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# Comments and Casenotes

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## DEEDS OF TRUST AND ARTICLE 66, SECTION 24, OF THE MARYLAND CODE

By HERBERT H. HUBBARD\*

The law in Maryland by judicial decision, prior to the enactment of this statute in 1892, was that when the owner of the note or debt and the party in whose name the mortgage stood were different persons, the lien of the mortgage followed the debt and the mortgagee of record had no title or interest therein to convey or release; thus a bona fide purchaser for value from the owner of the note or debt obtained a lien on the property involved which was superior to or attached to the interest of the bona fide purchaser for value dealing with the property in reliance on the fact that the mortgagee of record was the sole person interested in the lien of the mortgage.<sup>1</sup> These cases involved technical mortgages and not deeds of trust. However, several other jurisdictions applied the same law to deeds of trust, often basing their decisions on similar cases which had concerned mortgages.<sup>2</sup>

In 1892, what is now Art. 66, Sec. 24 of the 1951 Code was enacted. This section provides:

“The title to all promissory notes and other instruments hereafter made, and debts hereafter contracted, secured *by mortgage or deeds in the nature of a mortgage*, shall both before and after the maturity of such notes, other instruments or debts, be conclusively presumed to be vested in the person, persons or body corporate holding the record title to such mortgage or deed in the nature of a mortgage; and if such *mortgage or deed in the nature of a mortgage* is duly released of record, the promissory notes, other instruments or debts secured by such *mortgage or deed in the nature of a mortgage*, shall both before and after the maturity of such promissory notes, other instruments or debts,

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<sup>1</sup> Demuth v. Old Town Bank, 85 Md. 315, 37 A. 266 (1897); Dickey v. Pocomoke City Bank, 89 Md. 280, 295-7, 43 A. 33 (1899); Clark v. Levering, 1 Md. Ch. 132 (1847); Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 20, 26 (1848); Boyd v. Parker, 43 Md. 182, 199 (1875); McCracken v. German Fire Ins. Co., 43 Md. 471, 477 (1876); Hewell v. Coulbourn, 54 Md. 59, 63 (1880); see also, JONES ON MORTGAGES (8th Ed., 1928), Secs. 1018-1021; 1033-1042.

<sup>2</sup> 59 C. J. S., Mortgages, Sec. 6, p. 32 and cases cited. See also 41 C. J., Mortgages, Secs. 8-15, pp. 282-5.

be conclusively presumed to be paid so far as any lien upon the property conveyed by said mortgage or deed in the nature of a mortgage is concerned."<sup>3</sup>

The purpose of the statute was explained in *Dickey v. Pocomoke City Bank*:

"The object of the Act was to avoid the complications that often arose by reason of the fact that the release of mortgage by the mortgagee was not valid, unless he also owned the evidences of debt secured by it, and hence it often left the titles to the mortgaged property involved, as the ownership of the evidences of debt was not necessarily, or usually, a matter of record."<sup>4</sup>

But what about deeds of trust in Maryland? Does the statute include deeds of trust in the phrase "mortgage or deeds in the nature of a mortgage"?

Of all the cases construing Art. 66, Sec. 24,<sup>5</sup> the only one which appears to answer the inquiry here is *Royal Insurance Company v. Drury*,<sup>6</sup> in which the Court said: ". . . in Maryland a mortgage debt passes only by assignment of the mortgage itself, and does not pass by the transfer of the mortgage notes. . . . but under a deed of trust, such as we are here considering, the debt secured passes by the transfer of the notes, . . ." The question before the court, which was answered in the affirmative, was "whether

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<sup>3</sup> Emphasis supplied.

<sup>4</sup> *Supra*, n. 1, 296.

