

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 11/89

BEFORE: The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Downer, J.A.
The Hon. Mr. Justice Gordon, J.A.

BETWEEN THE BANK OF NOVA SCOTIA APPELLANT
JAMAICA LTD

AND MUSSON JAMAICA LTD RESPONDENTS

Dr. Winston McCalla, instructed by Orville Cox & Co
for Appellant

D. Gittens instructed by Ransford Brandon of
Livingston, Alexander & Levy for Respondents

October 30, November 1 & December 18, 1989

FORTE, J.A.

This is an appeal from an Order of the Master in Chambers dismissing an interpleader Summons issued on behalf of the appellant, by virtue of section 608 of the Judicature (Civil Procedure Code) Act.

As a result of a judgment obtained by the respondent against Wee Tom the judgment debtor, the respondent issued a writ of execution for the recovery of the judgment; and caused the Bailiff of the Resident Magistrate Court for the parish of Saint Catherine to seize a motor car belonging to Mr. Wee Tom. Consequently the appellant, issued this Interpleader Summons, claiming a priority interest in the motor car by virtue of a bill of sale a copy of which was exhibited to an affidavit of Mr. Glendale Singh, manager of its Hagley Park Branch filed in support of the application.

-2-

The issue for resolution in this appeal is whether that bill of sale is by virtue of section 35 of the Hire-Purchase Act a consumer bill of sale, and therefore exempt from Registration as a result of the provisions of section 36 of the Act.

It is convenient therefore to set out the provisions of the relevant sections. Section 35 reads:

"In this Part 'consumer's bill of sale' means any document which is a bill of sale as defined under section 2 of the Bills of Sale Act, not being -

(a) a document the subject matter of which includes -

(i) any part of the stock in trade; or

(ii) any plant or equipment, of a trade, business or calling; or

(b) a document made or given to a bank for a debt incurred for a purpose other than the purchase of the subject matter of such document."

Section 36 reads:

"The provisions of the Bills of Sale Act shall, from and after the 1st October, 1974, have no application to consumers' bills of sale."

It is conceded on both sides that the bill of sale exhibited was never registered at the Record Office and consequently, if not a Consumer Bill of Sale, would be null and void by virtue of section 3 of the Bills of Sale Act. In those circumstances, the appellant would have no preferential right to the motor vehicle vis-a-vis the respondent.

Before us, Dr. McCalla has argued that by virtue of the definition given to a consumer bill of sale in section 35, the bill of sale in the instant case is indeed a consumer bill of sale and therefore is caught by section 36. He maintains that in finding otherwise, the learned Master fell into error.

He submitted firstly that the bill of sale met with the provisions of section 35 (a) as the motor vehicle with which, the loan was secured, was neither any part of the stock in trade or any plant or equipment of a trade business or calling and secondly, that if it were not caught within those provisions, then it would be caught by the exception in the provisions of section 35 (b).

It was never contended before the learned Master, that the document with which this case is concerned satisfies the provisions of section 35 (a). However, whether this is so, is in my view irrelevant to the issues involved unless the document does not fall within the provisions of section 35 (b).

The section sets out firstly to equate bills of sale as defined by section 2 of the Bill of Sale Act, with consumer bill of sale and expressly excludes documents falling within the two categories described in section 35 (a) and (b). If therefore it falls within either of these, it would be excluded, and therefore cannot be equated with a Consumer bill of sale. The fact that this document, may come within the provisions of section 35 (a), cannot in my opinion avail the appellant if in the final analysis it is a document excluded by section 35 (b).

The real question therefore is whether the document is so excluded.

The answer to this, lay in the evidence. The document exhibited states in its preamble:

"The Mortgagor has requested the Mortgagee to extend to him such loan or loans or other general or specific financial and banking facilities or such further loans or facilities (as the case may be) or to grant such extensions of time for payment or agree to other changes in the terms and conditions attaching to any particular loan or facility as the Mortgagee may from time to time think fit which the Mortgagee has agreed to do upon receiving the security hereafter appearing and upon the conditions hereinafter set out."

