OFFICIAL REPORT
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Delegated Powers and Law Reform Committee

Tuesday 27 September 2022

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

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DELEGATED POWERS AND LAW REFORM COMMITTEE

24th Meeting 2022, Session 6

CONVENER

Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
*Paul Sweeney (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor George Gretton
Jenni Minto (Argyll and Bute) (SNP) (Committee Substitute)
Lady Ann Paton (Scottish Law Commission)
Professor Andrew Steven

CLERK TO THE COMMITTEE

Andrew Proudfoot

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 27 September 2022

[The Convener opened the meeting at 10:13]

Interests

The Deputy Convener (Bill Kidd): Welcome to the 24th meeting in 2022 of the Delegated Powers and Law Reform Committee. We have received apologies from Stuart McMillan MSP. I welcome Jenni Minto MSP as a substitute. Thank you very much for being here and contributing, Jenni.

The first item of business is a declaration of interests. In accordance with section 3 of the "Code of Conduct for Members of the Scottish Parliament", I invite Oliver Mundell MSP to declare any interests that are relevant to the remit of the committee.

Oliver Mundell (Dumfriesshire) (Con): I have no interests to declare, convener.

The Deputy Convener: Thank you, Mr Mundell, and welcome to the committee. It is good to have you here.

On behalf of the committee, I thank Graham Simpson MSP for his time with us. As both a member and convener of the committee over a number of years, Graham recognised the importance of delegated powers, and he was passionate about the need for their proper scrutiny. We all wish him well in his new role.

Decision on Taking Business in Private

10:14

The Deputy Convener: The second item of business, of which there seem to be many, is a decision on taking in private items 6 and 7. Is the committee content to those items in private?

Members *indicated agreement.*

Moveable Transactions (Scotland) Bill: Stage 1

10:15

The Deputy Convener: Under item 3, we will take evidence on the Moveable Transactions (Scotland) Bill. I welcome Lady Paton, who is chair of the Scottish Law Commission. I welcome, too, Professor George Gretton and Professor Andrew Steven, who, as former commissioners of the SLC, were heavily involved in the commission's report on moveable transactions, which was published in 2017.

Before we kick off, I remind all attendees not to worry about turning on their microphones during the evidence session, as they are controlled by the broadcasting team. If you would like to come in on a question, please raise your hand and we will bring you in.

Before we move to questions, I invite Lady Paton to make some brief opening remarks.

Lady Ann Paton (Scottish Law Commission): As chair of the Scottish Law Commission, I commend the bill. First, it modernises the law of assignation and, secondly, it creates new statutory pledges. Both will be good for business and will help Scotland's economy as it emerges from the pandemic.

I will focus first on statutory pledges. Start-up businesses will be able to access finance, even if they do not own any land or buildings, which are the traditional way in which banks secure loans. As security, new businesses will be able to offer moveable property such as vehicles, machine tools, patents, design rights, software licences and trademarks. They will be able to keep possession of and title to that property and use it to generate turnover and profit.

By creating that new avenue to finance, the bill will enhance Scotland's attractiveness as an investment centre and will level up Scotland to be more equal to other modern law systems. The bill will prevent young Scottish entrepreneurs being told to go elsewhere—to England, for example, where the law makes secured lending easier. It will prevent complicated workarounds that are currently being used as lawyers and clients try to get around the gap in the law. The bill will support the First Minister's gender pay gap action plan, which I can explain further. Historically, few women owned heritable property. Although, in 2022, things are getting better, it is a fact—I do not have the exact statistics—that women have difficulty starting a business because they have difficulty getting finance.

In addition to statutory pledges, the bill modernises the law that relates to assignations. Currently, when claims for the payment of debts are transferred from person A to person B, the amount of paperwork that is involved is enormous, and letters have to be sent to all debtors. The bill offers a new system with registers, which will cut the amount of paperwork. Importantly, the bill will mean that an effective transfer can be brought about when letters have not been sent to debtors, although we should say that debtors will still be protected, as they are entitled to be notified before they have to pay a new assignee—a new person. Professor Gretton and Professor Steven, who are sitting beside me, and who are former lead commissioners on this project, will be able to explain that advantage in more detail.

I commend the bill. It fills a big gap in Scots law to meet today's needs. I invite the committee to take it forward.

The Deputy Convener: Thank you, Lady Paton. That is a good outline of the bill and a good rationale for why it has been introduced. It is all very positive as far as I am concerned.

We move to questions from the committee. Questions can be answered by Lady Paton, Professor Gretton or Professor Steven. If our guests would like to give the lead answer on any question, they should please let us know by giving us a wee wave, and we will be fine with that.

I will open up with three wee questions. I think that they have been answered before by the professors in particular, but it would be useful for the committee to get an outline on them.

First, why did the Scottish Law Commission review the law on moveable transactions? Following on from that, how does Scots law compare with the law in other countries? Did international comparisons inform what was proposed?

Professor George Gretton: It has been apparent for a very long time—indeed, since the 19th century—that Scots law is outdated. It is cumbersome in its operation in these areas.

The position has got rather worse in recent years, with the internationalisation of finance. There was a time when Scottish businesses would raise finances within Scotland and people would be familiar with the system, cumbersome and unsatisfactory though it was. Now finance has become very much internationalised.

Furthermore, while Scotland has stood still, other countries have moved forward in the area of assignation and what the bill calls "statutory pledge". One has seen that modernisation happening in, for example, Australia, Canada, the United States—very much so in the United States,

which has been something of a leader in this area—and other countries. That has been happening in even the past 20 years. Scotland now stands out, a bit like a sore thumb, as unsatisfactory in this area. There are workarounds, but they themselves are rather unsatisfactory and add costs.

The Scottish Law Commission had been aware of the issue for a long time and decided to tackle it, and the bill is the result.

Andrew, do you want to add anything to that very brief account?

