A Historical Introduction to the Corporate Mortgage

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A HISTORICAL INTRODUCTION TO THE CORPORATE MORTGAGE

By

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University of Colorado, 1928

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Cecil Mead Draper

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BIBLIOGRAPHY

PRIMARY SOURCES:

Cases:


Bacon v. Bacon, Toth. 133 (1640).

Barry v. Merchants' Exchange Co., 1 Sand. Ch. 280 (N. Y. 1844).


Carpenter v. Black Hawk Gold Mining Co., 65 N. Y. 43 (1875).


Clark v. Titcomb, 42 Barb. 122 (N. Y. 1864).


Conkling v. Washington University of Maryland, 2 Md. Ch. 497 (1849).


Jackson v. Brown, 5 Wend. 590 (N. Y. 1830).


Sir Thomas Holland and Bonis's Case, 3 Leon. 175 (1587).


Statutes:

Code of Hammurabi, 1 SOURCES OF ANCIENT AND PRIMITIVE LAW (Boston: Little, Brown, 1915) 387-442.

DELEWRE GENERAL CORPORATION LAW, Art. 4, Sec. 115.

LAWS OF NEW YORK, 1826, Ch. 253.

LAWS OF NEW YORK, 1834, Ch. 39.

LAWS OF NEW YORK, 1846, Ch. 216.

LAWS OF NEW YORK, 1850, Ch. 140.

Mortgages:

Baltimore and Ohio Railroad Company to the state of Maryland (1834).

Baltimore and Ohio Railroad Company to the president of the company and his successors (1846).

Baltimore and Ohio Railroad Company to Baring & Company of London (1850)

Baltimore and Ohio Railroad Company to the president of the company (three mortgages) (1850, 1853).
Beaver Meadow Railroad and Coal Company to The Girard Life Insurance, Annuity, and Trust Company (1839).

Colorado Central Railroad Company to Fred L. Ames and John R. Duff (1870).

Colorado Central Railroad Company to Fred L. Ames and John R. Duff (1872).


Denver and Rio Grande Railroad Company to Bankers Trust Company (1908).


Erie Railway Company to Farmers Loan and Trust Company (1870).

Laurens Railroad Company to the state of South Carolina (1859).

Merchants' Exchange Company to James G. King (1838).

Montgomery Railroad Company to several individuals (1839).

Morris Canal and Banking Company to Wilhelm Willink, Jr. (1830).

Morris Canal and Banking Company to the state of Indiana (1840).

New York and Lake Erie Railroad Company to the state of New York (1833).

New York and Lake Erie Railroad Company to John J. Palmer and others (1849).
New York and Lake Erie Railroad Company to James Brown and John Davis (1853).


Richmond and Danville Railroad Company to the Commonwealth of Virginia (1850).

Richmond and Danville Railroad Company to the Board of Public Works of Virginia.

Tioga Navigation Company to The Girard Life Insurance, Annuity, and Trust Company (1839).

Tuscumbia, Courtland and Decatur Railroad Company to James King and John Ward (1833).

Vermont and Massachusetts Railroad Company to Robert G. Shaw, John Davis, and Jabez C. Howe (1849).

Washington Medical College of Baltimore to four individuals (1836).

Printed Record of The Denver and Rio Grande Railroad Foreclosure Proceedings in the District Court of the United States for the District of Colorado (1922).

Records in the Office of the County Clerk and Recorder of the County of Denver, Colorado.

Contemporaneous Literature:

ANGELL and AMES, CORPORATIONS (Boston: Hilliard, Gray, Little & Wilkins, 1832).

BIBLE, The.
SECONDARY SOURCES:


Drinker, Concerning Modern Corporate Mortgages (1926) 74 U. OF PA. L. REV. 360.


JONES, MORTGAGES (7th ed., 1915).

POLLOCK and MAITLAND, HISTORY OF ENGLISH LAW (2d ed., Cambridge: University, 1898).


Stetson, Preparation of Corporate Bonds, Mortgages, Collateral Trusts and Debenture Indentures, SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION (New York: Macmillan, 1922).

INTRODUCTION

The corporate mortgage is a product of the vast development of corporations initiated by the Industrial Revolution. The introduction of machinery led to the aggregation of large amounts of capital under single control and direction. As these units of capital enlarged, increasing dependence was placed on borrowed funds. The development of the corporate mortgage was the logical result.

All young lawyers and many of the older ones are thoroughly mystified by the enormous size and the myriad of covenants, provisions, and conditions which go to make up the modern corporate trust deed; and the drafting of such an instrument is accomplished, even by the seasoned practitioner, at the cost of countless hours of lost sleep and weeks of painstaking work.

An instrument of the magnitude and as fully standardized as is the corporate mortgage has never burst into bloom in its final form. The development, for the most part, is slow and gradual - a little bit

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1 While there is a technical distinction between a mortgage and a deed of trust or trust deed, the terms are used interchangeably when applied to corporate mortgages and will be so used in this article.
added here, a little there. In no case could this be more true than in the subject with which we are to deal. In the physical sciences theories evolve, parts being added, others dropped. Not so with the corporate mortgage; here there are many to add, but none to remove the chaff. Some lawyers lack the leisure or the inclination; others, the ability. The counsel for a corporation is asked to draw a mortgage. He uses a copy of the last mortgage he has drafted as a model; often he secures mortgages obtained elsewhere to check against his own. Perhaps they contain provisions new to him, which, not having the time to check their validity or desirability, and fearful that some rule of law may have escaped his attention, he hastily incorporates within his own. Thus the great ball rolls, gaining in size with every turn.

In a subject such as corporate mortgages, a historical approach is often found useful. When did the different features come into existence? At what were they aimed? What were they like in their primitive form? One is surprised at the small amount of information available concerning this subject. Not only has little been written about early corporate mortgages, but so far as is known, no systematic

2 See Drinker, Concerning Modern Corporate Mortgages (1926) 74 U. Of PA. L. REV. 360.
attempt has been made to collect or save any of these early instruments. However, assistance is to be received from the early reported cases in which the mortgages were foreclosed; and, fortunately, the early recording laws have preserved for us a splendid source of material in the public records.

No attempt is here made to go into the subject exhaustively; the length to which this article must be confined prohibits such a treatment. Besides, an outline form of presentation will, it seems, be a more interesting and perhaps a more instructive means of approach to a more complete study of the modern corporate mortgage.

"If a man have taken money from a merchant, and have given [as security] the merchant an arable field, to be planted in grain or sesame, and have said to him, Plant grain or sesame in the field and take the crop; if the cultivator produce grain or sesame in the field, then at the harvest the grain or sesame that the field has produced, he shall give the merchant half of it. If the field yield not contrary to the merchant's..."  

CHAPTER I

PREDECESSORS OF THE CORPORATE MORTGAGE

The mortgage must have originated as a necessity of civilized life rather than as a product of the inventive genius of any particular individual, age, or race. The idea of making property the security for an act seems to have existed in all civilizations. "In case I should despise thee," states an ancient Egyptian marriage settlement, "in case I should take another wife than thee, I will give thee twenty argenteus, in shekels one hundred, twenty argenteus in all. The entire of the property which is mine and which I shall possess, is security of all the above words until I shall accomplish them according to their tenor." In 2270 B.C., or thereabouts, the Babylonian king Hammurabi stated as law the following:

"If a man have taken money from a merchant, and have given as security the merchant an arable field, to be planted in grain or sesame, and have said to him, Plant grain or sesame in the field and take the crop; if the cultivator produce grain or sesame in the field, then at the harvest the grain or sesame that the field has produced shall be the property of the owner of the field, and he shall pay grain for the money he received from the merchant, and for the interest and for the support of the renter." And in biblical times, it was lamented that "We have mortgaged the vineyard, our vineyard is sold into slavery."
produced shall be the property of the owner of the field, and he shall pay grain for the money he received from the merchant, and for the interest and for the support of the renter."\(^4\)

And in biblical times, it was lamented that "We have mortgaged our lands, vineyards, and houses, that we might buy corn, because of the dearth."\(^5\)

There is nothing complex in the theory upon which the mortgage is based. The most illiterate sailor is fully conscious of the lien he has on the ship for his wages. How old is the boy when he first gives his ball to a playmate as security for the performance of an act and "for keeps" if the act remains undone, or when he promises to give his best agate under similar conditions? Thus we see that the idea of the mortgage is of early origin both in the individual and in the race.

