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Debentures

. and .

Other Charges

BY

HERBERT W. JORDAN

Author of "ABC Guide to Company Law and Practice,"
"How to Form a Company," &c.

THIRD EDITION

LONDON

JORDAN & SONS, LIMITED

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Debentures and Other Charges

Meaning of "Debenture."

ETYMOLOGISTS tell us that the word is derived from the Latin *debentur*, which was the first word of formal certificates of indebtedness issued by the Crown to soldiers and others entitled to payment for services rendered. Such certificates were a regular feature of the military organisation of the seventeenth century, and were issued to the Parliamentary Army during the Civil War. However, in the present day the term "Debenture" is applied only to instruments issued by Companies and Corporations.

Although a Debenture is one of the most common of legal instruments, and the word is self-explanatory, many business men not having special Company experience would be somewhat nonplussed if asked to give a precise description of such a document. Of course, I do not wish to imply that their ignorance is as great as that of

the schoolboy who, hearing a playmate boast of his father's wealth, and how he had, at great expense, erected a parapet on his house, replied "That's nothing; my father has a mortgage on his!" But that there is a great deal of ignorance on the subject is evident from the frequent use of the expression "Debenture Share." It is hardly necessary to point out that the expression is a contradiction in terms, for Debenture Holders and Shareholders are in the positions of creditors and partners respectively.

As generally understood nowadays, a Debenture is an instrument executed under the Seal of a Company charging the whole or a portion of its undertaking in favour of the Holder to secure a certain sum, and providing for the payment of interest at a specified rate until the principal is repaid.

The charge may be contained in the Debenture itself or in a Deed, to the benefit whereof the Holder is declared to be entitled, or each instrument may contain a charge independently of the other. Debentures are usually made to form part of a series of a specified number, each for securing a like sum and all being expressed to rank *pari passu* in point of charge.

The amount secured may be made payable to the Registered Holder or to Bearer. In the former case the Debentures can only be transferred by duly stamped instruments, but in the latter case the instruments are capable of passing by delivery. The charge may be either "fixed" or "floating," or a combination of the two. A fixed charge is frequently given on freehold property or other assets of a permanent nature with the object of preventing the Company from disposing of such property and thus depreciating the value of the Debenture Holders' security, but any assets subject to a floating charge may be sold, mortgaged, or otherwise dealt with by the Company as may be necessary. Stock-in-trade and other assets which fluctuate from day to day should, of course, only be subjected to a floating charge (see page 14).

It is not essential, however, that any charge should be conferred, nor need a Debenture be in any prescribed form. In fact, the term is wide enough to include almost any document executed by a Company which either creates a debt or acknowledges it.

Before discussing Debentures further I may perhaps be permitted to say a few words on the subject of Borrowing generally.

Borrowing.

In the Past.

It is well known that the practice of borrowing money has from time immemorial been regarded with disfavour, and the lender has been hampered by all kinds of legal restrictions, and frequently also subjected to persecution. Until quite modern times there has always been a strong prejudice against persons who made a business of lending money at interest, or "usury" as it was termed, however modest the rate might be. On the other hand the professional moneylender, it is almost needless to remark, was not particularly pleased when he came across persons (who must have been few and far between even in the "good old times") willing to make advances to those in distress without stipulating that they should have some return for the use of their money. Naturally enough, Shylock hated Antonio because—

" in low simplicity

He lends out money gratis, and brings down

The rate of usance here with us in Venice."

The practice of charging interest on loans was considered to be unsound in principle; it was condemned by the leaders of the Church not only as being immoral, but on the ground that money itself was unproductive and barren, so that the lender was entitled to no more than the sum advanced; and it was also condemned by public opinion. General acceptance was given to the theory of the political economists that the capital of the lender was put to no useful purpose (apart from himself), and ought to be diverted into some profitable channel by his engaging in commerce and thus causing the money to circulate. The lending of money was regarded in much the same light as the hoarding of it in our day.

Notwithstanding that the Legislature, the Church, and public opinion were hostile to the practice, their combined forces were of little avail; and one may predict with confidence that Lord Newton will not meet with greater success should his Bill to amend the law ever be passed (although certain abuses may be remedied); for in this world there will always be people who are hard up at times, and the law of supply and demand operates more strongly than any artificial law.