Professor Andrew Steven: Yes. Professor Gretton began the project as lead commissioner, and I succeeded him. We both worked on it.

It is fair to say that, since devolution, the Scottish Parliament has done world-leading work on land law, but moveable property law needs to catch up. Some of your land law work has been done via the Scottish Law Commission. The Land Registration etc (Scotland) Act 2012 was based on a report that Professor Gretton authored. The situation has not been the same—in fact, it has been totally different—for moveable property. We have stood still and we have got behind.

The bill will make a difference in two areas: assignation and security over moveable property. The last law reform in statute on assignation was in 1862. In my view—although this is a more subjective question—on security, or moveable property more widely, the bill would be the biggest reform since the Sale of Goods Act 1893.

Floating charges, which we may come to later, were introduced in 1961. Floating charges have a relatively narrow compass, because only companies and certain corporations can grant them. The bill is certainly the biggest piece of legislation on security law since 1961. I regard it as the most significant piece of legislation on moveable property generally in Scotland since 1893.

We are behind on this, which does not give Scots law a good reputation. There is an impact on businesses and, in my view, it is very important that we take the bill forward. That was very much what responses to the Scottish Law Commission's consultation said, in terms of both whether the Scottish Law Commission should work on this area, then, when we had worked on it, whether our representations should be taken forward. We found very strong support for that.

The Deputy Convener: Both of your answers were very helpful indeed.

It sounds as though there have not been very many previous attempts to reform the law in this area. Why do you think that the proposals in the bill are more likely to work than any of the previous attempts in Scotland?

Professor Gretton: The possibility of reform has been looked at before rather half-heartedly, in particular in the area of pledges—securities, that is to say.

What happened with the Scottish Law Commission project was that a huge amount of energy was put into it. There was detailed analysis of the current law and of the problems of the current law, extensive consultation with the relevant stakeholders and international comparison, which is very important in this area; you have to know what is happening in other countries, both around the world and in Europe.

It was a major project, not a half-hearted one, so that what we have is quite a sophisticated bill. It is very much up to international standards and international finance will like it. There is not only international finance, of course—I do not want to stress that too much. Scottish finance will like it, as well.

The Deputy Convener: Thank you. That is very helpful indeed. We will move on to more detail with Jenni Minto.

Jenni Minto (Argyll and Bute) (SNP): Thank you, panel, for coming to give evidence.

Lady Paton, I was very struck by your point about the bill modernising the law of assignation. I am interested to hear how the bill's provisions on assignation will, on a practical level, change how businesses might access finance. Perhaps you can give some examples of that and, specifically, talk about the gender pay gap action plan. As you said, women have difficulties in starting up businesses and accessing finance.

Lady Paton: I will deal with that latter point and then invite Professor Steven to deal with the first point.

The gender pay gap has been reflected very much in the people who start up businesses. In fact, when launching the action plan in 2019, the First Minister said:

> "It is still the case that more than three-fifths of new businesses are being started by men and less than two-fifths by women."

She also referred to research suggesting that an increase in the level of female ownership of businesses would make the economy richer and all of Scotland more prosperous.

I cannot give you precise statistics—and it might be that in 2022 things have moved on a bit; one hopes so—but it is often the case that a woman seeking finance to start up a business cannot offer heritable property, that is, land or buildings, but nevertheless has a very good idea. If she could be

allowed to raise finance over moveable property that she has—perhaps items in her workshop or whatever—that would solve her problem. She might be renting the workshop, but she would have items in it that are of value and could, cumulatively, form the basis of a security. This new statutory pledge would solve her problem and more women would able to access finance.

In fact, Professor Steven found a report. Perhaps he will hold it up—

Professor Steven: I will give it to the committee later—

Lady Paton: Oh good. Professor Steven will explain.

Professor Steven: It is a report by the World Bank from 2019, "Secured Transactions, Collateral Registries and Movable Asset-Based Financing", which I should have spotted earlier. It has a whole section on gender finance. I have to put a slight caveat on this and say that the World Bank is particularly interested in improving finance in developing countries. Obviously, I would not want to suggest that Scotland is a developing country in that sense. However, our laws are almost like those of a developing country; we need to develop them.

There is international evidence that a modern moveable transactions law helps what is referred to in the report as gender finance. There is evidence on that from beyond Scotland, which I think is valuable.

Lady Paton: The World Bank report gives examples of women entrepreneurs—like Constance Swaniker, an artist and founder of a small business designing furniture and home accessories—who could not move forward but then were able to obtain a loan. Constance Swaniker was ultimately able to hire 30 employees because of that facility.

Professor Steven: Was that in Ghana?

Lady Paton: Yes—Ghana is ahead.

10:30

Professor Steven: I will try to explain the assignation provisions. Many small businesses fail because people pay them late; in other words, they have a problem with getting debtors to pay on time. One advantage of the bill is that it will facilitate invoice financing. That would mean that small businesses could sell their invoices to a bank or other financial institution and get their money immediately. Admittedly, the bank or institution would charge for that. One process for making that charge is known as invoice discounting; the discount is how the bank takes its fee. However, Scottish law is way behind on that, and to make it work the process is often done through English law or a trust, which involves quite a complex legal structure. At the moment, the business—or, probably, the bank—needs to tell all the customers what has happened. Lady Paton referred to a lot of paperwork being involved in that. It becomes very costly to contact all the customers.

To explain why that process can be impossible at times, I typically use the example of a plumber saying that they will assign their invoices for the next three months to the bank. That could include an invoice for work on a shower that will not break for another two months; until the shower breaks and the person calls out the plumber, nobody knows the identity of the debtor. Therefore, the advantage of registration as an alternative to intimation is that a business can have a single registration for all its invoices for the next three months. That would be much cheaper.