While it would seem that both the mortgage and the pledge were used in early times, the Romans are given credit for distinguishing between the two.\(^6\)

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5 Nehemiah, c. 5, 3. Cf. ibid. c. 5, 4, 5.
6 In the Egyptian marriage settlement, supra page 9, the property must have remained in the possession of the husband. Nehemiah, c. 5, 5, "... and some of our daughters are brought unto bondage already: Neither is it in our power to redeem them; for other men have our lands and vineyards," indicates a transaction more in the nature of a pledge. Cf. The Code of Hammurabi, ##49-52, supra note 4.
7 I JONES, MORTGAGES (7th ed., 1915) #1.
Their law recognized two methods of transferring property as security for a debt: namely, the pignus and the hypotheca. In the pignus or pledge, the possession of the property was given to the creditor upon the condition that it should be returned to the debtor when the debt was paid. In the hypotheca, the possession remained in the debtor.

It seems certain that the mortgage, in some form, was used in Anglo-Saxon times. Whether or not the device was borrowed from the Roman law need not be decided here; the result must have been the same in either case. After the Norman Conquest the examples are more numerous. Doomsday Book (1085) contains passages which indicate that land was held by persons to whom it had been gaged. The transaction took different forms; but in most cases possession passed to the creditor, though the incidents following it were somewhat varied. In the vig gage, or vivum vadium,

8 1 JONES, MORTGAGES #1.
10 2 POLLOCK and MAITLAND, HISTORY OF ENGLISH LAW 118, citing D. B. ii, 137, 141, 217. In the first of these cases, a woman is ready to prove by ordeal that the debt for which the land was gaged has been paid.
the profits of the land went to reduce the debt; while the rule was otherwise in the case of the mortgage, or mortuum vadium. The latter practice, being usurious in its nature, was frowned upon; but the transaction was valid, even though the creditor were a Christian. In case the creditor died "in sin," that is, during the life of the mortgage, his chattels were forfeited to the king; but it would seem that even the Christians were very willing to run this risk, since the form in general use was apparently the mortgage rather than the visgage.

During the time of Glanvil (1290) the mortgagee held a peculiar interest in the mortgaged premises. This caused certain inconveniences with the result that it was later held that the mortgagee must take one of the recognized estates or interests: that is, a term, a life estate, or a fee simple. When Littleton wrote (1481) the common law mortgage had reached its final form; and the form adopted was that of a grant in fee simple, defeasible upon the

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11 2 POLOCK and MAITLAND, HISTORY OF ENGLISH LAW 119.
12 Ibid.
13 Ibid.
14 Ibid. 121.
performance of a condition subsequent. But the mortgage of Littleton's time, and indeed for several centuries afterwards, lacked at least one very important characteristic of the modern mortgage: namely, the equity of redemption. If the debt were not paid on the "law day," then an absolute title passed to the mortgagee. Courts of equity attempted to eliminate this element of forfeiture; but the equitable right to redeem was not fully established until the seventeenth century; and even after that time, this equitable right was severely criticized by the law judges.

Yet even before equity had granted relief from the oppression of the early mortgages, another device was used. Under this method the land was transferred to the creditor or to a third person to be held for the use of the creditor. If the debt were not paid on the date due, the land was sold, the debt paid, and the remainder paid over to the debtor. Consequently, one writer feels that much of the land ordi-

17 Bacon v. Bacon, Toth. 133 (1640).
18 1 JONES, MORTGAGES #6.
19 Chaplin, op. cit. supra note 16.
narily considered to have been held in trust during the medieval period in England was really mortgaged according to our usage of the term. The device was adopted to avoid the law of mortgages. However, it was a failure in this respect, for the courts decided that a deed in form a trust deed, but given in fact to secure a debt - did not convey a trust estate, but was a mortgage, and gave nothing but a mortgagee's estate.

Later a trust deed, as a sort of mortgage, came into use, the possession of the land remaining in the debtor. This possession in the debtor, according to one authority, had its origin with the advart of the Jews into London as money lenders. But the mortgage must have retained its popularity and no doubt was the form generally used, at least until the seventeenth century.

20 Smith, op. cit. supra note 16.
21 Chaplin, op. cit. supra note 16.
22 Hazeltine, op. cit. supra note 16.
CHAPTER II
EARLY BEGINNINGS OF THE CORPORATE MORTGAGE

The corporate mortgage, if indeed it was ever used, could not have been of great importance until after the Industrial Revolution in England. Kyd (1793) makes no mention of the mortgage, though he makes the following statement concerning the power to alienate:

"All civil corporations . . . or the corporate companies of trades in cities and towns, and all corporations established by act of parliament for some specific purpose, unless expressly restrained by the act which establishes them, or by some subsequent act, have, and always have had an unlimited control over their respective properties, and may alienate in fee, or make what estates they please for years, for life, or in tail, as fully as any individual may do with respect to his own property." 23

Angell and Ames (1832) admit that, under certain circumstances, a corporation may take a mortgage, but they fail to mention whether or not a corporation has the power to give a mortgage. About this time, however, it was decided, first in New York and later in Pennsylvania, that the general power of alienation was sufficient to give the power to alienate any part

24 ANGELL and AMES, CORPORATIONS (1832) 83.
or interest, thus necessarily giving the power to mortgage. Still later it was agreed that ordinary business corporations exercising no public functions, unless restricted by statute or charter, had the implied power to borrow money and to secure the payment thereof by a mortgage, so long as the power was exercised in furtherance of the corporate purposes. But the rule was confined to this class of corporations and did not extend to those organized for the performance of public functions, particularly railroad companies. Concerning the latter class, the theory was that the corporation, having been granted the right to perform the public service, was under obligation to do so. Therefore, it could not divest itself of the property necessary to a proper rendition of that service; and, since a mortgage in case of default might result in an absolute transfer, this same rule prohibited mortgaging. The right to mortgage, however, seems

27 Beers v. Phoenix Glass Co., 14 Barb. 358 (N. Y. 1852); Mead v. Keeler, 24 Barb. 20 (N. Y. 1857); Patridge v. Badger, 25 Barb. 146 (N. Y. 1857); Clark v. Titcomb, 42 Barb. 122 (N. Y. 1864). It is interesting to follow these cases in the order in which they were decided, noting the change in the attitude of the court from that of caution in the first case to a statement in the last case that this implied power to borrow was then the settled law of the state.

28 Curtis v. Leavitt, 15 N. Y. 9 (1857); Nelson v. Eaton, 26 N. Y. 410 (1863)

29 JONES, RAILROAD SECURITIES #11.

30 Ibid. The weight of authority seems to have been in favor of the proposition as stated.
to have been granted with considerable freedom and by a variety of methods. In certain cases it was granted by the act creating the corporation; in others, by special act at a later time. In still other cases the corporation executed the mortgage and then asked for legislative confirmation, which, it seems, was generally given. At present the power is usually given by general act. But the power to issue bonds did not, without express authority, carry the power to secure the bonds by a mortgage on the public franchises of the corporation, nor were these franchises subject to sale on execution. This power was given with great hesitation by special statutes until about 1850 when in New York, for example, the power was granted by general act.

One of the earliest, perhaps the earliest, corporate trust deed of which we have any record was executed in 1830 by The Morris Canal and Banking Company to an individual, Wilhelm Willink, Jr., of

31 Laws of N. Y. 1846, c. 216.
32 Laws of N. Y. 1834, c. 39.
34 For example, see DEL. GEN. CORP. LAW, art. 4, §115.
37 Laws of N. Y. 1850, c. 140.
Amsterdam, as trustee.

