

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 3/92

COR: THE HON. MR. JUSTICE CAREY - P. (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN THE REGISTRAR OF TITLES FIRST DEFENDANT/APPELLANT
A N D CLIFTON NEITA SECOND DEFENDANT/APPELLANT
(REFEREE OF TITLES)
A N D ADELA INTERNATIONAL PLAINTIFF/RESPONDENT
FINANCING COMPANY S.A.

D. M. Muirhead, Q.C. and William Campbell for Appellants
Dennis Goffe, Q.C. and Miss Minett Palmer for Respondents

September 21, 22 and October 12, 1992

CAREY P. (AG.):

This appeal takes us into the arcane realm of the Registration of Titles Act (hereinafter called the Act). It is concerned with the validity of a requisition raised by the Referee of Titles (Mr. Clifton Neita) to an application by the respondents to register by plan certain lands comprised in certificate of title registered at Volume 277 Folio 52 of the register book of titles, and directing the Registrar of Titles to issue the certificate of title in the name of purchasers, Gibraltar Trust Ltd. The respondents as mortgagees of the said land, having exercised their power of sale, had agreed to transfer the said land to Gibraltar Trust Ltd. The Referee upon a reference to him by the Registrar ruled (so far as relevant) as follows:

- "1. Section 88 of the Act clearly prescribes the manner in which the proprietor of land already under the Act may transfer the same, namely in one of the forms set out in the Fourth Schedule.

The Direction Clause of the application should therefore be deleted to enable title to be issued in the name of the applicant after which a Transfer to the nominee can be effected in the prescribed manner."

The respondents objected, and refused to comply with the requisition. There followed a series of letters from the legal advisers of the respondents to the first appellant in an endeavour to persuade the Referee that he had fallen into error. They said that not only was their view of the law correct, but it had been sanctioned by long practice. Despite these endeavours, the Referee remained entirely unmoved, and maintained his opinion that a direction by the respondents nominating the purchasers as new proprietors, was in breach of correct procedure. Finally, the respondents, their patience exhausted, sought the intervention of the Court by way of an originating summons under section 156 of the Act in which the order sought was in these terms:

- "1. The Second-named Defendant withdraw his directions dated May 25th and November 2, 1990 and approve the Applicant's application dated August 22, 1989.
2. The First-named Defendant issue a new title by diagram in the name of Gibraltar Trust Limited in respect of the lands now comprised in Certificate of Title registered at Volume 277 Folio 52.
3. There be such further or other relief as the Court may deem appropriate."

The matter came on for hearing before Harrison J. who made the order which the respondents had bespoken. The appeal is against that order and judgment which is dated 28th November 1991.

It is helpful to set out the relevant sections of the application to re-register and transfer the land which were made by the respondents. They are as under:

"We, ADELA INTERNATIONAL FINANCING COMPANY S.A. (hereinafter called "the Applicants") a Company incorporated under the Laws of the Republic of Panama of Via Espana 200, Panama, Republic of Panama and having our registered office in Jamaica at P.O. Box 401, Kingston 10 in the parish of Saint Andrew, whose address for the purpose of this application is care of Myers, Fletcher & Gordon Manton & Hart, 21 East Street, Kingston, **HEREBY APPLY** to have the land hereinafter described re-registered by plan under the operation of the Registration of Titles Act and I **BARBARA ANN ALEXANDER** whose true place of abode is at "Coobers", Hermitage Dam Road, Stony Hill in the parish of Saint Andrew and whose postal address for the purpose of this application is care of Myers, Fletcher & Gordon Manton & Hart, 21 East Street, Kingston, an Attorney of the Applicants **DECLARE:**

1. That the Applicants are Mortgagees under Mortgage No. 264088 and persons who have the power of disposing of the fee simple in **ALL THAT** parcel of land part of Palmetto Cottage and The Pinnacle now known as De La Vega Heights in the Parish of Saint Catherine containing by survey Four Hundred and Seventy Three Acres Thirty-Six Perches and Two Tenths of a Perch of the shape and dimensions and butting and bounding as appears by the Plan thereof prepared by Richard C. Carnegie, Commissioned Land Surveyor from a survey commenced on the Nineteenth day of November 1967 and completed on the Nineteenth day of January One Thousand Nine Hundred and Eighty-Eight hereunto annexed and marked "A", and being the land comprised in Certificate of Title registered at Volume 277 Folio 52 of the Register Book in the Office of Titles.
2. That such land including all buildings and other improvements thereon is of the value of Eight Hundred Thousand Dollars and no more.
3. That the deeds, documents and other evidence on which the Applicants rely in support of their title to the said land are set forth in the Schedule hereto to the best of my knowledge and belief and there are no deeds, documents or evidences invalidating the title of the Applicants to the said land.