I need to be clear that the change has an effect only on one of the two principal aspects of assignation. At the moment, intimation has two main aspects: one is to transfer the debts to the bank or other assignee; the other is to notify the debtor to pay the assignee. There has been concern about registration being an alternative to intimation and about consumers being put in an awkward position because they do not know who they have to pay, but the bill does not affect the notification function of assignation. It is crucial that, if the assignee wants the debtor to pay them and not continue to pay the assignor, there must still be intimation. The notification function of assignation will continue.

You might ask me why on earth we are setting up a register and causing the keepers to have to invest all this time and money if there will still be intimation. The answer is that registration protects the assignee if the assignor becomes insolvent. If the small business were, sadly, to become insolvent, the bank would be protected because the invoices would still be due to it, and at that point, it could intimate to the customer. Customers will not be affected by this reform because the introduction of registration changes or offers an alternative only to the transfer function of intimation and not to the notification function. I want to make that clear, because it is very technical. I am more than happy to help with further explanation.

I have already said this but I will say it again: what I have described already goes on, but it is done through workarounds. Small businesses are assigning their debts to banks without customers being told, because there is a workaround, such as a trust behind the scenes or debts being written under English law. The change is therefore pretty neutral because of what is happening in practice,

but it will definitely reduce costs and it will not have an effect on customers, because they will have to pay the bank only if the bank still notifies.

Professor Gretton: I entirely agree with that. I am sorry to harp on about the international theme, but notification to debtors of a transfer is required in no other country in the world. Sometimes it does not have to be registered at all and is done just by the written documentation and nothing else. In many other countries, registration is involved—as it would be here—and, on the whole, registration is the trend of the future. That is what we are seeing around the world.

People sometimes find the idea that debt has been transferred a bit odd. After all, if Professor Steven owes me £20, I expect to get the money from Professor Steven—he will pay me, and that will be it—but in the business world, debt is very often transferred without being directly paid to the original creditor. That is very important in the business world. As Andrew Steven said, that happens in Scotland, but only by workarounds that are awkward and expensive. Ultimately, of course, that expense is passed on to the businesses involved.

Professor Steven: An easy example of why a debt might be transferred is that it might not be due for 28 days. If an invoice says that a customer has 28 days to pay, the customer can say, "All right, I will pay on day 27". If the debt is sold to the bank immediately, the small business will get the money immediately—admittedly, with the discount. Hopefully, the bill will reduce the size of the discount, because the whole process will become cheaper.

Jenni Minto: That is very helpful. I am aware of the 28-day payment period, and sometimes it is much longer than that. As you said, that can really impact on the cash flow of businesses.

Could you quickly let us know, for the record, what evidence you have received that finance firms would welcome these changes and that businesses would be keen to take advantage of them?

Professor Steven: Our primary consultee in relation to this was the Federation of Small Businesses, which we met. At the time of the report, it made supportive statements about the bill, and I see that it has made a submission to the committee.

The FSB's particular concern was late payment of debts, because small businesses can go bankrupt before they get paid. The bill would provide a new option. The federation told us that it likes the option because it is not compulsory; businesses do not have to do it but they might do it if they want to. The option gives them an extra route to get finance, so the FSB is very supportive of it.

This is very technical—even Professor Gretton and I find the whole bill to be very technical. I would not expect a small business to be saying that the law of assignation needs to be reformed, in the same way as a small business might not be expected to understand the technicalities of broadband or plumbing. The advantage of the bill, I hope, is that it will make life easier. It will make the law easier. In a sense, to criticise the current law, you need to know the current law, but, honestly, it is very complicated. I would not expect the average small business to know it—just as I do not understand how a smartphone or broadband works. I just want them to work; I want my broadband to be as good as possible.

The Scottish Law Commission wants our law to be as good as possible. One of our advisory group members talked about infrastructure: broadband is infrastructure, transport is infrastructure and law is infrastructure. I commend that view.

Jenni Minto: Thank you.

Jeremy Balfour (Lothian) (Con): Good morning. I will pick up on a comment that you made, Professor Steven, about floating charges, which are not addressed in the bill. As you said, this type of law reform happens once in probably four generations. Was any thought given to opening up floating charges to individuals and partnerships? If not, why was it decided not to go down that route?

Professor Steven: Maybe Professor Gretton could start on that question, unless he particularly wants me to do so, given that that issue was raised in the discussion paper for which he was responsible.

Professor Gretton: Various things could be said about the floating charge. There has been discussion of extending it to individuals and partnerships, but there are difficulties there.

More broadly, the floating charge is unsatisfactory in many ways. It has a rather low ranking. What is proposed to some extent covers the same field as the floating charge covers, because it is about security for debt, but it operates in a very different way, and it is very important to improve access to finance. In England, for example, both the floating charge and fixed security interests, which are not the same as, but are comparable to, what the bill proposes, are used, and they are not regarded as operating in place of each other. That would continue to be the case in Scotland. I am sure that, typically, both would be involved with lending.

I think that extending the floating charge to individuals and partnerships would not take matters much further forward.

Professor Steven: That is exactly right. The discussion paper of 2011 consulted on that, and there was no support from the majority of consultees for extending floating charges further.

A floating charge covers all of someone's property. The idea that everything could be taken by the creditor would certainly be inappropriate for consumers. Even sole traders and partnerships are subject to personal insolvency law—in other words, the bankruptcy legislation—whereas companies are subject to corporate insolvency law; they are subject to the Insolvency Act 1986. There are certain checks and balances in the Insolvency Act 1986 to protect employees of companies when they go insolvent, for example. Those do not exist in the personal insolvency legislation. We could have recommended changing the personal insolvency legislation, but that would make things much wider and more difficult. That was something that influenced me, as the lead commissioner on the report. Extending floating charges further, for which there really was no support, would have meant revision of insolvency law, which have gone beyond scope.