I will conclude this brief dip into history with a quotation from Bacon, whose ideas on this subject, as on most others, were more enlightened than those current at the beginning of the seventeenth century. Recognising that usury (he was not referring to extortionate rates, for the maximum allowed by law was ten per cent.) must be permitted, he discusses in his essay on "Usury," first its "discommodities," and then its "commodities." Among the "discommodities" are—

That it makes fewer merchants, for but for the lazy trade of usury money would not lie still, but would in great part be employed in merchandizing, which is the chief vein of wealth in a State; *that it makes poorer merchants,* for as a farmer cannot husband his ground so well if he sit at a great rent, so a merchant cannot drive his trade so well if he sit at great usury; *that it bringeth the treasure of a realm or state into a few hands,* for the usurer being at certainties and the other at uncertainties, at the end of the game most of the money will be in the box, and ever a State flourisheth when wealth is more equally spread; *that it beats down the price of land,* for the employment of money is

chiefly either merchandizing or purchasing, and usury waylays both; *that it dulls and damps all industries, improvements, and new inventions wherein money would be stirring if it were not for this "slug."*

Among the "commodities" are—

That it in some respects advanceth merchandizing, for as it is certain that the greatest part of trade is driven by young merchants upon borrowing upon interest, so if the usurer either call in or keep back his money there will ensue presently a great stand of trade; that it enables merchants when markets are against them to avoid "sudden undoing," for whereas usury doth but gnaw upon them, bad markets would otherwise swallow them up; that it is a vanity to conceive that there would be ordinary borrowing without profit, and it is impossible to conceive the number of inconveniences that will ensue if borrowing be cramped.

We need not follow the "wisest, brightest, meanest of mankind" in his remedy for removing the evil whilst retaining the good features of usury, for it would not afford us much help at the present time. But that he had the right

end in view is evident from his desiring "that the tooth of usury be grinded that it bite not too much," and that liberty be given moneyed men to lend to merchants for the "continuing and quickening of trade."

In the Present.

Whatever may have been the views of our forefathers, the commercial community knows how indispensable it is to many a trading concern that it should be able to borrow readily. Without such facility thousands of businesses, among which would be found many sound and prosperous undertakings, would collapse. Certainly the maxim "Who goes a-borrowing goes a-sorrowing," and the advice "Neither a borrower nor a lender be," do not apply to traders generally or to Companies in particular.

Companies are peculiarly favoured, for, besides being able to create mortgages or other charges on specific assets, they may, as has been already observed, create Debentures conferring a "floating charge" on their undertaking. That this privilege has been taken full advantage of may be gathered from the fact that, whereas half a

century ago Debentures were practically unknown, it is estimated that the amount issued at the present time exceeds that of the National Debt.

Now let us consider—

The Use of the Debenture.

Generally.

Some financial purists would say that Debentures have no use and are, in fact, an abuse. Ruskin declared as much, although it was hardly consistent for him to hold a substantial amount of Bank Stock. But we no doubt are all agreed that it is in every way advantageous that Companies should be able to borrow on the security of Debentures, so long as (to quote Lord Avebury) the transactions benefit the lender as well as the borrower; and that such is the rule rather than the exception may, I think, be taken for granted. Were power to issue Debentures withdrawn from Companies a blow would be struck at the nation's commerce from which it might never recover, although it would still be possible for them to create legal Mortgages on their property.

To the Lender.

So far as the lender is concerned the Debenture is useful because—

- (1) He has a security more easily transferable and marketable than an ordinary Mortgage, and one that is obtainable without the observance of legal formalities.
- (2) If the Debentures are payable to Bearer instead of to Registered Holder, he has a security transferable merely by delivery. Bearer Debentures are not, however, for good reasons, in general favour in this country.
- (3) He may, if the Articles of Association so provide, vote at General Meetings,* and also (in conjunction with the other Holders) nominate one or more individuals for the Directorate. Thus the Holder of a Debenture may exercise as much, or perhaps greater,

* Except where the Meetings are convened for the purpose of passing Special or Extraordinary Resolutions, as in such cases only Members may vote (*see* Section 67 of The Companies (Consolidation) Act, 1908).

control over the affairs of the Company than if he were a Shareholder. If "Participating Debentures" are issued he will be entitled to a share in the profits of the Company in addition to interest at a fixed rate.

- (4) Should the Company fail to pay the interest when due, or the security be in jeopardy, he can either appoint a Receiver to take possession (in conjunction with the Holders of a specified proportion of the issued Debentures) or apply to the Court for an Order. Should he have fallen asleep, or not had sufficient leisure to acquaint himself with the facts, his position will be better than if he were an individual mortgagee. He will have many companions in misfortune, and those who are active in asserting their rights will incidentally also look after his interests, for all are on an equal footing. The maxim "There is safety in numbers" may set his mind at ease.
- (5) Should he have little capital he can invest it more readily than if a formal

Mortgage had to be specially drawn up, for in that case the trouble to him and expense to the Company would probably be effective deterrents.

To the Company.

To the Company the Debenture is of even greater service because—

- (1) It can raise money by making a public issue much more readily than by creating a Mortgage in favour of one or more individuals.
- (2) It can raise money to a greater extent than if it were an ordinary partnership, for the stock-in-trade and other assets which fluctuate from day to day in the ordinary course of business can be covered by a "floating charge," and a charge may also be given on uncalled Capital. Firms possessing no property capable of being specifically hypothecated are often unable to obtain advances owing to their inability to create floating charges, even though the sums might be amply secured.