These provisions describe an arrangement between the appellant and its customer Wee Tom, for general financing facilities to Mr. Wee Tom from time to time. Indeed a detailed perusal of the document indicates that there is no reference therein either expressly or impliedly from which it could be concluded that the loan was made to Mr. Wee Tom for the specific purpose of the purchase of the motor car. In my view, the document itself, defeats any contention that it was given to the Bank for a debt incurred for the specific purpose of the purchase of the subject matter. In the words of section 35 (b) the document per se purports to show that it is a document made or given to [the] bank for a debt incurred for a purpose other than the purchase of the motor car "the subject matter of the document;" the motor car being nothing more than the security offered in respect of the loan.

Consequently, without more, I would conclude that the document would be excluded by virtue of the provisions of section 35 (b) and therefore would not be a consumer bill of sale.

Dr. McCalla, however contended that the learned Master was incorrect in excluding certain extrinsic evidence, which the appellant attempted to produce, to establish that

the loan was made to Mr. Wee Tom specifically for the purchase of the motor car.

This contention can be dealt with shortly. In my view it is not necessary to determine whether in the circumstances of this case, extrinsic evidence of the nature produced, should have been admitted into evidence by the learned Master. Assuming, it was established that a loan was incurred for the purpose of the purchase of the motor car, would that assist in any way in determining that the document is in fact a "Consumer Bill of Sale"? To my mind it certainly would not. The document itself purports to show that quite apart from any sum loaned or incurred in the purchase of the motor car, the Bank was entitled to call upon Mr. Wee Tom to meet its demands for the payment of any other financial liability to them and that these whatever they may be, would equally be secured by the motor car - the subject matter of the bill of sale. This is demonstrated in Clause 2 of the document on which among other things the Mortgagor covenants to "pay to the Mortgagee all such sums of money as are now due or owing (including all sums which have become immediately due and payable under the terms of any Scotia Plan Loan) whether in respect of overdraft, moneys advanced or paid to or for the use of the mortgagor etc."

The terms of the document are indeed very clear and unambiguous, and consequently whether the Bank had given the loan for the purchase of the car, the parties nevertheless covenanted to place it on security, for sums, which were, or may become due in respect of loans, or other financial facilities offered by the Bank and which in no way relates to the sum loaned for the purchase of the car.

For these reasons, I am of the view that the learned Master was correct in finding that the document is not a consumer bill of sale as defined in section 33 of the Act, and consequently section 33 would not be applicable to it. The bill of sale, not having been registered would therefore be null and void.

I would dismiss the appeal.

DOWNER, J.A.:

This is an appeal from an order of Master Reid dismissing an Interpleader Summons brought before him by the claimant/appellant - The Bank of Nova Scotia Jamaica Limited. It is necessary to advert to the facts in order to appreciate the true nature of the transaction and to examine the instrument in favour of the Bank to determine if it is a valid "Consumer Bill of Sale" pursuant to the Hire-Purchase Act. If it is not then the appeal must be dismissed. Because of the wasting nature of the asset, this court has already ordered the bailiff to sell the motor car and pay the funds into court. So the issue is whether Musson the judgment creditor or the Bank who claims the car was secured by a consumer bill of sale is entitled to the proceeds. The legal issue is whether the Bank still has a title to the car.

THE FACTS

Musson (Jamaica) Limited is the judgment creditor of Gary Wee Tom and as a consequence issued a Writ of execution on a judgment obtained against him. The bailiff of the Resident Magistrate's Court seized the Toyota motor car from Wee Tom and this asset, the Bank avers, was the subject of a consumer bill of sale in their favour. These were the circumstances which made the Bank resort to an interpleader summons to claim an interest in preference to that of Musson.