4. That I am not aware of any mortgage or incumbrance affecting the said land or that any other person hath any estate or interest therein at law or in equity in possession remainder reversion contingency or expectancy other than Greendale Limited now or formerly of 15A Old Hope Road, Saint Andrew as mortgagor and **GIBRALTAR TRUST LIMITED**, a Provident Society registered under the Industrial and Provident Societies Act and having its registered office at 20 Hope Road, Kingston 10 in the Parish of Saint Andrew who are beneficially interested as purchasers.

5. That the said land is unoccupied.

6. That the names and addresses so far as are known to me of the occupants of all land contiguous to the said land are as follows:

The Commissioner of Lands	Kingston
Keith Oliver	Spanish Town P.O.
Margaret Linton	Spanish Town P.O.
Cynthia Barrett	13 Hampton Avenue, Spanish Town P.O.
Melvin Edwards	Mount Moreland P.A.
Dorothy Gordon	Mount Moreland P.A.
Icilyn Walters	Mount Moreland P.A.
Rodney Development Company	12 King Street, Spanish Town P.O.
Francis Elliot	43 Riverside Drive, Kingston 17.

7. That the names and addresses so far as are known to me of the owners of all land contiguous to the said lands are as follows:

The Commissioner of Lands	Kingston
James Campbell	Spanish Town P.O.
Margaret Linton	Spanish Town P.O.
Cynthia Barrett	13 Hampton Avenue, Spanish Town P.O.
Melvin Edwards	Mount Moreland P.A.
Dorothy Gordon	Mount Moreland P.A.
Icilyn Walters	Mount Moreland P.A.
Rodney Development Company	12 King Street, Spanish Town P.O.
Francis Elliot	43 Riverside Drive, Kingston 17.

8. AND in the exercise of our power of sale under Mortgage No. 264088, **WE DIRECT** the Certificate of Title to be issued in the name of **GIBRALTAR TRUST LIMITED**, a provident Society registered under the Industrial and Provident Societies Act and having its registered office at 20 Hope Road, Kingston 10 in the Parish of Saint Andrew."

For the most part, the application is that prescribed to bring land under the operation of the Registration of Titles Act and is set out in the First Schedule to the Act.

The present application of the respondents is, as I understood from Mr. Muirhead, Q.C., unusual by reason of its duality of function: it required the Registrar of Titles to re-register the land by "plat or diagram" as the initial registration was by "metes and bounds", and thereafter to transfer this re-registered land to the purchasers. But is this application really unusual?

I begin with section 54(1) of the Act which enables any person entitled to sell land registered by "metes and bounds" to make an application to register by plat or diagram. It is trite that a mortgagee is so entitled. This exercise is regarded as re-registration of registered land by plan.

Section 54(1):

"Any person entitled to sell land, which shall have been registered otherwise than by plat or diagram, may apply to have such land registered by plat or diagram."

Sub-section (2) is also of importance. It provides as follows:

"(2) An application under this section shall in all respects be treated and dealt with as if it were an original application to register land. The duplicate certificate of title shall accompany the application, and the same shall be retained and cancelled by the Registrar, and the original certificate of title shall also be cancelled by the Registrar, before the issue of a new certificate."

By virtue of this sub-section an applicant is authorized to use the same procedure, for example that form prescribed for an original application, to bring land under the operation of the Act.

This leads us then to section 28 of the Act which concerns original applications. The respondents as mortgagees qualify to make such an application by reason of section 28(iii) of the Act. Upon default in payment by the mortgagor a mortgagee is empowered to sell the land. See section 106 of the Act.

Section 28:

"Any of the following persons may, by an application addressed to the Registrar, in the form in the First Schedule, apply to have land brought under the operation of this Act, that is to say -

- (i) ...
- (iii) persons who have the power of appointing or disposing of the fee simple:

Provided that in the event of such land being brought under the operation of this Act such application shall be deemed both at law and in equity to be and to have been an exercise of such power, ..."

The proviso to the section, so far as is material, should also be set out. It reads thus:

"Provided always that a mortgagor shall not be entitled to make such application unless the mortgagee shall consent thereto, nor a mortgagee unless for the purposes of the exercise of his power of sale, and unless the certificate of title shall be directed to issue in the purchaser's name, ..."

