occasion. When the communication complained of was made Mr. Ronald had become the accuser, charging Stocks with having borne false witness against him. That was the charge before the committee. It was, in my opinion, clearly open to the jury to come to the conclusion that the respondent, in writing instead of attending the meeting at which his presence was requested, and in stating fully, in fairness to Stocks, what it was he really said to him, had used the privileged occasion reasonably. For these reasons I am of opinion that the finding of the jury as to malice cannot be disturbed. That being so, the verdict of the jury in the defendant's favour was amply justified. I agree, therefore, that the judgment of the Supreme Court was right, and that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. Hopkins.*

Solicitors, for the respondent, *Davies & Campbell.*

B. L.

Appr Thomson v Stamp Duties (NSW), Commissioner of (1929) 42 CLR 139

[HIGH COURT OF AUSTRALIA.]

ROSENTHAL AND ANOTHER . . . APPELLANTS; PLAINTIFFS,

AND

ROSENTHAL AND ANOTHER . . . RESPONDENTS. DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Settlement, duty on—"Trusts or dispositions to take effect after" the death of the settlor—Trust to come into operation on death of survivor of settlor or his wife—Death of the settlor before his wife—Administration and Probate Act 1890 (*Vict.*) (*No.* 1060), *sec.* 112—*Administration and Probate Act* 1903 (*Vict.*) (*No.*

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1815), *sec.* 8—*Costs—Unsuccessful appeal to High Court by trustee—Costs out of trust estate—Special circumstances.*

Sec. 112 of the *Administration and Probate Act* 1890 provides that "every settlement of any property made . . . . by any person containing trusts or dispositions to take effect after his death, shall upon the death of the settlor be registered within the prescribed time . . . . and no such trusts or dispositions shall be valid unless such settlement be so registered." The section also requires that the trustees of the settlement shall before registration pay the duty fixed by the Statute.

Held, that a settlement containing trusts which are directed to come into operation upon the death of the settlor and his wife is a settlement containing trusts to take effect after the settlor's death, notwithstanding that the settlor dies before his wife, and is liable to duty accordingly.

Whiting v. *McGinnis*, (1909) V.L.R., 250; 30 A.L.T., 207, approved.

Held, further (*Higgins* J. dissenting), that under the circumstances of this case the trustees who unsuccessfully appealed from the decision of the Supreme Court ought to be allowed their costs of the appeal out of the trust estate.

Decision of the Supreme Court: *Rosenthal* v. *Rosenthal*, 32 A.L.T., 46, affirmed.

APPEAL from the Supreme Court of Victoria.

On 15th May 1885 David Rosenthal by an indenture of settlement covenanted that he would transfer to trustees certain real estate to hold upon certain trusts which may be shortly stated as follows: Upon trust upon the marriage of each of his two daughters, Rosie and May, to pay to the trustees of the marriage settlements of each of them an annual sum of £240 to be applied according to the trusts of such settlement, and subject to such trust to permit the settlor's widow, Julia Rosenthal, to receive the rents and profits of the settled property for her life, and from and after her decease to permit the settlor to receive such rents and profits during his life, if he should survive his wife, "and from and after the decease of the longest liver of" the settlor and his wife upon trust to pay two annuities of £240 each out of the rents and profits to the two daughters of the settlor before mentioned in the event of either or both of them not having married, and subject thereto upon trust to divide and apply the rents and profits equally among the children of the

testator and his wife. The trustees of the settlement were given power to sell the trust property either during the lifetime of the settlor and his wife or the survivor of them or after the death of the survivor of them, in the former event with the consent in writing of the settlor and his wife or of the survivor of them. In either event the trustees were directed to set aside out of the proceeds of sale a sum of £4,000 for each of the two daughters Rosie and May, to be paid to the trustees of her marriage settlement in the event of her marriage, and to be invested for her benefit if she did not marry. In the event of a sale during the lifetime of the settlor and his wife or the survivor of them, the trustees were directed to hold the proceeds of the sale, subject to the trusts in respect of the two sums of £4,000, upon similar trusts to those respecting the trust property should it be unconverted, and in the event of a sale after the death of the survivor of the settlor and his wife, the trustees were directed to divide the surplus of the proceeds of sale among the children of the settlor and his wife share and share alike.

