GABRIEL WOOD, original defendant, *v.* WILLIAM OWINGS and JOB SMITH, assignees of WILLIAM ROBB, a bankrupt, original plaintiff.

Bankruptcy.—Deed.

A deed of lands in Maryland, signed, sealed and delivered on the 30th of May, and acknowledged on the 14th of June, is to be considered as made on the 30th of May; and its acknowledgment on the 14th of June, will not cause it to be such a deed as is contemplated in the bankrupt act which came into operation on the 2d of June.

ERROR from the fourth Circuit Court, sitting at Baltimore. This was an action on the case, for money had and received, by Wood, to the use of Robb, the bankrupt. Judgment below was entered by consent, subject to the opinion of the court on a case stating the following facts, viz.:

*On the 30th of May 1800, Robb, being in possession of his household furniture, and having two vessels, and no other property, [*240 on the high seas, signed, sealed and delivered a deed to Charles Garts and Gabriel Wood, trustees in behalf of themselves and other creditors of Robb, therein particularly named, and such others of his creditors as should, by a certain time, assent to the terms of the trust; by which deed, Robb, in consideration of five shillings, and towards payment of the debts due to the particular creditors therein named, in the first place, and in the next place, of such of his creditors as should agree to the terms of the trust; granted, bargained, sold, &c., to Garts and Wood, all his estate, real, personal and mixed, and choses in action, &c., in trust to sell the same, and collect the debts, &c., and on receipt of the money, to retain, in the first place, the amount due to Garts and Wood, for money lent, &c., then to pay the debts due to the other creditors particularly named, and then to pay the debts due to such of his other creditors as should, within a certain time, agree to the terms of the trust; and if there should be a surplus, to pay it over to Robb. This deed was acknowledged on the 14th June 1800. Robb did not, on the said 30th of May 1800, deliver to Wood his books, but they remained in Robb's possession. The vessels were not conveyed to Wood by any other conveyance than that before mentioned. Robb continued in possession of his household furniture, books of accounts, and all his papers, until the suing out of the commission of bankruptcy, except the policies of insurance on the vessels, which were delivered to Wood, at the time of delivering the deed. Robb considered Wood as having a right to take possession of the books and papers and personal estate, at any time after the delivery of the deed, but did not then expect to be obliged to stop business; on the contrary, that he actually went on, with the hope of retrieving his affairs, until the 20th June 1800. Robb was a trader, before and after the 1st of June 1800; at the time of signing, sealing, and delivering of the said deed, he was the legal proprietor of a lot of ground, in the state of Maryland, as assignee of a term of 99 years, renewable for ever, and was also possessed of personal property, and had debts due to him; Garts and Wood, and the other persons in the deed particularly named, were creditors *of Robb; and there were other creditors besides those particularly preferred in [*241 the deed. A commission of bankruptcy issued against Robb, on the 12th July 1800, founded on the execution and acknowledgment of the said deed, under which Robb was declared a bankrupt, and his effects were assigned

to the plaintiffs, Owings and Smith, by a deed of assignment, on the 1st of May 1801. And the action was brought to recover all moneys received by Wood, in virtue of the said deed to Garts and Wood. If, on the above state of facts, the plaintiffs were entitled to recover, then judgment was to be entered for the plaintiffs for $3000; but if, &c., then judgment of *non pros.*

By the bankrupt act of the United States, § 1, it is enacted, that "from and after the 1st day of June next (June 1st, 1800), if any merchant, &c., with intent unlawfully to delay or defraud his creditors, shall make or cause to be made any fraudulent conveyance of his lands or chattels, he shall be deemed and adjudged a bankrupt."

Two questions were made by the counsel in the court below, viz.: 1st. Whether this deed could be considered as made at the time of its acknowledgment, on 14th June, 1800, so as to constitute it an act of bankruptcy, under the bankrupt law of the United States, which came into operation on the 2d June 1800, or whether the acknowledgment should relate back to the 30th May 1800, the day on which the deed was signed, sealed and delivered, so that the deed should be considered as made on that day? 2d. Whether, if made after the 1st of June 1800, it could be considered as such a fraudulent conveyance, as is contemplated by § 1 of the bankrupt law?

Martin, for the plaintiff in error, now waived the second point, and relied entirely on the first.—

*242] This involves three questions: *1st. Whether the deed, signed, sealed and delivered on the 30th of May, and acknowledged on the 14th of June, is an act of bankruptcy, under the law which came into operation on the 2d of June? 2d. Whether the signing, sealing and delivery shall be considered as going forward to the time of acknowledgment? or 3d. Whether the acknowledgment shall refer back to the time of the signing, sealing and delivery?