- (3) It can make the Debentures repayable at a fixed date (the period being short or remote), or on notice, or redeemable only in the event of a winding up. The last-mentioned are known as Perpetual Debentures.
- (4) It can reduce its indebtedness gradually —*e.g.*, by taking power to discharge any Debentures on three months' or other short notice, or arranging for periodical drawings, and by purchasing the instruments in the open market.

Choice of Security.

Moreover, the Company has considerable choice as to the nature of the security it offers. The following are a few varieties of Debentures forming a series and all ranking *pari passu* :—

- (1) They may contain a floating charge on the entire assets, including uncalled Capital.
- (2) They may specifically charge the Company's freehold property and other fixed assets, the remainder being covered by a floating charge.

- (3) They may be framed so as not to contain any charge, or only a general one, the series being secured by a Deed vesting the assets in Trustees for the Debenture Holders, as will be explained later.
- (4) Again, they may confer no charge, neither need they be secured by a Trust Deed, provided persons can be induced to take them up. Several instances have come under my notice of persons who, evincing a blind confidence in human — or rather Company—nature, have subscribed for such instruments. Whether such a lamentable lack of business perspicacity has brought them the reward which some of you may think is their due I am not in a position to say.

Floating Charge.

Several references have been made to "floating charges." A charge of the kind may cover the whole of the undertaking or only a portion of the assets, such as, for example, the stock-in-trade or the book debts. The charge

does not specifically affect any item unless some event happens causing the security to crystallize, and until then the Company is at liberty to sell, exchange, lease, or otherwise deal with the charged assets in the ordinary course of its business. Crystallization may be brought about by the appointment of a Receiver or by the Company going into liquidation, and in various other ways, according to the conditions in the Debenture or Trust Deed.

The ability to create floating charges is of immense value to Companies, and there can be no doubt that if such privilege were not accorded them the remarkable development during the past fifty years of the practice of raising money on the security of Debentures would not have taken place.

The validity and effect of a floating charge on the assets of a Company do not appear to have been discussed in the English Courts until the year 1870. But the practice of creating charges on the possessions of individuals, which from their nature must have operated as floating charges, is of remote antiquity. Anyone may verify this statement by a little research at the British Museum, for among the Babylonian and Assyrian antiquities may be found a deed

executed at Erech in the seventh year of Sin-shar-ishkum (about 608 B.C.) recording a loan of half a maneh of silver by Nabû-zêr-ushabshi to the two sons of Shuma on the security of "all their possessions," the interest payable being at the rate of 20 per cent. Although so many centuries have elapsed since the deed was drawn up, it is in a perfect state of preservation, and the inscription is easily legible to those who understand cuneiform writing. It is hardly necessary for me to explain that the deed was not engrossed on parchment, as clay in tablet form was the material used, the characters being impressed thereon by a "pen" made of wood, bone, or metal. The tablet was then sun-dried or baked, and thus became a permanent record of the transaction.

Trust Deed.

The advantages of having a Trust Deed, to which I have also made reference, may be summarised thus:—

- (1) Specific property may be conveyed to Trustees on behalf of the Debenture Holders by way of legal Mortgage. (As I have already hinted, Debentures usually only confer a floating charge,

which becomes fixed in certain eventualities.)

- (2) The Debenture Holders are organised and their interests looked after by men of experience, who are able to take prompt action in the interests of the Holders in cases of emergency.
- (3) The Trustees can call Meetings of the Holders whenever occasions arise. If the Company is unable to discharge its obligations a compromise can sometimes be arranged to the advantage of all parties—particularly if the Company is only in temporary difficulty, or the assets could not at the time be disposed of at a reasonable price owing to the market being adverse.

So much for the use of the Debenture. Now let us turn to

The Abuse of the Debenture.

Unfortunately many tricks can be played by the unscrupulous, and with little risk so long as circumspection is exercised. A few instances will suffice.

Issuing to Vendor.

X. is the owner of an unsound business, and things are going from bad to worse. A brilliant idea occurs to him: Why not form a Company to acquire the undertaking, write up the goodwill, and sell the concern for a large sum, to be satisfied by the issue to him or his nominees of Debentures? Then all that remains for him to do is to go on trading for a year or so, drawing a handsome remuneration as Managing Director, discharging the liabilities incurred prior to formation, but incurring new ones freely, and, as soon as a creditor levies execution, to enforce his security. The Receiver appointed by him will dispose of the assets for what they will fetch, and as the amount will probably be less than the face value of the Debentures, the sum will be handed over to the Holder, who can laugh at the unsecured creditors. By this means the Vendor has not only avoided bankruptcy, but he has actually enriched himself at the expense of the obliging creditors, who are robbed under the cloak of the Companies Acts, for the goods supplied by them are sold for his benefit as the Holder of the Debentures.