[Emphasis supplied]

The proviso expressly mentions the position with respect to a mortgagee exercising a power of sale under the mortgage and desirous of having title issued by the Registrar of Titles in the purchaser's name. It sanctions the mortgagee giving a direction that title be issued in the purchaser's name. In my opinion, the combined effect of the proviso and section 28(iii) is that an application to re-register by a mortgagee exercising his power of sale where the certificate is to be issued in the purchaser's name is in all respects akin to an original application to register. This is, I suggest, the true meaning of the section and if that be so, then, the respondents would be correct that a special document "transfer", forms no part of the procedure required where a mortgagee who has

exercised his power of sale seeks to have the purchaser's name placed on the certificate of title.

I can now examine section 88 which relates to transfers:

"88. The proprietor of land, or of a lease, mortgage or charge, or of any estate, right or interest, therein respectively, may transfer the same, by transfer in one of the Forms A, B or C in the Fourth Schedule hereto; and a woman entitled to any right or contingent right to dower in or out of any freehold land shall be deemed a proprietor within the meaning hereof. Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, or the original lessee, mortgagee or annuitant."

Plainly, if the exercise being performed by any of the categories of persons named in the section, is a transfer of the interest of which he is proprietor, then resort to Forms A, B, C in the Fourth Schedule which are forms of transfer would be appropriate. The respondents however were not the proprietors of land which they were transferring, nor were they the proprietors of any mortgage which they were transferring: they were mortgagees who had exercised their power of sale and were acting thereafter pursuant to those powers as provided for, by law. Strictly speaking, *nemo dat quod non habet*. In my judgment, section 88 is not applicable to a mortgagee who has exercised his power of sale and is transferring the land to a purchaser.

Mr. Muirhead, Q.C. referred us to three provisions in the Act which deal specifically with mortgagees, viz.: sections 106, 108 and 114. He argued that these were specific and mandatory provisions

dealing with effective transfers by mortgagees. He regarded sections 28, 54 and 174 as subordinate provisions and the first named trilogy as substantive provisions. The subordinate provisions, he said should give way to the substantive: procedural requirements should give way to substantive rights.

It is not at all necessary to join issue on this idea of the pre-eminence of sections on rights over sections concerning procedural requirements. With all respect to Mr. Muirhead, Q.C., the question for this Court however, appears to me to be essentially one of procedure: we are not in the slightest degree concerned with the rights either of the respondents or of any other person. The question may be formulated thus: Are the respondents in the instant application to the Registrar of Titles complying with the prescribed procedural requirements? I set out hereunder sections 106, 108 and 114 of the Act:

- "106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.

"108. Upon the registration of any transfer signed by a mortgagee or annuitant, or his transferees, for the purpose of such sale as aforesaid, the estate and interest of the mortgagor or grantor in the land therein described at the time of the registration of the mortgage or charge, or which he was then entitled or able to transfer or dispose of under any power of appointment or disposition, or under any power herein contained, shall pass to and vest in the purchaser, freed and discharged from all liability on account of such mortgage or charge, and of any mortgage, charge or incumbrance, registered subsequently thereto, excepting a lease to which the mortgagee or annuitant, or his transferees shall have consented in writing; and the purchaser when registered as the proprietor shall be deemed a transferee of such land, and shall be entitled to receive a certificate of title to the same.

...

114. In addition to and concurrently with the rights and powers conferred on mortgagees and on transferees of mortgagees by this Act, every mortgagee for the time being of land under this Act and every transferee of a mortgage for the time being upon any such land shall, until a discharge from the whole of the money secured, or until a transfer upon a sale or an order for foreclosure, as the case may be, shall have been registered, have the same rights and remedies at law and in equity as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him, with a right in the mortgagor of quiet enjoyment of the mortgaged land until default in payment of the principal and interest money secured or some part thereof respectively, or until a breach in the performance or observance of some covenant expressed in the mortgage or to be implied therein by the provisions of this Act.

Nothing contained in this section shall affect or prejudice the rights or liabilities of any such mortgagee or transferee after an order for foreclosure shall have been entered in the Register Book, or shall, until the entry of such an order, render a mortgagee of a lease

"made under this Act, or the transferee of his mortgage, liable to or for the payment of the rent reserved by the lease, or for the performance or observance of the covenants expressed or to be implied therein."

There is little doubt that these provisions are concerned with the legal consequence of transfers by mortgagees and not with procedure. Mr. Muirhead is perfectly right. These provisions relate to rights. But the writ of the Registrar of Titles and the Referee of Titles runs not to substantive rights but I would suggest to procedure. Take section 106, it relieves the Registrar of Titles of making the enquiries set out in the provision once a transfer is produced. But the requirement of a transfer is mandatory in the circumstances set out in section 88. Neither section 108 nor section 114 of the Act impose any function or duty on the Registrar of Titles however. The former, as the marginal note indicates, speaks to the effect of registration of a transfer while the latter speaks to the rights of mortgagees pending discharge or transfer.