Professor Gretton: Thank you. I think that that was a much better answer than mine.

Jeremy Balfour: It is helpful that we have that.

The bill would reform the rules on delivery for possessory pledges. What practical impact will that have? Will there be continuing demand for possessory pledges, beyond that of pawnbrokers?

Professor Steven: That is a very interesting question. Because of the case of Hamilton v Western Bank in 1856, it appears that the only way in which one can do pledge in Scotland is by physically handing the thing over. For example, if I want to pledge my pen to Lady Paton—it is not very valuable, Lady Paton—I have to physically give it to her. It is like pawn, which consumers do. If my pen is among my key assets, like my computers and my vehicles, that is no good to my small business. However, the case that I mentioned suggests that that is the only type of possessory pledge.

In other countries, the law is clear that people can do possessory pledges by intimation. For example, if I had whisky that was stored in an independent warehouse, I could tell the warehouse to hold it for its bank. Because of the case that I mentioned, it is not currently clear under Scottish law that possessory pledge can be done by notifying to a custodier. The bill makes it clear that that could be done. That might help our whisky industry, by making clear that whisky that is stored in independent warehouses can be the subject of a possessory pledge. The statutory pledge lets one go a step further and grant scrutiny of the whisky in the company's own warehouse rather than in the independent third-party warehouse. That is a definite step forward.

Why not simply abolish possessory pledge? Pawn is reserved under the Consumer Credit Act 1974, so the Scottish Parliament could not do that. More widely for businesses, it is the international norm to have security created either by delivery—that could be delivery by notification to an independent custodier—or by registration. Therefore, we are really following the international rules.

My colleague Professor Louise Gullifer at Cambridge, who is arguably the world's leading expert on this subject, mentions that some African countries have reformed the law so that the approach is non-possessory only. However, as she says, the standard international approach in Europe, North America, Australia and New Zealand is to have both possessory security and security by registration. Does that help?

Jeremy Balfour: It does. That is very helpful. Thank you.

The Deputy Convener: Thank you for the question, Jeremy, and thank you to our witnesses for their answers.

10:45

Oliver Mundell: Following on from that, I guess that, if someone is in possession of something, the risk is lower. At the lower end of the market, there is potentially an advantage, where people have credit issues and other things, to the individual or small business being able to hand the item over, in terms of the cost—

Professor Steven: Well, it is lower risk for the creditor.

Oliver Mundell: Yes.

Professor Steven: It is the same for security rights in general, whether they are created by delivery or by registration; the lending is lower risk because the creditor has an asset that they can go against. It is also better for the debtor because, in general, secured lending attracts lower interest rates.

In relation to the risk of losing the asset, I am not sure that it particularly makes a difference whether there is delivery or not. The most important security in Scotland is the standard security—the mortgage of land—and the absolute core of the standard security, as in all other countries, is that the debtor stays in possession. A person does not have to give the bank the keys to their house in order to get mortgage finance. In

many ways, the bill seeks to introduce for moveable property the same type of security that we typically grant over our houses, where we do not have to hand the thing over.

On moveables, when things such as watches are pawned, they do not take up much storage space, but bigger assets such as a company's vehicles or computers will take up significant storage space, and the cost will be increased because the creditor has to store the things. For those reasons, non-possessory finance is typically better for both creditor and debtor. I stress the word "typically".

Oliver Mundell: That is why I referred to the lower end. There is obviously a cost in recovery, and effort is involved in doing that—

Professor Steven: Yes. I note that you have had written evidence along those lines. There is a worry that the costs might be higher because items such as vehicles have to be recovered. However, the same argument can be made for houses. Ultimately, to enforce a security against a house, the house has to be recovered, so—

Oliver Mundell: A house is generally of higher value, which balances out the risk.

Professor Steven: Yes, to some extent, and that is why creditors would not take a security over very low value assets in any case. It has to be something that is worth several thousand pounds, realistically.

Oliver Mundell: I will come back to that question later. I am just interested in how the register might work in practice, particularly at the lower end. You said that the approach could be cheaper and more efficient and that finance could be accessed immediately, but how do you envisage that it would work in practice? The process of registering a house or other legal documents in Scotland could end up being quite clunky and costly.

Professor Steven: I will answer first, and maybe Professor Gretton will follow. The international norm in this area is to have electronic registers with limited documentation and fairly standard forms, and the keepers of the registers do not check the documentation. The system is basically automated. We have looked at comparator jurisdictions and based our work on that international norm, under which registration is relatively cheap.

That is very different from land registration, where standard securities—mortgages—have to go to the land register and the keeper has to check things. There is a huge challenge with land registration in relation to mapping—we have to ensure that the mapping of a person's land does not overlap with a neighbour's land. That has meant that the land register is a relatively costly register.

There is no mapping for the register that we are discussing. In theory, one could have a photograph of an object to help to describe it, but I doubt that that will happen. As registers go, it should be relatively cheap to run. For the most part it should be automated, which means that the charges to register something or search should be relatively low—in line with international standards.

Professor Gretton: I have a couple of points. First, as Andrew said, in practice, it will only be larger value assets that people will be interested in—we are not talking about securities over biros, for example. The costs have to be considered in that connection.

Secondly, securities are often enforced not directly but because the debtor has gone bankrupt. When a debtor goes bankrupt or a company goes into administration or liquidation—there are different regimes for companies, as there are for personal bankruptcy—enforcement may be by the insolvency administrator. They would then sell the vehicles—let us say—and then the secured creditor over those vehicles is paid in preference. In many cases, there is no action enforcement by the secured creditor. There may be—it depends on circumstances. If the debtor is not paying the secure creditor, they are probably not paying other people either, in which case it is likely to be an insolvency situation and the question of enforcement does not arise, because the insolvency administrator will be selling everything anyway.

Oliver Mundell: That is helpful.