No longer has the unsuccessful trader to face the prospect of being harassed in all sorts of ways, perhaps turned out of home, spurned by acquaintances, and ultimately adjudged bankrupt. Like the Boy Scout, he may "smile and whistle under all circumstances." He needs no place of refuge from pressing creditors, such as the Ephesians of old had in their Temple of Artemis. With the "Village Blacksmith," he can "look the whole world in the face for (*in law*) he owes not any man." Of course, the Company must part with its possessions, but, thanks to its impersonal constitution, none of these troubles affects it, and contumely and anathemas may pour on it like water on a duck's back. The Company requires a home to maintain some show of respectability, it is true, but if it cannot find a guinea a year to pay for the privilege of having its name on the outside of some office, and lingers on without visible means of subsistence, that is not a serious matter. Should the Registrar threaten it with pains and penalties under the Acts, it may metaphorically snap its fingers at him, relying upon his compassionate disposition towards offending Companies; for in order that the Company's useless existence may not be prolonged, he will take steps with a view to bringing about a painless termination

to its inglorious career. Moreover, the Registrar will even go so far as to provide the Company with a short obituary notice in a paper which ranks second to none in age or prestige—the *London Gazette*. Could any Company desire a happier end?

As an alternative to pocketing the proceeds of the sale the Debenture Holder may himself take over the assets in satisfaction of his claim. If so disposed he may forthwith form another Company to acquire the assets, again taking Debentures for them, and in process of time once more obtain possession of the undertaking. This procedure may be repeated *ad infinitum*, the sufferers being powerless to interfere. One individual who was adjudicated bankrupt in 1899 has in fact since that date performed the operation no less than thirteen times, and apparently he is still "going strong," for not long ago he registered his fourteenth Company.

Such scandalous proceedings are by no means uncommon, and will go on unchanged until the law is altered. Of course, persons who are asked to give credit can protect themselves to a very considerable extent by having the Company's file inspected and the amount of any registered debt ascertained. Were this precaution taken

there would be less crying over spilt milk, but unfortunately people generally prefer to incur the risk of making a bad debt rather than to go to any trouble or expense, however trifling.

Avoiding Publicity.

The Directors of a Company fear that its credit would be impaired if the amount of its indebtedness were disclosed by registration. So they discharge the Debentures within the twenty-one days allowed for registration by issuing fresh ones in substitution, repeating the process until matters are brought to a head, when the most recent issue is registered. It has been held that the registered Debentures are valid in such a case; but the Directors must be wary, for should liquidation ensue within three months of the creation of the instruments they will be invalid unless it be proved that the Company was solvent immediately after the creation. Moreover, penalties may be incurred under the Companies Acts for not registering the previous Debentures, and also under the Stamp Act for not stamping the documents.

Avoiding Damages.

A jobmaster takes holiday parties out for the day. He has little reserve capital, and

fears that if a disaster were to befall a party he might be called upon to face a heavy claim for compensation; so he converts the business into a Company, selling for Debentures, and, becoming thus a secured creditor, he need not be perturbed by any claim of the kind. In similar manner a newspaper proprietor can relieve himself of anxiety, and, like the old-age pensioner, "sleep peacefully in his bed," even in these days of £50,000 damages for libel.

Issuing at Discount.

Debentures are issued to Directors or other interested persons at a large discount and/or redeemable at a heavy premium. There being nothing illegal in such a course, it is quite possible for the Holders, on the Company going into liquidation (after three months),* to receive considerably more than the amount advanced, to the prejudice of the unsecured creditors.

"Bonus" Debentures.

Debentures may be issued for no valid consideration. Such a transaction is, of course, fraudulent, and punishable as such. Not long ago certain culprits were accorded the privilege

* See page 29 (at foot).

of being boarded and lodged for three months at one of His Majesty's establishments at the expense of the public. But although one may have suspicions as to the validity of the instruments, there are rarely sufficient data to go upon to warrant an application to the Court to set them aside.

Other examples of the misuse of Debentures might be given, but these will probably suffice. It may be of interest to turn our attention to a class of Debentures coming within another category. To some of the examples I am about to cite no exception can be taken, but others are of a questionable sort. The instruments I have in mind may be described as—

“Freak” Debentures.

1. Debentures issued by a Golf Club Company charged on its entire assets, of which the only articles worth anything at all were golf balls! If the Company were in difficulties a cartload of balls would be required to pay off even a small issue. Unfortunately, however, golf balls have a habit of disappearing, and therefore the Debentures could hardly be deemed

gilt-edged securities; in fact, they are hardly of more value than Rabelais' will, which, it has been said, was a sealed paper bearing the words "I owe much, I have nothing, the rest I leave to the poor." Would that Directors of Limited Companies were equally candid!

2. Debentures of Football and other Club Companies of a sporting character charged on gate money. These are by no means as rare as might be imagined.