"... and the said The Morris Canal and Banking Company, for the purpose of securing the re-payment of the said capital sum of seven hundred and fifty thousand dollars, with interest on the same, made and executed in due form of law, and delivered to the complainant, their certain indenture of mortgage, bearing date the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and thirty, and made between the said The Morris Canal and Banking Company, of the first part, and the complainant, by the name and description of Wilhem (sic) Willink, junior, of the city of Amsterdam, in the kingdom of the Netherlands, merchant, being the agent and trustee of the several subscribers to the loan therein after mentioned, of the second part; and in and by the said indenture of mortgage it is recited and set forth that whereas the complainant, in pursuance of the authority and instruction of the board of directors of the Morris Canal and Banking Company, had on behalf of the said company lately negotiated and concluded in the city of Amsterdam, an agreement for a loan of seven hundred and fifty thousand dollars, to be advanced by the subscribers thereto according to the sums subscribed by each of them respectively, by the conditions of which agreement, the said loan was to bear interest at the rate of five per centum per annum, to be paid half-yearly, that is to say, on the first day of July and on the first day of January of each year until its reimbursement; and the capital sum to be reimbursed by five equal annual installments, commencing the first day of January, in the year of our Lord one thousand eight hundred and forty-six; and that the said interest, and also the said instalments (sic) of principal, should be paid in Amsterdam to the complainant, representing the said lenders, or to his successor or successors in said trust ...; and that the payment thereof should be secured by the pledge and hypothecation of the Morris Canal ... with its appendages and appurtenances (sic), and the annual revenues, chartered rights (sic) and property of the said company

therein after mentioned; . . . and thereupon the said indenture of mortgage witnessed that the said 'The Morris Canal and Banking Company,' for the purpose of securing the reimbursement of the said capital sum, and the due payment of the said interest, . . . and in consideration of the sum of one dollar, . . . and in pursuance of the power and authority for that purpose given and granted to them by the laws of the state of New-Jersey, had granted, bargained, sold, assigned, transferred and set over, and by the said indenture of mortgage did grant, bargain, sell, assign, transfer and set over unto the complainant, his heirs, executors, administrators, successors, substitutes and assigns, for the benefit of the said lenders, all and singular the said Morris Canal, . . . together with . . . the chartered rights of the said company, and all the tolls, income, revenues and profits accruing, . . . to have and to hold . . . upon trust, nevertheless, for the benefit and behoof of the several lenders, their respective executors, administrators and assigns, in proportion to the sums by them respectively advanced, or to be advanced, on account of the said loan; Provided always, and the said indenture of mortgage was and is upon the condition, that if the said The Morris Canal and Banking Company, or their successors, should well and truly pay to the complainant . . . the aforesaid capital sum . . . and also the annual interest . . .; then that the said indenture of mortgage, and the estate therein granted, and every act, matter and thing therein contained, should cease and be null and void to all intents and purposes; and the said The Morris Canal and Banking Company . . . did covenant, promise and agree . . . that they . . . should and would well and truly reimburse, pay and discharge the said principal sum and interest . . .; and it was also by the said indenture of mortgage expressly declared and agreed . . . that if default should at any time be made in the payment of the said capital sum and interest, or either of them, or any part thereof, . . . then in that case, and as often as such default should be made, it should be lawful for the complainant . . ., or such person or persons as shall or may have succeeded to the said trust, to enter upon and to have, hold, use and enjoy, the said canal . . ., and to take and receive the revenues, tolls, rents, issues and profits thereof,
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in as full and ample a manner . . . as they the
said Morris Canal and Banking Company . . . . 39

In 1833 the Tuscumbia, Courtland and Decatur
Railroad Company issued $96,000 in bonds to two indi-

40

viduals. Except for a provision in the obligations
themselves - pledging "all their estate, both real and
personal, their road, their stock, and profits" - the
bonds were unsecured. The court, however, held that
this provision was sufficient to create a mortgage in
favor of the bondholders. A few years later the same
company secured a loan by a trust deed to an individ-

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ual.

The Mohawk and Hudson Railroad Company was

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incorporated by special act in 1826; but the right
to mortgage was not granted until 1834. In that year
the company was given the power to execute a mortgage
for not more than $250,000, and also to convert the
loan into stock at par within two years after the

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passage of the act. This is perhaps the earliest
example of the conversion feature so common in our
modern bonds.

In 1835 the Washington Medical College of
Baltimore executed a trust deed to four individuals,

39 Supra note 38.
Cas. No. 7808, 7 Pa. Law J. 166 (N. D. Ala. 1846).
41 Ibid.
42 Laws of N. Y. 1826, c. 253.
43 Laws of N. Y. 1834, c. 39
as trustees, to secure a loan of $50,000. In 1836 the Philadelphia and Reading Railroad Company issued $1,000,000 in five per cent bonds, securing the issue by a trust deed to three individuals.

During this period and afterwards, corporations, particularly those engaged in the performance of some public function, often mortgaged their assets to the state - usually, though not always, as security for a loan from the state. The New York and Lake Erie Railroad Company, in 1833, executed a mortgage to the state of New York, in return for which the state guaranteed some of the stock of the road. In 1834 the Baltimore and Ohio Railroad Company, to secure a loan, mortgaged its road to the state of Maryland. Part of the canal of the Morris Canal and Banking Company was, in 1840, mortgaged to the state of Indiana. During the decade of the eighteen fifties, various railroads in the South were mortgaged by statute to secure advances made by the incorporating state; for

44 Conkling v. Washington University of Maryland, 2 Md. Ch. 497 (1849).
45 Smith, op. cit. supra note 16, at 903.
46 Stetson, Preparation of Corporate Bonds, Mortgages, Collateral Trusts and Debenture Indentures, SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION (New York: Macmillan, 1922) 5.
47 Ibid.
48 Willink v. The Morris Canal and Banking Co., supra note 38.
example: the Richmond and Danville to the Commonwealth of Virginia in 1850, a second mortgage of the same road to the Board of Public Works of Virginia, the Laurens to the state of South Carolina in 1859, and the various liens under the Internal Improvement Laws of Tennessee and other states in 1853 and 1854.

The Merchants' Exchange Company executed a mortgage for $400,000 in 1838, and another for $300,000 in 1840. Both were made to James G. King, in trust for the respective holders of the bonds. The mortgages recite that bonds are to be issued payable to the order of Mr. King, give a short description of the bonds, and state that the money is to be used in the completion of the Exchange which is being erected on the mortgaged premises; but in other respects, both of the indentures are in the form used in ordinary real estate mortgages. The bonds are payable to James G. King or his assigns, and are in the form of a simple bill under seal. On each is endorsed a simple assignment by Mr. King to the person advancing on it, or his assigns; and "dividend warrants" are attached, in form substantially as follows:

49 Stetson, op. cit. supra note 46, at 7.
50 Barry v. Merchants' Exchange Co., 1 Sand. Ch. 280 (N. Y. 1844).
"Merchants' Exchange Company, New-York,

Pay the bearer thirty-five dollars for the
half yearly interest due February 1st, 1850, on
bond No. 189.

$35

R. C. M'Cormick, Sec."

The validity of these mortgages was tested, in 1844, in Barry v. Merchants' Exchange Company. There it was objected, inter alia, that a limitation upon capital was a limitation upon the total amount of property that the corporation might own; in other words, that the term "capital" included both stocks and bonds, and that bonds issued in an amount exceeding the authorized capitalization of the company were void and unenforceable. The point was argued by the keenest intellects of the New York bar. The Assistant Vice-Chancellor held, however, that the capitalization of the company, as the term was used in the act of incorporation, included only the capital stock and was not to be extended to include the bonded indebtedness or surplus of the company. The importance of the decision can hardly be overestimated. Had the rule announced been otherwise, either legislative relief must have been granted or our whole history of corporate enterprise must have been different.

51 Supra note 50.
In 1839 the Montgomery Railroad Company executed a trust deed to several individuals to secure fifty bonds of $1,000 each.


While we have isolated instances of corporate trust deeds in the early thirties, the real beginning did not occur until the following decade. During the forties, we have a score of instances in which railroad companies mortgaged their roads to secure issues of bonds.