Both Mr. Muirhead, Q.C. and Mr. Goffe, Q.C. referred us to section 174 of the Act. Mr. Muirhead considered this provision as subordinate and therefore it should yield to what he described as provisions concerning rights. Mr. Goffe said that this provision was helpful as it set out the duty payable in circumstances where a direction, that is a direction to issue title in the purchaser's name, operates as a transfer. In my view, Mr. Goffe is perfectly correct.

Section 174 prescribes the stamp duty where the applicant directs a certificate of title to issue in the name of another person. The application to bring land under the operation of the Act (and it is to be remembered that the same application is used for re-registering land) is that prescribed in the First Schedule which is that used by the respondents.

"174. - (1) On every application to bring land under the operation of this Act or to re-register land with a plan wherein or in respect of which the applicant shall direct the certificate of title to issue in the name of any other person there shall be chargeable and paid the following stamp duty -

- (a) where the direction operates or is intended to operate as a transfer upon the sale of the land for valuable consideration one third of the ad valorem duty payable under the heading 'Conveyances' in the Schedule to the Stamp Duty Act;
- (b) where the direction operates or is intended to operate as a transfer of the land whether voluntarily or gratuitously or for good or valuable consideration other than a bona fide pecuniary consideration upon a sale one-third of the ad valorem duty payable under the heading 'Settlements' in the Schedule to the Stamp Duty Act: ..."

[Emphasis supplied]

If the Act is read as a whole, then it is clear that a direction for the certificate of title to be issued in the purchaser's name, can operate as a transfer. If that be right, then a transfer cannot be insisted upon by the Registrar or Referee as being a mandatory requirement of the Act. The conclusion is inevitable not only that the direction allowed by the proviso to section 28 of the Act amounts to a transfer but also that the legal rights created by sections 106, 108 and 114 are likewise applicable where such a direction is given.

In my judgment, Harrison J, came to the correct decision and for the right reasons. The requisition raised by the Referee of Titles is for the reasons I have given, misconceived. A transfer is not necessary: a direction in the terms stated in the present application to the Registrar is the correct procedure. I would accordingly dismiss the appeal.

The order made by Harrison J. must be varied to give effect to the provisions of section 33 and section 54(3) of the Act so that provisional approval be given to Gibraltar Trust Ltd. Save for that variation, it is affirmed in other respects. There will be no order as to costs.

DOWNER, J.A.

Adela International Financing Company S.A. (Adela) is the registered mortgagee of two parcels of land the size of which amounts to 473 acres. The registered title pursuant to section 30 (b) of the Registration of Titles Act (The Act) is by metes and bounds and Adela now seeks to secure a registered title by plat or diagram in accordance with section 30 (a) of The Act. This type of application is classified by section 54 of The Act as Re-registration of Registered Land by Plan and section 54 (1) states:

"54.—(1) Any person entitled to sell land, which shall have been registered otherwise than by plat or diagram, may apply to have such land registered by plat or diagram."

Section 54 (2) is a legislative reference to the procedure laid down in sections 24 to 42 for bringing land under the operation of The Act. It reads:

"(2) An application under this section shall in all respects be treated and dealt with as if it were an original application to register land. The duplicate certificate of title shall accompany the application, and the same shall be retained and cancelled by the Registrar, and the original certificate of title shall also be cancelled by the Registrar, before the issue of a new certificate."

It is also clear that initially, the Referee is empowered to grant provisional approval and this is provided for as follows in section 54 (3). This is the provision:

" The Referee, when communicating any provisional approval of the registration of such title to the Registrar, shall, besides giving such directions as are required in the case of original applications, direct the Registrar to cause notification of the application to be served on all persons other than the applicant who appear by the certificate of title to have any interest in the land."

This subsection is to be understood in conjunction with section 31 which expressly provides for provisional approval in the first instance.

In this case, the Referee of Titles has refused to grant registration as requested, and it is necessary to set out the reasons for his refusal in order to understand the nature of the dispute between the respondent Adela and the appellants who are the Registrar and the Referee. The refusal reads as follows:

" GROUND UPON WHICH DIRECTION GIVEN

The application by the Applicants as Mortgagees to transfer the land to a purchaser for value is governed by and subject to the provisions of Section 106 of the Act.

My direction dated November 2, 1990 emphasised this, supporting and reiterating a previous direction to the same effect given on May 25, 1990.

sgd/ CLIFTON NEITA
Referee of Titles.