The Manager of the Hagley Park branch of the Bank, Glendale Singh, stated in his affidavit that Wee Tom was a party to a consumer bill of sale in favour of the Bank. Further, he contended that there were still outstanding payments on the Toyota so that the Bank retained its interest in

the security. In a further affidavit Singh related that the Bank loaned Wee Tom \$78,000.00 to purchase the Toyota referred to in item three in the schedule of the instrument and that the defendant signed the bill of sale in respect of the transaction prior to that. In addition to that, Singh further said that Wee Tom also signed a promissory note for the \$78,000.00 to which \$37,440.00 was added as the costs of the loan. The total, therefore, was \$115,440.00. There was one other document tendered through Glendale Singh and that was the motor vehicle certificate which showed that the car was registered in Wee Tom's name.

The other affidavit evidence on behalf of the Bank was given by Trevor Dixon who reiterated that Wee Tom borrowed \$78,000.00 from the Bank and that he added \$42,000.00 from his own funds to purchase a manager's cheque for \$120,000.00 which was exhibited as well as the agreement for the sale of the car signed by Dr. Dwight Benjamin the vendor. At this point it ought to be stressed that both officers regarded the transaction as a loan to Wee Tom, although the Hire-Purchase Act requires the Bank to act as a vendor and the instrument to be treated as a "conditional sale agreement."

Since neither Wee Tom nor the judgment creditor, Musson, gave any evidence and the officers from the Bank were not cross-examined, the uncontested affidavit evidence and the five exhibits were the only factual matters for the Master's consideration. It is, therefore, necessary at this stage to examine the law applicable to a consumer bill of sale.

THE LAW

Since Section 3 of the Bills of Sale Act makes registration mandatory, failure to register would make the

bill of sale void. With regard to the Bank, they sought to justify the validity of the instrument as a "Consumer Bill of Sale". The definition of this document is set out in Section 35 of the Hire-Purchase Act—

"PART IV. Application of this Act to prescribed bills of sale

35. In this Part "consumer's bill of sale" means any document which is a bill of sale as defined under section 2 of the Bills of Sale Act, not being—

- (a) a document the subject matter of which includes—
 - (i) any part of the stock in trade; or
 - (ii) any plant or equipment, of a trade, business or calling; or
- (b) a document made or given to a bank for a debt incurred for a purpose other than the purchase of the subject matter of such document."

It is necessary to examine the instrument to see if it makes reference to any plant or equipment of a trade, business or calling. Further, it is of particular importance to see if it is disqualified because it is a document given to a bank for the purchase of any other item than that stipulated in item 3 of the schedule. Sections 36 and 37 are also important. They read:

"36. The provisions of the Bills of Sale Act shall, from and after the 1st October, 1974, have no application to consumers' bills of sale."

This section speaks for itself, so we must now turn to Section 37, it reads:

"37. The provisions of sections 7, 13, 16, 17, 22, 24, 25 and 26 of this Act shall apply to consumers' bills of sale in like manner as if—

- "(a) the person to whom such bill of sale is granted were a vendor of the goods, the subject matter of the bill of sale;
- (b) the person granting such bill of sale were a purchaser of such goods; and
- (c) the document constituting the bill of sale were a conditional sale agreement."

The initial comment is that this section makes it necessary for the transaction to be a genuine sale and any colourable device will not be given the protection of the Act.

**Does the instrument exhibited by the
Bank qualify as a consumer bill of
sale pursuant to the Hire-Purchase Act?**

The instrument is headed **Hire-Purchase Act 1974
Consumer Bill of Sale.** The recital states that the bill was made on 17th December, 1987 between the Wee Toms and the Bank and further states the mortgagor has requested the Bank to extend to him such loan as the Bank may have thought fit, which the Bank had agreed to on receipt of the security appearing and on conditions which were set out. It is pertinent to set out this clause of the recital; it reads:

"WHEREAS:

(1) The Mortgagor has requested the Mortgagee to extend to him such loan or loans or other general or specific financial and banking facilities or such further loans or facilities (as the case may be) or to grant such extension(s) of time for payment or agree to other changes in the terms and conditions attaching to any particular loan or facility as the Mortgagee may from time to time think fit which the Mortgagee has agreed to do upon receiving the security hereinafter appearing and upon the conditions hereinafter set out."