In 1846 the Baltimore & Ohio Railroad Company mortgaged its road to the president of the company and his successors, as trustees. The instrument is interesting because it recites that the company had issued "certificates of debt in which was contained the pledge of the property and funds and stock" of the company, and states that it had "been suggested that the security intended to be given by the Company to the holders of said certificates, and their assigns, would be to them more satisfactorily expressed if there was executed by the said Company an instrument..."

53 Smith, op. cit. supra note 16, at 904.
54 Stetson, op. cit. supra note 46, at 6.
CHAPTER III

ACCEPTANCE AND EARLY DEVELOPMENT - 1840 to 1870

While we have isolated instances of corporate trust deeds in the early thirties, the real beginning did not occur until the following decade. During the forties, we have a score of instances in which railroad companies mortgaged their roads to secure issues of bonds.

In 1846 the Baltimore & Ohio Railroad Company mortgaged its road to the president of the company and his successors, as trustees. The instrument is interesting because it recites that the company had issued "certificates of debt in which was contained the pledge of the property and funds and stock" of the company, and states that it had "been suggested that the security intended to be given by the Company to the holders of said certificates, and their assigns, would be to them more satisfactorily expressed if there was executed by the said Company an instrument

53 Smith, op. cit. supra note 16, at 904.
54 Stetson, op. cit. supra note 46, at 6.
of writing which being duly acknowledged might be recorded as deeds and mortgages are recorded." Except for the recital, the instrument is substantially an ordinary real estate mortgage without covenants. The Baltimore & Ohio executed another mortgage, in 1850, to Baring & Company of London, and in 1850 and 1853, three mortgages to the president of the railroad company, as trustee.

The charter of the Hudson River Railroad Company, in 1846, gave the company power to execute a mortgage for $2,000,000, subject, however, to the limitation that it should not cover the personal property, that it should be $500,000 less than the paid up capital stock, and that the total stock and bonds should not exceed in amount $6,000,000.

The Vermont and Massachusetts Railroad Company, in 1849, issued bonds to the amount of $1,100,000, giving as security a deed of trust executed to three individuals, as trustees. Here we have at least one new feature - the certification by the trustee, which is invariably placed upon all bonds of the present day. Note, however, that the provision seems to be intended solely for the protection of the

55 Stetson, op. cit. supra note 46, at 7.
56 Ibid. 2.
bondholders, since there is nothing to indicate that the signature is essential to the validity of the bond.

The following is substantially the form of the bonds:

"Vermont and Massachusetts Railroad Company. No. 582. Mortgage Bond. Amount $1000.

The Vermont and Massachusetts Railroad Company, for value received, hereby promise to pay to ___________ the sum of one thousand dollars, at the office of the treasurer, in the city of Boston, on the first day of July which will be in the year one thousand eight hundred and fifty five; and also interest for the same semi-annually, on the first day of January and July in each and every year after the date hereof, upon the surrender of the corresponding warrant.

In witness whereof, and pursuant to a vote of the stockholders of said company, passed on the 29th day of June 1849, the president and treasurer have hereunto set their hands and the seal of said corporation, this second day of July 1849.

John Rogers, Treasurer,
Thos. Whittemore, President.

I hereby certify that this bond is secured by mortgage, dated July 11th 1849.

Jabez C. Howe, one of the trustees."

In 1847 the New York and Lake Erie Railroad Company issued $3,000,000 in bonds. Two years later,
the company executed its so-called "second mortgage," being its first deed of trust. The instrument grants to John J. Palmer and others, as trustees, the property of the company "now owned . . . or which shall hereafter be owned," subject to the $3,000,000 prior lien. The going concern value was realized, it seems, even at this early time.

In the bonds the company acknowledges the indebtedness "which sum they promise to pay to the said John J. Palmer or bearer." The bond also provides for the payment of interest semi-annually upon presentation of the annexed dividend warrants, and contains a recital of the purpose for which the money is to be used and of the fact that the bonds are secured by a mortgage. They also contain a conversion privilege in the following form:

"The holder of this bond shall be entitled at any time before the first day of March, 1859, to convert the principal sum into the capital stock of the Company at par, on surrendering the bond with the warrants not then due annexed."

The mortgage recites briefly the corporate authority of the company and the purpose of the deed.

59 Stetson, op. cit. supra note 46, at 8.
60 The mortgage of The Morris Canal and Banking Co., executed in 1850, was held sufficient to pass the after acquired property, supra note 38. Contrary to general opinion, the after acquired clause is not a product of the last century; the Egyptian marriage settlement, supra note 3, contained such a provision.
The form of the bonds is set out in full. Then follows the grant in trust to the trustees, subject to the prior lien, a covenant of further assurances, and a provision under which the trustee, "upon the request in writing of any one of the holders of the bonds on which interest or principal is not fully paid," may enter upon and take possession of the property, sell the same, pay the costs and the mortgage debt, and render the balance to the mortgagor. The mortgage also provides for filling vacancies among the trustees.

In October of the same year (1849) the Norfolk County Railroad Company executed its mortgage to Robert G. Shaw, Jonathan A. Davis, and Charles T. Russell, as trustees. The instrument recites the vote of the stockholders authorizing the mortgage and the vote of the directors directing the president and treasurer to execute the mortgage. This recital is followed by the names of the parties, the granting clause, the description of the property, and the habendum clause, "subject to the conditions herein made, to wit:" The first condition provides that the company shall issue the authorized bonds as soon as possible and that the face of the bonds shall indicate...
that they are secured by the mortgage; the second
fixes the dates, amounts, and time of payment of the
bonds; and the third allows the company to remain in
possession so long as the conditions contained in the
bonds are complied with and the value of the property
remains unimpaired by waste, neglect, or mismanage-
ment. The mortgage also contains the usual defeasance
clause. In addition, the trustees are given power, in
the case of a breach of any of the conditions of the
mortgage and "if they see fit," to take possession of
the property, manage and control it, and "apply the
net proceeds to the purposes of the trust." And if
either the interest or principal shall remain due and
unpaid for a period of six months, and if "two thirds
in amount of the bondholders shall request it in writ-
ing, under their hands," the trustees, upon giving
three months notice by advertisements, may sell the
property, apply the proceeds to the payment of inter-
est and principal on the bonds, and turn over the
remainder, if any, to the mortgagor. Then follows a
provision for filling vacancies among the trustees,
and finally, a covenant by the trustees, that, in case
they are required to take possession of the property,
they will manage it with their best skill and will
render certain reports. "But it is understood and
agreed that the said trustees and their successors are
not to be liable in any contingency for the acts of each other, but that each is solely liable for his personal acts or negligence."

Mr. Stetson feels that the New York and Lake Erie mortgage of 1849 "was drafted probably by Judge William Kent, then the counsel of the railroad, some of Chancellor Kent, and himself of high authority as a lawyer, conveyancer and judge." Mr. Rufus Choate acted as counsel for the Norfolk County Railroad Company when its mortgage, executed in the same year (1849), was foreclosed. At the time of the execution of the mortgage, he was practicing law in Massachusetts; hence it is entirely possible that the instrument was drawn subject to his supervision, or perhaps even by him. At any rate the mortgage must represent a well drawn and complete instrument for that period.

To return to the New York and Erie: In 1853 its so-called "third mortgage" was executed to James Brown and John Davis, as trustees. It provided for the issuance of $10,000,000 in bonds, part of which were to be used in the payment of the bonds issued under the so-called "second mortgage"—perhaps our first refunding mortgage. The form is substantially

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63 Ibid.
that of the former mortgage. On the margin of the bond, however, appears the following:

"New York and Erie Railroad Company

Mortgage Bond No. $1000.

This is to certify that the within bond is included in a mortgage on the entire property of the New York and Erie Railroad Company, duly executed to James Brown and John Davis, Trustees, and dated March 1, 1853."