This refusal under the hand of the Referee, was a requirement of section 156 of The Act and Smith, J., in the Supreme Court granted a summons to Adela to compel the Registrar and the Referee as the case may be, to substantiate the grounds of their refusal. Smith, J., permitted Adela to seek an order that:

- "1. The Second-named Defendant withdraw his directions dated May 25 and November 2, 1990 and approve the Applicant's application dated August 22, 1989.
2. The First-named Defendant issue a new title by diagram in the name of Gibraltar Trust Limited in respect of the lands now comprised in Certificate of Title registered at Volume 277 Folio 52.
3. That there be such further relief as the Court may deem appropriate."

It should be noted that, even if Adela's contention is correct, its entitlement pursuant to section 31 of The Act would be to ask the Registrar to submit deeds, documents and other evidence to the

Referee so that "he shall provisionally approve the registration of title of the applicant or his nominee as an absolute title to the land described or identified in the application." Section 31 also has provisions for provisional approval for a qualified title.

Sections 24 to 42 of The Act apart from laying down the procedure to be followed by Adela, also set out the duties of the Registrar and the Referee attendant on an application. In this regard section 28 is of special importance as it states the requirement for a qualified applicant. The relevant part states:

"28. Any of the following persons may, by an application addressed to the Registrar, in the form in the First Schedule, apply to have land brought under the operation of this Act, that is to say—

...

(iii) persons who have the power of appointing or disposing of the fee simple:

Provided that in the event of such land being brought under the operation of this Act such application shall be deemed both at law and in equity to be and to have been an exercise of such power."

Then the first proviso to the section states in part:

" Provided always that a mortgagor shall not be entitled to make such application unless the mortgagee shall consent thereto, nor a mortgagee unless for the purpose of the exercise of his power of sale, and unless the certificate of title shall be directed to issue in the purchaser's name,..."

Clause 8 of the application which must follow the statutory form in the First Schedule to The Act reads:

"8. AND in the exercise of our power of sale under Mortgage No. 264088, WE DIRECT the Certificate of Title to be issued in the name of GIBRALTAR TRUST LIMITED, a Provident Society registered under the Industrial and Provident Societies Act and having its registered office at 20 Hope Road, Kingston in the Parish of Saint Andrew."

The second proviso reads:

" Provided also, that the attorney of any corporation howsoever and wheresoever incorporated, whether already constituted or hereafter to be constituted, appointed under a seal purporting to be the common seal of the corporation, may make such application for or on behalf of the corporation of which he is the attorney, and may make the requisite declaration to the best of his knowledge, information and belief, and may subscribe the application in his own name."

The subscription of Barbara Ann Alexander, duly appointed attorney under a power of attorney suggests that there was also compliance with this provision. To understand the mechanics of registration, it is necessary to refer to section 29. It states in part:

"29. Every such application shall be accompanied by the deeds and documents or other evidence that the applicant relies on in support of his title, and by an affidavit containing such particulars as may be prescribed, and by the fees set forth in the Eighteenth schedule as payable on making application under this Act, and by a certificate from the proper officer that all quit rents and property tax affecting the land have been paid up to the date of the application, and by a receipt or receipts from the proper officer showing that all succession duties that have become payable"...

When the Eighteenth Schedule is referred to, it sets out the fees due on making application for re-registration by plan. The schedule to the application in conformity with the First Schedule to The Act reads:

- "1. Duplicate Certificate of Title registered at Volume 277 Folio 52 of the Register Book in the Office of Titles.
2. Plan of De La Vega Heights bearing Survey Department Examination Number 203056 prepared by Richard O. Carnegie, Commissioned Land Surveyor.
3. Certificate of Payment of Taxes.

Quite apart from those fees, there are revenue implications expressly provided for in section 173 to 177 of The Act. The relevant sections are as follows:

"173.--(1) Subject to any order made under subsection (2) the appropriate fees specified in the Eighteenth Schedule to this Act shall be paid to the Registrar.

(2) The Minister may by order amend, vary or add to the Eighteenth Schedule."

Then section 174 (1) states:

"174.--(1) On every application to bring land under the operation of this Act or to re-register land with a plan wherein or in respect of which the applicant shall direct the certificate of title to issue in the name of any other person there shall be chargeable and paid the following stamp duty--

(a) where the direction operates or is intended to operate as a transfer upon the sale of the land for valuable consideration one third of the ad valorem duty payable under the heading 'Conveyances' in the Schedule to the Stamp Duty Act;"

implicit in this section is a reference to sections 24 and 54 which deals with applicants under The Act and the re-registration of registered land by plan.