3. "Church" Debentures, or Debentures issued by churchwardens containing a charge, not on the building, but on the donations, subscriptions, and offertories. I know of two instances, one in the North and the other in the South of England; the purpose of the issue in the former case being to provide the wherewithal to erect a new church, and in the latter to enable a debt to the builders to be discharged. As the amount of Church collections depends largely on the "drawing" capacity of the preacher, and preachers come and go, I deemed it prudent not to fill up the application forms that were sent to me. As someone remarked, it might have been my melancholy lot to have to contribute towards the collections at the Church in which I was financially interested in order to provide the

wardens with funds out of which to pay me my principal and interest!

The charging of ecclesiastical incomes is by no means a modern innovation, as might be imagined. In the course of a recent search at the British Museum I found striking evidence of the antiquity of the practice, for I discovered a Deed of the kind already described recording the mortgaging of certain Babylonian temple revenues, dated 244 B.C.

4. "Chapel" Debentures, or Debentures charged on the fabric of a chapel. Only one instance has come to my notice, the charge being on a building erected as a Wesleyan Chapel. However, the chapel is now utilised as a picture palace, and, seeing that people seem more ready to pay for the privilege of being admitted to a house of entertainment than to a house of worship, there is no doubt as to which is the more attractive class of security.

5. A Debenture in the form of a Bill of Sale. Only one case has come to my notice, but what the object was I cannot say. Not being, like ordinary Debentures, outside the scope of the Bills of Sale Acts it had to be registered under those Acts as well as the Companies Acts.

6. Debentures created by an Industrial and Provident Society, a Prospectus inviting subscriptions from the public being issued. Seeing that such a Society is governed by the Industrial and Provident Societies Acts, and that neither the Debentures nor the Prospectus require registration under the Companies Acts, extreme caution should be exercised by intending applicants for any of such Debentures. Registration of the Debentures is necessary under the Bills of Sale Acts, but not one person in a thousand would be aware of that.

A Building Society is in much the same position, but its borrowing power is limited by Section 15 of The Building Societies Act, 1874, to two thirds of the amount owing to the Society on Mortgage: that is to say, if the Members' Mortgages amount to £12,000 the Society may only borrow up to £8000.

7. Debentures charged on the undertakings of two Companies. This arrangement seems to be not only curious but also unbusinesslike, and one that is likely to lead to complications. I know of only two instances of the kind, and in neither case were the Company or the Debenture Holders free from trouble.

In giving these examples I have not drawn upon my imagination, for chapter and verse could be cited in every instance. They are a striking testimony to an excellent feature of the Companies Acts: namely, the elasticity they allow to Companies. But enough has been said to show that there is urgent need for an amendment of the law, for the unscrupulous have many opportunities for defrauding others, and the wise and prudent are fleeced almost as much as the ignorant and foolish. The present safeguards, which I will now point out, although of great value, are far from adequate.

Safeguards.

1. A Public Company cannot commence business or exercise any borrowing powers until after the filing of a prospectus or statement in lieu thereof (in which various particulars as to the promotion and the Shares and Debentures of the Company must be given), the allotment of Shares to the amount of the "minimum subscription," and the filing of a Declaration of compliance with certain statutory requirements. A Trading Certificate will then be issued by the Registrar of Companies.

A Private Company is not subject to these restrictions, and may therefore commence business and exercise any borrowing powers immediately after incorporation.

2. If a prospectus inviting the public to subscribe for Debentures is issued (whether on incorporation or at any other time), a copy must be filed with the Registrar of Companies.

3. All "floating" and several other kinds of charges must be registered, as will be described later.

4. All charges specifically affecting property of a Limited Company must be entered in a Register of Mortgages. Creditors or Members have the right to inspect the Register and take extracts therefrom without payment; any other person may be required to pay a fee not exceeding 1s.

5. The Register of Holders of Debentures, *if kept*, may be inspected by Registered Holders of Debentures and Members, refusal being punishable by heavy penalties. But our legislators have quixotically neglected to provide that such a Register shall be kept.

6. If the Company goes into liquidation within three months of the creation of a Debenture

containing a floating charge, and it cannot be proved that the Company was solvent immediately after such creation, the Holder is entitled to no more than the amount of any cash paid in consideration for the charge "at the time of or subsequent to" its creation, with interest thereon at the rate of five per centum per annum.*

7. If Debentures are issued at a discount, or any commission has been paid or allowance made, the filed "Particulars" must disclose the amount or rate per cent. thereof, and the amount must also be set out in the Annual Return subsequently registered. Should, however, the information not be given, the validity of the Debentures will not be affected. The deposit of any Debentures as security for a debt of the Company is not considered to be an issue at a discount.