If, therefore, the loan was for the purchase of the motor car, and the condition in the instrument is that it was

solely for that purpose, then the instrument would qualify as a consumer bill of sale pursuant to Section 35(b).

Clause (2) of the recital merely reiterated the caption and states that the document is subject to all the provisions of the Hire-Purchase Act relating to consumers' bill of sale. The comment that may be made is that the recital cannot govern the operative part of the instrument. If it could, the fact that at the outset the draftsman stated that the instrument was a consumer bill of sale as defined would necessarily describe the contents. It is, therefore, appropriate to turn to the operative part of the instrument. Clause 1 reads:

"NOW THIS INSTRUMENT WITNESSETH as follows:-

1. For the consideration aforesaid the Mortgagor as beneficial owner **HEREBY ASSIGNS to the Mortgagee ALL AND SINGULAR** the goods chattels equipment plant vehicles and things specifically described in Item 3 of the Schedule hereto together with all attachments accessories spare parts and other equipment attached or belonging thereto (hereinafter called 'the said property') **TO HOLD** the same **UNTO** the Mortgagee by way of security for payment of all moneys hereby secured and subject to the proviso for redemption hereinafter contained."

Although it could be contended that Item 3 of the schedule, the motor car, is the only item "which is the subject matter of the document", the more convincing interpretation is that as "equipment and plant" are also mentioned in clause 1, this would contravene Section 35(a) of the Hire-Purchase Act. Equipment and plant are generally associated with trade, business or calling, and there was no indication that it is otherwise in this context. On the contrary, in the next clause there is a reference to mortgagors course of business, an indication that the instrument was not confined to the

Toyota motor car. The impression created at the outset is that this was not a document prepared for a consumer bill of sale or how could these defects appear so early? Turning to Clause 2 of the instrument, the relevant section reads:

"2. For the same consideration the Mortgagor **HEREBY COVENANTS** with the Mortgagee as follows:-

- (1) To pay to the Mortgagee on demand all such sums of money as are now or shall at any time and/or from time to time hereafter become due or owing from or by the Mortgagor to the Mortgagee or which the Mortgagor is or may at any time hereafter become liable to pay to the Mortgagee on any account (including all sums which have become immediately due and payable under the terms of any Scotia Plan Loan) or in any manner whatsoever whether in respect of overcraft, moneys advanced or paid to or for the use of the Mortgagor or charges incurred on his account or in respect of promissory notes and other negotiable instruments drawn accepted or endorsed by or on behalf of the Mortgagor and discounted or paid or held by the Mortgagee either at the Mortgagor's request or in the course of business or otherwise and whether such moneys shall be paid to or incurred on behalf of the Mortgagor alone or jointly with any other person firm or company and whether as principal or surety and also to pay interest on each advance or financial facility made available by the Mortgagee to the Mortgagor as aforesaid at such rate or rates as shall from time to time be chargeable by the Mortgagee in respect of each of them respectively and all usual and accustomed charges and expenses which the Mortgagee may in the course of its business charge in respect of any of the matters aforesaid all such interest as aforesaid being computed in each case from the time of each advance and being payable with monthly rests or at such other times and in such manner as the Mortgagee shall from time to time specify.

In considering Clause 2(1) it is necessary to advert again to Section 35(b) of the Hire-Purchase Act for easy reference. This section states in emphatic terms a Bill of

Sale will not qualify as a consumer bill of sale if it is -

"(b) a document made or given to a bank for a debt incurred for a purpose other than the purchase of the subject matter of such a document."