The property the subject of the settlement was duly transferred to the trustees on 19th May 1885, and with the consent of the settlor and his wife was sold during the lifetime of both of them. On 18th August 1885 the settlor's daughter Rosie was married to one Aubrey Davis, and the sum of £4,000 was paid to the trustees of her marriage settlement. On 29th October 1889 the daughter May was married to one Fernand Levic and the sum of £4,000 was paid to the trustees of her marriage settlement.

The settlor died on 7th March 1910 leaving him surviving his widow, his four daughters, Essie Joske, May Levic, Rosie Davis and Ethel Phillips, and his son John Ernest David Rosenthal. The trustees of the indenture of settlement were then the settlor's widow and Samuel Gabriel Pirani (a member of the firm of solicitors acting for the trustees).

The trustees took out an originating summons, to which J. E. D. Rosenthal, on behalf of himself and all other persons beneficially entitled under the trusts of the settlement, and Thomas Prout Webb, the Master-in-Equity of the Supreme Court of Victoria, were made defendants, and by which the following questions were asked :—

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"(1) Is the said indenture of settlement a settlement of property made by a person containing trusts or dispositions to take effect after his death within the meaning of sec. 112 of the *Administration and Probate Act* 1890?

"(2) Having regard to the facts . . . . is any and what duty payable under the said section in respect of the said indenture and the property or any and what portion thereof now or at any and what time heretofore respectively comprised therein?

"(3) If the second question be answered in the affirmative, how and by what person or persons should the duty or any and what part or parts thereof be paid or borne?"

The summons was heard by *Hodges* J.: *Rosenthal* v. *Rosenthal* (1), who answered the questions as follows:—

"(1) The above mentioned indenture of settlement is a settlement of property made by a person containing trusts or dispositions to take effect after his death within sec. 112 of the *Administration and Probate Act* 1890.

"(2) Duty is payable on all the property which was subject to the provisions of the settlement at the date of the death of the settlor.

"(3) The duty should be paid by the trustees out of the property which was subject to the provisions of the settlement at date of the death of the settlor."

The plaintiffs now appealed to the High Court from this decision so far as regards the answer given to the first question.

Mitchell K.C. (with him *Braham*), for the appellants. The decision of the Full Court in *Whiting* v. *McGinnis* (2), on the authority of which case *Hodges* J. based his decision in this case, was wrong. In sec. 112 of the *Administration and Probate Act* 1890, the word "after" means "immediately upon," and the meaning of the word "settlement" in sec. 8 of the *Administration and Probate Act* 1903 is limited by the words to "take effect upon the death of such person" (the settlor).

[GRIFFITH C.J. referred to *Davidson* v. *Armytage* (3) as to the meaning of "settlement."]

(1) 32 A.L.T., 46.

(2) (1909) V.L.R., 250; 30 A.L.T., 207.

(3) 4 C.L.R., 205.

The intention of the *Administration and Probate Act* 1890 is to tax property of which the settlor keeps the benefit during his lifetime. That is shown clearly in sec. 115. The time at which the question whether the document is a settlement has to be determined is the death of the settlor. See *The King* v. *Austin* (1). There are no trusts or dispositions here which depend upon the death of the settlor. In order to bring a document within sec. 112 the death of the settlor must be the event which brings about the vesting of an estate in interest or in possession. The settlor having predeceased his wife, his death has not accelerated the interests of the remaindermen.

Schutt, for the respondent Rosenthal. The language of sec. 112 of the Act of 1890 and of sec. 8 of the Amending Act of 1903 is so doubtful and ambiguous that the Court should not hold that this instrument is brought within them. It is impossible to read the two sections together grammatically, the words "after" and "upon" are used indiscriminately, and looking at the context, they both mean "at."