8. The amount of any commission paid or payable must also, in the case of a Public Company, be stated in the Prospectus or Statement in lieu of Prospectus, and each Annual Return of Capital and Members (whether the Company be a Public or Private one) must disclose

* This is provided by Section 212 of The Companies (Consolidation) Act, 1908. It has been held that a payment to a Company made on account of the consideration for a charge and in reliance of a Resolution to create it is made "at the time of" the creation of the charge within the meaning of the Act, although the payment was made some days before the instrument was executed by the Company.

the amount of any commission paid or discount allowed since the date of the last preceding Return, and the amount paid or payable.

9. The total amount of debt due in respect of all Mortgages and Charges (as defined on page 34) must be stated in every Annual Return.

We will now deal with the subjects of Stamping and Registration.

Stamp Duty.

Debentures, Mortgages, and other securities for money which are transferable only by instrument of transfer are chargeable under The Stamp Act, 1891, with duty according to the following scale:—

Where the amount secured does not exceed	£10	0	3
Exceeding £10 and not exceeding	£25	-	0 8
„	£25	„	£50 - - 1 3
„	£50	„	£100 - - 2 6
„	£100	„	£150 - - 3 9
„	£150	„	£200 - - 5 0
„	£200	„	£250 - - 6 3
„	£250	„	£300 - - 7 6
„	£300, for every £100, and also for any fractional part of £100	-	- - 2 6

The “amount secured” includes any bonus or premium which the Company covenants to pay on redemption in an event not dependent on

the volition of the Company. For example, a Debenture for £100 redeemable at £105 must be stamped with the duty of 3s. 9d., but if redeemable at a fixed date at par, with an option to the Company to redeem earlier at a premium, the duty is 2s. 6d.

Debentures, Bonds, or other securities payable to Bearer or transferable otherwise than by an instrument of transfer are liable to stamp duty at the rate of 2s. for every £10, or fractional part of £10, of the money secured.

When Debentures repayable at a fixed date are renewed by endorsement during the currency thereof, the memorandum or instrument of renewal, if under hand only, is liable to the duty of 6d. (which must be paid within fourteen days, the stamp being impressed or adhesive), or, if under seal, to duty at the rate of 6d. for every £100 or part of £100 of the amount secured (with a maximum of 10s.); but if the renewal is effected after maturity the instrument is charged as a new security, whether it be under hand or seal.

If the Debentures are secured by a Trust Deed, it must bear a deed stamp of 10s. Should the entire series not be issued at once, duty in respect of the remaining Debentures must be

deposited with the Board of Inland Revenue. The reason for this is that the Trust Deed operates as a Mortgage for securing the entire sum. As further Debentures of the series are issued the duty will be transferred thereto, but no amount will be refunded should all the instruments not be taken up.

The foregoing duties (with the one exception mentioned) must be impressed on the instruments within thirty days after execution, unless the execution took place abroad, in which case the time is calculated from the date on which they were first received in the United Kingdom.

Where any Local Authority, Corporation, Company, or body of persons formed or established in the United Kingdom proposes to issue any "Loan Capital," a statement of the amount intended to be secured by the issue must be lodged with the Commissioners of Inland Revenue before the issue is made. The statement must be stamped with duty at the rate of 2s. 6d. for every £100 of the sum secured, unless the duty has been paid on any Trust Deed or other document securing the Loan Capital proposed to be issued. Default in complying with this requirement renders the Company or other body liable to a fine of ten per cent. on the amount of

the duty, and the like fine for every month after the first month during which the neglect or failure continues. The expression "Loan Capital" includes Debenture Stock, County, Corporation, or Municipal Stock, or Funded Debt, or any Capital which is borrowed or has the character of borrowed money, but it does not include "any overdraft at the bank or other loan raised for a merely temporary purpose for a period not exceeding twelve months." Where the overdraft does not come strictly within the exemption the Commissioners require a statement furnished.

Where the amount of the loan is secured by a Trust Deed or Debentures, or any other document liable to *ad valorem* mortgage duty it is not the practice to furnish the particulars referred to.

When a duly stamped statement has been delivered after the 9th August, 1907, by a Company in respect of Loan Capital which has been wholly or partly applied for the purpose of the conversion or consolidation of existing Loan Capital, a claim may be made for repayment of duty at the rate of 2s. for every £100 of the Capital to which the statement relates which has been so applied.

Registration.

If the Debentures or other Charges come within either of the following descriptions, and the Company was incorporated in England or Ireland, registration must be effected within twenty-one days after the first execution of any of the instruments :—

- (a) A Mortgage or Charge for the purpose of securing any issue of Debentures.
- (b) A Mortgage or Charge on uncalled Share Capital.
- (c) A Mortgage or Charge created or evidenced by an instrument which, if executed by an individual, would require registration as a Bill of Sale.
- (d) A Mortgage or Charge on any land, wherever situate, or any interest therein.
- (e) A Mortgage or Charge on any book debts of the Company.
- (f) A Floating Charge on the undertaking or property of the Company.

Where there is a Trust Deed it must be registered within twenty-one days after execution.

