CONCERNING MODERN CORPORATE MORTGAGES

As each new lawyer is called on to struggle seriously with the modern form of corporate mortgage, he experiences a series of mental reactions which are a practical duplication of those through which, during the last fifteen years, each of his predecessors has passed.

Following close on the initial bewilderment at the very bulk of the thing (often 150 pages without the description) comes a feeling of protest at its complication and the thought that if only he had the time and opportunity, he could cut down the text to ten pages, or to fifteen at the outside.

Let us suppose, then, that to a young lawyer of our acquaintance, comes this opportunity. An important client calls on him to prepare a corporate mortgage with all the appurtenances—additional bonds issuable in series without limit as to principal amount, fully registered as well as coupon bonds, additional bonds for additions and improvements, the acquisition of stocks and bonds of subsidiaries, refunding of underlying liens and prior series, conversion privileges, sinking funds, possible modifications of the indenture, maintenance of assets, and all the other modern developments.

He is given a month and expects to finish in a week.

From a banker friend he borrows three or four standard mortgages and merrily begins with his scissors and his red pencil.

For a time all goes well. Before long, however, as he studies the different clauses and begins to understand their purpose and legal effect, it gradually dawns on him that there is more solid meat in all this legal verbiage than he had supposed. He realizes that the provision which yesterday he so lightly deleted may well be of importance to his client in a contingency which until now had not occurred to him.

Again and again this happens, until in despair he tires of rubbing out, and resolves to begin over again, raising his space limit to fifty pages (or seventy-five at the outside) and his time limit to two weeks.

Determined to make a complete job of it, he borrows three or four more forms from another friend and begins to compare

the clauses in the different forms. To his surprise he finds that the form which he had been following and which had seemed to him so unnecessarily complete, really lacked certain provisions which might well be most useful. These he adds to his draft—a step fatal to his initial resolution.

He has by this time reached the definition stage, when he is assured that by proper definitions in Article I he can cut the text in half and make all the obscure provisions perfectly clear. He constructs, with great labor and ingenuity, a mass of arbitrary definitions, such as "refundable divisional lien bonds," "isolated properties," "primary purposes of the Company's business," and "cost of an acquired system," which finally aggregate ten or twelve pages. These phrases are then used in italics throughout the succeeding articles, and are perfectly clear to the author of them, but entirely unintelligible to anyone else without continued reference to the Definition Article, which entails so much cross reference and consequent interruption of thought as to make the result even more difficult to understand than before.

Now he turns to the decisions and studies the law of reorganizations and the administration of corporate trusts. As he does so, he begins to realize how little the average lawyer knows of the practical problems and difficulties which the provisions of a corporate mortgage are designed to solve and to guard against. He also begins to understand why the modern mortgage has grown to its present size and complication.

Beginning with the simple ten-page document of thirty years ago, each new set of lawyers which has attacked the problem (for there are usually three lawyers in every case, representing bankers, mortgagor and trustee) has added provisions to meet the specific points which their individual experience and imagination suggest, each being fearful to omit anything lest he have overlooked some Court decision which renders the omitted clause essential for his client's interest. Many mortgages, too, are prepared in the first instance with scissors and paste, by juniors, who, anxious to make a hit with the firm, cull out clauses to meet every remotest contingency. Their seniors, seeing no objection, lacking time to investigate (and with perhaps a feeling that their

client will not expect the fee to vary inversely with the size of the production) do not attempt to cut down. Those who have the time have not the necessary experience; those who have the experience have not the time.

A potent cause of illogical arrangement results from the hectic hour which, at the end of the day before that fixed for settlement, immediately precedes the final printing. From five or six different sources suggestions come pouring in, those by counsel for the trustee being invariably the last. They insist on the insertion of specific clauses at specific places, and then disappear in court, in conference, or elsewhere, precluding the chance of pointing out that these matters are adequately covered elsewhere. Such suggestions should of course be eliminated in the next mortgage, but usually they are not, and, like barnacles which have attached themselves haphazard to a ship, they remain after the faint spark of life which gave them their original hold has long since expired.

But to return to our hero.

His month is almost up, but his new mortgage is still far from complete. What he has produced is nothing like that which he started out to make. Instead of ten pages it is eighty. Instead of omitting most of the provisions of the long form he has added additional clauses. While many changes and abbreviations still seem feasible, to risk these requires more experience and more study of the decided cases.

It is at this stage that there usually appears another client with another and urgent piece of business which makes it impossible for our lawyer longer to give his time exclusively to this pioneer work. Fearful of assuming the responsibility of omitting anything without more study and experience, and realizing that to do what he started out to accomplish will require him to give up all his other practice for an indefinite period, he goes back to the standard form, lock, stock and barrel, with the additions culled from many sources, resulting in a considerable net increase in size.

After all is said, most of the sympathy expressed for those compelled to read corporate mortgages is wasted, for the reason

that, with one notable exception, no one ever reads a corporate mortgage except those who are both familiar with all its difficulties and well compensated for their trouble.

The attorneys for the bankers have been studying mortgages for years. In the very difficulty of these documents is the backlog of the firm's annual receipts. They would resent a simplification, as artisans have always resented the machine which threatened their livelihood. Fortified by an iron-clad provision in the bankers' letter of commitment that "all the provisions of the mortgage shall be subject to the approval of our counsel," and assured by another such provision that "The Company agrees to pay all expenses incident to the foregoing transaction, including the fees of counsel for the Bankers," they revel in a welter of elaborately incomprehensible phraseology, producing an even more complicated clause each time another attorney has the temerity to question one of their pet provisions.