What does clause 2(1) of the instrument oblige Wee Tom to do? It obliges him to pay all sums on demand to the Bank which were owed or which could be owed in the future. This would therefore include a debt incurred for a purpose other than for the purchase of the motor car in item 3 of the schedule. The legislature in creating a consumer bill of sale intended to protect 'purchasers' against 'sellers', and yet the Bank seeks to rely on this instrument. The legislature intended the Bank to act as a vendor and the borrower to be deemed a purchaser. Yet the Bank continued to act as a traditional lender. As proof that this document was never prepared with Section 35 of the Hire-Purchase Act in mind, the instrument gives the Bank power to demand payment for debts due by way of overdraft, advances of money to Wee Tom, charges incurred in respect of promissory notes. These provisions are sufficient to show that this instrument fails as a consumer bill of sale and the Master's ruling in this regard was correct.

Is extrinsic evidence admissible to show the true nature of the transaction?

There is another aspect to this case as advanced by the appellant's counsel. The question was whether it was appropriate to adduce extrinsic evidence to show the true nature of the transaction. The first point to note in respect of the admissibility of extrinsic evidence, is that it is an exception to the basic rule that extrinsic

evidence will not be admissible to contradict the words of the instrument. Lord Morris in Bank of Australasia v. Palmer [1897] A.C. 540 at p. 545, puts it thus:

" 'Parol evidence cannot be received, ' to contradict, vary, add to or subtract 'from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract'."

The second point which is relevant to this case is that if the instrument does not qualify as a consumer bill of sale then it does not protect Wee Tom or his creditors and the courts would not in such circumstances exercise a discretion to admit extrinsic evidence. Holroyd Pearce, L.J., stated it thus in Campbell Discount Co. Ltd. v. Gall [1961] 1 Q.B. 431 at p. 439:

"The Hire-Purchase Act, like the Bills of Sale Acts and the Rent Acts, cannot in my judgment be excluded by documents which, though purporting to be outside the Act, represent a transaction which is in truth within it."

The fact is, the instrument represent a transaction in which is a loan on a security and requires a registered bill of sale or it is void.

The third and related point is that the admission of extrinsic evidence being an exception, the courts will only admit extrinsic evidence where the document is a sham and the court then examines the true nature of the transaction. This is how Diplock, L.J., puts it in Snook v. London and West Riding Investments Ltd. [1967] 2 W.L.R. 1020 at 1030-31:

"As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham,' it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word.

"I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see Yorkshire Railway Wagon Co. v. Maclure [1882] 21 Ch.D. 309, C.A. and Stoneleigh Finance Ltd. v. Phillips, [1965] 2 Q.B. 537), that for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived."

Certainly it was not contended in the instant case that the instrument between the Bank and Wee Tom was a sham so as to give the court the discretion to admit extrinsic evidence. If the Bank used a void document, how can it claim to be a secured creditor as against a judgment creditor? There is yet a further authority which shows when the courts resort to extrinsic evidence so as to examine the true nature of the transaction. Polsky v. S. and A. Services [1951] 1 All E.R. 185, approved in the Court of Appeal at p. 1062, is an instance where the court looked behind the documents to see the true nature of the agreement. The headnote shows the reasons why the court adopted that posture. At page 185 it reads:

"the main object of the Act of 1882 being to protect borrowers against lenders, it was the duty of the court to look behind the documents to discover the true nature of the transaction; the facts set out in the proposal form were incorrect, and the transaction was not a genuine sale and re-hire, but was merely a loan of £400 by the defendants to the plaintiff on the security of the car; and, therefore, the

"hire-purchase agreement of June 22, 1984, was a bill of sale within s. 3 of the Act of 1882, and, as it was not registered, it was void under s. 8."

In the instant case the document reflects the true nature of the transaction that it was a loan on a security. That being so it ought to have been registered. It must be emphasised that the Bills of Sale Act is for the protection of borrowers and creditors as Musson. As Lord Goddard puts it in Polsky at pp. 188-189:

"I must equally bear in mind, as LORD ESHER, M.R., pointed out in Madell v. Thomas & Co. [1891] 1 Q.B. 230 at 233, that the object of the Bills of Sale Act is:

'... to protect borrowers against lenders as well as to protect other persons who might be creditors of borrowers. The main object of the Act of 1882 is to protect borrowers as against lenders'."

