

Replacing Bills of Sale Acts

In September 2016 the Law Commission presented before Parliament the Report on Bills of Sale¹, which concluded a two-year examination of the Bills of Sale Act 1878 and the Bills of Sale Act 1878 (Amendment) Act 1882.² It recommended that the Acts should be abolished and replaced with alternative legislation. This note considers the key aspects of the proposed reform.

The Bills of Sale Acts govern documentary transfers of property in personal chattels from an individual (A) to another person (B) where A is to remain in possession of the goods and B is vested with a power to seize them.³ The Acts prescribe the form of the documents and impose a requirement of their registration at the High Court. By virtue of insolvency legislation, the registration requirement was extended to general assignments of book debts where the assignor is an individual engaged in a business.⁴ The Acts were drafted to encompass both transfers of property outright (absolute bills of sale) and by way of security (security bills of sale)⁵ but the primary context in which they operate is secured lending through the use of security bills. Given that lenders tend to take security in a document, not orally, compliance with the Acts is essential to the effective granting of security in goods by consumers and unincorporated businesses (sole traders and partnerships).

The Bills of Sale Acts began to attract substantial criticism from their inception and calls for their reform now boast an astonishing 130-year record.⁶ Document and registration requirements under the Acts are extensive, complex and couched in arcane language, confusing even to lawyers.⁷ The aggravating factor is the serious sanction for lack of compliance: invalidity of the bill either against everyone or against all bar the grantor. The Acts restrict the ability to grant registrable non-possessory security that would be valid against trustee in bankruptcy of the grantor. For example, it is not possible under the Acts to

¹ Law Commission, *Bills of Sale* (Law Com No 369, 2016), referred to as the 'Report'. Note also Law Commission, *Bills of Sale. A Consultation Paper* (Law Com No 225, 2015), referred to as the 'Consultation Paper'.

² Referred to collectively as the 'Acts' and individually as the '1878 Act' and the '1882 Act'.

³ The 1878 Act, s3. See generally e.g. Beale, Bridge, Gullifer, Lomnicka, *The Law of Security and Title-based Financing* (2nd edn OUP 2012) paras 11.03-11.62.

⁴ Insolvency Act 1986, s344.

⁵ Absolute bills are governed exclusively by the 1878 Act. Security bills are governed by both the 1878 and the 1882 Act but see the 1882 Act, s3.

⁶ *Thomas v Kelly and Barker* (1888) LR 13 App Cas 506 (HL) 517 (Lord Macnaghten); *Consumer Credit: Report of the Committee* (Cmnd 4596, 1971); AL Diamond, *A Review of Security Interests in Property* (DTI, 1989) para 10.27; Law Commission, *Report on Company Security Interests* (Law Com No 296, 2005) p xiv, paras 1.48, 1.53; Law Commission, *Company Security Interests Consultative Report* (Law Com No 176, 2004) 2.70-2.76; Department for Business, Innovation and Skills, *A Better Deal for Consumers: Consultation on Proposals to Ban the Use of Bills of Sale in Consumer Lending* (2009); Department for Business, Innovation and Skills, *Government Response to the Consultation on Proposals to Ban the Use of Bills of Sale in Consumer Lending* (2011); Secured Transactions Law Reform Project *To Whom Should Registration of Security Apply?* (2013 Discussion papers) available at <https://securedtransactionslawreformproject.org>. Of more recent academic calls for reform see D Sheehan, 'The Abolition of Bills of Sale in Consumer Lending' (2010) 126 LQR 356; G McBain, 'Repealing the Bills of Sale Acts' (2011) 5 JBL 475; L Gullifer and S Hurst, 'Bills of Sale Acts: Ripe for Reform?' [2013] JIBFL 685.

⁷ See paras 2.12-2.20 of the Report. See, too, *Chapman v Wilson* [2010] EWHC 1746 (Ch) (a bill drawn up and registered by a solicitor void for lack of compliance).

create a registrable security over intangibles or after-acquired property⁸ except in relation to growing crops and replacement machinery.⁹ Registration at the High Court is expensive, burdensome, paper-based and the register is difficult to search. The Acts offer little protection from unreasonable enforcement of security as the lender can, for example, repossess goods without a court order, irrespective of the amount repaid, and there is no protection to purchasers of legal title in good faith without notice of security, which stands in stark contrast with the safeguards under the hire-purchase regime.¹⁰ Some of these shortcomings are probably due to bad drafting of the Acts and underdeveloped thinking about grantor protection but others are a consequence of the registration regime being based primarily on the prevention of fraud.¹¹ By contrast, modern regimes of registration of non-possessory interests focus on providing publicity and facilitating access to finance; fraud prevention is fulfilled by other means.