Counsel for the mortgagor, though somewhat bewildered, realizes that he is powerless, and after one or two disastrous passages at arms with the more experienced counsel for the bankers, is convinced that it is to the interest of the bankers to provide his clients with a workable instrument and that his interference will probably do more harm than good. He contents himself with a few minor suggestions which counsel for the bankers cheerfully and tactfully accept.

The Vice-President and Trust Officer of the Trustee sits smug in the assurance that "it shall not be responsible for any act or omission save only for its wilful default or gross neglect," that it need do nothing until satisfactorily indemnified against everything, and that it may accept as true and act on statements by any number of prejudiced people without liability to anyone for the consequences of any amount of poor judgment or ill-advised action or inaction.

Counsel for the Trustee is also complaisant in the knowledge that the more difficult and complicated the mortgage, the more questions will have to be solved by him for the Trustee, his compensation being provided primarily by the Company and guaranteed by a prior lien on the trust estate.

There is one man, however, for whom the legal heart justly bleeds on each such occasion—the President of the Mortgagor.

For thirty-five years he has worked day and night, Sundays and Washington's Birthday, to build up the business, acquiring one by one the tracts and premises with the buildings and equipment thereon hereby mortgaged or intended so to be, growing gradually from nothing to a recognition by Bankers of Importance.

All that there is to know of the construction of automobiles, the mining of coal, or the manufacture of women's hosiery or of druggists' supplies, he knows.

Now, at the crucial point of his career, when about to embark on his first major financing, and to enter the lists of really big business, he is confronted by a document of sinister and dire content, incomprehensible and terrifying, threatening disaster.

Each night he struggles with it and finds numberless provisions, which appear to him utterly impossible. Each morning they are all conclusively explained by the bankers' counsel as either wholly innocuous or as really designed for his own protection in a contingency which from his practical knowledge he is sure can never arise, but which has actually arisen a number of times after equally confident predictions by other Presidents.

Finally, as the day of settlement draws near and he must have the money to liquidate his loans and to pay the contractors who are busy on his new plant, he gives up and in desperation, signs, seals and acknowledges these presents, relying on the integrity and experience of his bankers. But for weeks thereafter, he awakes at 3 A. M. in a cold sweat, lest by some provision which he has failed to understand, on some overlooked contingency, his beloved property may be taken away from him.

As illustrating what has been said, the writer has prepared a special provision which may be added at the end of any corporate mortgage. It is believed that the elucidation which the thorough comprehension of this clause entails, will render the preceding provisions of the average corporate mortgage, by contrast, relatively simple and clear.

ARTICLE XXIII.

This Indenture, with any supplemental instruments which, in its discretion the Trustee (or its successor or successors in the trust herein provided) may require the more fully to effectuate the same, as well as each and every the Bonds now or hereafter issued and to be issued hereunder and secured hereby or intended to be, together with the coupons, if any, thereto at any time annexed or appertaining, shall be interpreted according to the interpretation which would have been applicable thereto if this Article XXIII hereof regulating and prescribing the interpretation thereof respectively, were not and/or had never been contained herein, anything herein or in said Bonds and coupons to the contrary notwithstanding; provided, however, and it is hereby expressly agreed between the Company and the Trustee, between the Trustee and the Company, and by each of them with each and every the holder or holders of the said Bonds and coupons, if any, now or hereafter at any time issued and outstanding hereunder, and the said holders of said Bonds and coupons, if any, by accepting the same respectively, do hereby covenant for themselves, their respective heirs, executors, administrators, successors and assigns that nothing herein or in said Bonds and coupons contained, shall be so construed or applied, as in any way or manner, or at any time or times, or under any circumstances and/or conditions whatsoever, to hinder, prevent, delay, restrain, or infinitesimally to deter any counsel, solicitor and/or attorney, learned in the law or otherwise, of any court of record of law or in equity, in any jurisdiction, from in any lawful manner insisting or maintaining that the true and proper interpretation hereof differs, either in whole or in part, or otherwise whatsoever, from that hereinabove specified or intended so to be; but anything herein or in said Bonds or coupons to the contrary notwithstanding, any such attorney may, and on the written request of the holders of a majority in face amount of the Bonds secured hereby then outstanding on the happening of any of the events of default hereinabove specified or at any time prior or subsequent thereto shall, but at the cost, charge and expense of the Company, dispose of, dissipate and utterly consume, in whole or

in such parcels as to them may at the time seem meet and/or be considered most advantageous to them, their heirs, executors, administrators and assigns, the time (which is hereby declared to be the essence of the contract), the money (of the present standard of weight and/or fineness and/or otherwise) and the patience (which is hereby declared to be the essence of the Trustee, but without responsibility for the application of the proceeds, unless satisfactorily indemnified) of each and every the parties hereto; it being expressly understood that this Indenture, as well as the said Bonds and the coupons, if any, thereto appertaining, unless called for previous redemption, together with any, all and every the interchangeably incomprehensible provisions herein contained are intended primarily for the benefit of each and every the said attorneys, their heirs, executors, administrators and assigns, without preference or priority of any over the others, or of the others over any, equally and ratably, with the same force and effect as if each and every the said attorneys had intermeddled with the same without cessation or interruption, either by the Trustee or by the holders of twenty-five per centum (25%) in face amount of the Bonds secured hereby then outstanding, continuously from a year and a day next preceding the date hereof, whichever be greater, and for their and each of their so doing these presents shall be and remain full authority and security, otherwise to be void and of no effect.

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