<sup>5</sup> See Flack's Annotated Code and Page, *Latent Equities in Maryland*, 1 Md. L. Rev. 1 (1936); *Bank & Trust Co. v. College*, 167 Md. 646, 653, 176 A. 276 (1935), is cited for the proposition that the statute "will probably not be construed to give persons not assignees of the mortgage any rights". Judge Parker in *Sapero v. Neiswender*, 23 F. 2d 403, 405 (4th Cir., 1928), whose opinion is cited with approval by *Bank & Trust Co. v. College*, *supra*, states: "It will be observed that in all of these cases the statute has been construed as determining the ownership of the debt secured by mortgage only as it affects conflicting claims with respect to rights under the mortgage or in the property embraced therein." (Emphasis supplied.) See also *Dickey v. Pocomoke City Bank*, *supra*, n. 1; *Sapero v. Neiswender*, *supra*, 405 continues: "In no case has it been held to have the effect of invalidating an assignment between assignor and assignee, or as vesting the title to the debt or notes secured by the mortgage in one who has assigned or transferred them as against the claims of his assignee." See *Getz v. Johnson*, 143 Md. 543, 548, 123 A. 74 (1923). *Cf. Whitelock v. Whitelock*, 156 Md. 115, 122, 143 A. 712 (1928). *Nussear v. Hazard*, 148 Md. 345, 129 A. 506 (1925), implied that Art. 66, Sec. 24, may destroy negotiability of a mortgage note. *Quaere* as to the note which makes no reference on its face to the existence of the mortgage.

<sup>6</sup> 150 Md. 211, 228-9, 132 A. 635 (1926).

or not the final ratification of the sale of property made under a power of sale contained in a deed of trust, to the holders of the notes secured by the deed of trust, effects 'any change of ownership' in the property within the meaning of the phrase as used in the 'standard mortgage clause', now customarily used in fire insurance policies covering mortgaged property." The facts of this case throw little or no light upon the problem being discussed herein, since this interpretation of Art. 66, Sec. 24, was made to resolve, indirectly, a question of insurance law. In effect, this Court apparently decided not only that the old Maryland doctrine existing prior to the enactment of Art. 66, Sec. 24, as to mortgages<sup>7</sup> also applied to deeds of trust but also that the legislature had not abrogated this old rule as to deeds of trust. This result is reached without citation of authority. In other words, a deed of trust is enough like a mortgage to apply to it the old Maryland rule of mortgage law without hesitation or question and without the necessity of giving reasons for so doing, yet a deed of trust is not a "mortgage or deed in the nature of a mortgage" within Art. 66, Sec. 24. The answer to this apparently anomalous situation is to be found in the Maryland cases.

First there is the language used in many Maryland cases in differentiating mortgages from deeds of trust. Many of these cases were reviewed by the Maryland Court in 1924 in *Kinsey v. Drury*,<sup>8</sup> where the court said:

"It has been definitely decided by this Court that a deed of trust securing an indebtedness is not a mortgage within the meaning of various provisions of the recording statutes. In *Stanhope v. Dodge*, 52 Md. 483, it was held that a deed of trust to secure the payment of promissory notes of the grantor might be recorded after the expiration of six months from its date and would then have the same validity as if recorded within that period. The requirement of Section 32 of Article 21 of the Code that no mortgage shall be valid, except as between the parties, without an affidavit by the mortgagee as to the consideration, has been held applicable only to technical mortgages and not to deeds of trust. *Shidy v. Cutter*, 54 Md. 677; *Snowden v. Pitcher*, 45 Md. 265; *Carson v. Phelps*, 40 Md. 96; *Stockett v. Holliday*, 9 Md. 499; *Charles v. Clagett*, 3 Md. 82; *Stan-*

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<sup>7</sup> See n. 1, *supra*.

<sup>8</sup> 146 Md. 227, 230-2, 126 A. 125 (1924), decided two years before *Royal Insurance Co. v. Drury*, *supra*, and related in some manner to the latter case.