Davis and *Sanderson*, for the respondent the Master in Equity. This settlement falls within the plain meaning of sec. 112 of the Act of 1890. The legislature has indicated the meaning of the word "after" by using immediately afterwards the word "upon." The object of the section was to impose a succession duty upon the interest which a person might take after the death of a settlor, where the alienation was not for value. A tax is imposed on every voluntary disposition which takes the place of a will. The instrument would clearly have been taxable if the settlor had survived his wife and there is no logical reason why the fact that he predeceased her should make any difference. If sec. 8 of the Act of 1903 applies it has an enlarging and not a restrictive effect. The intention of that section was to clear away any doubt that might arise as to the meaning of the word "after" in sec. 112. Sec. 115 of the Act of 1890 is aimed at fraudulent dealings and has no analogy to sec. 112. There being no ambiguity, the Acts

(1) 29 V.L.R., 82; 25 A.L.T., 7.

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are to be construed like any other Act: *Heward* v. *The King* (1); *Affleck* v. *The King* (2).

Braham, in reply.

Cur. adv. vult.

The following judgments were read :—

Sept. 16.

GRIFFITH C.J. This case affords a singular instance of the manner in which a simple question may be lost sight of in a haze created by what, with all respect, I regard as wasted ingenuity. The case is in form an appeal from *Hodges* J., but is in substance an appeal from the decision of the Full Court in *Whiting* v. *McGinnis* (3). The question to be determined is the meaning of the words, "Every settlement of any property made on or after 16th December 1870 by any person containing trusts or dispositions to take effect after his death" contained in sec. 112 of the *Administration and Probate Act* 1890 (No. 1060). Part V. of that Act deals with duties on deceased persons' estates. Secs. 98 to 111 deal with the assessment and payment of duty in case of probate and administration. Sec. 112 provides that every settlement (&c. as above quoted) "shall upon the death of the settlor be registered within the prescribed time . . . and no such trusts or dispositions shall be valid unless such settlement be so registered." In the section as originally passed there followed an exception of settlements in consideration of the settlor's marriage, or in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or on or for the wife or children of the settlor of property which had accrued to the settlor after marriage in right of his wife, but this exception was repealed by the *Administration and Probate Act* 1903 (No. 1815).

The general intention of the legislature evidently was that property disposed of by way of voluntary assignment taking effect wholly or in part after the death of the settlor should be placed on the same footing with regard to taxation as property disposed of by will or passing on intestacy. This is shown both by the place of sec. 112 in the Act and by the exception to which

(1) 3 C.L.R., 117, at p. 127.
(2) 3 C.L.R., 608, at p. 622.
(3) (1909) V.L.R., 250 ; 30 A.L.T., 207.

I have referred. The trusts of the settlement in the present case were for the wife of the settlor for her life, with remainder to the settlor for his life if he should survive her, and after the death of the longest liver of them for their children. The settlor had, therefore, a life interest antecedent to that of his children. He predeceased his wife, who is still living. The question is whether this settlement comes within the words of sec. 112.

In my opinion the words "Every settlement . . . made . . . by any person containing trusts or dispositions to take effect after his death" are plain and unambiguous. The word "after" means after, that is, at a period subsequent to the event mentioned. The death of the settlor must, of course, be made by the settlement a condition precedent to the taking effect of the trusts or dispositions. The question whether they are to take effect after his death depends upon the construction of the instrument itself, which cannot be affected by any subsequent event, although the actual operation of the instrument may be so affected. This being premised, the question in each case is whether at the death of the settlor any trust or disposition contained in the settlement which has not yet taken effect is still capable of taking effect. If so, the settlement must be registered, but if not, there is no need to register it.

It is suggested, however, that the word "after" should be read "at" or "upon" in the sense of *eo instanti*, and if I rightly understand the judgments, this view commended itself to *Madden* C.J., if not to *àBeckett* J., in *Whiting* v. *McGinnis* (1). No doubt there are many cases in which the words "after" and "upon" may be used interchangeably. For instance, in the very next sentence of sec. 112, the word "upon" is used in the sense of "soon after." But, although they may in some cases be both appropriate to describe the same event, they do not mean the same thing. I cannot find any grounds for reading "after" in sec. 112 as having any other meaning than its primary one of subsequent in point of time.