Professor Steven: I would not generally expect debtors to look at such registers—in the same way that the average business or consumer does not look at the land register, even though with Scotland's land information service—ScotLIS—that is now easy to do. For the most part, we leave such registers to our legal advisers. I would not expect businesses or consumers to be looking at the registers, just as, typically, they do not look at the land register.

Oliver Mundell: That is helpful. There have also been some concerns about privacy. What thoughts do you have on that?

Professor Steven: That is an important issue, particularly for natural persons—that is, humans, rather than corporate bodies.

Again, we can draw on international comparators and consider how other systems have dealt with the issue.

What the Scottish Law Commission suggested and the Government has taken forward is, for natural persons, to show only the month and the

year of birth. There may be only one George Gretton, but there is more than one Andrew Steven out there. If it just had "Andrew Steven" and the address, that would be okay, but a date of birth would take someone that bit further. Only the month and year of birth will be publicly viewable, which follows Companies House practice. In the United Kingdom, one can find out at Companies House whether someone is a director of a company but one can only see their month and year of birth. We drew on the existing model operating in the UK at the moment, which is Companies House.

It is a valid concern. The detail of the registers will be addressed through statutory instruments. I am sure that such issues will be considered carefully at that stage, too.

Oliver Mundell: I am sure that they will be.

I want to move on to some of the consumer issues. We have mentioned a few times that the impact will only be on high-value items. Before going into the consumer stuff, I am interested in the minimum sums that will be involved.

The issue has been picked up quite a lot outside the Parliament, and I know that you have made representations on it. I just want to understand where the £1,000 figure came from, what you think is the right threshold and why you went for a fixed-sum model rather than one that identifies types of moveable good to which the bill should apply.

Professor Gretton: I will be very brief. The amount would be for the Scottish Government. The figure is in there because, as a drafting issue, it was thought that an initial figure should be provided.

Professor Steven: Perhaps the figure should be determined under the affirmative procedure—I need to look at that again; I am assuming that the bill provides a statutory instrument making power. Obviously, the bill is not in its final form. The affirmative procedure would potentially provide another check, beyond the Scottish Government.

Professor Gretton: That is a good point.

One should not, therefore, take the £1,000 figure too seriously. It derives from the commission's report of five years ago, and £1,000 is now worth less—indeed, it is worth less than it was when I arrived in this committee room. [*Laughter.*] The figure would be for future consideration.

Oliver Mundell: Let me push you a little, as you are the experts who came up with the proposed changes that you say are needed. At what level should they kick in? Without a figure or type of property in mind, it is difficult to get one's head round the issue. This has come up in relation to consumers: is the figure designed to cover household goods?

Professor Steven: No, absolutely not. Let me say where the £1,000 came from. The figure appears in the Debt Arrangement and Attachment (Scotland) Act 2002, which is about diligence: you cannot go against certain assets below that figure. That is the origin.

However, a statutory instrument from 2010—I refer to it in my written evidence—says that for vehicles the figure is £3,000, although if you search the official databases you find that the 2002 act still says "£1,000". That is misleading. I suggest that, for motor vehicles, the figure should be at least £3,000, to match the figure in the statutory instrument.

Professor Gretton is right: the bill provides for the figure to be set by ministers, taking account of what is considered appropriate at the time. I agree with him that £1,000 is on the low side. It was proposed in 2017; we are now in 2022 and the legislation will probably not come into force until 2024 at the earliest, given the detailed work on the registers and the statutory instruments that will be needed. The year 2024 is another two years away, and I hope that, by that point, the Government and others will have looked carefully at the issue.

The figure should be higher than £1,000, but we are where we are. The bill is designed to be agile: ultimately, the figure will be set by statutory instrument. Our view is in line with international comparators: we could not find a system over the past 20 years that applied to no consumer; we found that reforms applied to consumers, but with special protections.

I refer again to the World Bank report from 2019, which I will leave with the committee. It says:

> "A secured transactions law should apply to any type of grantor, whether an entity or individual getting financing for business or consumer purposes. The rights of consumer grantors and debtors are typically also addressed through consumer protection legislation that may limit the extent to which a security right may be created (e.g., up to 60 percent of wages)"—

the bill says there should be no assignation of wages, so we are talking about 100 per cent—

> "or enforced (e.g., a security right may not be enforced in some household goods)."

Mr Mundell, to be absolutely clear, the Scottish Law Commission's policy was not for household goods. The figure of £1,000 was seen as a simpler rule than the diligence rule. Therefore, I am absolutely clear that the figure should be set at a level that excludes ordinary household goods.

11:00

Oliver Mundell: I guess that the horse has bolted a bit in that there is now a lot of interest in that aspect of the bill. Would there be any negative aspects to putting something on that in the bill? At the moment, through secondary instruments, it is possible to exclude items from becoming covered by the bill, but is there any merit in putting that in plain English in the bill?

Professor Steven: Can you be more specific?

Oliver Mundell: Could the bill state that ordinary household goods or essential household goods are excluded from the bill's provisions? Is there a negative aspect to doing that?

Professor Steven: Oh, I see what you mean. That is a possible way forward, yes.

Professor Gretton: The bill enables the Scottish ministers to provide specific categories that cannot be subject to security. Therefore, the Scottish ministers could say that household goods are excluded. That is in the bill as an option.

Oliver Mundell: Yes, but that is a ministerial thing. What I am saying is that it might provide reassurance to some of the parties that have commented on the bill to move that into the bill so that it is in the primary legislation. The question is whether you see any negative aspects to excluding ordinary household goods from these provisions up front.

Professor Gretton: I will give that question to Andrew Steven, but I first wish to add some background information. Where consumers are concerned, the statutory pledge would still be subject to the regime of the Consumer Credit Act 1974, so that would automatically kick in. The bill does not say that it would be subject to that act, because that applies automatically. Therefore, that regulatory regime is applicable anyway.