It is now important to note that section 49 of The Act specifically makes provision in an instance where a purchaser requires a registered title. The material section states:

"49. When any contract shall have been made for the sale and purchase of any land, then unless the person agreeing to sell such land shall have stipulated to the contrary, it shall be lawful for the purchaser at any time before the completion of the purchase, to require that the vendor shall instead of making a conveyance of such land, cause him to be registered as proprietor of the land, the subject of the contract, under the provisions of this Act, with an absolute title, in cases where the land has been agreed to be sold without any special conditions as to title, or with a title subject to such qualifications as may be in accord with

"the conditions under which the land was agreed to be sold:"...

Then the provisos read:

" Provided that nothing herein contained shall deprive any vendor of any right which may arise out of such contract for sale by reason of any rule of law and equity:

Provided also that the incidence of costs as provided for under the Conveyancing Act, shall be in no way affected."

Be it noted that the reduction in duty specified in section 174 (1) (a) of The Act where the direction operates as a transfer, entitles the vendor to avoid making a conveyance. So the statutory transfer required by section 106 is not necessary. This is the clue to this case.

As for the revenue, the Registrar was rightly concerned with ensuring that the proper duty was paid as section 174 (2) reads:

" (2) On every such application it shall be the duty of the Registrar to enquire into the nature of the transaction in order to ascertain the proper duty (if any) payable in respect thereof, and he may require evidence to be produced to his satisfaction for this purpose; and the Registrar shall not submit any such application to a Referee of Titles unless and until the duty hereby imposed shall have been paid and duly impressed on such application."

And section 176 provides thus:

"176. The Registrar is hereby required to see that every transfer of land, or of an estate or interest therein, excepting only as is hereby excepted, is impressed with a stamp denoting payment of the duty imposed by the Stamp Duty Act."

This section ties in with reduction in stamp duty noted in section 174 (1) (a). Further, section 177 imposes heavy penalties for any fraudulent attempt to deprive the Revenue of its due.

Did the Referee err in requiring Adela
to comply with section 106 of The Act?

Because of the procedural and revenue implications in issue, it is appropriate to advert to the submissions made to support the Referee's decision. In the Referee's direction, required by section 156, adverted to previously, the Referee made reference to previous directions of May 25 and November 2, 1990. It is pertinent to set out this initial decision. It states:

"Registrar of Titles:

Application No. 92885
pt. Palmetto Cottage, St. Catherine

Papers returned herewith.

The application is to re-register by Plan land already under the Act with a direction for title to be issued in the name of a nominee.

The Application is misconceived. The Applicants are mortgagees purporting to sell under power of sale contained in a registered mortgage. The procedure to be followed is laid down by section 106 of the Act which makes the production of a transfer obligatory."

Sections 103 to 125 of The Act make provision for mortgages and charges. After stipulating the effect of registering a mortgage in section 105, section 106 provides for power of sale in case of default. It reads:

"106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made

"or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

The issue joined herein is whether in a re-registration of registered land by plan, where the mortgagee qualifies to exercise a power of sale and directs a transfer to the purchaser pursuant to the proviso to section 28, he must produce a transfer in compliance with section 106. If this statutory transfer is mandatory as the Referee insists, then the transfer must be in the form provided by section 88 and set out in Form A of the Fourth Schedule.

This is the substance of Mr. Muirhead's submissions. That was also the basis of the Referee's decision which can be seen from his reasons of April 8, 1990. It reads:

"Registrar of Titles:

Application No. 92885
pt. Palmetto Cottage, St. Elizabeth

Papers returned herewith.

1. Section 88 of the Act clearly prescribes the manner in which the proprietor of land already under the Act may transfer the same, namely in one of the forms set out in the Fourth Schedule.

The Direction Clause of the application should therefore be deleted to enable title to be issued in the name of the applicant after which a Transfer to the nominee can be effected in the prescribed manner."

Section 54 (2) suggests that once the land is re-registered according to plan, then the duplicate certificate accompanying the application must be cancelled before the issue of a new certificate. Moreover, section 174 recognizes that because of section 28 this is a legitimate means of transfer as it speaks of where direction operates,

or intended to operate as a transfer of the land for valuable consideration, then the duty payable is 1/3 of the ad valorem duty. Section 88 requires a transfer in the statutory form if the mortgagee wishes to transfer his interest. It is pertinent to set out the material part of the section. It reads:

"88. The proprietor of land, or of a lease, mortgage or charge, or of any estate, right or interest, therein respectively, may transfer the same, by transfer in one of the Forms A, B or C in the Fourth Schedule hereto;"

Equally, section 106 stipulates for a statutory transfer for a second and subsequent exercise of a power of sale. But the statutory transfer is not applicable in this instance where there is an initial registration or a re-registration by plan when a mortgagee as Adela exercises a power of sale and directs that the purchaser's name be put on the registered title.

