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Present: De Sampayo and Schneider JJ.

HOLLANDIA AND ANGLO-SWISS CONDENSED
MILK CO. *v.* THE NESTLE AND ANGLO-
SWISS CONDENSED MILK CO.

94—D. C. Colombo, 930.

Trade Marks Ordinance, 1888—Passing off—Both marks having the figure of a female—Possibility of deception of ignorant people by traders—Is that ground for refusing registration?

The appellants and respondents were manufacturers of condensed milk. The respondents' trade mark, registered in 1893, was the figure of a maid with a pail on the head and another in the hand, and their condensed milk was known as the "Milkmaid Brand." The appellants sought to register their mark, which consisted of a female figure carrying a bunch of flowers in one hand and a sword in the other enclosed in an oval with five medals above the figure, and the words of guarantee in thick letters across it, and the word, "Hollandia," displayed beneath. The District Judge refused the application, on the ground that the use of a female figure by the appellants, though it may not mislead an intelligent and cautious purchaser who knew English, might deceive an unwary purchaser in Ceylon.

Held, that appellant was entitled to register his mark.

"The appellants' mark is in itself not calculated to deceive, and there is no evidence whatever that the appellants have any design to facilitate the passing-off of their goods as the goods of the respondents."

"The deception is not in the use of the mark, but in passing-off of the goods of one person as those of another by the trader. The remedy in such a case is an action for damages against the trader, and the mere possibility of deception by passing-off is not a good ground for refusing registration of the mark."

THE facts are set out as follows by the District Judge (A. St. V. Jayawardene, Esq.):—

The applicants, by their petition, pray for an order on the Registrar of Trade Marks directing him to proceed with the registration of two marks, which are the subject of applications Nos. 1,790 and 1,773. The applications are made by the Hollandia Anglo-Dutch Milk and Food Co. of Holland, through their local agents, the Holland Ceylon Commercial Co. of Colombo, and are opposed by the Nestle and Anglo-Swiss Condensed Milk Co. of Colombo. The mark in application No. 1,790, which is the subject of proceedings No. 930, consist of a figure of a woman said to be the figure of "Hope," enclosed in an oval with five medals above the figure. The mark in application No. 1,773 also consists of the same figure, similarly enclosed with coat of arms in circles on either side. The opponents are the proprietors of two trade marks already on the register, one of which consists of a figure of a woman—a milkmaid with a pail in one hand and with the other hand supporting another pail on her head (see R 6). The other trade mark No. 60 contains the identical figure, with the addition of a medal on either side of the figure (see R 5 and R 7). Mark No. 61 is registered in respect of condensed milk and No. 60 in respect of sterilized natural milk. The opposition to registration is based on the grounds that the applicants' marks are not distinctive, and have such resemblance to the trade marks of the respondents as to be calculated to deceive. The applicants, of course, deny this, and claim to be entitled to register their marks. It appears that the applicant company is well known in Europe, and a trade mark similar to the ones now in question had been registered in Holland in 1883 and internationally at Berne in 1894. A similar mark has been registered in England in the year 1886 (see A 1 with marks B and A 2 with mark A 1). The respondents themselves registered their mark A 1 in England so far back as the year 1877, and in Ceylon in 1893 (see R 15 and R 9). It appears, however, that the respondents, who had their mark in the register in 1877, did not oppose the registration of the mark of the applicant company in England in 1886. This may be due to various reasons, and to the fact that the applicant company never seriously attempted to sell their condensed milk in England. I may mention that I have found a case of the year 1886, in which the respondent company successfully asserted their right to the exclusive use of their trade mark in respect of condensed milk, and prevented another trader in condensed milk from using a mark very slightly similar to theirs in connection with the same goods (see *The Anglo-Swiss Condensed Milk Co. v. Metcalff*).¹ This registration of the applicants' trade mark in England, however, would not give them any rights or privileges here, and such registration might, as Mr. Hayley contended, negative any suggestion of *malá fides* on their part. According to the evidence on record, the respondents have been selling condensed milk with the "Milkmaid Brand" very largely in this country for many years, and their milk has acquired a reputation for itself in the local markets. They seem to be very jealously guarding their trade mark in Ceylon, evidently appreciating the truth of the saying of a learned English Judge "that the very life of a trade mark depends on the promptitude with which it is vindicated," and they have resisted every attempt to sell condensed milk with a mark in any way resembling their own. According to the witness Alliar, he applied to register a mark of a woman holding a basket of flowers on her head called "The