Professor Steven: To go back to the question, I want to reflect on it but I do not have an immediate objection to putting that in the bill. The concern with simply saying, "You may not have a statutory pledge in respect of property that cannot be the subject of diligence"—that is certain household goods that are listed and others—is that the rules are spread across at least five sections in the Debt Arrangement and Attachment (Scotland) Act 2002 and they are also nuanced. Therefore, the motor vehicle provision, which is currently at £3,000, says something like "in so far as is needed by the family", so we then get into a discussion about whether the vehicle was actually needed by the family or whether they had a second vehicle. The financial limit was designed to make it a lot simpler. If an asset was below that figure, it would not be—

Oliver Mundell: I understand that that is easier from a legal or technical point of view. However, with regard to consumer protection, those might be questions that we should be asking: are we allowing people to secure debt against things that they cannot live without?

Professor Gretton: Yes, that is a legitimate question.

Professor Steven: The interesting thing is that, when the Law Commission in England and Wales did a report on a similar area of what they called goods mortgages, it started with the idea of having a power to exclude certain goods, such as household goods, but it dropped that in its final report—that information is in my written evidence—because the evidence was that creditors would not be interested in ordinary household goods. However, we are agreed that, as a matter of policy, such goods should be excluded.

The Deputy Convener: Thank you. Paul Sweeney MSP will ask the next questions. He joins us online.

Paul Sweeney (Glasgow) (Lab): I thank the commissioners for their helpful evidence and statements so far. I will touch on some of the aspects around consumer protections, in addition to the issues mentioned by Mr Mundell, with regard to how we can create a mechanism that is effective at protecting consumers.

There has been some focus on the £1,000 placeholder, which, with hindsight, has perhaps been a bit of an unfortunate red herring. In private session, the committee has considered lodging an amendment to provide automatic controls on that figure—some sort of deflator that would automatically correct every financial year. Would you endorse such a mechanism? Would that be a reasonable undertaking, and would you, perhaps, assist us in designing it?

Professor Steven: I think that that sounds reasonable. I assume—I think that the answer to this is yes—that if that was to be done in the Moveable Transactions (Scotland) Bill, it should probably be done in the diligence legislation as well, and probably in other places. I wonder whether there might be a wider way of doing that.

However, what you suggest seems eminently sensible as a matter of policy. I am slightly nervous about our being asked to help with technical achievability, but we would be willing so to do. I just wonder whether there are precedents in other legislation, which we and the Scottish Government lawyers could look into. I suggest that it would be best done more widely, particularly in relation to the diligence provisions.

Professor Gretton: The suggestion is perfectly reasonable.

There is a systemic issue here. In the criminal law, there a system that involves the standard scale, which, with criminal penalties, means that it is not necessary to name a figure, which would be subject to the problem of the changing value of money. The legislation simply says that the fine will be at point 5 of the standard scale, or whatever it happens to be. The standard scale can be adjusted every now and again. That all works smoothly. That is on the criminal side.

On the civil side, that approach has never been adopted, which often causes problems with figures getting out of date and Governments not getting round to introducing the necessary statutory instruments to update them. Therefore, there is a systemic issue here. However, as I said, I have no objection to the idea.

Paul Sweeney: That is reassuring. Perhaps committee members can reflect on the matter as we proceed with the bill.

More broadly, we are interested in understanding more about what the commission did to seek the views of consumer groups. What feedback or evidence did you receive in the course of preparing the draft legislation?

Professor Steven: We sought the views of consumer groups. In 2012 or 2013, we discussed our policy proposals, as they were—at that stage, they were within the commission—with Consumer Focus Scotland in Glasgow. I remember specifically discussing the diligence exception—in other words, the financial limit rather than the excluding goods exception. Consumer Focus Scotland was content that consumers were included, but it was keen to keep in touch to receive further detail. Of course, Consumer Focus Scotland was abolished, so that did not happen.

We looked at the question whether lending would be made to consumers. We discussed that with one of our advisory group members, Bruce Wood, who knows a lot about that area—he worked heavily in it with the Consumer Credit Trade Association and the Finance and Leasing Association. The evidence was that that could, and indeed would, bring benefits to consumers, from the point of view of the potential for lower interest rates.

There were subsequent consultations on the bill. There was a consultation on the final draft of the bill in the summer of 2017, before the report was published at the end of 2017. The Economy, Energy and Fair Work Committee held a consultation from 2019 into 2020. In addition, the Scottish Government held a targeted consultation. All those consultations offered opportunities for consumers to engage. We also made specific attempts to engage with law centres to get their views, but those did not result in a response.

We regarded the consumer element as a very sensitive one, and one on which it was important to get evidence. We were influenced by the fact that that is how reforms have been done in other countries. It is unusual to leave consumers out. The original discussion paper has questions for consumers and we did our best in the ensuing period to highlight the consumer aspects of the bill.

Ultimately, people are busy. I have noticed before in law reform that the people who respond to a parliamentary committee's call for evidence have not always engaged at an earlier date and that some stakeholders who have engaged in consultation 1 are a little bit fatigued when it gets to consultation 5. Therefore, I invite you to look at the responses to earlier consultations as well as the responses to the most recent one, but, yes, we were sensitive to the fact that consumers raised particular issues.

I talked earlier about small businesses not understanding moveable transactions law in the same way as I do not understand plumbing and smart phones. There is a similar challenge with consumers because it is a technical area of law.

Professor Gretton: I agree with all that.

I come back to an earlier point about the exclusion of household goods because I was a bit vague in my response. I would have no objection to hardwiring that into the bill. There might be a slight difference between me and Andrew Steven on that.

Professor Steven: No, there is not. I am content with that as well.

Professor Gretton: It is not a big issue because it can be done by statutory instrument anyway. However, if it was thought desirable to hardwire it into the bill, that would not be unreasonable.