In the case of a Debenture or other Charge executed out of the United Kingdom comprising property situate solely outside the United Kingdom, it is sufficient to produce a duly verified copy of the instrument within twenty-one days after the date on which it could, in due course of post, and if dispatched with due diligence, have been received in the United Kingdom. The copy of the instrument must be certified to be a true copy under the Seal of the Company or under the hand of some person interested therein otherwise than on behalf of the Company.

It is to be noted that the provisions as to registration do not apply to Companies registered in Scotland. Such a Company may accordingly create charges as described on property situate in England or Ireland without incurring the obligation to register under the Companies Acts. But if an English Company creates any such charge on property in Scotland, it must be registered under the Companies Acts. A Scotch Company must, however, disclose the amount of its indebtedness in every Annual Return of its Capital and Members.

It will also be observed that certain Charges do not require registration. A Debenture or other instrument specifically charging Letters

Patent or Trade Marks or ships does not, for example, come within either of the foregoing descriptions; although a Mortgage or other Charge on any such property to secure an issue of Debentures must be registered.

Where a negotiable instrument has been given to secure the payment of any book debts of a Company, the deposit of the instrument for the purpose of securing an advance to the Company will not, for the purposes of the Act, be regarded as a Mortgage or Charge on those book debts; and the holding of Debentures entitling the holder to a charge on land will not be deemed an interest in land.

In the event of a Company purchasing property subject to a mortgage, the conveyance of the equity of redemption does not require registration, as no charge is created by the Company.

Where a Mortgage on any land or premises of a Company is transferred and the Company as beneficial owner conveys and confirms the property to the transferee, the Deed of Transfer operates as a Statutory Mortgage, and accordingly requires registration as a new charge.

Failure to register any instrument requiring registration will render it void against the

Liquidator and any creditor of the Company so far as any security on the Company's property or undertaking is thereby conferred. But this is without prejudice to any contract or obligation for repayment of the money secured, which becomes immediately payable.

Default in registration will, besides invalidating the charge, render the Company liable on conviction to a fine not exceeding £50 a day. Subject to this provision, default in complying with any of the requirements as to registration renders the Company and every director, manager, and other officer knowingly and wilfully authorising or permitting the default liable on summary conviction to a fine not exceeding £100, without prejudice to any other liability.

The obligation to register Mortgages and Charges is imposed on the Company, but registration may be effected on the application of any person interested therein. Should some other person effect registration he will be entitled to recover from the Company the amount of the fees paid to the Registrar.

Registration is effected by lodging with the Registrar the prescribed Form of "Particulars," setting out the amount of the charge, a general

description of the property subject thereto, and certain other information, accompanied by one of the Debentures or the Trust Deed (if any) or the Mortgage or Charge, as the case may be. Where a series of Debentures is registered the fee payable is 10s. should the total amount of the series be £200 or less, but 20s. if it exceeds that amount. The fees are at the same rate where single Debentures not forming part of a series or Mortgages or other Charges are registered.

If there is more than one issue of Debentures of the series particulars of the date and amount of each issue after the original registration, impressed with a fee stamp of 5s., must be filed. The validity of the Debentures is not, however, affected by an omission to comply with this requirement, but the Company and the officers knowingly in default will be liable to heavy fines.

On registration of the Charge the Registrar issues his Certificate, which is conclusive evidence that the requirements as to registration have been complied with.

The Company must endorse a copy of the Certificate of Registration on every Debenture or Certificate of Debenture Stock which is issued and the payment of which is secured by

the registered Mortgage or Charge, unless the instrument was created after the issue of the Debenture or Stock Certificate.

Any person knowingly or wilfully authorising the delivery of any Debenture or the Certificate of any Debenture Stock without a copy of the Certificate of Registration being endorsed thereon will, without prejudice to any other liability, be liable on summary conviction to a fine not exceeding £100.

On the discharge of any registered Debentures or Mortgage or Charge a Memorandum of Satisfaction, impressed with a 5s. fee stamp, should be filed. Registration, although not compulsory, is desirable in order to place on record the reduction in the indebtedness.

A copy of every instrument creating any Mortgage or Charge requiring registration must be kept at the Registered Office. In the case of a series of uniform Debentures, however, a copy of one Debenture will suffice.

“ Oral ” Charges.

Before passing from the subject of registration it may be well to point out that the obligation to register is not avoided by making the charge

an "oral" one—i.e., a charge which is not created or evidenced by any instrument. It is well known that Bankers occasionally allow Companies to overdraw their accounts, the deposit of title deeds (without any covering instrument) being the only security. Such a proceeding is contemplated by the Act, and the prescribed Form of "Particulars" must be filed within twenty-one days after the date of the deposit. In the event of a memorandum of deposit or legal charge being subsequently executed, further registration is necessary.

Re-issue of Debentures.