The repeal of the Acts can hardly be opposed. The difficulty is, and has always been, what to put in their place. The Law Commission recommends that the Acts should be replaced with a new Goods Mortgages Act, governing transactions, not documents. Its scope is meant to broadly mirror that of the Bills of Sale Acts (in terms of person of the grantor and subject matter of security) except that it is suggested, rightly, that absolute bills of sale ought no longer to be regulated due to their rarity.¹² The Law Commission makes reasonably clear that the purpose of the reform is to deal with urgent problems perpetuated by the Act and not to seek modernisation more widely as it would take more time.¹³

Two key consequences follow from this narrower approach to reform. One is that the proposed new legislation preserves the separation of secured transactions regimes governing non-corporate and corporate borrowers. Greater protections for consumer and small business debtors do not, on their own, necessitate wholly different regimes of secured transactions applicable to corporates and non-corporates. Jurisdictions across the world do not tend to differentiate legislative framework for security depending on the person of the grantor.¹⁴ In light of this, the Law Commission's proposal to include in the new legislation a power to make regulations to streamline the registration regime between companies and non-corporates is welcome. However, a debate ought to take place on the feasibility and cost-effectiveness of one registration system, irrespective of the person of the grantor, should be given some serious thought. Another consequence of the perceived urgency of the Bills of Sale Acts reform is that the discussion on the ability of unincorporated businesses to grant floating charges was left for another day.¹⁵ Until then, the Law Commission recommends a conservative approach: that the non-corporate borrowers should not be

⁸ This is because a bill is void against everyone except the grantor in respect of any personal chattels that are covered by the bill but not "specifically described" in the schedule or, if specifically described, which the grantor does not own: the 1882 Act, ss4 and 5.

⁹ The 1882 Act, s6.

¹⁰ See paras 2.32-2.39 of the Report. Contrast protection of purchasers under hire purchase law: Hire Purchase Act 1964, ss 27-29.

¹¹ AL Diamond, 'Hire-purchase Agreements as Bills of Sale (I)' (1960) 23 MLR 399, 399-400.

¹² Paras 10.24-10.27 of the Report.

¹³ Paras 4.6, 6.53, 6.62 of the Report and paras 5.94, 6.63, 7.1, 10.47 of the Consultation Paper.

¹⁴ See e.g. Sierra Leone Borrowers and Lenders Act 2014, s1; Liberian Code of Laws of the Commercial Code 2010, Title 7 ch5 s2; Australian Personal Property Securities Act 2009, s10; Saskatchewan Personal Property Securities Act 1993, s3; Ontario Personal Property Securities Act 1990, s2. I am grateful to Miss Shehnai Arora for her research assistance in identifying these provisions.

¹⁵ See paras 6.63-6.64 and Appendix D of the Consultation Paper.

permitted to create floating charges and also that they should not be able to use after-acquired property as security (fixed or floating) for a loan.¹⁶

It should be added that the Law Commission was right to reject a more interventionist approach, suggested by some¹⁷, to ban Bills of Sale Acts without replacement and to disable individuals from creating non-possessory security generally except in relation to certain asset types, for example vehicles or share portfolios. Such a drastic general prohibition could harm businesses and encroach unduly on the wider individual freedom to manage one's financial affairs and choose how one's assets are used, which borrowers currently enjoy. Any protective restrictions on debtors' ability to grant security ought to be carefully weighed against the economic as well as social benefit accessing finance.¹⁸

The proposal to deal with the cumbersome formalities of the bills of sale regime is highly desirable. For example, the abolition of the requirement to state the amount of the loan as well as the repayment date in the document should facilitate the use of registrable non-possessory security in respect of revolving credit facilities, overdrafts or guarantees.¹⁹ However, in some ways the simplification of formalities could go further. It is recommended that a mortgage, to be valid, would have to be created in a written document signed by the borrower in presence of a witness.²⁰ Writing is desirable in consumer context because written documents caution debtors, especially if they are to contain compulsory warnings, e.g. about repossession of the goods upon default.²¹ It is not clear that this level of caution is needed in business context, especially where the lack of compliance invalidates the transaction; companies are generally not compelled to grant security in writing although in practice they do so. The principle is that formalities should be minimized and only introduced where necessary and there seems no convincing rationale for the additional benefit of including a witness requirement. The Law Commission saw it as a preventative measure against excesses, e.g. the debtor signing a document when drunk and alone.²² If so, debtors might perhaps be better protected by other means, e.g. a cooling-off period, especially if witnessing e-signatures was to be introduced.