*hope v. Dodge, supra.* In *Bank of Commerce v. Lananhan*, 45 Md. 396, where the provisions of Article 64 (now 66) of the Code relating to the exercise of powers of sale in mortgages were held not to apply to deeds of trust, the distinction between such instruments and technical mortgages was stated by Judge Alvey as follows: 'As to the question of the character of the deed, upon careful examination of its provisions, we are of opinion that it is not a technical mortgage, within the contemplation of the Code, Art. 64, Sec. 5, referred to, but a deed of trust, clearly denominated such by the Code, Art. 24, Sec. 55. It is a deed of trust to secure debts; and while it has some of the attributes of a mortgage, yet it presents features which distinguish it from that class of security, strictly considered. By the legal, formal mortgage, as distinguished from instruments held to be mortgages by construction of courts of equity, the property is conveyed or assigned by the mortgagor to the mortgagee, in form like that of an absolute legal conveyance, but subject to a proviso or condition by which the conveyance is to become void, or the estate is to be reconveyed, upon payment to the mortgagee of the principal sum secured, with interest, on a day certain; and upon non-performance of this condition, the mortgagee's conditional estate becomes absolute at law, and he may take possession thereof, but it remains redeemable in equity during a certain period under the rules imposed by courts of equity, or by statute.' In reference to the deed of trust then under consideration Judge Alvey said: 'Upon default of payment, these creditors, as mere *cestuis que trust* under the deed, could not take possession of the estate and apply the rents and profits to the discharge of their claims; nor have they any right of foreclosure, such as a mortgagee would have under a technical mortgage. *Charles v. Clagett*, 3 Md. 94, 95. Their only remedy is the enforcement of the trust; and, to execute the trust requires the property to be sold.'

In view of the decisions to which we have referred, and of the principle upon which they were based, we have no difficulty in holding that the deed of trust in this case, though not recorded until the expiration of six and one-half months after its execution, was valid and effective from that time as against . . ." (subsequent creditors).

The earliest case above reviewed by the court is *Charles v. Clagett*,<sup>9</sup> in which the four judge Court split evenly thus affirming the lower court.<sup>10</sup> Speaking for the Court, Judge Eccleston held that a deed of trust was not a technical "mortgage" within the provisions of the statute requiring an affidavit as to the bona fides of the consideration by the mortgagee.<sup>11</sup> He referred to a deed of trust as a "quasi or equitable mortgage". Judge Mason, who dissented, called the deed of trust under consideration "*a deed in the nature of a mortgage*". He also said: "It must be conceded that but for the interposition of the trustee in this case, there could be no question as to the character of the deed. It would clearly be a *simple mortgage*, and as such, within the law."<sup>11a</sup> Thus, the earliest case had trouble in deciding that a deed of trust was not a technical "mortgage".

In *Kinsey v. Drury*,<sup>12</sup> *supra*, the Court held that deeds of trust were not "deeds or conveyances by way of mortgages" and thus were not required to be recorded within six months.<sup>13</sup> The quoted language of Art. 21, Sec. 24, is a bit broader than just plain "mortgages", but the court reasoned from the decisions construing the narrower language of other statutes. However, the earlier cases of *Wilson v. Russell*,<sup>14</sup> and *Bank v. Lanahan*,<sup>15</sup> had construed the even broader language of the statute dealing with mortgages, for future advances, which is most similar to the language of Art. 66, Sec. 24, which is the subject of this discussion, and which read, when *Wilson v. Russell*, was decided in 1859:

"That no mortgage, or deed of that nature, . . . shall operate . . . as a lien or charge, on any estate or property whatsoever, for any other or different principal sum or sums of money than the principal sum or sums that shall appear on the face of such mortgage, and be specified and recited therein, and particularly mentioned and expressed to be secured thereby, at the time of executing the same."<sup>16</sup>

<sup>9</sup> 3 Md. 82 (1852).

<sup>10</sup> Although later following the case unanimously.

<sup>11</sup> Art. 24, Sec. 29 of the Code of 1860 (now Md. Code (1951), Art. 21, Sec. 38).

<sup>11a</sup> *Supra*, n. 9, 95, 90, 87. Emphasis supplied. This footnote covers the three short quotations immediately preceding it.

<sup>12</sup> *Supra*, n. 8.

<sup>13</sup> Md. Code (1951), Art. 21, Sec. 24.

<sup>14</sup> 13 Md. 494 (1859).

<sup>15</sup> 45 Md. 396, 408 (1876).

<sup>16</sup> Md. Laws 1825, Ch. 50; now Art. 66, Sec. 2 of the 1951 Code. Not only Sec. 24 of Art. 66, but also Secs. 1, 3 and 25, use language similar to that emphasized in these statutes dealing with mortgages for future advances.