Mr. Stetson thinks that "this is clearly the origin of the certificate of authentication . . . by the trustee." However, it seems probable that this is a statement of the security behind the bonds - a feature which at the present time is ordinarily incorporated within the body of the bond. Credence is given to this view by the fact that a similar statement appears in the margin of the bonds issued by the Vermont and Massachusetts Railroad in 1849, while a shorter statement to the same effect, which is actually signed by one of the trustees, appears at the foot of the bond.

Next followed the New York and Erie "fourth mortgage" in 1857 to James Brown and John C. Bancroft Davis, as trustees. Here we meet several new features. In the first place, both the bonds and the mortgage contain a provision that in case of six months' default

64 Stetson, op. cit. supra note 46, at 9.
65 Supra p. 27.
States, or, at the option of the holder, in sterling at a fixed rate of exchange, and a recital that "this bond shall not become obligatory until authenticated by a certificate endorsed hereon signed by the said Trustee."

69 ibid. 10-11. In 1837 the Merchants Exchange Company executed two sets of bonds, one payable in United States coin and the other in sterling, which were sent to the agent of the company in England with directions to negotiate a loan on one or the other, supra note 50.
In the earliest corporate trust deeds, a single individual generally acted as trustee. Later it was customary to appoint two or three persons to hold that position. Apparently the idea of the possible conflict of interests of the trustee had not crept in, because we find numerous examples in which the same individual or individuals acted as trustee under two or more mortgages executed by the same company; and this practice was followed even in the case of corporate trustees. Further, we find cases

70 Thus the New York and Lake Erie mortgage of 1853 was executed to James Brown and John Davis, supra p. 31, while the mortgage of the same company executed in 1857 named James Brown and John C. Bancroft Davis as trustees, supra p. 32. The Colorado Central Railroad Company executed its mortgage of 1870 to Fred L. Ames and John R. Duff, as trustees, infra p., and another mortgage to the same trustees in 1872, infra p. . The Denver and Rio Grande Railway Company named John Edgar Thompson, Samuel M. Felton, and Louis H. Meyer as trustees of its mortgage executed in 1871, infra p., and Louis H. Meyer and John A. Stewart trustees of the mortgage of 1880, infra p. .

71 The United States Trust Company of New York acted as trustee of the Denver and Rio Grande mortgage of 1886, infra p., and of a mortgage executed by the same company in 1888, infra p.
in which the officers of the mortgagor company were appointed to act as trustees. Despite the fact that the interests of the officers were undoubtedly adverse to those of the bondholders, the practice was not uncommon. As might be expected, certain individuals often acted as trustees under several mortgages executed by different companies. This fact leads to the conclusion that they were in a sense professional trustees. Until about 1880, most of the mortgages were made to individual trustees. Indeed, the practice continued up until the opening of the present century. However, the trend was definitely in favor of the corporate trustee; and after about 1880, the trustee named was usually a corporation. In recent years, to meet the requirements of the statutes of certain states, an individual trustee is often joined with the corporate trustee - the former, however, having, for the most part, no active duties.

At an early time there was serious doubt as to the capacity of a corporation to hold land in trust. Kyd denies any such power:

72 See, for example, the mortgage executed by the Baltimore & Ohio to the president of the company and his successors, supra p. 25.
73 Thus Robert G. Shaw acted as trustee under the Vermont and Massachusetts mortgage of 1849, supra p. 26, and under the Norfolk County Railroad mortgage of 1849, supra p. 29.
"Neither can a corporation aggregate, by the strict rules of the common law, be seised of lands to the use of another; for this is foreign to the purpose of its institution; the persons, who compose the corporation, might, in their natural capacities, have been seised to the use of another; it would therefore be nugatory to allow them to do that in their corporate capacity, which they had power to do in their natural, as the sole purpose of incorporating them, was to confer powers upon them which they could not otherwise have; another reason given for this incapacity is, that the corporation aggregate could not be compelled by subpoena to execute the possession to the use, because if it disobeyed, it could not be compelled by imprisonment."

He admits that certain corporations did hold land for charitable purposes, but reconciles this fact to the rule by stating that "the trust is not vested in the corporation, as a corporation; but the natural persons of whom it is composed are created trustees, and their description, as constituent parts of a corporation, operates only as a more certain designation of their persons." Indeed in one case it was objected that a corporation could not grant land by deed, "for a corporation cannot be seised to another's use; and the nature of such a conveyance is to take effect by way of use in the bargain, and afterwards the statute draws the possession to the use." The court,

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74 1 KYD, CORPORATIONS 72
75 Ibid. 73.
76 Sir Thomas Holland and Bonis's Case, 3 Leon.175 (1587).
79 Ibid. 87.
however, rejected the doctrine as dangerous, which leads Comyns to state that "they may give an use, though they cannot be seised to an use."

With this as a background, it is not surprising to find that the American courts proceeded with some hesitation in the matter. Angell and Ames criticize the rule as laid down by Kyd, pointing out the fallacies in the various reasons advanced, and state as the American rule "that corporations may be seised of lands, and hold other property in trust, for purposes not foreign to their institution." This rule has generally been followed; yet it was long the custom to name one or more individuals as trustees. The custom, along with the uncertainty concerning the power of a corporation to act in that capacity, probably retarded the adoption of the policy of appointing corporate trustees.

In the earliest examples of a corporation acting as a so-called trustee, the documents were rather in the nature of certificates of deposit or escrow agreements. Thus, in 1835, the Farmers' Loan & Trust Company held funds in trust for the Long Island Railroad Company under what was clearly a cer-

77 COM. DIG., Tit. Bargain and Sale, B. 3.
78 ANGELL and AMES, CORPORATIONS 84-86.
79 Ibid. 87.
Between 1837 and 1840, the Girard Trust Company (under its old title) acted as "trustee" in various transactions, which upon examination are found to be merely escrow agreements.

From 1840 on, the North American Banking & Trust Company floated a series of bonds, which were secured by a trust deed. The company did not act as trustee, however. The activity of the company in these transactions, together with the prolonged litigation incident thereto, later became notorious as the "million trust deed."

As early as 1839, The Girard Life Insurance Annuity and Trust Company (later the Girard Trust Company) acted as trustee under an instrument which was substantially a mortgage. The indenture secured $250,000 advanced by individual subscribers to the Beaver Meadow Railroad and Coal Company. The obligation was in the form of a single bond for the penal sum of $500,000 and was executed by the coal

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80 Smith, op. cit. supra note 16, at 907.
81 Ibid. 908.
82 Curtis v. Leavitt, 17 Barb. 309 (N. Y. 1854); Leavitt v. Palmer, 3 N. Y. 19 (1849), discussed in 4 BANKERS MAG. (N. Y.) 596-602. See also 1 ibid. 524 (1847); 7 ibid. 340 (1852); 9 ibid. 349, 354 (1854); 12 ibid. 141-144 (1857); 13 ibid. 202-206 (1858).
83 Smith, op. cit. supra note 16, at 908.
company to the trustee. Two years later The Tioga Navigation Company executed a mortgage to The Girard Life Insurance Annuity and Trust Company, as trustee, the bonds not to exceed in amount $100,000. However, in this case instead of issuing a single bond to a trustee, the company issued several bonds, varying in amount, to the individual subscribers; and to meet this new situation, provision was made for registration of the bonds. This mortgage also provided for a sinking fund.

