaintiffs, who were laborers and employes, and providing for the payment of balance into court, to be held until a time fixed by the order for distribution among other creditors whose claims should be established. On the 14th day of February, 1894, the appellant, the Youngstown Bridge Company, a corporation of Ohio, intervened, asserting a claim against the railway company for \$7,253.75, and claiming a lien upon certain property. This was referred to the master, who reported, recommending that the debt be allowed, but that the lien be disallowed. Upon exceptions by appellant to the report, it was confirmed by the court. No appeal has been taken from any of these orders, but on the 13th day of June, 1894, appellant filed two motions; one directed against the judgment in favor of the Minneapolis Trust Company, receiver of the Northwestern Guaranty Loan Company, and the other against the

the judgment in favor of Reese, receiver of the Galveston Trust Company, asking that, in so far as they affected the Youngstown Bridge Company, they be set aside, canceled, and annulled. The motions set up the previous intervention by appellant and its result, alleged that the property of the defendant railway company had been sold for \$30,000, and that this sum was sufficient, if applied to just debts only, to pay all claims; but that the claims allowed in favor of the two parties just mentioned were fictitious, and, in effect, that they had been procured by collusion, and that, by false representations made to appellant's counsel, appellant had been prevented from contesting them at the proper time; that no notice had been given to appellant of those interventions, and that it had no opportunity to resist them; that they were not referred to the master, as they should have been; that the judgments were rendered simultaneously with the filing of the pleas, and without proper evidence to establish the indebtedness; that, if such claims were allowed to stand, appellant would not receive more than 10 cents on the dollar of its claim, etc. There was request for an opportunity to be heard, that the claims be referred to the master in chancery, that proper proof of their justice be required, and that the claims be stricken out, and that the claimants be not allowed to participate in the distribution of funds. Exceptions to these motions were overruled, evidence was heard, and judgments were rendered overruling them, from which these appeals are prosecuted.

Upon the trial of the motions, no evidence was introduced, so far as the statements in the briefs show, tending to sustain the charge of collusion and misrepresentation, and none to establish the allegations as to the fictitious character of the claims asserted by appellees. The trial seems to have proceeded upon the theory that the appellees, in order to meet the motions, were required to again adduce evidence to prove the debts, and that, notwithstanding the former judgments, if they failed to prove up their claims by satisfactory evidence, judgment in appellant's favor would follow as a matter of course. This view gives no effect whatever to the judgments, and we cannot agree to it. When the interventions were filed by appellees, appellant was not a party to the suit, and there was no rule of law which required that it should be cited or that notice be given to it before appellees could take judgments against the railway company. It is true that it had the right to contest those claims, to show that the judgments had been collusively rendered, or that the claims were false and fictitious; but this is a very different proposition from that for which appellant seems to contend, that by simply filing a motion asking that further proof be required of appellees of their claims it could destroy the effect of the judgments already rendered, and put upon appellees the burden of proving

that those judgments were correctly rendered. Certainly those judgments had some effect, and afforded evidence of an indebtedness from the railway company to appellees, until they were overthrown by evidence to sustain the charges upon which they were attacked. No such evidence was introduced. The testimony that was taken on the trial all tended to prove rather than to disprove the claims, and appellant's contention on this appeal is not that it showed fraud or collusion in the obtention of the judgments, or that the claims were false, but that appellees, in answer to the motions, did not adduce sufficient legal evidence of the justness of the debts. They were not required to do so. They could safely rest upon their judgments until some evidence was produced in support of the allegations on which the motions were based. This view makes it unnecessary for us to consider whether or not the evidence offered was sufficient to legally prove the indebtedness for which the judgments were rendered. That evidence did not show or tend to show that the debts were fictitious.

The facts that the claims of appellees were not referred to the master in chancery, and that a receiver appointed by a court of another state was allowed to intervene, afforded no ground for a collateral attack upon the judgments. They in no way affect the jurisdiction of the court. It can justly make no difference to appellees that a foreign receiver is allowed to represent the creditor, if the debt is bona fide, and to participate in the fund. Appellant is itself a foreign creditor, and is not entitled to priority over the claim represented by the receiver. The resident creditors are protected by the precedence given to their claims over that of the foreign receiver, and no reason is seen why the court might not properly allow the receiver to intervene and represent the indebtedness asserted. At any rate, appellant is not injured by it, if the debt is just. Two transcripts have been filed, one upon each motion, but, as they present the same questions, both cases (Nos. 847 and 848) are disposed of by this opinion. Affirmed.

(10 Tex. Civ. App. 439.)

DANIEL v. HARVIN et al.

(Court of Civil Appeals of Texas. May 2, 1895.)

LIMITATION OF ACTION — NEW PROMISE BY EXECUTRIX — EFFECT — RELEASE OF SURETY.

1. An independent executrix has power, before a claim against deceased is barred, to suspend the running of limitations by her promise to pay the claim.

2. The estate of a surety is not released by the fact that the cause of action against the principal is barred by limitations, when the running of the statute in favor of the estate was suspended by a new promise by the executrix.

3. Hearsay evidence admitted without objection and uncontradicted should be treated by the court as competent.