The debtor, independently of the bankrupt act, may prefer one creditor to another. No creditor can prevent him, unless by taking out a commission of bankruptcy. This principle is acknowledged by all the state governments, and by the laws of England, in cases not within the bankrupt law.

In the case of *Hooper* v. *Smith*, 1 W. Bl. 441, one Hooper, being *bonâ fide* indebted to his mother, in the sum of 800*l.*, at 8 o'clock in the morning, assigned and delivered to his mother, half his stock in trade, which was taken away immediately to his mother's lodgings. On the evening of the same day, he committed an act of bankruptcy. His assignees, by stratagem, got possession of the goods and sold them: the mother brought trover against the assignees, and recovered. Lord MANSFIELD, in that case, said, that "a preference to one creditor, especially, by assigning only part of his goods, and to pay only part of the debt, has been frequently held to be good; particularly in the case of *Cock* v. *Goodfellow* (the case of a parent and child), *Small* v. *Owdley and others*." "Suppose, he had sold the goods in question to John or Thomas, and with that ready money, had paid his mother part of her debt; would that sale or payment have been void?" The courts of Virginia, Maryland and Pennsylvania have always recognised the

same principles. If the bankrupt law had never passed, this deed would have been protected in courts of law and equity.

Is this a fraudulent conveyance, under the bankrupt law? *The acknowledgment is necessary for some purposes, but not to constitute [*243 it a deed. A deed is defined to be, a writing on parchment or paper, sealed and delivered. Suppose, a mortgage of lands, containing a covenant to pay money, be not acknowledged, it would not, at law, convey a legal title to the land, but it would be good as a covenant to pay the money; and would be good to pass an equitable title to the land. Suppose, it contained a conveyance of land and chattels; it would be good as to the chattels. This shows that acknowledgment is not a necessary part of the deed; but only that a deed, not acknowledged, will not pass a legal estate in lands, as to creditors.

But the act of Maryland, November session 1766, c. 14, § 2, says, "that no estate of inheritance, &c., shall pass or take effect, except the deed or conveyance by which the same shall be intended to pass or take effect, shall be acknowledged before the provincial court, &c., and be also enrolled in the records of the same county," &c. It must, therefore, be a deed, before the acknowledgment. And by the 5th section of the same act, it is declared, that every such deed shall have relation, as to the passing and conveying the premises, from the day of the date thereof; thereby evidently contemplating it to be a deed from its date. This section was inserted because, by the former act of 1715, the deed took effect only from the time of its acknowledgment. But the law is the same, independent of the positive declaration of this act; 1 Bac. Abr. 277, Bargain and Sale; and 2 Inst. 674–5, where Lord Coke, in his exposition upon the statute of 27 Hen. VIII., c. 16, of enrolments, says, "And when the deed is enrolled within six months, then it passeth from the livery of the deed. And, albeit, after the delivery and acknowledgment, either the bargainor or bargainee die before enrolment, yet the land passeth by this act." "And by the words of this statute, when the deed is enrolled, it passeth *ab initio*." And he cites the case of *Mallery* v. *Jennings*, determined in the common pleas, 42 Eliz., which was this: "One Sewster was seised of certain lands in fee, and acknowledged a recognisance *to Turner, whose executrix brought a [*244 *scire facias* upon the recognisance, bearing date the 9th November, 41 Eliz., against Sewster, and alleged him to be seised of those lands *in dominico suo ut de feodo*, the day of the *scire facias* brought; and the truth of the case being disclosed by long pleading, was this: Sewster, 7th November, before the recognisance acknowledged, by deed indented, for money, had bargained and sold the said land to another, and the deed was enrolled the 20th November following. The question was, whether Sewster was, upon the whole matter, seised in fee, the 9th of November, the deed being not enrolled until the 20th of the same November. And it was adjudged, *und voce*, that Sewster was not seised in fee of the land, on the 9th day of November. For that when the deed was enrolled, the bargainee was, in judgment of law, seised of that land, from the delivery of the deed. And it was resolved, that neither the death of the bargainor, nor of the bargainee, before enrolment, shall hinder the passing of the estate. And that a release of a stranger to the bargainee, before enrolment, is good. So that it holds not by relation, between the parties, by fiction of law; but in point of estate, as well to them

as to strangers also. And that a recovery suffered against the bargainee, before enrolment (the deed indented being, afterwards, within the six months, enrolled), is good, for that the bargainee was tenant of the freehold, in judgment of law, at the time of the recovery. And *non refert* when the deed indented is acknowledged, so it be enrolled within the six months. And all this was afterwards affirmed for good law, by the court of common pleas, Trin., 3 Jac., upon a special verdict given in an *ejectione firmæ* between *Lellingham* and *Alsop;* and further, it was there resolved, that if the bargainee of land, after the bargain and sale, and before the enrolment, doth bargain and sell the same, by deed indented and enrolled, to another; and after the first deed is enrolled, within the six months, the bargain and sale, by the bargainee, is good."