84 Smith, op. cit. supra note 16, at 910.
CHAPTER V

FINAL DEVELOPMENT - 1870 - 1900

In 1870 the Colorado Central Railroad Company (now the Colorado and Southern Railway Company) executed its mortgage to Fred L. Ames and John R. Duff, as trustees. The instrument sets out the names of the parties, the act of incorporation, the route of the road (both authorized and completed), the statutory power to mortgage, the resolution authorizing the mortgage, a description of the bonds, the granting clause, a description of the property mortgaged, and the habendum and "in trust" clauses, followed by fourteen covenants. Briefly, the covenants are as follows: (1) Bonds are to be issued to the treasurer by the trustee upon affidavit by the president that a certain amount of the road bed is in condition for laying the track. (2) Until default in payment of the principal, or in some other thing required to be done by the mortgagor,
possession shall remain in the railroad company. (3) Upon default in interest and the continuance of the default for a period of six months, "it shall be lawful for the party of the second part" to enter and manage the road, pay the necessary expenses, and apply the remainder, first, to the payment of interest in the order in which it shall become due, and second, to the principal of such of the bonds as shall then be due. The mortgagor agrees, upon default, to do all things necessary to put the trustees into possession. (4) In case of default, the trustees, after proper notice by advertisement, may sell the property, and pay the necessary expenses involved in the sale. The balance is applied to the accrued interest and the principal (whether the principal has matured or not) ratably as to the entire amount; and any remainder is turned over to the railroad company or to such persons as the court may order. (5) The trustee may, in case the property is sold, bid at the sale for the holders of the bonds. (6) In case of a default in interest, and the continuance of the default for six months after demand; and in case a majority of the bondholders shall request in writing both to the corporation and to the trustee that the principal shall be declared due, the trustee shall declare the principal due. (7) The seventh is the usual covenant of further assurances. (8) The trustee
shall have power to convey or release such real property as is no longer needed, and to allow the company to dispose of similar personal property; but property which the company purchases to replace the property disposed of shall become subject to the mortgage. (9) The trustee, upon proper indemnification, shall have a duty to enter, sell, or take court proceedings (a) in case of a default in principal or interest, or (b) in case of a default in any other condition, provided in either case that a majority of the bondholders shall request the same in writing. In the latter case, the trustee or a majority of the bondholders may waive the default; but in either case, a majority of the bondholders may force the trustee to proceed. (10) Vacancies among the trustees may be filled, or the trustees may be removed upon the written request of a majority of the bondholders. The next four covenants provide (11) that the company will keep an office in Boston for the payment of principal and interest, and for transferring shares of stock; (12) that the company will apply the proceeds of the bonds to the purposes for which issued; (13) that the company will keep all conditions; and (14) that upon payment of the debt, the mortgaged premises shall revert to the company—that is, the usual defeasance clause.
The next mortgage by the Colorado Central was executed in 1872, to the same trustees as in the previous mortgage. This instrument is similar to the preceding mortgage; and since much of the language in the two is identical, we may conclude that the first acted as a copy for the second. However, the later instrument contains certain changes. In the first place, the trustee is given power to refund the previous bonds, and is required to deliver the new bonds to the company, as directed by the board of directors. In the second place, the trustee may bid at the foreclosure sale only when requested to do so by a majority of the bondholders. Vacancies among the trustees are to be filled by the directors of the company, instead of by the bondholders; but, to make the trustee a party with the proper interests, a trustee is required to own at least one thousand dollars in bonds. A covenant is added, providing that the amount of bonds issued shall not exceed fifteen thousand dollars per mile of road; and in the last covenant, which is number sixteen, it is provided that the "said trustees shall not be liable [except?] for gross negligence or wilful default, and neither shall be answerable for the acts or

87 Recorded in Book 35, p. 514, in the office of the Clerk and Recorder of the City and County of Denver, Colorado.
omissions of the other unless consented to by him."
This mortgage contains no provision by which the prin-
cipal may be declared due, upon default in interest
payments - that is, the acceleration clause - as was
contained in the previous instrument. As has been
stated, the wording of the two mortgages is identical
in many cases. This fact leads to the conclusion that
the clause providing for the maturity of principal in
case of default was omitted intentionally. Since
modern corporate trust deeds always contain such a
provision, the omission must be considered as a back-
ward step.

The first mortgage of the Denver and Rio
Grande Railway Company was executed April 13, 1871,
to John Edgar Thompson, Samuel M. Felton, and Louis H.
Meyer, as trustees. The bonds - the form being set
out in full - are payable to "J. Edgar Thompson or
bearer" in United States money, "or if preferred by
the holder," in English sterling. The interest is
payable in New York, Amsterdam, or London, upon pre-
sentation of the annexed interest coupons; and pay-
ments made are to be "free of United States taxes."

88 Recorded in Book 67, p. 141, in the office of
the Clerk and Recorder of the City and County of Denver,
Colorado.
It is also provided that "This Bond shall not become obligatory upon the Company until the certificate endorsed hereon is signed by the trustees." On the back of the bond is found the following:

"We certify that this Bond is one of the bonds secured by the Deed of Trust within referred to.

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__________________________

Trustees"

The form of registration is set out in full; but registration extends only to principal, and does not affect the negotiability of the coupons. Both $1,000 and $500 bonds are authorized. The covenants are not similar to, though more elaborate than, those of the Colorado Central mortgages. However, several new features appear: (1) The mortgagor may offer to surrender the property to the trustees in case of a threatened default, the trustees having the right to accept or reject the possession as they shall see fit. (2) The trustees may sell only a part of the property, if that will be sufficient to pay the items upon which there has been default. And (3) the trustee may resign. In many of the mortgages during this period, the bondholders are given certain powers. To facilitate the exercise of these powers, elaborate provisions are made for the calling and procedure of bondholders'
meetings, and for methods whereby one bondholder may challenge the authority of another, or others. Provision is made for the establishment of a sinking fund; and a right is given to apply the bonds to the purchase price in case of sale. In addition, the company covenants not to take advantage of any rule of law allowing a stay of sale in case of default. Covenants of this type seem in after years to have been elaborated into the present clause (of such doubtful validity) waiving the equity of redemption.

In 1880 the Denver and Rio Grande executed its First Consolidated Mortgage to Louis H. Meyer and John A. Stewart, as trustees. The bonds, while not being set out in full, are described and are similar to the bonds of the previous mortgage. In addition to providing for registration of the principal, the mortgage permits the removal of unmatured coupons from the bonds, after which the interest is payable only to the registered owner - provided the facts are endorsed upon the bond. First among the covenants we find elaborate provisions for refunding the bonds issued under the mortgage of 1871 and under another mortgage executed in 1872, covering only the Arkansas Valley.

89 Recorded in Book 100, p. 435, in the office of the Clerk and Recorder of the City and County of Denver, Colorado.
Division of the road. Then follow provisions for issuing Consolidated Bonds, and in the next article, the machinery for refunding the same bonds. A sinking fund is created; and after its establishment, the bonds, it seems, are made subject to redemption. This last feature was new at the time, and consequently was not well developed. The exact way in which the bonds were to be redeemed is hard to follow. Such a provision, "then novel," had been incorporated in the Erie Railway Company mortgage executed six years earlier (1874).

The earlier mortgages had provided for compensation to the trustees, but in the later indenture that provision is much more elaborated. In certain cases, they are to receive reasonable compensation; in other cases, they are to receive such compensation as may be fixed by the court. A definite amount - one dollar each - is fixed for signing the bonds. In case of entry, a certain percentage of the income is allowed; in case of sale, a percentage of the selling price.

In the earlier mortgages the covenants were added without much attempt to obtain a proper grouping. In this indenture we have an attempt to group some of the covenants. For example, in article five the

90 Stetson, op. cit. supra note 46, at 11.
company covenants: (1) to pay taxes and other governmental charges; (2) to keep the property in repair; (3) to comply with the law, thus preventing loss or impairment of the corporate franchises; (4) not to issue any more of the "prior bonds" and to pay those outstanding; (5) not to issue the bonds under this mortgage, except for purposes therein provided; (6) to keep an agency for the bonds and a registration book, and to prepare statements for the inspection of the bondholders; (7) to pay principal and interest, and in case of default, not to defend under any "stay or extension" law, or appraisement law, or to redeem after sale; (8) to allow the trustees to inspect the books, and if the net income is not sufficient to pay the interest charges, to report that fact to the trustees; and (9) to execute further assurances. This is clearly an advance in form. However, not until in article sixteen is it provided that these covenants shall be binding upon the successors of the mortgagor.

