effect a renewal of the former notice, and of itself operated to terminate the said contract at the expiration of thirty days from its date.

Assuming as the bill of exceptions seems to show, that the date of the notice of September 19th was the date of its service on plaintiff, we think the court erred in refusing this prayer.

The only object or purpose of any notice in the case was to apprise the party on whom it was served that the other party intended to terminate the contract. The contract itself fixed the time when this should take place, namely, thirty days after the service. The fact that the notice refers to a past notice and speaks of the termination of the contract as being already accomplished, does not destroy its effect as a notice of present intent to put an end to the arrangement. This notice of intent the contract makes effectual at the end of thirty days, and so the court was asked to instruct the jury. In declining to do this the court left the jury to infer that it had no effect whatever.

It is probable that if the first notice was wholly waived or abandoned the defendant had no right to dismiss the plaintiff until the 19th day of October. But even in reference to damages defendant had a right to show that under the contract and the notice she had only fifteen days to remain, and was injured only to that extent.

JUDGMENT REVERSED.

AVERY v. HACKLEY.

A valid lien is not divested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption made to him with a view of giving to him a preference, and in violation of the Bankrupt Act. The transfer of the equity of redemption of course is void.

ERROR to the Circuit Court for the Western District of Michigan.

Avery, assignee of Blake, a bankrupt, brought trover in

the court below against Hackley & Co. to recover the value of certain saw-logs, alleging that they had been transferred by the bankrupt to the said Hackley & Co. in fraud of the Bankrupt Act.

The case, as found by the court on a waiver of a jury, was thus:

Hackley & Co. were owners of saw-mills and engaged in sawing logs, and so making boards from them. Blake was a lumberman without capital, and engaged in buying logs and bringing them to saw-mills to be thus sawed into boards.

On the 25th of January, 1868, a contract was made between the two parties, by which Blake, on the one hand, agreed to deliver at the saw-mill of the defendants 18,000,000 feet of saw-logs to be sawed into boards, and by which Hackley & Co., on the other, agreed to advance to him $4 per 1000 feet, to be paid from time to time as the sawing advanced, and to be applied exclusively to the purchase of logs to be brought to them to be sawed.

To secure the advances, the property in the logs was conveyed to the defendants and the right of property vested in them; and they covenanted that when the lumber was manufactured they would send it to market and sell it to the best advantage; the proceeds to be equally divided between the parties.

Blake accordingly sent to the defendants large quantities of logs, and the defendants advanced large sums ($77,000) of money upon them; the case, as found, showing that but for the advances Blake could not have got this lumber from the forests, and thence to the defendants' mills.

During the spring of 1868 the price of lumber fell largely, so much so that it seemed likely that all the logs which Blake had sent to the defendants would be inadequate to repay to them their advances on account of it. Hereupon Blake, on the 25th of May, in the year just named, informed the defendants that he was unable to pay his debts, and proposed to make an assignment. They objected to his doing this and requested him to make a bill of sale of his property to them. This he made; the bill of sale embracing not only

the logs then at their mills, but certain land from which it was cut, and various property, saws, horses, oxen, wagons, &c., which had been used in getting it from the place where it grew to the mills. *The defendants, however, did not deliver up nor cancel, nor agree to deliver up or cancel, the contract of January 25th, but contrariwise, kept it in their possession.*

The bill of sale of May 25th was made afterwards, with a view to give the defendants a preference, and therefore in violation of the Bankrupt Act.

On the 2d of June, 1868, Blake was decreed a bankrupt, and Avery, the plaintiff below, appointed his assignee. Soon afterwards, the creditors objecting to the bill of sale, the defendants transferred to the assignee all the property conveyed by the bill except the logs. These they had sold, the proceeds paying them nothing above their advances previous to May 25th, and on their refusing to pay to the assignee these proceeds he brought the action below.

The question, of course, was whether this contract of the 25th of January was abandoned by the defendants doing what they had done subsequent to it (that is to say, by their taking, in the circumstances which they did, the bill of sale of May 25th), and merged in that bill. If so, the defendants had lost their lien, since it was obvious that they could not stand on the new contract of May 25th, it having been plainly void as to creditors. On the contrary, if the old security was not abandoned, then, although the defendants had attempted to strengthen their hold on the logs by an additional security, voidable at the election of creditors, and which the creditors did avoid, the right of lien justly acquired was not lost to the defendants, and they were at liberty to assert it in this action.

The court below decided that the lien was not affected by what was done on the 25th of May, and from that decision this writ of error was taken.

Mr. J. W. Champlin, for the plaintiff in error; Mr. E. A. Storrs, contra.

Mr. Justice DAVIS delivered the opinion of the court.

If the contract of January 25th, 1868, was never surrendered or abandoned it is manifest that the defendants acquired an interest in and lien upon the logs furnished by Blake to the extent of the advances made by them. There could be, therefore, on the theory that the contract of the 25th of January was subsisting, no ground for the maintenance of this action. It is said, however, that the defendants lost their rights under this contract by what occurred and was done subsequently to its execution.

It is undeniable that before the execution of the contract of May 25th the logs in controversy were in the possession of the defendants, who had advanced on them to Blake a very large sum of money. Without these advances the logs could not have been cut, banked, and put in the river; and, unless the defendants have plainly lost their right to retain the logs, common justice requires that they should be repaid. The honesty of the transaction is undisputed. Nor is there anything to show that the defendants were aware of the insolvent condition of Blake until after the logs had been delivered and the money advanced. They were proceeding in good faith to carry out their part of the contract when they were met by information of Blake's inability to go on with his business. The bill of sale, as it is called, which they took embraced not only the logs in controversy, but other personal property and real estate.