Paul Sweeney: That is helpful background and provides some degree of reassurance on the commentary that we have heard on the proposed legislation.

Responses from law centres were mentioned. We have received a response from Govan Law Centre, which, in effect, compared the enforcement of statutory pledges to warrant sales. I assume that you do not think that that is a fair characterisation.

Particular sections of the bill have been highlighted in that regard. Section 63 entitles a creditor to serve a pledge enforcement notice on a debtor if payment has not been made. Section 65 enables an authorised person—in other words, a

sheriff officer—to enter someone's home to remove moveable goods, subject to the statutory pledge. Section 66 gives a creditor the right to sell someone's moveable goods at a public auction.

Bearing in mind the fact that we have discussed the protections that we can introduce in relation to particular goods, household vulnerability and exposure, will you explain why the characterisation of the enforcement of statutory pledges as warrant sales is not fair? That will allow us to understand the context better.

Professor Gretton: Which was the first section that you mentioned? I did not hear it. I got the other ones.

Professor Steven: It was maybe section 63.

Paul Sweeney: I mentioned sections 63, 65 and 66.

Professor Steven: The characterisation of enforcement as a warrant sale is incorrect. The Scottish Law Commission was behind the legislation that replaced warrant sales, so the idea that it would support their reintroduction is wrong.

We have discussed the exclusion of household goods. That would mean that a sheriff officer would not go into somebody's house, because ordinary household goods would be excluded.

The provision about auction is drawn from Saskatchewan, where the legislation says that, if the creditor buys the property, it has to be at auction. That is an enhanced debtor protection provision to ensure that best value is achieved. However, just about every other debt enforcement process involves auctions. A pawnbroker, a holder of a standard security, someone doing diligence or a trustee in sequestration could auction. In other countries, the idea of auctioning is standard. Therefore, it is wrong to characterise the statutory pledge as being unique in regard to auctions.

11:15

I have read the Govan Law Centre response, which refers to certain checks and balances. I am more than happy to consider what further protections could be brought in. Existing protection regarding the diligence of attachment would also apply here: that seems entirely reasonable. I suggest that if we exclude ordinary household goods, what you suggest will not happen anyway.

I have one final point. With a warrant sale, the creditor could come in to sticker goods and take them away. In the case of a security, the only thing that the creditor can remove is what the debtor has voluntarily granted the security over. If the bill excludes certain property, it will not be possible to take it, even if the debtor granted security. I know that it may be suggested that vulnerable debtors have no choice and will be told to "sign here", but the only thing that the sheriff officer can remove is what has been identified for security purposes, whereas in warrant sales for the poll tax, sheriff officers could come in and sticker lots of things. The warrant sale may seem to be the same at first sight, but it is a bad analogy.

What do you think, Professor Gretton?

Professor Gretton: I agree.

The Deputy Convener: Before I bring Paul Sweeney back in, Jeremy Balfour has a question about that point.

Jeremy Balfour: I wanted to push a little on that, Professor Steven. At the moment, we are looking at the bill as it is, although there may be amendments.

You can correct me if I am wrong, but my understanding is that, at the moment, if I buy a television for £1,000, assign it to someone else in the appropriate way so that it is registered to a third party, and then stop paying for my television, someone can come along after due process in court and take my television away.

Professor Steven: Are you asking whether they could take your television away in the same way as they could if you had bought it through hire purchase?

Jeremy Balfour: Yes.

Professor Steven: Depending on the financial limits—

Jeremy Balfour: That is at the moment, as the bill stands—

Professor Steven: That depends on its value.

Jeremy Balfour: I appreciate that sheriff officers cannot come along and take everything, as they used to when we had warrant sales, but could they still remove that television?

Professor Steven: If the television had a value of above £1,000, it could, in principle, be taken. I think that, as with hire purchase, that would be relatively unusual for something whose value was not that high, because of the cost of recovery. In some cases, banks will simply write things off.

If there were no protections in the bill—the financial threshold and the power to exclude certain goods—those processes could follow through. As the bill stands, the main difference between consumers and businesses is that a court order is needed as a protection for consumers. The creditors would also need to follow the Consumer Credit Act 1974, which requires a 14-day warning notice—they would have to follow the powers that courts have under that legislation.

That gives me the opportunity to say something that I had hoped to say. To be clear, the statutory pledge is not a new product in consumer credit law. There is a concern that I am keen to assuage about something called "buy now, pay later", which was not regulated. The Financial Conduct Authority had to catch up, but it is absolutely clear that the statutory pledge is subject to the Consumer Credit Act 1974 as that act stands, because it is a type of security and "security" is defined in the act. As well as needing to get a court order under the bill, creditors would need to go through the procedures in the 1974 act. That is another layer.

I absolutely agree that the ordinary television should be excluded.

Paul Sweeney: I have no further questions. That was a helpful series of responses, so I am happy to rest on that.

Jeremy Balfour: Just before we come to an end, I would like to ask something. We have discussed the highlights of the bill, on which there have perhaps been most responses both in your initial consultation and in the one carried out by the committee. Are there other areas—perhaps small ones—in which the bill needs to be amended or which need to be considered to make the bill even better than it is at the moment? Rather than list them all now, you might want to write to us after you have come away from the meeting. The next stage in the Parliament's bill process will involve the lodging of amendments. From your perspective, are there any areas—however small they might be—that require examination?

Professor Steven: There are. I have tried to read all the responses to the committee, some of which—those from the legal consultees—are lengthy. I know that the Scottish Government intends to consider those in detail in the run-up to stage 2.