A Company which has redeemed any Debentures has power to keep them alive for the purpose of re-issue, unless the Articles or the Conditions of Issue expressly otherwise provide, or unless the Debentures have been redeemed in pursuance of any obligation on the Company so to do (not being an obligation enforceable only by the person to whom the redeemed Debentures were issued or his assigns). Where a Company has purported to exercise such a power—e.g., by the passing of a resolution at the time of redemption—the Debentures may be re-issued or other Debentures may be issued in

their place. The Holder of any re-issued Debentures possesses the same rights and priorities as if the instruments had not previously been issued. If with the object of keeping Debentures alive for the purpose of re-issue they have been transferred to a nominee of the Company, a transfer from that nominee will be deemed to be a re-issue.

Companies occasionally deposit Debentures to secure advances on current account or otherwise. In such cases the Debentures will not be deemed to have been redeemed merely because the Company's account has ceased to be in debit while the Debentures were deposited.

The re-issue of a Debenture, or the issue of another one in its place, is regarded as the issue of a new instrument for the purpose of stamp duty, but not for the purpose of any provision limiting the amount or number of Debentures to be issued. A person lending money on the security of a Debenture which has been re-issued, and appears to be duly stamped, may give the Debenture in evidence in proceedings to enforce his security without paying the stamp duty or any penalty, but in any such case the Company is liable to pay the proper stamp duty and penalty.

The original registration protects the re-issued Debentures. If, however, a Memorandum of Satisfaction is recorded upon redemption, particulars of the new issue should be registered, but no further registration is required otherwise.

Appointment of Receiver.

In the event of a Company not being able to meet its obligations to its Debenture Holders, a Receiver (who in some cases may be given power to manage) should be appointed. Any person who appoints a Receiver or Manager, or who obtains an Order for an appointment, must within seven days thereafter cause a Notice of such appointment to be filed with the Registrar. The fee payable is 5s.

A Receiver or Manager appointed under the powers contained in any instrument must file every six months an Abstract of his Receipts and Payments, and upon his ceasing to act a Notice to that effect must also be filed.

* * * *

Let me now conclude with a few "hints" indicating certain precautions to be taken and pitfalls to be avoided, either by the Company or the person who proposes to apply for Debentures.

“Hints.”

1. See that the Company is expressly empowered by its Memorandum of Association to borrow, or, if not, that such power is implied. If the Memorandum is silent the power will not be implied “unless it be properly incident to the course and conduct of the business for its proper purposes.” Consequently a Building Society cannot borrow without express authority, but generally any trading Company may do so.

2. See that the sum to be raised does not exceed the amount authorised by the Articles of Association. Directors are, for example, frequently prohibited from borrowing any sum beyond the amount of the subscribed Capital without the consent of the Company in General Meeting.

3. If uncalled Capital is charged, see that the power taken is sufficiently wide to include it. A power to charge the “undertaking and property, present and future,” is not, for example, wide enough, although the more comprehensive term “assets” has been held to include uncalled Capital. Ascertain also whether the Company has passed a Special Resolution determining that

its uncalled Capital shall not be called up except in the event of the Company being wound up, as in that case it can only be used for the purpose of the liquidation. Should the Company be limited by guarantee, the amount guaranteed by Members cannot be subjected to a charge.

4. If it is desired that the Debentures shall be a first charge on the whole of the assets, see that the creation of any Mortgage or Charge on the freehold or other property ranking in priority to or *pari passu* with the Debentures is prohibited. It is advisable to have a Trust Deed in such a case, as if the prohibition appears only in the conditions endorsed on the Debentures the Holders are not absolutely protected.

5. See that the Debentures are expressed to form a series ranking *pari passu* in point of charge; otherwise the instruments may rank according to the dates of issue.

6. See that power is conferred on the Holders of the series to appoint a Receiver of the property subject to the charge upon the principal moneys becoming payable. In the absence of such power it may be necessary for application to be made to the Court for an Order.

7. Make sure that registration has been duly effected, and see that a copy of the Registrar's Certificate is endorsed on each Debenture.

8. If you already hold Debentures and the Company is unable to pay the entire amount of interest due, do not allow interest to be paid on any of the other Debentures of the series unless your proportion is paid at the same time. It has quite recently been held that in the event of foreclosure the Receiver must not pay arrears of interest to any who may have exercised consideration towards the Company and thus put them on the same footing as the rest, as they are only entitled to be treated as secured creditors for the amount of the principal and interest and to payment *pro rata*.

9. In case of doubt inspect the file of the Company yourself, or instruct some expert to do so on your behalf, and ascertain if any prior incumbrances are registered, and the financial position of the Company generally. To neglect this precaution on account of the trifling expense involved is a "penny wise and pound foolish" policy.

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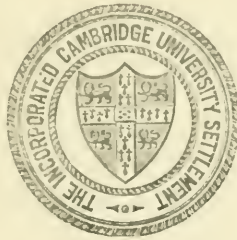


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