In 18 Viner 289, tit. Relation, it is said, "when two times, or two acts, *245] are requisite to the perfection of an *act, it shall be said, upon their consummation, to receive its perfection from the first." If A. makes a deed to B., on the 30th of May; and another, for the same land, to C., on the 1st of June, and acknowledges it the same day; afterwards, on the 14th of June, he acknowledges the deed to B., this overreaches the deed to C., and the acknowledgment of the deed to B. is not a fraudulent act Suppose, A. makes a *bonâ fide* deed to B., for valuable consideration, on the 30th of May: on the 1st of June, A. commits an act of treason: on the 14th of June, he acknowledges the deed to B.: the land is not forfeited by the treason of A. If an indictment had been found for forging this deed, and to support the indictment, evidence had been given of the forgery of the acknowledgment only, would have that supported the indictment? If a declaration upon this deed, stating it to have been made on the 14th of June, had been drawn, would it have been supported, by producing in evidence this deed signed, sealed and delivered on the 30th of May?

This deed intends to convey *choses in action* and personal effects, as well as lands. As to the former, the deed is good, without acknowledgment; for as to the *choses in action*, the deed, without acknowledgment, is an equitable assignment, and if acknowledged, it would have amounted to nothing more.

But if the assignees are entitled, they must take the bankrupt's estate, subject to all the equity of others. 2 Vesey, sen., 585, 633; Cooke's Bankrupt Law, 203; *Taylor* v. *Wheeler*, 2 Vern. 564. Courts of law will protect equitable rights; as in the case of *Winch* v. *Keeley*, 1 T. R. 619, where the plaintiff having assigned his right of action to Searle, and having become bankrupt, was still held able to support the action for the benefit of Searle, notwithstanding the assignment of his effects under the bankrupt *246] laws. *And by the authority of *Ex parte Byas*, 1 Atk. 124, if the assignees had received the money due to Robb, the bankrupt, they would have been obliged to pay it over to Wood, the plaintiff in error, instead of receiving it from him.

The deed is not fraudulent *in se;* and would not now be questioned, if the bankrupt law had not been passed. Although it is a deed of all his effects, yet it is not an absolute deed, nor was it made on any secret trust, or for his own benefit. The only thing which can be alleged against it is, that it gives a priority to some of his creditors, and this he had a clear right to do, both in law and equity. It was not made in secret; it holds up no false colors; it enables him to receive no false credit. He might have sold the property

for ready money, and paid any one of his creditors in full. But making a deed of trust, he has prevented a sacrifice of his property, whereby it is competent to satisfy a greater number of his creditors, and he is himself rendered more able to pay the residue of his debts by his future industry.

The committing an act of bankruptcy is, in law, considered as criminal. The bankrupt law is, therefore, in this respect, to be construed strictly. It ought not to be extended beyond the letter of the law. Cooke's B. L. 67; Cowp. 409, 427, 428; 5 T. R. 575; *Fowler* v. *Padget*, 7 Ibid. 509.

But however fraudulent the deed might have been, yet it was no act of bankruptcy, under the act of congress; because not executed after the 1st of June; unless the acknowledgment can be considered as the making of the deed. And if it was not an act of bankruptcy, the title of the defendants in error fails.

Harper, contrà.—The act of bankruptcy charged, is the making a fraudulent deed, after the 1st of June 1800. The counsel for the plaintiff in error having abandoned the second point which was made, and strongly contended for, in the court below, the only question now to be considered is, whether the deed was made before or after the 1st of June.

*A deed, at common law, is an instrument in writing, signed, sealed and delivered. If it be signed and sealed, but not delivered, it is no deed; and the reason is, that until the last act of volition is performed, there is still a power of recalling it. The cases from the English books, respecting the statute of enrolments, are not applicable to the law of Maryland respecting acknowledgment. The English laws only protect creditors and purchasers without notice. But the law of Maryland is intended to protect the maker of the deed himself, to prevent forgeries and fraud, and to give a further solemnity, that the grantor may have more time to reflect, and to secure himself from being suddenly entrapped. The law, therefore, superadds to signing, sealing and delivery, a further act of volition. [*247

It is said, that a court of equity will set up such a deed; true, it would, in certain cases; but not because it is a paper signed and sealed; but because it is a contract for a valuable consideration. But this deed would never have been supported, in a court of equity, if it had not been completely valid at law. Suppose, Robb had refused to acknowledge it; and application had been made to chancery to carry the deed into effect; it would have been refused. Can a deed be said to be made, when it is not complete? It was not complete, on the 30th of May; something was still to be done, of which it would have been necessary to apply to a court of chancery to compel the performance.