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Flowermaid Brand" in respect of condensed milk, but withdrew his application owing to the opposition of the respondents (see R 2). In 1920 the present applicants placed on the local market, for the first time, condensed milk with the label R 17, which is the same as the subject of application No. 1,790, but, when threatened by the respondents with legal proceedings, civil and criminal, the applicants' agents, who still represent them in these actions, gave an undertaking in writing (R 18) to refrain from placing condensed milk with mark R 17 on the market. Soon afterwards they put on the market tins of condensed milk with the label R 19. The respondents appear to have again objected. Early in 1921 the applicants sought to obtain registration of the mark in R 19, the respondents opposed the application, and took the necessary steps under the Ordinance. The applicants abandoned their application (see R 21). The applicants say that their agents had no authority from them to give the undertaking (R 18), and did so in ignorance of the history of their mark which they have set out in A 1. However that may be, the applicants' agents were so impressed with the justice of the respondents' opposition that they gave the undertaking I have referred to. The applicants have registered another trade mark for condensed milk (R 80). To this the respondents rightly raised no objection, as no confusion or deception is likely to result from its use. In these circumstances, the applicants now apply for the registration of the marks, subject of applications Nos. 1,790 and 1,773, and the main question which the Court has to decide is "whether the marks propounded by the applicants have such resemblance to the trade marks of the opponents as to be calculated to deceive" ? This question is specifically raised by the third issue framed for decision in this case. It was agreed by the parties that the two cases should be heard together, and that the evidence in one case (recorded in No. 930) should be taken as evidence in the other No. 931. In the first place, then, the two sets of marks should be compared; when we do so, we undoubtedly find differences between them, and it may be conceded that if they are placed side by side, an intelligent and cautious purchaser who can read and understand English would not be deceived. The marks propounded by the applicants, although they contain the figure of a woman as the central figure or main feature, have in the label, which is subject of application No. 1,790, a number of medals above the figure and the word "Hollandia" prominently displayed below it, followed by the name of the makers and the place of preparation, and on the label the subject of application No. 1,773, the differences are even more striking. Here, above the figure, we find the words "Hollandia Brand" in large type, and on either side of it coats of arms in circles attached by loops, and under the figure the word "Hollandia" followed by the name of the makers and the place of preparation. In the opponents' trade mark we have the same main feature, the figure of a woman, a milkmaid in one (R 6) with the words "Milkmaid Brand" above the figure, and the names of the makers and the place of preparation under it—and in the other (R 5 and R 7) the word "Milkmaid" or "Milkmaid Brand" with the name of the place where it is prepared near the head of the figure. The two sets, therefore, are not the same throughout or exactly similar, and the names of the brands are different, and the names of the persons preparing them are also different. Those who can read and understand English will not be easily deceived. This, however, does not conclude the matter considering the local markets where the milk will be sold.

The learned Judge then proceeded to discuss at length the cases on the point, and continued:—

There is the further question: Do the applicants' marks contain a "leading characteristic" or "the dominating portion" or "a material and substantial" part of the opponents' trade marks? It is said that "two marks when placed side by side may exhibit many and various differences. Yet the main idea left in the mind by both may be the same, so that a person acquainted with the mark first registered, and not having the two side by side for comparison, might well be deceived if the goods were allowed to be impressed with the second mark, a belief that he was dealing with goods which bore the same mark with which he was acquainted. Take, for example, a mark representing a game of football, another mark may show players in a different dress and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade marked goods and relying, as they frequently do upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing When the question arises whether a mark applied for bears such resemblance to one on the register as to be calculated to deceive, it should be determined by considering what is the leading characteristic of each. The one might contain many, even most of the same elements as the other, and yet the leading—it may be the only impression left on the mind—might be very different, whilst, on the other hand, a critical comparison of two marks might disclose numerous points of difference, and yet the idea which would remain with any person seeing them apart at different times might be the same." The principles indicated in the above passage from the report of Lord Herschell's committee are stated in *Kerly on Trade Marks* to be in accordance with the leading cases on the subject, and the many reported decisions which I have had occasion to consult lead me to the same conclusion.

With regard to those two sets of marks, I feel that what impresses the eye most, or strikes the eye on looking at them, is the central picture—the woman's figure. In fact, there is nothing else that could impress persons in Ceylon who are unable to read and understand English. The medals or the coats of arms will not strike them and hardly convey any meaning to them. It is the "Nona," a lady in what appears to be European dress, that will impress them and signify anything to them. These remarks apply to the name of the applicants' brand "Hollandia," although very prominently displayed, as also to the names of the markers. Even with regard to persons able to read and understand English, Jessel M. R. said: "People do not care very much about reading the names, so I do not think the difference of names very important." (*In re Worthington's Trade Mark*.)¹ It is also not unimportant to bear in mind that the applicants' labels with these marks are intended to be affixed to tins similar in size, shape, and colour to those of the opponents. In my opinion the main feature in both sets of marks is the same—the figure of a woman.