It is therefore unnecessary to consider the effect of sec. 8 of Act No. 1815. The intention of that section was to extend, not to limit, the ambit of the term "settlement," and, possibly, if the

(1) (1909) V.L.R., 250; 30 A.L.T., 207.

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settlement in question were not already included, it would have been sufficient to cover it.

The whole matter may be summed up in a few words. When Rosenthal, the settlor, died his life interest came to an end. The trusts and dispositions in favour of his children could not take effect until it had come to an end. They were therefore trusts and dispositions taking effect after his death, and the case is within the plain words of sec. 112.

ISAACS J. Sec. 112 of the *Administration and Probate Act* 1890 enacts certain provisions with respect to settlements, made after 16th December 1870, which contain trusts or dispositions to take effect after death. Those provisions in substance are—(1) that the settlements must be registered "upon," which there means "after" the death of the settlor, and within the stated time; (2) that unless so registered the trusts are to be invalid; (3) that before registration a certain statement is to be filed; (4) that before registration duty must be paid; (5) if not registered as prescribed the duty may be assessed; (6) if the duty is not paid the Court may order a sufficient part of the property to be sold to defray the duty and expenses. Those are the purposes of Part V. of the Act as to settlements. In 1903 the amending Act No. 1815 was passed, of which sec. 8 declared that for "the purposes" of that Act, and of Part V. of the Principal Act, "settlement" should include certain instruments therein described. Sec. 9 repealed part of the earlier sec. 112, and substituted a new third paragraph. Sec. 10 allowed a deduction where duty was paid on a settlement under the *Stamps Act*.

The language of sec. 8 of the later Statute is not easy to blend harmoniously with the earlier legislation, and in itself is not free from grammatical faults. But it is not I think difficult to collect its real meaning. While on the one hand the Crown fails if the case is not brought within the words of the Statute interpreted according to their natural meaning, yet the Court is not to be deterred by any crudeness or infelicity of expression or by grammatical errors from giving full effect to the intention of Parliament as fairly gathered from the language of the enactment.

Now, the opening words of sec. 8 are very significant. "For

the purposes of this Act or Part V. of the Principal Act"—and then follows what is to be law for those purposes. It is not for one purpose but for all the purposes specified which are relevant to settlements, that is for everything including registration, payment, and execution, and also, under the later Act, deduction. The operative words effect two objects: first, the word "settlement" had not been interpreted in sec. 112, and as its dominant notion, where not artificially defined or controlled by the context, is the creation of a succession of interests—the marriage settlement being the most prominent example—it might easily have been contended that with reference to a taxing Act the strict construction should be applied. By this means great opportunity might have been afforded to steer between wills and settlements properly so called, largely affecting the revenue. No doubt one of the objects of Parliament was to end this uncertainty or else to add to the class of instruments to be regarded as taxable. But this was perfectly achieved by a part of the new enactment. I mean that, if you stop at a certain point in it, you attain fully the mere object of definition. The words I refer to are—"Every conveyance, transfer appointment under power declaration of trust or other document or non-testamentary disposition of property made by any person." And if that had been the only object of the legislature, or, in other words, if its intention had been simply to enlarge the class of documents which should henceforth be within the purposes of the enactments, without altering the conditions, the definition would have ended there. But it did not. It went on to add these words—"containing trusts or dispositions to take effect or which shall or may take effect upon the death of such person." These are new conditions and stand side by side with the old. The description of the documents which are to be embraced within the purposes of the enactments is as perfect and complete in every way as that of the original class mentioned in sec. 112. Reading the words of the two Statutes so as to get their natural construction as applied to the subject matter, it is impossible to insert the whole of the new provision of sec. 8 into sec. 112 as a mere enlarging definition of documents with identical trusts, because that would be

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sacrificing sense and incurring the objections of contradiction and futility.