The mortgage of 1880 is almost twice as long as its predecessor executed in 1871. It is executed in twenty counterparts, all of which are to be considered as one original. The instrument is signed by the company; and "the said trustees in evidence of their acceptance of the trusts hereby created" have signed, sealed with wafer seals, and acknowledged the
In 1886 the Consolidated Mortgage of The Denver and Rio Grande Railroad Company (successor to the Denver and Rio Grande Railway Company) was executed. This was the first mortgage of the company to a corporate trustee - the United States Trust Company of New York. The mortgage recites the previous mortgages, the foreclosure and sale, and the organization of the new company. It is, however, more elaborate than the previous mortgage. Three new provisions are found: namely, a covenant to insure; a stipulation that the mortgage is to be foreclosed only by the trustee, and only as provided by the instrument; and a provision under which a receiver may be appointed in certain cases.

The Denver and Rio Grande Improvement Mortgage was executed in 1888, the United States Trust Company of New York also acting as trustee under this instrument. The form is substantially that of the previous mortgage.

The panic of 1893 and the ensuing depression caused a number of the larger railroad systems to default on their outstanding bond issues. These

defaults precipitated foreclosure and reorganization proceedings. In most cases, the reorganized roads issued large, all-embracing mortgages by which the prior bonds were refunded and new capital provided.

These mortgages, "such as the Southern, the Erie, the Northern Pacific, the Atchinson, and the Union Pacific, made from 1894 to 1896, were the result of comprehensive study of such instruments by many counsel, and they established the form of the corporate mortgage now substantially followed." In investigating the product of their labor, we may turn to the First and Refunding Mortgage of the Denver and Rio Grande Railroad Company executed in 1908.


95 Ibid. vol. 1, p. 65.
CHAPTER VI

THE MODERN CORPORATE MORTGAGE

The Denver and Rio Grande Railroad Company executed its First and Refunding Mortgage to the Bankers Trust Company on August 1, 1908, and its Adjustment Mortgage to The New York Trust Company on May 1, 1912. The two are very similar, the wording being identical in most of the covenants; hence a discussion of one will be applicable, for the most part, to the other. Since the First and Refunding Mortgage represents the first example of the adoption of the new form by the Denver and Rio Grande, that instrument will be used as a basis for the present discussion. A minute analysis of the modern corporate mortgage is outside the scope of this paper; yet a brief outline as to form and substance may be interesting and perhaps not amiss.

The Denver and Rio Grande First and Refunding Mortgage presents quite a change from its prede-

95 Ibid. vol. I, p. 65.
cessor executed in 1888. In the first place, it is, excluding the table of contents, almost five times as long as the Improvement Mortgage. The form is a complete innovation. It is the general, though not the universal, practice to preface the modern corporate mortgage with a table of contents, which, though printed with the mortgage, is generally not recorded. The bonds are almost invariably set out in full. An attempt has been made to divide the covenants into convenient groups, each troup falling within a single article with the general subject treated by the group forming the title for the article. The smaller subdivisions under the general topic are treated as sections of the proper article.

While at first glance the substance seems to be altogether different - and indeed it does present some rather important changes - a close analysis will show that the extra space is largely taken up with greatly elaborated statements of provisions which are found in a more primitive and simplified form in the earlier instruments. The recitals present very little alteration, and the same may be said of the granting clause. The description of the property, however, is much more complete than in the prior instruments; and with other property mortgaged, we find various stocks and bonds which are owned by the company.
The covenants are grouped into fourteen articles.

The first has to do with the "form, execution, delivery, registry and exchange of bonds."

Both coupon and registered bonds are issued; and this article describes the bonds, provides for registration, exchange, transfer, the place of payment, the rate of interest, and so on. In the modern issues, very often some of the bonds are sold before the engraved bonds are ready for delivery; hence it is customary to make provision for temporary bonds. Also provision is made for replacing lost, mutilated, or destroyed bonds. Scrip certificates with a face value of $100 each are provided for. These certificates are not entitled to the benefits of the mortgage, and were issued in order to aid in the refunding of the earlier bonds then outstanding.

The next article has to do with the issuance of the bonds. Very often this article is extremely short. In the instant case, however, because of the fact that these bonds are being issued to refund previous issues as well as provide new capital, and because of the peculiar relationship existing between the mortgagor and the Western Pacific and other companies, this article takes up some fifty-four pages in the printed report.
The third article contains the "particular covenants of the railway company." The covenants mentioned here are much the same as are found in the earlier mortgages. A few new provisions are found, such as a covenant to deposit the mortgaged securities; a covenant not to suffer default under leases; a covenant to prevent those companies, whose stock is pledged under this mortgage, from issuing securities and from selling or leasing their property, except under certain conditions; and a covenant not to assent to extension of the coupons. All but the last are self explanatory. The last was incorporated as a guard against the practice indulged in by some companies of buying up a large part of the interest coupons then due and thus preventing a foreclosure.

Article four has to do with the sinking fund, its establishment and uses; article five, with the machinery to be used in the redemption of the bonds of this issue.

The next article has to do with the rights of the company and of the trustee with reference to the stocks and bonds pledged: that is, the voting rights, the right to receive the interest or dividends, the right of the trustee to protect the stock, and others.

Article seven is called "Remedies of Trustee and Bondholders." In it are contained the events of
default, the procedure to be followed subsequent to a
default, the acceleration clause, the right to sell
or institute judicial proceedings, the procedure at
the sale, the application of the proceeds, the right
to apply the bonds on the purchase price, the waiver
of the equity of redemption, and allied provisions.

Article eight is new. Here it is provided
that the bonds are corporate obligations only, and
that no recourse shall be had against the incorpora-
tors, stockholders, officers, or directors of the
mortgagor corporation.

Article nine has to do with the bondholders'
execution of instruments and proof of ownership of
bonds. Article ten provides for release of the mort-
gaged premises. Article eleven contains the following
items: a provision that the mortgagor shall have
possession until default; a defeasance clause in the
usual form; and a stipulation that moneys for the pay-
ment of unpresented bonds - remaining in the hands of
the trustee for six years after the bonds are due -
shall be returned to the mortgagor.

Article twelve deals with the immunities of
the trustee; provisions for the resignation, removal,
and appointment of trustees and co-trustees; the neces-
sary qualifications of a trustee; and the method of
vesting a new trustee or trustees with the mortgaged
Article thirteen is entitled "Sundry Provisions," and is in the nature of a catch-all. It attempts to meet the contingency of a consolidation or merger of the mortgagor corporation or a lease or sale of the mortgaged premises. Assigns and successors of the mortgagor are to be bound by the mortgage. The article also contains various definitions, a statement that the mortgage may be executed in several counterparts which "shall together constitute one and the same instrument," and other provisions of minor importance not taken care of elsewhere.

The last covenant provides that the instrument shall be "for the sole and exclusive benefit of the parties hereto and of the holders of the refunding bonds" and shall not be construed to give any other person or corporation any right or remedy whatsoever. This provision is intended to prevent another person from coming into court and insisting upon a foreclosure or other remedy given by the mortgage; thus it is a direct stipulation against the "third party beneficiary" doctrine.

The instrument is signed, sealed, executed, and delivered by both the mortgagor and the trustee in the presence of witnesses. Although the acceptance of the trust by the trustee is here located in the
testimonium, in later mortgages it is often found in a separate paragraph which frequently just precedes the testimonium. The signatures are followed by the acknowledgments, the affidavits of good faith, and the county clerks' certificates.

In summary, the history of the corporate mortgage has been that of growth from the unpretentious real estate mortgage, without recitals or covenants, to the largest of all legal documents. It would, therefore, be interesting to review some of the tendencies in the modern corporate mortgage in the light of these historical observations.

The corporate mortgage has developed within the last century; and its development has been marked by an accumulation of specific provisions. Refinement of form has been attempted, and though certain improvements are still needed, much has been accomplished; the development in substance, however, has been less satisfactory. The practice here has been, and still is, to add new provisions or to elaborate old provisions, without any attempt to discard those which no longer meet our changing conditions.

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CHAPTER VII
CONCLUSIONS

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The mortgage has logically divided itself into two parts: the mortgage proper and the covenants. The first part is practically complete in itself. If
a testimonium clause with the signatures and acknowledgments were placed at the end of the mortgage proper, the resulting instrument would not be essentially different from the ordinary real estate mortgage.