And which read, in 1876 when *Bank v. Lanahan*, was decided, substantially the same:

“No mortgage, or deed in the nature of a mortgage . . . ; this not to apply to mortgages to indemnify the mortgagee against loss from being endorser or security, . . . ”<sup>17</sup>

Other exceptions as to mortgages were added to the above statute including, in April, 1924,<sup>18</sup> the following:

“ . . . nor are the provisions hereof intended to apply to deeds of trust in the nature of mortgages or any other deeds of trust to secure bonds, notes or other obligations. ”<sup>19</sup>

*Wilson v. Russell*,<sup>20</sup> held that the requirements of the above quoted Act of 1825 were met by the deed of trust involved and went on to say: “that deed is in the nature of a mortgage . . . ”;<sup>21</sup> and “. . . it is in the nature of a mortgage . . . ”<sup>22</sup> In *Bank v. Lanahan*,<sup>23</sup> the Court was construing a deed of trust to secure all of the grantor’s creditors existing at the time of said deed’s execution. The Court, in support of its decision that it was not a technical “mortgage” and that therefore it was not necessary to advertise and conduct a sale of the property under the deed in the county where the property was situated, went on to say, after quoting the language of the statute above:

“It is plain, therefore, that this deed would be seriously imperiled by declaring it to be a mortgage, or even a deed in the nature of a mortgage; as the amounts

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<sup>17</sup> Md. Laws 1872, Ch. 213.

<sup>18</sup> Md. Laws 1924, Ch. 224, Sec. 2.

<sup>19</sup> Thus we see the precise terminology which probably should be used to make it absolutely clear when mortgage type deeds of trust are intended to be covered: “deeds of trust in the nature of mortgages”. See: BOGERT, TRUSTS AND TRUSTEES (1951), Vol. 1, Sec. 29, pp. 222-7; *Diggs v. Fidelity & Deposit Co.*, 112 Md. 50, 72, 75 A. 517 (1910); *Weiprecht v. Gill*, 63 A. 2d 311 (Md., 1948). It cannot be argued that the above express exception of deeds of trust by the legislature means that deeds of trust are never intended to be included when the phrase “mortgage or deed in the nature of a mortgage” is used, since exceptions were also made of certain types of mortgages and the same reasoning would not apply to the use of the word “mortgages”. However, it can be argued that when the legislature made this exception of deeds of trust in Art. 66, Sec. 2, it failed to add said exceptions to the Art. 66, Sec. 24, which also deals with mortgage type instruments and which uses the exact same language.

<sup>20</sup> *Supra*, n. 14.

<sup>21</sup> *Ibid*, 528.

<sup>22</sup> *Ibid*, 530.

<sup>23</sup> *Supra*, n. 15.

of the debts intended to be secured, with one exception, are not made to appear on the face of the deed, nor specified and recited therein. This is not required in a deed of trust for the benefit of all the creditors of the grantor, such as that in the present case.

The case of *Wilson v. Russell*, 13 Md. 495, relied on by the counsel of the appellant, and where the instrument in question was sometimes spoken of as a deed in the nature of a mortgage, and sometimes as a deed of trust, does not support the position of the appellant's counsel in this case. There the deed was not a conveyance for the benefit of creditors generally, nor an assignment of the property of the grantors for the payment of their existing debts; but it was intended to secure two named parties the payment of an old debt, and certain notes agreed to be loaned under the deed; the amount thereof being specifically stated on the face of the instrument. It was not pretended, in that case, that the deed was a technical mortgage.<sup>24</sup>

Thus *Bank v. Lanahan*, expressly distinguished *Wilson v. Russell*, and did not overrule it, holding, instead that a deed of trust given to secure all existing creditors of the grantor was not a deed in the nature of a mortgage.<sup>25</sup> The court probably felt it was more like a general assignment to pay creditors which, unquestionably, is not in the nature of a mortgage.<sup>26</sup> However, the case was later cited as applying to deeds of trust generally,<sup>27</sup> and, of course, the legislature so read the decisions, or else it had other reasons of its own, for it added the aforementioned express exception of deeds of trust.<sup>28</sup>

<sup>24</sup> *Ibid.*, 408-9.

<sup>25</sup> The annotator to Flack's 1951 Code, under Art. 66, Sec. 2, writes: "This section held to have no application to a deed of trust for benefit of creditors. If such a deed were held to be a mortgage, this section would apply. *Bank of Commerce v. Lanahan*, 45 Md. 408."