The Master, therefore, was correct in not admitting extrinsic evidence in the circumstances of this case, because evidence could not cure the unregistered instrument which was a nullity and Musson would lose the very protection which the Bills of Sale Act afforded. If there are numerous such transactions as counsel for the Bank submitted, this issue is of importance to the commercial and financial community. The appropriate instrument should, therefore, be drafted for transactions such as this where the law obliges the Bank to act as a vendor and the client a purchaser. Alternatively, if it is proposed to use the instrument as a Bill of Sale, it should be registered. The Master's order was correct and should be affirmed. Costs are to the respondent which must be agreed or taxed.

GORDON, J.A. (Ag.):

This is an appeal by leave of the Master dismissing an interpleader summons brought by the Bank of Nova Scotia (Jamaica) Limited (The Bank) under section 606 of the Judicature (Civil Procedure Code). The subject of the summons was a Toyota Corolla motor car seized by the bailiff for the parish of St. Catherine, pursuant to a Writ of Seizure and Sale issued by the plaintiff against the defendant pursuant to a judgment. The Bank sought the Court's determination of its claim on a document purporting to be a consumer bill of sale by which the said motor car was mortgaged to the Bank by the defendant to secure a loan.

At the hearing of the summons the Bank sought leave to adduce extrinsic evidence of an affidavit by Glendale Singh the Manager of the Hagley Park Road branch of the Bank and Trevor Dixon the Consumer Credit Officer, a promissory Note and the loan application form to assist in the interpretation of the Bank's claim and to show that the document captioned "Consumer Bill of Sale" on which the Bank relied, conformed with the requirements of Section 35 of the Hire-Purchase Act (The Act). The learned Master ruled that the extrinsic evidence sought to be adduced was inadmissible. For convenience it is desirable that Section 35 of the Act be set out at this stage -

"35. In this Part 'consumer's bill of sale' means any document which is a bill of sale as defined under section 2 of the Bills of Sale Act, not being—

- (a) a document the subject matter of which includes—
 - (i) any part of the stock in trade; or
 - (ii) any plant or equipment or a trade, business or calling; or

"(b) a document made or given to a bank for a debt incurred for a purpose other than the purchase of the subject matter of such document."

Dr. McCalla submitted that Section 35(a) was applicable in that there was no evidence that the motor car given as security for the banking facilities was part of the mortgagor's stock in trade or any plant or equipment of a trade or business or calling so as to be in contravention of Section 35(a): thus complying with the requirements of the section the document was a consumer bill of sale. He submitted that by virtue of section 35(b) the document was a bill of sale and extrinsic evidence was admissible to prove the true purpose of the agreement. He relied on a statement in Chitty on Contract 25th Edition para. 807 and 812:

"807. **Consideration.** Consideration is a necessary requirement for the formation of all contracts which are not under seal. Extrinsic evidence may therefore be admitted to show want of or failure of the consideration stated to have been given in a written instrument. Thus the words in a bill of exchange 'for value received' do not preclude the court from finding that no consideration has in fact been given. Extrinsic evidence is also admissible to prove the true consideration where no consideration has been stated or where the consideration is inaccurately recorded. Also an additional consideration may be proved, provided it does not contradict the stated consideration. 'The rule is that, where there is one consideration stated in a deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated.'"

Paragraph 812:

" **True nature of the agreement.** Extrinsic evidence is admissible to prove the true nature of the agreement, or the legal relationship of the parties, even though this may vary or add to the written instrument. Thus a conveyance may be shown to be merely a mortgage, a sale and hire-purchase agreement to be an unregistered bill of sale, and a sale of property to be a loan on security."

Dr. McCalla said the document captioned "Consumer Bill of Sale" was a consumer bill of sale under Section 35 of the Hire-Purchase Act and ought to have been so treated.