If acknowledgment is necessary by statute law, it is the same as if necessary by common law. The one is as binding as the other. They are both derived from the same source, but evidenced in different modes. Signing, sealing and delivery only are necessary by the common law, but acknowledgment also is necessary by the statute.

The deed of land was an act of bankruptcy, and prevented the operation of the deed as a deed of personal estate. The deed for the land and for the chattels was executed *eodem instanti.*

*Chase, J.—The effect of an acknowledgment is to prevent the grantor from pleading *non est factum.* [*248

Harper.—By the law of England, acknowledgment is not necessary. By the law of Maryland, it is a necessary part of the conveyance, and can no more be dispensed with, than the signing, sealing and delivery. Having signed and sealed, the grantor may refuse to deliver; so, having signed, sealed and delivered, he may refuse to acknowledge, and in either case, it is no deed. The deed, therefore, was not made until the 14th of June.

Martin, in reply.—Acknowledgment is absolutely necessary in England, before enrolment; Viner, tit. Enrolment, p. 443; "No deed, &c., can be enrolled, unless duly and lawfully acknowledged, citing Co. Litt. 225 *b*." The acknowledgment is the warrant for the enrolment. An acknowledgment in Maryland has no greater effect than in England.

There was an enrolment at common law, for safe-custody, it makes an estoppel, and the party cannot plead *non est factum*. *Per* HOLT, Ch. J., Comb. 248, *Smart* v. *Williams*, cited in Viner, tit. Enrolment, p. 444. And in p. 445, it is said, "Enrolment of a deed is to no other purpose, but that the party shall not deny it afterwards," citing Bro., Faits, Enrol., pl. 4. And in Sav. 91, *Holland* v. *Downes*, cited in Viner, tit. Enrolment, pp. 446, 447, it is said, "the sealing and delivery is the force of such deeds, as deeds of bargain and sale, &c., and not the enrolment." And again, in the same case, "Bonds, indentures and deeds take their force by the delivery; so there is a perfect act, before the conusance is taken, and before any enrolment. The enrolment could not be made upon proof by witnesses. The acknowledgment was the only authority.

Harper.—The enrolment is the act of the grantee. The acknowledgment is the last act of volition of the grantor. It is wholly voluntary; he may refuse; and if he does, the deed has no effect. In England, the acknowledgment is *a regulation of the courts, not a provision of the statute of enrolments. That statute is different from the act of Maryland; the latter expressly requires the acknowledgment, and no estate passes at law, without it. It, therefore, becomes as much a requisite of a deed as sealing or delivery. It is not only an absolute requisite that the deed should be acknowledged, but the courts of Maryland have been very strict in requiring it to be done precisely in the mode prescribed. In the case of *Hall* v. *Gittings*, decided in the court of appeals in Maryland, the case was, that the grantor resided in Anne Arundel county, but the deed described him as a resident of Baltimore county, where the lands were situated; the acknowledgment was made in Prince George's county. This acknowledgment was decided by the court of appeals not to be good, and the cause was lost upon that ground, although the deed was twenty-five years old, and possession had been quietly enjoyed under it. The error was discovered by the court themselves, and had not been suggested by the counsel at the trial. It has also been decided, that the acknowledgment of a *feme covert* must be precisely in the form prescribed by the act. This shows the great importance of acknowledgments in Maryland.

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Martin, in reply.—The acknowledgment, in England, is not a regulation of the courts only, but is a principle of the common law relative to enrolment, which existed before the statute of enrolments. It was known, at the time of enacting that statute, that by the common law, an acknowledgment

was a prerequisite to enrolment. It was not necessary, therefore, that it should be expressly prescribed by statute. Acknowledgment and enrolment was a proceeding well known and understood, and was not originated by the statute of 27 Hen. VIII. The statute only applies the process to new cases, or makes it necessary where before it was only voluntary. As to the case of a *feme covert*, she could not, by the *common law, convey her land, except by fine and recovery. But the law of Maryland authorized her to do it in a certain mode. That mode must, therefore, be strictly pursued. [*250

March 1st, 1803. The CHIEF JUSTICE delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the fourth circuit, sitting at Baltimore, in the following case:

On the 30th of May 1800, William Robb, who was then a merchant, carrying on trade and merchandise, in the state of Maryland, signed, sealed and delivered to Gabriel Wood, an instrument of writing, purporting to convey to the said Gabriel, his real and personal estate, in trust, to secure him from certain notes and acceptances made by him, on account of the said Robb, and afterwards, in trust for other creditors in the deed mentioned. This deed was acknowledged on the 14th of June; and was then enrolled, according to the laws of Maryland.