Welding the new provision to the old, the combined construction I place upon them is this: that by separate enactments two distinct classes of instruments are now declared to be subject to sec. 112—the first is a settlement properly so called containing trusts or dispositions which are necessarily to take effect *after* the settlor's death; and the second is any instrument of the kind described in sec. 8 containing trusts or dispositions to take effect or which shall or *may* take effect *upon* the death of the person making it. Probably the second class would include the first; but the first is not abrogated, and some documents would fall within both. The first is satisfied by a settlement properly so called containing a disposition of property which cannot take effect in the settlor's lifetime, and which in this respect resembles a will. If his death is an essential factor in the effectuation of the disposition, it is quite immaterial whether or not some intervening event or condition must arise or be satisfied. The section says "after his death," not *immediately* after; and not after his death "*per se.*" So long as the gift is so made that it is legally impossible of enjoyment until the settlor's death, it sufficiently approaches the analogy of a testamentary disposition to satisfy both the words and the manifest object of the legislation.

The second is self-evident. If the instrument, though not distributing successive interests, deals with the property so that its enjoyment must in any event, or may in some event, depend upon the fact of the death of the person making it, it is struck by the enactment.

I do not assent to the view that the character of the instrument is determined by the state of facts at the settlor's death. That state of facts may, according to the terms of the instrument, entitle the intended beneficiaries to immediate enjoyment, or to postponed enjoyment, or to no enjoyment at all; but the nature of the instrument must be the same from the moment of its execution.

Events may affect its operation so that the person who might have taken the property under it does not take any interest by virtue of the settlement. In that case the consequence is that

there is nothing to invalidate, that registration is unnecessary, and that the words of the taxing Schedule would not apply to the case. But that is foreign to the point now under consideration, which is as to the character of the instrument itself.

In this case the document falls under both descriptions, and therefore the appeal fails. I would add that, there being no appeal on this question of what portion of the property is subject to the tax, I have formed no opinion upon it.

HIGGINS J. In my opinion the appeal should be dismissed. I see no reason for refusing to give the ordinary meaning to the word "after" in sec. 112 of the *Administration and Probate Act* 1890. Duty is to be paid if the settlement of 15th May 1885 contained "trusts or dispositions to take effect after his death" —the death of the settlor. In this case the children of the settlor are to receive certain rents and profits, but not until after the settlor's death. It is true that the settlor died; that his wife survives; and that the children do not begin to enjoy the rents and profits so long as their mother lives; but there is nothing in the Act prescribing that there is to be no tax unless the enjoyment of the beneficiaries springs up immediately on the settlor's death. On the contrary, the very nature of the enactment, as well as the use of the word "after" instead of "upon," point to the other conclusion. The section occurs in an Act imposing duty on deceased persons' estates; and the object of sec. 112 is obviously to subject to duty benefits conferred by settlement which might fitly have been conferred by will. In the very words following in sec. 112, the registration of the settlement is to take place "*upon the death*"; and in sec. 115, which deals with conveyances made in evasion of the Act, it is provided that "any conveyance . . . to take effect *upon the death* of the person making the same" shall be deemed to have been made with intent to evade the duty. I think that it is not a violent presumption to adopt that, where there is a change of prepositions in the same phrase in the same Act, a change of meaning is intended. The reason for the change of language is obvious. A conveyance that is so framed as to take effect immediately on the grantor's death operates exactly as a will, and is in effect an

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Higgins J.

evasion of duty, and must be treated as an evasion. But the case of settlements is different. The trusts and dispositions which take effect before the death ought not, on the scheme of the Act, to make the settlement liable to duty; but all the trusts and dispositions to take effect at any time *after* the death are such as might fitly have been made by will, and render the settlement subject to duty under sec. 112.

Under this view it becomes unnecessary to decide the exact construction of sec. 8 of the Act No. 1815. But it has been argued, and my mind inclines to the view, that, even if the settlement were not liable to duty under sec. 112, it would be liable under sec. 8 of the Act No. 1815. The latter Act extends the area of taxation; and, for the purposes of sec. 112 of the Principal Act, if the settlement contains trusts or dispositions which *may* take effect upon the death, it is subject to duty, although the trusts and dispositions do not necessarily so take effect.

Braham, asked that the same order should be made as to the appellants' costs of the appeal as was made in the Court below, viz., that those costs should be taxed as between solicitor and client, and paid out of the settled property.

Schutt, for the respondent Rosenthal, consented to such an order being made.