This was Mr. Goffe's submission, and he supported it by relying on a lucid and economical statement of principles by Harrison, J., in the Court below. The learned judge, after referring to the direction in the first proviso to section 28 of The Act, said:

" For this direction to be seen to operate as a transfer, means that the direction is elevated to be construed as a transfer obviating the requirement of such a formal document of transfer whenever the mortgagee is exercising his powers of sale and in the same transaction making an application under section 54."

Bingham, J., in Re Application in the Estate of Louise Dunbar an earlier and helpful unreported Supreme Court judgment Suit No. E202/83 made the same point where the applicant was qualified pursuant to section 28 of The Act. He cited section 37 of The Act, the proviso of which reads:

" Where an applicant has directed a certificate of title to be issued in the name of a nominee the Registrar shall at the direction of the applicant and with the consent of the nominee issue the certificate of title to such person as shall be named in such direction and consent which direction and consent shall be liable to the stamp duties provided by section 174."

Then the learned judge said at p. 5:

"The word transfer is not defined in the Act. The Act, however, defines 'instrument' to include 'a conveyance assignment, transfer, lease, mortgage charge and also the creation of an easement.'

A transfer is used to describe 'the instrument by which one person conveys to another an estate or interest in land.' Great West Permanent Loa Co. vs. Friesen [1925] A.C. 200 at 220, 221."

Further on p. 6 the learned judge recognised the force of the direction clause to transfer an estate to a nominee in an instance of first registration. The relevant passage reads:

" On the basis of the documents lodged therefore and the stamp duty paid the direction clause had of necessity to be limited to one directing title to be issued in the name of the applicant Louise Dunbar or her nominee and in my opinion the ruling of the learned Referee of Titles was therefore correct."

The reasons of the Referee in the instant case suggest that, save for the absence of a statutory transfer, he was satisfied in all other respects with the application. If this is correct, then the applicant is entitled to a provisional approval pursuant to sections 33 and 54 (3) of The Act, so that the Registrar will cause notification by advertisement in the Gazette or an appropriate newspaper. This would mean that the order of Harrison, J., ought to be varied. The learned judge had ordered the issue of a new title to Gibraltar Trust Ltd. without specifying that provisional approval be given in the first instance. I agree with the order proposed by Carey, P. (Acting).

GORDON, J.A.

The respondent in the purported exercise of his power of sale as a mortgagee sought to have title in the mortgaged premises vested in the purchaser. The premises had been registered under the provisions of the Registration of Titles Act, (the Act) by "metes and bounds" and the respondent in its application for registration of the said premises by plan directed the Registrar of Titles, to issue the title in the name of its nominee Gibraltar Trust Limited.

The Referee of Titles, to whom the documents were submitted by the Registrar of Titles as is required by the Act, directed that there should be filed by the respondent a transfer in accordance with the provisions of section 106 of the Act. This direction was resisted and the respondent prayed in aid section 156 of the Act. Harrison, J heard the originating summons and granted the relief sought by setting aside the directions of the Referee. The appellants now seek the restoration of the Referee's directions.

The Act which came into effect on 1st October 1889 provides the machinery for a comprehensive system of land registration and the issuing of Titles. It provides for registering lands by (a) metes and bounds and (b) by plat or diagram (s. 30). The provision for registration by metes and bounds recognizes that heretofore that was the method employed in describing and identifying land and most owners could indicate their boundaries by reference to physical landmarks. Registration by plat or diagram was modern and advanced with modern technology in land surveying.

Sections 24 to 42 outline the procedure whereby land is brought under the operation of the Act. Persons who may make application to have land brought under the operation of the Act are listed under section 28 of the Act. A mortgagee falls under the provisions of section 28 (iii) and the proviso to the section.

"28. Any of the following persons may, by an application addressed to the Registrar, in the form in the First Schedule, apply to have land brought under the operation of this Act, that is to say -

...

(iii) persons who have the power of appointing or disposing of the fee simple:
Provided that in the event of such land being brought under the operation of this Act such application shall be deemed both at law and in equity to be and to have been an exercise of such power;

...

Provided always that a mortgagor shall not be entitled to make such application unless the mortgagee shall consent thereto, nor a mortgagee unless for the purpose of the exercise of his power of sale, and unless the certificate of title shall be directed to issue in the purchaser's name, ...". [Emphasis added]

Section 54 makes provision for registration by plat or diagram of land formerly registered by metes and bounds. By section 88 "The proprietor of land, or of a lease, mortgage or charge, or of any estate right or interest, therein respectively, may transfer the same by transfer in one of the forms A, B, or C in the fourth schedule hereto." It was submitted by the appellant that may in the context used above means must as the forms provided in the schedule must be used to transfer land registered under the Act.