The recitals appear at the beginning of the corporate mortgage. Historically, their addition was the first step in changing the form of the corporate mortgage from the form of the real estate mortgage. The substance of these recitals has been covered elsewhere in this paper. In legal effect, the recitals are intended to estop the parties to the instrument from denying the statements therein contained.

Following the recitals is a copy of the bonds. The earliest bonds were in the form of a simple bill under seal. Since then, they have undergone many changes both in form and in substance. At a very early date, it became customary to recite the mortgage security in the bond. Authentication by the trustee followed. The fact that in the early cases the bond was apparently valid without the trustee's signature would indicate that this last provision was inserted primarily for the protection of the bondholder, rather than for the protection of the company. Later, provision was made that the bond should not be valid unless signed by the trustee. By this step, protection
against forged bonds was extended to include the com-
pany. Next, arrangements for the registration of
bonds and for the attachment of interest coupons
thereeto were developed. The so-called tax free cove-
nant was originated during the period following the
Civil War. Its inception was a direct result of the
post-war federal taxes. In recent years, a reverse
tendency has set in. Bonds are now free from taxes
only to an amount equal to two per cent of the annual
interest. Further, although the two per cent provision
is now taken as a matter of course, it is believed that
this provision will become less common in future years.
Another provision which made its appearance at about
the same time as the tax free covenant was that of
arranging for the payment of the obligations in foreign
currencies. Because financing had become international
in scope, it became customary to make both the princi-
pal and interest payable in one or more places on the
Continent in the currency of the country in which
payment was made. For example, the Denver and Rio
Grande Adjustment Bonds, issued in 1912, are payable,
both as to principal and interest, in gold coin of the
United States, in New York; in sterling, in London; in
marks, in Berlin; in francs, in Paris; or in guilders,
in Amsterdam, "as such bearer or registered holder may
Illustrative of a concomitant tendency, the bonds of this mortgage were printed not only in English but also in German, French, and Dutch - a feature not uncommon in many modern bonds. In this connection it is customary to provide against possible variations in texts by stipulating that the English version shall govern in the construction placed upon the bonds. A final and much more recent change is the custom of setting forth, in outline form in the bonds, some of the more important provisions of the mortgage. The insertion of these provisions is purely for the convenience of the bondholder.

The trend has been to describe the mortgaged property with greater certainty. In some of the larger of the modern issues, the description of the property may take up as many as one hundred printed pages. The "after acquired" clause appears at a very early date. Indeed, contrary to the popular belief, this clause long antedates the corporate mortgage. The same may be said of the "rents, income, and profits" clause. In the earliest mortgages, the mortgaged premises generally consisted of real estate with or without tangible personal property. Later it became

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customary to include leasehold interests; and still later, stocks and bonds. At first only a mortgage was given on the stocks and bonds; but in recent years, provision is generally made for depositing these securities with the trustee, thus creating a perfect pledge.

The covenants have developed through elaborate refinements in form and through equally elaborate additions in substance. They are in the nature of a contract supplementary to the mortgage. Owing to this fact, it has been suggested that perhaps they were not recorded in the earlier mortgages; that is, that the mortgage was executed and recorded, but that the covenants were contained in a separate contract which was not recorded. This suggestion seems improbable, however, for the following reasons: First, the mortgages which were recorded in the middle of the last century do contain a few covenants, and there appears to have been a gradual addition of covenants in the later recorded mortgages. Second, that part of the covenants should be recorded with the mortgage, while the other part should be executed in a separate contract, seems extremely improbable. The tendency has been to include the entire transaction in the mortgage instrument.

Thus those provisions which deal only with the relations between the mortgagor and the trustee, that is, as to
the funds in the hands of the trustee, the amount of
the interest on those funds, and so on, are contained
in the mortgage, though it would seem that they could
be more logically placed in a separate contract.

Perhaps in no part of the mortgage has the
change been greater than that with reference to the
trustee. In the earliest mortgages, the trustee was
in fact, as in name, an equitable trustee holding the
legal title or the lien for the benefit of the bond­
holders. While, technically, that function still
exists, it has been relegated to a position of rela­
tively minor importance. The chief duties of the
trustee at the present time, relate to the issuance
and registration of bonds, the payment of principal
and interest, and the care and investment of those
moneys which come into his hands as trustee. The ad­
dition of these and numerous other duties have caused
a change in the type of trustee appointed. This ex­
plains the fact that the earlier trustees were indivi­
duals while modern trustees are almost invariably cor­
porations. Further, it accounts for the fact that a
public trustee is seldom named as trustee under a cor­
porate mortgage. In this connection it is to be noted
that in those cases in which a public trustee has been
named, the active duties are almost always given to a
registrar.
A notable development has been the myriad of protections and immunities which have been placed around the trustee. In practically no case does he have a positive duty to act; and when requested to do so, he may still hold back until properly indemnified against any possible loss. He is not responsible for the recording of the instrument, nor for the truth of statements which may come to him. And yet, with all his immunities, the trustee will almost never act without an order from the court. It is just this - the extreme reluctance of the trustee to act - which has resulted in machinery for the enforcement of the bondholders' rights dehors the mortgage. Theoretically, the mortgage contains all that is necessary to its proper enforcement. Provisions are made within the instrument for setting all the machinery in motion. But those provisions, in practical operation, simply do not work. The bondholders' protective committee has resulted. This committee is generally formed at the instigation of the banker who was instrumental in underwriting the sale of the securities. The reason for the development of the protective committee is perhaps this: the machinery in the mortgage is slow and cumbersome, hard to operate, and difficult to put into motion. Any enforcement of the bondholders' rights
must be instigated and carried on by an aggressive minority. Sufficient power is accumulated only after the elapse of a period of time. The mortgage contains no provision for such an arrangement. Thus we see that the mortgage is not what it purports to be — an automatic machine containing provisions for its own enforcement. Yet this feature may not be altogether undesirable. Mortgages, both those executed by corporations and those executed by individuals, are standardized instruments. Theoretically, they should not be construed in favor of either party; and in fact, it is generally held that a reasonable construction should apply. But public opinion has been distrustful, perhaps justly so, of the large corporate undertakings; and the courts have reflected this attitude in numerous decisions upon corporate mortgages. To meet, and in many cases to anticipate, these adverse rulings, lawyers have inserted provisions in the mortgage which are generally unfavorable to the mortgagor corporation. It is believed by many that the corporation is unduly bound and restricted. Indeed, if all the provisions were enforced, it is difficult to see how the corporation could successfully carry on its business. One redeeming circumstance, however, exists and acts as a cushion for the corporation: the provisions are not enforced. Many of them are too cumber-
some to be operated successfully; and in most cases, so long as the interest is paid, no serious attempt is made to unduly curtail the policies of the corporation.

It is interesting to note that, notwithstanding the many provisions in the mortgage, a great number of them have no legal effect. One or two examples will serve to illustrate the point. The power of sale - a provision of early origin - which is contained in all modern corporate mortgages, is practically never used. Further, the trustee seldom, if ever exercises his right of entry. In cases in which this right might be of value, application is made to the court for the appointment of a receiver; and then generally, except in cases of fraud or mismanagement, an officer of the corporation - usually the president -, rather than the trustee under the mortgage, is named as receiver. Even in those cases in which the trustee, or an officer of the trust company, is appointed as receiver, he acts in regard to the property, not as trustee under the mortgage, but rather as a ministerial officer of the court.

The corporate mortgage is significant in that it illustrates the tendencies involved in the development of a legal device to meet a specific situation. For the most part, the instrument is a
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The corporate mortgage is significant in that it illustrates the tendencies involved in the development of a legal device to meet a specific situation. For the most part, the instrument is a
product of lawyers; and in this respect, it is analogous to the fine and common recovery. Very little help has been received from either the legislatures or the courts; yet, without their assistance, the business lawyer has developed, from the early relatively insignificant real estate mortgage, a legal machine - the largest of all legal documents and the most advanced of all non-statutory instruments.