GRIFFITH C.J. This is a very exceptional case, and I think the trustees and the beneficiary who appears should have their costs as between solicitor and client out of the property. The trustees should pay the Master-in-Equity his costs and be allowed to recoup themselves for the same out of the property.

ISAACS J. I agree with what the learned Chief Justice has said as to the costs. I think in this case the appeal of the trustees was most reasonable. The position from a legal standpoint was that there was not a well settled definite view taken by the Judges of the Supreme Court. They differed in their reasons. It was a very important matter, and I think the trustees were certainly acting reasonably, and in the interest of their *cestuis que trustent* in appealing.

HIGGINS J. I have to dissent as to the order for costs of the appeal. I do not know how this question, which is not a question of construction of the settlement, and which is not between parties interested under the settlement, comes to be debated on originating summons (see *Rules of the Supreme Court* 1906, Order LV., r. 3; Order LIV. A, r. 1). But even taking the question as having been properly submitted, there is a rule of very long standing that, although trustees are entitled to their costs out of the estate of getting the guidance of the Court in cases of difficulty, they appeal at their own risk, and must take the usual consequences. If this were not the rule, experience shows that estates would very frequently be frittered away in costs. The trustees' right to come to the Court is based on the principle that they ought not to be expected to take any risk as to the law, and are entitled to the Court's protection; and in this case the order of *Hodges* J. gave them unimpeachable protection. In this case, also, there were five children beneficially interested, all over age; and it was for them to appeal if they chose; but they have not appealed or taken any step to qualify themselves to appeal. The trustees selected one of the children as defendant, "on behalf of himself and all other persons" interested, and he, through his counsel, consents to this order. But there is nothing to show why he was selected; and as he has not got an order authorizing him to defend on behalf of the others, he cannot give away their rights in this fashion. Even if he were authorized to defend, it would appear that this does not authorize such a consent: *Rees* v. *Richmond* (1). This beneficiary offers no explanation why he did not appeal himself. In my opinion, the appeal should be dismissed with costs; and when the trustees seek to include the expenses of the appeal in their accounts, it would be for them to justify the inclusion, if the beneficiaries should object. We have no evidence of the facts which may have justified the trustees in appealing.

Appeal dismissed with costs to the Master-in-Equity, to be paid by the appellants, who may recoup themselves out of the

(1) 62 L.T., 427.

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estate. Costs of application and of respondent Rosenthal as between solicitor and client to be paid out of estate.

Solicitors, for the appellants, *Braham & Pirani.*

Solicitor, for the respondent Rosenthal, *C. H. Lucas.*

Solicitor, for the respondent the Master-in-Equity, *Guinness,* Crown Solicitor for Victoria.

B. L.

Foll *Boral Resources (Qld) Pty Ltd v Johnstone Shire Council* [1990] 2 QdR 18

Cons *Boral Resources (Qld) Pty Ltd v Johnstone Shire Council* 69 LGRA 261

Foll *Barnett v Minister for Housing & Aged Care* (1991) 31 FCR 400

Refd to *Kelly v Toowoomba City Council* [1995] QPLR 3

Refd to *Bongers v Byron SC* (1999) 105 LGERA 274

[HIGH COURT OF AUSTRALIA.]

RANDALL . . . . . APPELLANT;

AND

THE COUNCIL OF THE TOWN OF NORTHCOTE . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 26, 27, 30, 31, *June* 1.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

Local Government—Registration of place of amusement—Discretion of Municipal Council—Mandamus—Local Government Act 1903 (*Vict.*) (*No.* 1893), *sec.* 197; *Thirteenth Schedule, Part VI.*

A Municipal Council had adopted Part VI. of the Thirteenth Schedule to the *Local Government Act* 1903 (Vict.) which requires the occupier of any ground in which public amusements are conducted to register the ground each year, imposes a penalty upon the causing or permitting of any public amusement on an unregistered ground, and provides that the Council on the application of the occupier may, if they see fit, cause any ground to be registered and grant a certificate of registration thereof.

Held, that mandamus would lie to compel the Council to exercise their discretion as to granting or refusing an application for registration.

Held, also, that in exercising their discretion the Council might properly take into consideration the facts that the ground sought to be registered