<sup>26</sup> BOGERT, TRUSTS AND TRUSTEES (1951), Vol. 2, Sec. 248, p. 804. See also n. 18, *supra*.

<sup>27</sup> *Diggs v. Fidelity & Deposit Co.*, *supra*, n. 19, 72.

<sup>28</sup> See Watkins, *Maryland Mortgages for Future Advances*, 4 Md. L. Rev. 111, 117 (1940), where the language of *Wilson v. Russell*, *supra*, ns. 14, 20, is criticized and *Bank v. Lanahan*, *supra*, ns. 15, 23, as well as the cases dealing only with the narrower language of other mortgage statutes are cited in footnote 18 for the proposition: "That a deed of trust is not a mortgage within the provisions of Md. Code (1924), Art. 66, and its predecessors, has often been held. *Eisinger Mill, etc., Co. v. Dillon*, 159 Md. 185, 190, 158 A. 267, 269-270 (1930); *Kinsey v. Drury*, 146 Md. 227, 230, 126 A. 125, 126 (1924) (recording statutes); *Dudley v. Roberts*, 144 Md. 155, 124 A. 883 (1923); *Diggs v. Fidelity and Deposit Co.*, 112 Md. 50, 72, 75 A. 517, 521 (1910); *Bank of Commerce v. Lanahan*, 45 Md. 396, 408-9 (1876)." That



The result of the decisions in Maryland under various such statutes was that the provisions of the Code relating to the execution and recording of mortgages, were to be construed as referring to deeds of mortgage, technically such, and did not apply to deeds of trust.<sup>29</sup>

The reason why the earlier Maryland Courts were loath to hold that deeds of trust were within the purview of our mortgage statutes is explained in *Harrison v. A. & E. R.R. Co.*<sup>30</sup>

"In several of the more recent decisions of this court, in which the construction of different sections of Art. 64, title Mortgage, of the Code of the Public General Laws, was involved, it has been held that the mortgages therein referred to were 'technical mortgages', and the court has distinguished other instruments, which in some respects were equitable mortgages, from technical mortgages, to avoid the embarrassment and inconveniences which would result from applying all the provisions annexed to technical mortgages to other deeds of a cognate character, deeds of trust, etc. *Charles v. Clagett*, 3 Md. 82; *Bank v. Lanahan*, 45 Md. 396."

In this case the objection had again been raised to a sale of the premises under a deed of trust outside of the county where the land lay but *Bank v. Lanahan* had already dealt with this problem as explained earlier.<sup>31</sup> Thus the early Courts which are responsible for the construction placed on the mortgage statutes did not wish to cause an innocent person claiming in good faith and for value under a deed of trust to suffer merely because he failed to comply with certain formal requirements; requirements which he could have in good faith believed did not apply to deeds of trust in the nature of mortgages and hence made no effort at compliance therewith in executing or recording the instrument. Even though these requirements were designed to avoid or make less probable the occurrence of a real sub-

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part of the text which cites the foregoing footnote reads: "If it were simply a deed of trust, the provisions of the Act of 1825, and of (sic) the provisions of Art. 66, even before the amendment of Sections 2 and 3 in 1924, would have been inapplicable." This was said in reference to *Wilson v. Russell*. In the conclusion doubt is expressed as to the reason for, or the propriety of, excepting deeds of trust from the operation of Art. 66, Sec. 2.

<sup>29</sup> *Carson v. Phelps*, 40 Md. 73, 90 (1874); *Snowden v. Pitcher*, 45 Md. 260 (1876); *Harrison v. A. & E. R.R. Co.*, 50 Md. 490 (1879).

<sup>30</sup> *Supra*, n. 29, 514, 515.

<sup>31</sup> *Supra*, n. 23.

stantive evil, such evil evidently was not believed to have actually occurred in the cases at bar.<sup>32</sup>

In *Wilson v. Russell*,<sup>33</sup> the instrument was found in compliance with the statute and so the Court had no hesitation in treating it as if it were in fact governed by said statute. In *Bank v. Lanahan*,<sup>34</sup> the court was also very concerned about upholding the public faith in public sales of property generally.