The Judge then proceeded to hold that the opponents' milk were widely known to those able to read and write English, and to others by the names "Lady Brand Milk" and "Nona Kiri" in Sinhalese and "Nona Pal" in Tamil, and that the applicants' milk, if allowed to be sold under the proposed trade mark, would be called by the same names.

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¹ (1880) L. R. 14 Ch. 3 (11)

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He held, therefore, that the use of the proposed mark by the applicants was calculated to deceive "ordinary or unwary purchasers," and the principle laid down in *Kerly*, p. 227: "When the goods of a particular trader have become known by a name derived from his trade mark, any other mark which would be likely to suggest the use of the same name for the goods on which it is used to resemble the former as to be calculated to deceive," was applicable. After referring to certain cases which had a striking similarity to the facts of the present case, *Johnstone & Co. v. Orr-Ewing & Co.*,¹ *The Eastern Dye Works Case*,² *Anglo-Swiss Condensed Milk Co. v. Metcalff (supra)*, *Seize v. Prevesende*,³ and *In the Matter of Currie's Application for a Trade Mark*,⁴ in which application to register marks were disallowed, or in which trade marks already registered were ordered to be expunged from the register, he continued: I would therefore hold that the essential feature, viz., the figure of a woman in the opponents' trade marks is also the essential feature or main characteristic of the applicants' marks, that there is thus a resemblance between the two sets of marks, that the name "Lady Brand Milk," "Nona Kiri," "Nona Pal" derived from the essential feature by which the opponents' goods are called will inevitably be applied to the goods of the applicants if their marks be allowed to be registered, and that confusion and deception are certain to result. Some little difficulty is, however, caused by the more recent judgment of the House of Lords in *Boord & Son v. Bagots Hutton & Co.*⁵ to which I drew the attention of counsel. Mr. Hayley relies on this case. But after careful consideration I think that that case can be distinguished. In that case Messrs. Bagots Hutton & Co., the respondents to the appeal, applied for registration as a trade mark for gin of a pictorial label, of which the principal feature was the representation of a cat got up as a puss in boots sitting on the snow and holding in its forepaws a glass; on either side of the cat was a bottle and a hat with feathers. The application was opposed by Messrs. Boord & Son, on the ground that they were the registered proprietors of various trade marks for gin and similar goods bearing representations of a cat, that as a consequence their goods had become known in the United Kingdom and in the markets of the world by the name of "The Cat Brand," and that the trade mark which the respondents were seeking to register was calculated, the goods being the same, to be described as "Cat Brand" goods and to be passed off as and for the appellants' goods. At the argument before the House of Lords, Messrs. Boord & Son, through their counsel, admitted that the cat mark was open to the trade in the English market, and did not object to its use as a trade mark in England; but they contended that the registration of the trade mark should be refused, as it was likely to deceive people in the Eastern markets. The House of Lords held that the applicants were entitled to have their mark registered. In my opinion the decision of the case turned on the fact that the device of a cat *per se* had become *publici juris* in England in connection with gin. Where a mark or device has become *publici juris*, "registration should not be refused for a new trade mark incorporating it, merely because people might be misled by ignorance into construing its presence as signifying that the goods which bore it were the goods of another person who had previously incorporated that feature, without any exclusive right to do so" to adopt the language of Lord Haldane in that case approving

¹ (1880) L. R. 13 Ch. D 454 and
L. R. (1881) App. Cas. 275.
² (1910) 27 R. P. O. 241.

³ (1886) L. R. 1 Ch. App. 192.

⁴ (1896) 13 R. P. C. 681.