It is fair to infer from the facts found in the case that the bill of sale was not intended to clothe the defendants with any greater rights in the logs than they possessed without it, for it is very clear that the parties acted on the idea that the lumber, when manufactured and sold, would fall short of reimbursing the defendants for their advances, interest, and expenses. To save them from anticipated loss was, doubtless, the motive for including the remaining property of Blake, and not any expectation that previously acquired legal rights would be enlarged. The giving this preference has not operated to lessen the estate of Blake, as the creditors

got everything but the logs, and these, as it turns out, Blake had no interest in.

If there were any reasonable doubt about the intention of the defendants not to abandon the contract of January 25th, it is set at rest by the consideration that when the bill of sale was executed and delivered there was no agreement to cancel it, nor was it, in fact, cancelled, but was held and retained by the defendants. Naturally, if they had intended to rest their right to the logs exclusively on the bill of sale, they would have surrendered the former security. It is, therefore, not a case where an old security is abandoned and given up, and a new one taken as a substitute for that which previously existed. If, then, the contract of 25th January was not merged in the contract of 25th May, the latter one cannot operate an extinguishment of the former, the fairness of which has not been denied. This would not be the case if both contracts were valid, unless by express agreement, and it would be singular if such an effect could be produced, where one of them could be avoided by creditors as against the policy of the law. The creditors having elected to avoid the fraudulent conveyance, take the property as though it had never been made, and subject to all lawful liens upon it. The assignee, standing in the place of the bankrupt, acquired no greater rights than he possessed, and the defendants neither gained nor lost any rights because of the bill of sale.

These general views are sustained by authorities which seem decisive of the point at issue.*

One of these authorities, *White* v. *Gainer*,† was trover by the assignee of a bankrupt. The defendant, a maker of

* In re Kahley, 4 Bankrupt Register, 124; Ladd *v.* Wiggin, 35 New Hampshire, 428; Towle *v.* Hoit, 14 Id. 63; Stedman *v.* Vickery et al., 42 Maine, 136; Hoyt *v.* Dimon, 5 Day, 483; Britt *v.* Aylett, 6 English, 475; Mead *v.* Combs, 4 C. E. Green (New Jersey), 112; Ripley *v.* Severance, 6 Pickering, 474; Sawyer *v.* Turpin, 5 Bankrupt Register, 339; Eastman *v.* Porter, 14 Wisconsin, 39; Stokoe *v.* Cowan, 29 Beavan, 637; Meshke *v.* Van Doren, 16 Wisconsin, 319; White *v.* Gainer, 2 Bingham, 23.

† 2 Bingham, 23.

cloth, who had a lien on some cloth in his possession, purchased it of the bailor, together with several other pieces, after he became bankrupt, and when the cloth was demanded of him by the assignees of the bankrupt, refused to give it up, saying, "I may as well give up every transaction of my life."

It was contended at the trial that the lien was merged in the purchase, and that, at all events, it was waived, because not set up when the cloth was demanded. The judge directed the jury that the demand should have been accompanied with a tender of the amount due for the workmanship on the cloths, but reserved the point as to the merger of the lien.

On deciding the motion for a rule *nisi* to set aside the verdict, Best, C. J., said: "It has been urged that he (the defendant) bought the cloths after the bankruptcy. If that were so, he stands in the same situation as every other purchaser, under the same circumstances; the purchaser is liable to restore them to the assignees, but the assignees must take them subject to such rights as had accrued previously to their claim, and the bankruptcy of the bailor will not deprive the defendant of the right to which he is entitled,—the right of lien. It might have been otherwise, if the defendant, when called on to surrender the goods, had relied on the purchase; but this was not the case, and the verdict must stand."

The rule laid down by Chief Justice Best is applicable here.

The assignee of Blake had no right to the property until he had tendered the advances upon it, and there is no evidence that the defendants placed their refusal to deliver the property upon any particular ground. In the absence of this evidence it is a reasonable presumption that the lien, if not asserted in terms, at least, was not when demand was made, waived. It is true the defendants claimed, after the execution of the bill of sale to the creditors of Blake and other persons, to be the absolute owners of the property conveyed to them, but so far as the logs were concerned,

this claim was doubtless founded on the belief that the price of lumber would not advance, and if it did not, according to the estimates which were made, Blake had no interest in them. If so, although the claim of absolute ownership might not be legally correct, it had a basis of fact to rest upon, and does not prove that the defendants intended to abandon their lien. Indeed, it would be a harsh rule to infer the abandonment of a lien to the extent of this one, contracted in good faith in the prosecution of a legitimate business, unless the evidence on the subject left no other alternative.

It is said that after the execution of the bill of sale the lumber was not sold on joint account, and, therefore, the lien was waived. The answer to this is that the contract by which the lien was secured did not require the lumber to be sold on joint account. If the defendants sent the lumber to market, sold it to best advantage, and divided the proceeds, the contract on their part was complied with. They had entire control over it, and the manner of sale is immaterial and cannot affect the rights of the parties.

The leading purpose of the Bankrupt law is to secure an equal distribution of the bankrupt's property among his creditors. This purpose was accomplished in this case when the bill of sale was set aside, but the assignee seeks to go further and increase the estate more than seventy thousand dollars by relieving the bankrupt from the performance of a pre-existing valid contract. This he cannot do, unless on the clearest proofs that the defendants intended to abandon this contract and rely wholly on the bill of sale. As these proofs are wanting, the judgment is

AFFIRMED.