Art. 66, Sec. 24, is not a statute in the nature of those construed in any of the aforementioned cases but was designed to overcome early judicial decisions which had preferred the owner of the note or debt over the mortgage recorded under the recording system. These decisions were probably partly a result of the experience derived from England and the early years of the United States where no recording systems on the scale of those later developed in the United States ever existed.<sup>35</sup> The statute's obvious purpose was to reverse this state of the law and to prefer the person relying upon the recording system in a case where some security of record had been given for a note or for just a debt.<sup>36</sup> Whether or not the instrument which accomplishes this result happens to be labeled a deed of trust or a mortgage should not be controlling in a case where the problem is squarely before the court as to whether the actual loss should fall upon the good faith note or debt owner without notice<sup>37</sup> who relies on his ownership of the note or debt, or upon the party who in good faith and without notice has dealt with the property or the security instrument of record in reliance on the record.<sup>38</sup>

<sup>32</sup> For example, though an affidavit of consideration was required there was no real dispute over the fact that bona fide consideration had passed. See *Charles v. Clagett*, 3 Md. 82 (1852); no fraud was believed to have occurred although the trust deed did not comply with Art. 66, Sec. 2. See also *Cole v. Albers*, 1 Gill 412, 424 (1843), and *Watkins*, *Maryland Mortgages for Future Advances*, *supra*, n. 28 at pp. 112-13.

<sup>33</sup> 13 Md. 494 (1859).

<sup>34</sup> 45 Md. 396 (1876).

<sup>35</sup> See n. 1, *supra*.

<sup>36</sup> See ns. 1 and 5, *supra*.

<sup>37</sup> What is notice might be determinative. For example, there are cases which imply that a statement in the mortgage (or deed of trust) referring to notes outstanding is notice that such notes exist and they should be requested by the person dealing with the record holder of the mortgage. *Williams v. Jackson*, 107 U. S. 478 (1882), and see also n. 1, *supra*. *Quaere*: Is reference to the mortgage (or deed of trust) in the note notice, at least at the time of the note's transfer, to check the mortgage of record?

<sup>38</sup> In *Bank v. Lanahan*, *supra*, n. 34, the court expressed concern over the fact that if it held the deed of trust within the purview of the mortgage statute and the sale in the wrong county thus an invalid one, it would destroy public faith and confidence in such sale. Similar reasoning should lead the court to hold a deed of trust within the coverage of Art. 66, Sec. 24, *Bank v. Lanahan*, *supra*, 410.

If the Court should have this precise question before it, it might, following the dicta of *Royal Insurance Company v. Drury*<sup>39</sup> and the reasoning of *Kinsey v. Drury*<sup>40</sup> and the other cases which have been previously analyzed herein, read deeds of trust out of the statute and favor the owner of the note (or debt), construing the old Maryland cases which involved ordinary mortgages as applying also to deeds of trust.<sup>41</sup> However, a better result would be obtained either by (a) ignoring, overruling, or explaining and distinguishing the language of *Royal Insurance Company v. Drury*, and deciding that although prior to the enactment of Art. 66, Sec. 24, the old Maryland rule applied to mortgages, it never applied to deeds of trust; or by (b) deciding that although the early Maryland rule did apply to deeds of trust as well as mortgages, Art. 66, Sec. 24, likewise applies to both types of instruments. It could be pointed out that *Royal Insurance Company v. Drury*<sup>42</sup> was not dealing with conflicting rights of bona fide purchasers or the effects of recording statutes, and that the correct result is reached by the United States Supreme Court in *Williams v. Jackson*<sup>43</sup> on appeal from a District of Columbia appellate court. The Supreme Court held that the one relying on the record should prevail by reasoning simply that any other result ". . . would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business".

In order to follow this latter approach in Maryland it would probably not only be necessary to distinguish the aforementioned Maryland cases which differentiated deeds of trust from mortgages in construing the various statutes hereinabove described, but also would be necessary to supply other reasoning and authority in support of the proposition that a deed of trust can be a "mortgage or deed in the nature of a mortgage". In addition to the foregoing language used in *Wilson v. Russell*,<sup>44</sup> and *Charles v. Clagett*,<sup>45</sup> the following facts and cases might help support such a proposition.

The pertinent language of Art. 66, Sec. 25, is almost the same as Art. 66, Sec. 24, and reads:

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<sup>39</sup> *Supra, circa*, n. 6.

<sup>40</sup> *Supra, circa*, n. 8.