The plaintiff/respondent exercised the power of sale given him by section 106 of the Act which inter alia authorises the mortgagee "may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale." The sale being a sale of registered land, the appellants urged that may in this section also means must and the transfer adverted to is that prescribed by section 88. Thus in a sale under section 106 the provision of section 88 must be adhered to and the prescribed form of transfer executed by the mortgagee.

The provisions of section 86 show clearly that a mortgagee can only transfer under this section the interest he has in the land, namely the mortgage. The fee simple can only be transferred as provided for in section 106. Under this latter section the mortgagee is obliged to transfer the mortgaged property with the existing title by using Form A in the fourth schedule.

By section 174 direction is given for the payment of stamp duty on first registration or on re-registration by plan. The scheme of the Act is the encouragement of land registration and this is borne out by the concessions in duty payment provided by this section. Although this section primarily provides for concessionary stamp duty payment it serves to recognize the provisions of sections 24 to 42 which deal with first registration and 54 which deals with re-registration by plan. The section states:

"174. (1) On every application to bring land under the operation of this Act or to re-register land with a plan wherein or in respect of which the applicant shall direct the certificate of title to issue in the name of any other person there shall be chargeable and paid the following stamp duty -

- (a) where the direction operates or is intended to operate as a transfer upon the sale of the land for valuable consideration one third of the ad valorem duty payable under the heading 'Conveyances' in the Schedule to the Stamp Duty Act'."
[Emphasis supplied]

The directions of the Referee of titles which were challenged by the respondents are as follows:

"The application is to re-register by Plan land already under the Act with a direction for title to be issued in the name of a nominee. The application is misconceived. The Applicants are mortgagees purporting to sell under power of

"Sale contained in a registered mortgage. The procedure to be followed is laid down by section 106 of the Act which makes the production of a Transfer obligatory."

Land registered by plan is preferred to land registered by metes and bounds. Under section 106 the mortgagee in the exercise of his power of sale " may sell the land mortgaged ... subject to such terms and conditions as may be deemed fit." The respondent as mortgagee was required to provide the Registrar of Titles with "deeds and documents or other evidence" that he relied on in proof of his right as required by section 29, 54 and 106. The Registrar accepted this proof and submitted them to the Referee for his directions as is required by section 31 of the Act. It must be taken as given that all necessary proof was provided to the Referee save the transfer which he demanded. It must also be assumed that the sale by the mortgagee was subject to the term that the purchaser be provided with a title registered by plan.

In order to obtain this registration the respondent invoked section 54 of the Act which reads:

"54. (1) Any person entitled to sell land, which shall have been registered otherwise than by plat or diagram, may apply to have such land registered by plat or diagram.

(2) An application under this section shall in all respects be treated and dealt with as if it were an original application to register land. The duplicate certificate of title shall accompany the application, and the same shall be retained and cancelled by the Registrar, and the original certificate of title shall also be cancelled by the Registrar, before the issue of a new certificate." [Emphasis added]

(3) The Referee, when communicating any provisional approval of the registration of such title to the Registrar, shall, besides giving such directions as are required in the case of original applications, direct the Registrar to cause notification of the

"application to be served on all persons other than the applicant who appear by the certificate of title to have any interest in the land."

Section 54 (1) sanctions the application. Section 54 (2) declares that the application must be treated in all respects as if it were an original application and requires the cancellation of the former registration before the new certificate registering the land by plan is issued. Therefore, there is a period of time, however brief, when there is no registered title in existence for that land. With what then are we left? There is no title that the mortgagee can transfer but there is an application for a new title with a direction that it be issued in the name of the purchaser from the mortgagee of the former title. Section 54 (3) declares the procedure to be followed by the Referee.

The proviso to section 28 requires that the mortgagee in applying for a title in the exercise of his power of sale must direct that the title be issued in the name of the purchaser. Section 54 provides that an application thereunder shall be dealt with as if it were an original application to register land and section 174 recognizes the validity of both section 28 and section 54. Section 174 accepts that a direction to issue title in the name of another can operate as a transfer on sale for valuable consideration.

I find that in this case the direction of the respondent was intended to and does operate as a transfer.

I agree with the learned trial judge and hold that the Act must be construed as a whole. The provisions of section 54 make the execution of a transfer under section 100 in the form provided by section 83 unnecessary and I hold that the Referee of Titles fell into error in his directions.

I am persuaded to agree with Mr. Muirhead's submissions that in context of sections 88 and 106 when land, lease, mortgage, any estate right or interest therein registered under the Act is being transferred may means must and the forms provided in the schedule must be used. However, for the reasons given above these forms are inapplicable in this case.

I would dismiss the appeal and concur in the order proposed by Carey, P. (Ag.)