On the 12th of July 1800, a commission of bankruptcy was sued out, founded on the execution of the deed above mentioned, and the said William Robb being declared a bankrupt, his effects were assigned to William Owings and Job Smith, who brought this suit against Gabriel Wood, to recover the money received by him under the deed aforementioned. Judgment was confessed by the defendant below, subject to the opinion of the court on a case stated, of which the foregoing were the material facts. The court gave judgment in favor of the assignees, to which judgment a writ of error was sued out by the present plaintiff. The only question made by the counsel was, whether the deed stated in the case was an act of bankruptcy?

On the 4th of April 1800, congress passed an act to establish a uniform system of bankruptcy throughout *the United States, which declares, among other things, that any merchant who shall, after the first day of June next succeeding the passage of the act, with intent unlawfully to delay or defraud his creditors, make, or cause to be made, any fraudulent conveyance of his lands or chattels, shall be deemed and adjudged a bankrupt. It was admitted, in the argument, that this deed, if executed after the 1st day of June, would have been an act of bankruptcy, but that being sealed and delivered on the 30th of May, it was not within the act, which only comprehends conveyances made after the 1st of June. [*251

For the defendants in error, it was contended, that, by the laws of Maryland, a deed is not complete, until it is acknowledged, and therefore, this conveyance was made on the 14th of June, when it was acknowledged; and not on the 30th of May, when it was sealed and delivered.

The Maryland act alluded to was passed in 1766, and declares, "that after the 1st day of May next, no estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass or take effect, except the deed or conveyance, by which the same shall be intended to pass or take effect, shall be acknowledged in the provincial

court, or before one of the justices thereof, in the county court, or before two justices of the same county where the lands, tenements or hereditaments, conveyed by such deed or conveyance do lie, and be also enrolled, &c., within six months after the date of such deed or conveyance." The 5th section gives the conveyance, so acknowledged and enrolled, relation to the date thereof.

It is a well-established doctrine of the common law, that a deed becomes complete, when sealed and delivered. It then becomes the act of the person who has executed it, and whatever its operation may be, it is his deed. The very act of livery, which puts the paper into the possession of the party for whose benefit it is made, seems to require the construction that it has become a deed.

*252] *The question now made to the court is, whether the act of the legislature of Maryland has annexed other requisites to an instrument of writing conveying lands, without the performance of which, not only the passing of the estate, intended to be conveyed, is arrested, but the instrument itself is prevented from becoming the deed of the person who has executed it. Upon the most mature consideration of the subject, the opinion of the court is, that the words, used in the act of Maryland, which have been recited, consider the instrument as a deed, although inoperative, until acknowledged and enrolled. The words do not apply to the instrument, but to the estate that instrument is intended to convey.

Since, then, the bankrupt law of the United States does not affect deeds made prior to the 1st of June 1800, and this deed was made on the 30th of May 1800, the court is of opinion, that the rights vested by the deed (whatever they might be) are not divested in favor of the assignees of the bankrupt, and therefore, that they ought not to have recovered in this case.

Judgment reversed, and judgment of *non-pros.* to be entered.

United States *v.* Simms.

Penal laws of the District of Columbia.

The acts of congress of 27th February and 3d March 1801, concerning the District of Columbia, have not changed the laws of Maryland and Virginia, adopted by congress as the laws of that district, any further than the change of jurisdiction rendered a change of laws necessary.[1]

Fines, forfeitures and penalties, arising from a breach of those laws, are to be sued for and recovered in the same manner as before the change of jurisdiction, *mutatis mutandis*.

Error from the Circuit Court of the district of Columbia, sitting at Alexandria, to reverse a judgment rendered by that court for the defendant, on an indictment for suffering a faro bank to be played in his house, contrary to an act of assembly of Virginia.(*a*)

The indictment set forth that Simms, "on the 1st April 1801, with

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(*a*) In the case of United States *v.* More (3 Cr. 159), it was decided, that no writ of error will lie in a criminal case.

[1] United States *v.* Heinegan, 1 Cr. C. C. 50; United States *v.* Gadsby, Id. 55; United States *v.* Ellis, Id. 125; United States *v.* Taylor, 4 Id. 731. And see Rhodes *v.* Bell, 2 How. 397.