Mr. Gittens urged that to qualify as a consumer bill of sale the document had to comply with the requirements of Section 35(b) of the Act, in that, the document must be given to the Bank for a debit incurred for the purchase of the subject matter of the document. The article pledged by the mortgagor to the Bank must be the property bought with the money loaned by the Bank and the document, the bill of sale, must so state. Even if extrinsic evidence was admissible to show that the loan was given for the purchase of the motor car the document would still not qualify as a consumer bill of sale because it came into existence to secure debts which had nothing to do with the purchase of the motor car. In the promissory note no mention is made of a motor car and in the loan application there is no indication that the car pledged was to be purchased with the loan. Section 35(b) would operate to exclude the document from the definition of a consumer bill of sale. He submitted Section 35(a) was no aid to the appellant's contention.

By Section 3 of the Bills of Sale Act, all bills of sale must be registered within thirty days of execution. Non-registration renders the bill of sale void. By Section 36 of the Hire-Purchase Act, consumer bills of sale are exempt from registration. The section reads:

"36. The provisions of the Bills of Sale Act shall, from and after the 1st October, 1974, have no application to consumers' bills of sale."

A document which fails to qualify as a consumer bill of sale may stand as a bill of sale but may be defeated by want of registration. By Section 35 of the Hire-Purchase Act, a

consumer bill of sale is created and defined. Section 37 requires that it conforms with the provisions of the Hire-Purchase Act. Section 37 states:

"37. The provisions of sections 7, 13, 16, 17, 22, 24, 25 and 26 of this Act shall apply to consumers' bills of sale in like manner as if--

- (a) the person to whom such bill of sale is granted were a vendor of the goods, the subject matter of the bill of sale;
- (b) the person granting such bill of sale were a purchaser of such goods; and
- (c) the document constituting the bill of sale were a conditional sale agreement."

A conditional sale agreement is defined in section 2 of the Act. This definition states:

" 'conditional sale agreement' means an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled;"

Part IV of the Act deals exclusively with consumer bills of sale in the three sections, 35, 36, and 37. Section 37(e) requires that the document should be a "conditional sale agreement" as defined in section 2 of the said Act. What the legislation provides is that a document to be a consumer bill of sale must comply with the requirements of sections 35 and 37 of the Act and if it does, it is exempted by section 36 from the provisions of the Bills of Sale Act, section 3 of which requires that bills of sale must be registered. The document captioned "Hire-Purchase Act 1974" simpliciter must be registered or be rendered void for want of registration. While section 35(a) excludes stock in trade, plant or equipment already held from being made the subject

-21-

of a consumer bill of sale it seems that such items can qualify to be the subject of a consumer bill of sale given to a bank if they are purchased with the loan advanced by the Bank as provided for in section 35(b). Section 35(a) cannot apply to cover the document in this case as section 35(b) provides exclusively for such transactions with a bank. A bank is not precluded from taking a bill of sale on stock in trade, plant or equipment of any trade, business, or calling, but such a document is not a consumer bill of sale but a bill of sale under the Bills of Sale Act and it must be registered.

The document captioned "Hire-Purchase Act 1974 Consumer Bills of Sale", so far as is material, recites--

"WHEREAS:

(1) The Mortgagor has requested the Mortgagee to extend to him such loan or loans or other general or specific financial and banking facilities or such further loans or facilities (as the case may be) or to grant such extension(s) of time for payment or agree to other changes in the terms and conditions attaching to any particular loan or facility as the Mortgagee may from time to time think fit which the Mortgagee has agreed to do upon receiving the security hereinafter appearing and upon the conditions hereinafter set out.

(2) This Bill of Sale is a consumer's bill of sale as defined in the Hire Purchase Act 1974 (hereinafter called 'the Act') and is subject to all the provisions of the Act relating to consumer's bills of sale.