The Law Commission recommends that non-possessory security over vehicles ("vehicle mortgage") become registrable in designated asset finance registries and that failure to do so would be met with invalidity of security against a trustee in bankruptcy and third parties.²³ This proposal is likely to make registration simpler, more accurate and

¹⁶ Para 4.73 of the Report.

¹⁷ See City of London Law Society, *CLLS response to Law Commission Consultation Paper 225* (16/12/2015), available at <http://www.citysolicitors.org.uk>, response to Q1 but *cf Bills of Sale Consultation – a response. An explanation by the chairperson of the Financial Law Committee of the City of London Law Society* (Lexis@PSL Banking & Finance, 26/01/2016) (suggesting that only consumers should be deprived of the general ability to grant security). See also S Thomas, 'Mortgages, Fixtures Fittings, and Security over Personal Property' (2015) 66 Northern Ireland Legal Quarterly 343 (favouring a limitation on consumers' ability to grant non-possessory security).

¹⁸ In the economic psychology, debt is no longer represented as a result of recklessness or self-indulgence but a means of financial management: see e.g. S Livingstone and P Lunt, 'Predicting personal debt and debt repayment: Psychological, social and economic determinants' (1992) *Journal of Economic Psychology* 111, 116 and literature cited there.

¹⁹ Paras 2.21-2.22, 5.7, 5.30, 5.34, 5.38, 11.48 of the Report and paras 6.8-6.13 of the Consultation Paper.

²⁰ Para 5.27 of the Report.

²¹ See paras 5.40-5.54 of the Report.

²² See para 5.20 of the Report.

²³ Paras 6.10-6.23 of the Report.

reliable but care needs to be taken to ensure it remains low-cost. In addition, there is scope to consider wider reform to make registrable hire purchase agreements, leases, contracts of sale with retention of title clauses in order to provide wider publicity of asset finance. After all, they are already recorded in commercial registries that would likely handle registration of vehicle mortgages (such as HPI), alongside security interests in vehicles. Security in other goods are to remain, under the Law Commission's proposals, registrable at the High Court. In the long term, this is undesirable because registration of security should be online, as simple and as cheap as possible, and facilitate registration in advance of the transaction, at least in the case of business debtors, which the register at the High Court does not offer. According to the Law Commission, retaining registration at the High Court is meant to be a temporary solution "[u]ntil an electronic register is reasonably in prospect".²⁴ Paper-based register looks archaic in an era where a lot of information is available at the tap of the screen, so careful consideration of a wider reform contemplating such an electronic register and the accompanying regime is important. In any case, any asset-based registries should also enter into information-sharing arrangements with any debtor-based register, so that one could search either against the debtor's name or serial number of the vehicle.

The Report also contains important recommendations to improve the protection of the grantor in relation to creditor enforcement in cases where the mortgage secures a loan which is a regulated credit agreement under consumer credit regulation²⁵ and to protect a good faith private purchaser of goods subject to security.²⁶ However, further consideration should be given to safeguards to protect borrowers granting security in respect of non-regulated credit agreements (i.e. business loans of above £25,000) against methods of enforcement that would compromise the viability of the entire business such as repossession in some circumstances of the vehicle used to conduct the business.²⁷

The proposals go a considerable way to address the complexities of law under the Bills of Sale Acts but they are relatively modest, so the need for a wider modernisation clearly persists.²⁸ Some comfort is taken in the fact that the Law Commission clearly recognises this need. While the proposed initial reform is a pragmatic approach to expediently bringing forth the much-needed changes, let us hope that further improvement in this area does not require another 130 years to come to fruition.

²⁴ Para 6.62 of the Report.

²⁵ See chapter 7 of the Report, in particular paras 7.100, 7.123-7.124 (recommending no special protections to mortgagors securing loans that are exempted from consumer regulation, i.e. loans to businesses and high net worth individuals above certain thresholds).

²⁶ See paras 8.23-8.33 of the Report.

²⁷ See paras 3.17-3.18, 3.38 and *cf* para 7.133 of the Report.

²⁸ See the work of Secured Transactions Law Reform Project <https://securedtransactionslawreformproject.org> and the work CLLS Financial Law Committee on the Secured Transactions Code: <http://www.citysolicitors.org.uk>. See also L Gullifer and M Raczynska, 'The English Law of Personal Property Security: Under-reformed?' in L Gullifer and O Akseli, *Secured Transactions Law Reform* (Hart, 2016) ch 12.