<sup>41</sup> See n. 1, *supra*.

<sup>42</sup> *Supra, circa*, n. 6.

<sup>43</sup> *Supra*, n. 37.

<sup>44</sup> *Supra*, ns. 14, 20.

<sup>45</sup> *Supra, circa*, ns. 9-11a.

"Whenever any real estate or leasehold interest therein is encumbered by a mortgage, deed or other instrument in the nature of a mortgage, except when it is otherwise agreed by the terms thereof, no annual crops pitched or cultivated by any debtor therein or those claiming under him shall pass with the said real estate or leasehold interest at any sale under or by virtue of said mortgage, deed or other instrument, but such crops shall be and remain the property of the said debtor, or those claiming under him, subject, however, to the lien mentioned in the next section."

To hold that a trust deed is not within the reach of this statute would allow its purpose to be defeated by mere form. Furthermore, thereafter, the legislature passed "an act providing for crop lien agreements, and providing for the effect and recordation thereof", which reads:

"... and provided further that in the event of a sale, under a mortgage or deed of trust executed and recorded after April 4, 1933, of the land upon which any such crop has been so seeded and/or may be growing and before said crop has been gathered or harvested, such sale shall be made subject to the said crop lien, and the rights of the lienee shall be protected in the same manner and to the same extent as the rights of the debtor would be protected under analogous circumstances under the provisions of Sections 25, 26 and 27 of Article 66 of the Annotated Code of Maryland."<sup>46</sup>

*Fouke v. Fleming*,<sup>47</sup> referred to the deed of trust there as a "quasi mortgage" to save it from the invalidity which would have attached to a finding that it was a deed of trust to pay creditors generally.

In *Witt v. Zions*,<sup>48</sup> the Court treats deeds of trust as mortgages and substitutes "mortgagee" for "cestui que trust", saying:

"This case is an appeal by the appellants from the order of the chancellor overruling exceptions filed by them and finally ratifying and confirming a foreclosure sale. The appellees are trustees named in a deed of trust dated the 6th day of June, 1946, executed by the appellants to them. *This deed of trust is a mortgage*

<sup>46</sup> Md. Laws (1933), Ch. 185, now Md. Code (1951), Art. 53, Sec. 26. Emphasis supplied.

<sup>47</sup> 13 Md. 392, 406 (1859).

<sup>48</sup> 70 A. 2d 594, 595, 596 (Md., 1949).

and contains a power in the trustees to sell the property in the event that default is made in its terms and conditions by the grantors. Default occurred and the trustees instituted the foreclosure proceeding in this case on December 30, 1948.

The exceptions to the ratification of the sale do not charge fraud in the obtention of the mortgage."

Also *Orrick v. Fidelity & Deposit Co.*,<sup>49</sup> refers to the deed of trust there involved as a "mortgage". In *Manor Coal Co. v. Beckman*,<sup>50</sup> the following appears in the syllabus:

"Where a deed of trust to secure bonds empowered the trustee, upon default, to sell the property on the request of the majority of the bondholders, but the majority of the bonds had passed into the control of the owner of the equity of redemption, and the trustee refused to act at the request of the minority bondholders, after the default, *held* that equity would decree a sale of the property at the request of such minority bondholders."

The Court said:

"The conveyance therefore, though called a deed, is in substance and purpose a mortgage, although it differs from the conventional mortgage in that the property pledged as security for money loaned is conveyed to a third person charged with the duty of enforcing the lien instead of to the lender directly. That statement of the purpose and meaning of the deed agrees with the general rule by which the character of such instruments is determined, and which is thus stated in *Jones on Mortgages*, Par. 62: 'A deed of trust to secure a debt is in legal effect a mortgage. It is a conveyance made to a person other than the creditor, conditioned to be void if the debt be paid at a certain time, but if not paid that the grantee may sell the land and apply the proceeds to the extinguishment of the debt, paying over the surplus to the grantor. It is in legal effect a mortgage with a power of sale, but the addition of the power of sale does not change the character of the instrument any more than it does when contained in a mortgage. Such a deed has all the essential elements of a mortgage; it is a conveyance of land as security for a debt. It passes the legal title just as a

<sup>49</sup> 113 Md. 239, 248, 77 A. 599 (1910).