⁵ (1916) L. P. 2 A.C. 382.

the judgment of Wright J. (*In re Dextor's application*.¹) His Lordship continued: "My Lords, the difference in character ought always to be borne in mind between the question in a case where a man is trying to deceive by passing-off his goods as those of another and the question of interference with proprietary right, which is what the Registrar has, in the first instance, to consider in deciding whether registration ought to be allowed of a trade mark bearing some resemblance to another. If this difference in the questions is attended to, I think it will be found that the authorities cited at the Bar on this appeal can, in the main, be classified and reconciled. It is for the most part where the difference has been forgotten that obscurity in expression has arisen." The observations of a general nature to be found in the judgment in this case which seem at first sight to lend support to the applicants case here must be read in the light of the outstanding fact in the case—that the device of a cat was *per se publici juris*. For as Lord Halsbury L.C. remarked in *Quinn v. Leatham*² "every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found." *In Boord & Son v. Bagots Hutton & Co.* (*supra*) both the parties were entitled to use the figure of a cat in their trade marks, and the opponents would not be allowed to interfere with the proprietary right of the applicants, unless the device was used in a combination so resembling the combination adopted by the opponents as to be likely to deceive. In the opponents' label the cat was depicted seated on a barrel, while in the applicants' label the cat was shown seated on the snow with accessories not to be found in the other label. What that case decided, therefore is this, that when a device is *publici juris*, the adoption of that device in combination with other things cannot be objected to, unless the device is used in a combination so resembling the combination adopted by another as to be likely to deceive. The figure of a woman in connection with condensed milk is not *publici juris*, at least, in Ceylon, and the present applicants have no proprietary right whatever to its use. That case can thus be distinguished from the present case, and the case of *Johnstone & Co. v. Orr-Ewing* (*supra*) which was frequently referred to there, without a doubt being cast in its soundness. Similar observations apply to a dictum of Lord Selborne L.C. in *Johnstone & Co. v. Orr-Ewing* (*supra*), which Mr. Hayley pressed on me. This dictum which is cited by Lord Haldane in *Boord & Son v. Bagots Hutton & Co.* (*supra*) is as follows: "Your Lordships are not called upon to decide whether a ticket which was a rightful and *bona fide* trade mark of the trader using it should be excluded by injunction from particular markets (though unimpeachable everywhere else), merely because in these markets it might be liable to be called a name, which the mark of another trader had already acquired there. To that proposition I should not myself as at present advised be prepared to assent." P. 277. The words to be noted in this passage are the words: "A ticket which was a rightful and *bona fide* trade mark of the trader using it." In fact, in *Boord & Son's* case the House of Lords decided the very point which Lord Selborne had left undecided. In that case the applicants had a rightful and *bona fide* title to the mark in dispute, while neither in *Johnstone & Co. v. Orr-Ewing* (*supra*), nor in the present case, nor in the other cases cited by me, had the defendants or applicants any such right or title. This dictum therefore, does not help

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¹ (1893) L. R. 2 Ch. 262.² (1901) L. R. A. C. 495 at 506.

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the applicants. The principles indicated by the House of Lords in *Johnstone & Co. v. Orr-Ewing (supra)* and by Neville J. in the *Eastern Dye Works Case* must guide me in the decision of this case. I hold, then, that in view of the facts and circumstances stated above, and the legal principles applicable to them, the marks propounded by the applicants have such resemblance to the trade marks of the opponents as to be calculated to deceive.

Hayley, for appellant.

Driberg, K.C. (with him *Schokman*), for respondents.

Cur. adv. vult.

March 1, 1923. DE SAMPAYO J.—

The appellants are the Hollandia Anglo-Dutch Milk and Food Company of Vlaardingen, Holland, who are manufacturers of condensed milk, and the respondents are the Nestlé and Anglo-Swiss Condensed Milk Company, who also are manufacturers of condensed milk. Both parties use certain trade marks in respect of their goods, which are sold in tins, with the marks printed on a label. The respondents' mark is the figure of a maid with a pail on the head and another in the hand, and their condensed milk is thus known as the "Milkmaid Brand." The respondents' mark was registered under the provisions of the Trade Marks Ordinance, 1888, in June, 1893. The appellants' mark consists of a female figure, carrying a bunch of flowers in one hand and a sword in the other, enclosed in an oval with five medals above the figure, and words of guarantee in thick letters across it, and the word "Hollandia" displayed beneath. The appellants in June, 1920, applied to the Registrar for the registration of their mark, and were opposed by the respondents, and the case thus stood for the determination of the Court. The present proceedings were accordingly taken by the appellants under section 11 (1) of the Ordinance, and they applied for an order that notwithstanding the respondents' opposition the registration of the appellants' mark be proceeded with by the Registrar. The District Judge after inquiry dismissed the application, and hence this appeal.