NOW THIS INSTRUMENT WITNESSETH as follows:-

1. For the consideration aforesaid the Mortgagor as beneficial owner HEREBY ASSIGNS to the mortgagee ALL AND SINGULAR the goods chattels equipment plant vehicles and things specifically described in item 3 of the Schedule hereto together with all attachments accessories spare parts and other equipment attached or belonging thereto (hereinafter called 'the said property') TO HOLD the same UNTO the mortgagee by way of security for payment of all moneys hereby secured and subject to the proviso for redemption hereinafter contained."

This Bill of Sale is given to secure "loan or loans or other specific financial and banking facilities or such further loans or facilities (as the case may be)" It is not given to secure a loan used to purchase the subject matter of the Bill of Sale to make it qualify as a consumer bill of sale. For the recital to continue to express "This Bill of Sale is a consumer Bill of sale as defined in the Hire-Purchase Act 1974" does not make it what it says it is, in fact this document despite the caption, is a bill of sale, which by Section 3 of the Bills of Sale Act should be registered.

What remains to be resolved is whether extrinsic evidence can be admitted to prove the true nature of the agreement. In Cross on Evidence 3rd Edition at p. 508 there is this statement of the rule, which I endorse:

"(i) Statement

Extrinsic evidence is generally inadmissible when it would, if accepted, have the effect of adding to, varying or contradicting the terms of a judicial record, a transaction required by law to be in writing, or a document constituting a valid and effective contract or other transaction. Most judicial statements of the rule are concerned with its application to contracts, and one of the best known is that of Lord Morris who regarded it as indisputable that:

'Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract'
Bank of Australasia v. Palmer, [1897] A.C. 540, at p. 545."

Further to this at p. 509 (idem) the author states this principle -

"Even when a transaction is required by law to be in writing, extrinsic evidence is admissible in aid of the interpretation of the document, but that does not constitute an infringement of the rule under consideration. Additional or different terms may not be proved by extrinsic evidence."

It is an accepted principle in the interpretation of documents that extrinsic evidence is admissible to fill gaps and/or explain ambiguities in a document. This is an exception to the general rule mentioned above. Under this caption falls the statement at page 513 of Cross on Evidence (supra) -

"(iv) The real nature of the transaction.— When it is relevant, having regard to the principles of common law and equity involved, extrinsic evidence may be given of the real nature of any transaction, whether it is recorded in a document in pursuance of legal requirements or at the instance of the parties. Thus evidence has been received to show that an apparent sale was really a mortgage, and a secret trust could never be established without recourse to extrinsic means of proof."

The extrinsic evidence sought to be adduced consists of the loan application, the promissory note and affidavits by bank officials. The promissory note is of no avail as apart from mentioning the Act, it is given for value received. The loan application gives the purpose of the loan as "to purchase car" and not "To purchase 1984 Toyota Corolla S R 5" as the goods offered as security therein. These two documents being of no avail, should any reliance be placed on affidavits by bank officials? I should think not. In addition to being unhelpful, the loan application discloses that the applicant has had other loan transactions with the Bank on which there was a current balance.

The tenor of the Act was to provide a scheme whereby the consumer could pledge as security the goods purchased with the money loaned. The law offered the consumer relief from the costs attendant on registration of a bill of sale. Loans for business purposes are covered by Bills of Sale under the Bills of Sale Act. Section 35(b) requires that documents should stipulate that the loan was given for the purchase of

the subject of the bill of sale and the document is captioned with an awareness of the provisions of the Act. The document is, however, framed to cover a wide range of banking transactions and great care is taken to state in recital 2 (supra) that it is a consumer bill of sale. Paragraph 3(b) and (c) recite compliance with the requirement of section 25 of the Act and reference is made to the Regulations made under the Act but no where in this document is any attempt made to comply with section 35(b) of the Act. This document was carefully drafted as a bill of sale; it does not fit the description of a conditional sale agreement and it is not a consumer bill of sale. There is no ambiguity in this document. It purports to be what it is not.

I hold that the learned Master came to the correct conclusion in refusing to admit the extrinsic evidence and in dismissing the summons. I would dismiss the appeal with costs to the respondent.