<sup>50</sup> 151 Md. 102, 115, 133 A. 893 (1926).

mortgage does, except in those states where the natural effect of a conveyance is controlled by statute; and in states where a mortgage is considered merely as a security, and not a conveyance, a trust deed is apt to be regarded in this respect just like a mortgage. Both instruments convey a defeasible title only; the mortgagee's or trustee's title in fee being in the nature of a base or determinable fee; and the right to redeem is the same in one case as it is in the other.' 19 R. C. L. 270. Its primary and essential purpose was to secure the payment of a debt, and the power of sale contained in it is collateral to, and in aid of that purpose, and is, generally speaking, a cumulative and not an exclusive remedy. And while ordinarily the payment of the debt secured by the mortgage must be enforced through an execution of the power by the trustee, yet, where the trustee refuses to act, or where his conduct threatens to impair the security pledged by the deed, the lien may be enforced in a court of equity under its general chancery jurisdiction. *Jones on Mortgages*, Pars. 1733, 1443, 1774."

In a similar case in 1936, the Court in *Northrop v. Beale*,<sup>51</sup> said:

"The instrument, though in form a deed of trust, was in effect a mortgage (*Manor Coal Co. v. Beckman*, 151 Md. 102, 115, 133 A. 893), containing the covenants usually found in a technical mortgage (Code, Art. 66), with respect to the payment of the principal debt, interest, taxes, and public liens, with the right to foreclose, however, if 'default be made in the payment of any of said promissory notes . . . or any installment of interest . . . or any proper cost or expense in or about the same'."

Any legal research in the field is further confounded by the fact that certain publishing companies headnote, cite, etc., cases and rulings dealing with deeds of trust under "Mortgages".<sup>52</sup>

Outside of Maryland we find language like the following:

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<sup>51</sup> 170 Md. 439, 441, 184 A. 900 (1936).

<sup>52</sup> For example see *Davis v. Casey*, 103 F. 2d 529 (C. A. D. C., 1939).

"If the transaction, though in form a trust, contains a defeasance clause, it will be construed to be in fact a mortgage."<sup>53</sup>

". . . while a mortgage is not necessarily perhaps a deed of trust, a deed of trust to secure the loan of money is necessarily a mortgage."<sup>54</sup>

A deed of trust in North Carolina is:

". . . in the nature of a mortgage, and both are placed together in the provisions of our registry laws, and in many respects the same principles of law are applicable to both kinds of such conveyances."<sup>55</sup>

Thus we find many authorities both in and outside of Maryland, holding that a deed of trust given for security and subject to a defeasance clause on payment of the debt, and a mortgage, are essentially the same.<sup>56</sup>

In conclusion, it seems to be obvious that if the issue of whether Art. 66, Sec. 24, applies to deeds of trust is ever presented to the Court of Appeals, that substantial arguments may be made on either side thereof. Unfortunately, however, it is not so obvious what the decision of that Court might be. The legislature could preclude the need for such litigation, and remove substantial uncertainty, by explicitly including deeds of trust, as herein suggested, within the coverage of Art. 66, Sec. 24.

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<sup>53</sup> Turner v. Watkins, 31 Ark. 429 (1876).

<sup>54</sup> W. A. H. Church, Inc. v. Holmes, 46 F. 2d 608, 610 (C. A. D. C., 1931).

<sup>55</sup> Means v. Montgomery, 23 F. 421, 424 (C. C. W. D. N. C., 1884).

<sup>56</sup> See also: 19 R. C. L. Mortgages, Sec. 40, p. 269; JONES ON MORTGAGES (8th Ed., 1928), Sec. 77; 59 C. J. S., Mortgages, Secs. 5, 6 and 7, pp. 31-2; Words and Phrases, Vol. 11, p. 473; Chicago Union Bank v. Kansas City Bank, 136 U. S. 223 (1890); Cuzzola v. Tokio Marine & Fire Ins. Co., 117 W. Va. 169, 184 S. E. 793, 794 (1936); JONES, *supra*, Sec. 2290; Sacramento Bank v. Alcorn, 121 Cal. 379, 53 P. 813 (1898); BOGERT, TRUSTS & TRUSTEES (1951), Vol. 1, pp. 225-229.