I have my own thoughts at a small level, but I do not think that we have time to go through those at the moment. The detailed points that the committee's consultees have raised should be considered if the bill is to come up to a slightly higher level. The aspect that is missing from the bill but was mentioned in the Scottish Law Commission's report is financial instruments and shares. I know that legal consultees are particularly keen to see those covered. The Scottish Government has said that it will be done, provided that the UK Government agrees, under a section 104 order. The best way in which the bill could be improved would be to put financial instruments back in, but I know that there is an issue of legislative competence. I am delighted that the Scottish Government is working to achieve that aim through such an order.

Professor Gretton: The expression "financial instruments" in this context includes shares, which might not be immediately obvious from the terminology. I agree with Professor Steven. At the moment, intellectual property is covered in the bill, which is excellent. Therefore, for example, if a new business has intellectual property worth £100,000 it can now grant security over it, which under the current law is possible only by a workaround that is highly unsatisfactory in all sorts of ways. It is important that shares should be brought within the bill. If a section 104 order is necessary, I hope that one can be obtained.

There are also drafting issues, but those are too technical to cover here. The big policy aim is to ensure that other intangibles come in, and not just IP.

Jeremy Balfour: Perhaps you could come back to us in writing if there are technical issues that you would like us to consider.

My final question is about those things being included in your draft bill but not in the Scottish Government's bill. This might be an unfair question to ask you, but I will ask it anyway. Do you agree with the Scottish Government that it is incompetent for it to include those in the bill? If they were to be put back in, would that be competent?

Professor Gretton: Are we talking about financial instruments?

Jeremy Balfour: We are—yes.

Professor Gretton: I have not looked at that question carefully. My general impression was that it would be competent to have them in the bill. However, of course, legislative competence is a difficult area and I have not looked at it in detail.

Professor Steven: I have not seen the Scottish Government's detailed legal opinion on that aspect. I would need to do so to check whether the view on inclusion that we took in the report was misplaced. However, I can understand the Scottish Government wants to be cautious: it does not want there to be a situation in which it could be challenged on the basis of legislative competence. However, I have not been able to look at that in detail because I have not seen the internal opinion that Scottish Government obtained on that.

I am very pleased that the policy decision is to implement that, albeit via the section 104 order route. I think that you will hear from the Law Society and other lawyers working in the area that they are keen that it goes forward as well. Although it has to be done by section 104 order, when the legislation comes into force, it all comes into force; there is not a lag with the financial instrument stuff.

There are real issues here; it is a good example of Scots law being inadequate. Under Scots law, you have to transfer the shares into the bank's name, and the bank has to therefore register as a "person with significant control" and meet all sorts of other administrative requirements, which puts up costs. That means that you cannot create security over shares more than once, because you can transfer only once. Who gets the dividends? Who gets the vote at the annual general meeting?

None of that is an issue in England, but in Scotland the only way in which you can create security is by transferring the shares into the bank's name, which definitely needs to be addressed, so I am pleased that the Scottish Government has committed to do that. In its view, it is dependent on the UK Government, so I hope that the committee will support the Scottish Government in pressing the UK Government to have that taken through.

Professor Gretton: I agree with that entirely. We have mentioned physical assets a lot in the meeting, but intangible assets are hugely important. Scots law has already fixed that problem for IP, shares and maybe other things as well.

Jeremy Balfour: I have just been reading my notes. I have another quick question, which is completely unrelated to my previous one and picks up from something that my colleague Mr Mundell said in relation to looking at the register and how often you can do that. My understanding is that—correct me if I am wrong—the opportunity for people to search the register would be limited.

Professor Steven: No. It would be a public register like the land register, but the way in which you could search would be limited. The standard approach is that you could search only against the granter of the statutory pledge or the assignor. There is a commercial reason for that, which is that, if you could search against the assignee or the creditor, you would get their customer list.

Professor Gretton: If you could search against Bank of Scotland plc, you would get a vast number of results and details of the customers.

Jeremy Balfour: That clarifies that point that I was asking about.

Professor Gretton: But if you search against George Gretton of 52 Grange Loan, you would get nothing.

Professor Steven: The register will be mainly used by would-be creditors to check whether you have already done it. It will not be checked by consumers. Particularly for assignation, consumers will simply not look at the register. There was concern about consumers having to pay search fees, but they absolutely do not to look at the register.

Jeremy Balfour: Thank you for clarifying that.

The Deputy Convener: I thank committee members for their questions; the questions are exhausted, as may well be our witnesses. Thank you very much. The evidence session has been extraordinarily helpful.

I thank Lady Paton, Professor Gretton and Professor Steven for their extremely helpful evidence. I ask Lady Paton whether it would be acceptable for the committee to follow up by letter with any additional questions that stem from the meeting.

Lady Paton: Yes, that would be acceptable; in fact, we express our gratitude for the opportunity to discuss and, I hope, assist with the progress of the bill. A written follow-up would be very welcome.

The Deputy Convener: That is very kind of you. We will let you go now. I suspend the meeting briefly to allow witnesses to leave the room.

11:28

Meeting suspended.

11:30

On resuming—

Instruments subject to Affirmative Procedure

The Deputy Convener: Under item 4, we are considering two instruments on which no points have been raised.

Homeless Persons (Suspension of Referrals between Local Authorities) (Scotland) Order 2022 [Draft]

Social Security (Miscellaneous Amendment and Transitional Provision) (Scotland) Regulations 2022 [Draft]

The Deputy Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

The Deputy Convener: Under item 5, we are considering three instruments on which no points have been raised.

Coronavirus (Recovery and Reform) (Scotland) Act 2022 (Commencement No 1) Regulations 2022 (SSI 2022/274 (C14))

Planning (Scotland) Act 2019 (Commencement No 9 and Saving and Transitional Provisions) Regulations 2022 (SSI 2022/275 (C15))

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Recognition and Enforcement of Judgments) 2022 (SSI 2022/277)

The Deputy Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Deputy Convener: As agreed earlier, I move the meeting into private.

11:31

Meeting continued in private until 11:55.

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