The provision of the Ordinance relating to the matter in issue between the parties is that contained in section 15 (2) which enacts that "the Registrar shall not register with respect to the same goods or description of goods a trade mark having such resemblance to a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive." The question then is whether the appellants' mark has such resemblance to the respondents' mark as to be calculated to deceive. There are important differences, as the District Judge notes, between the two marks, and on the face of them they are distinctive marks, notwithstanding the appearance of a female figure in both. But the District Judge considers that, the leading characteristic of the respondents' mark being a female figure, the use of a female figure by the appellants,

though it may not mislead an intelligent and cautious purchaser who knows English, may deceive an "unwary purchaser" in Ceylon and induce him to buy the appellants' goods as the goods of the respondents, especially as the respondents' mark has locally given a name to the goods as *nona kiri* (Sinhalese) and *nona pal* (Tamil) meaning "lady milk."

The two propositions involved in this ground of decision must be examined. In my opinion, too much emphasis has been placed on the so-called unwary purchaser and the alleged local name. The District Judge has collected most of the older English cases, and specially relies on *Johnstone v. Orr-Ewing*.¹ I suppose, however, there are unwary purchasers in Europe as well as in the East, and yet we find that, while the respondents' mark was registered in England in 1877, the appellants' mark was likewise registered in England in 1886 without any opposition, and has been used ever since. It seems to me that we must be careful how in Ceylon a trade restriction is created which does not exist elsewhere. It is said, however, that the local dealers and shopkeepers are generally ignorant of English, and merely go by the name which the mark has given to the goods, such as *nonakiri* or *nona pal*. I do not think that these people are so unwary as the respondents suppose them to be. They are, generally speaking, very shrewd, and able to see that they get what they want, and not anything else. The fact of the matter appears to me to be that the respondents' "Milkmaid Brand" milk has hitherto been practically the only condensed milk in the market, and it was convenient for the dealers, in ordering condensed milk, to describe what they want compendiously by the name suggested by the mark. If the appellant's brand of condensed milk comes into the market, it is just as likely that these people will give it a name too, such as the "Five Medal" milk. In any case, I do not think that the likelihood of any confusion has been established. *Boord & Son v. Bagots Hutton Co.*² is, I think, the latest and authoritative case applicable to the matters involved. It related to Boord & Son's trade mark with respect to "Old Tom" gin, which, by reason of the mark being a cat on a barrel, had acquired a wide reputation as "cat gin" or "cat brand gin." Bagots Hutton & Co.'s mark which was opposed was a cat in boots sitting on the ground. There were differences in the two marks which it was conceded would prevent confusion and deception in England, but it was contended for the appellants, Boord & Son, that such would be the result in the Eastern market where ordinary people would be solely guided by the mark of the cat and be deceived into buying the respondents, Bagots Hutton & Co.'s, gin, believing it to be Boord & Son's gin. The observations of their Lordships in the House of Lords are very applicable to the circumstances of the present case. Lord Buckmaster L.C. said "the evidence establishes no more than this, that the natives buy according to the mark and

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¹ (1880) L. R. 13 Q. D. 434, 7 A. C. 219.² (1916) 33 R. F. C. 357.

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not according to the words, and that they look to the mark for the purpose of seeing what it is they buy. If they really look to the mark, deception is impossible, and the only way in which it could arise would be because people asked for goods as the 'cat' or the 'cat brand,' and traders, knowing that these purchases meant the appellants' goods, would deliberately supply goods that were not the appellants', simply because the label happened to bear the mark of a cat, though it was totally distinct from the cat which forms part of the appellants' device. I see no reason to attribute such conduct to the dealers, and if it occurred the wrong done to the appellants would be one for which they would have to seek a remedy in the Courts within whose jurisdiction the offence was committed." This means that the deception is not in the use of the mark, but in passing-off of the goods of one person as those of another by the trader. The remedy in such a case is an action for damages against the trader, and the mere possibility of deception by passing-off is not a good ground for refusing registration of the mark. Referring to *Johnstone v. Orr-Ewing (supra)* the Lord Chancellor observed "it (that case) depends throughout upon the view that the mark which the defendant was using had been adopted by him with the deliberate purpose of causing the goods sold under it to be mistaken for the goods of the opponent in the markets of India. That case is of no assistance to the appellants in the present dispute." Nor is it of much assistance in this case, for here, too, the application for registration is quite *bona fide*, and is by no means intended to be utilized for a course of deception. Lord Loreborn also considered that the suggested deception would be good ground for an action when it is actually committed, but not for refusing registration of the mark beforehand. His further remark about the oriental mind is very interesting and apt, for he said "Your Lordships were asked to believe that the oriental mind has so associated cats with the appellants' goods that the presence of a cat in any posture and in any surroundings on a trade mark would in Eastern countries cause goods sold under such a mark to be mistaken for the appellants' goods. I do not believe that the oriental is so undiscerning, and certainly it is not proved." As I said before, the oriental mind, so far as it is represented by the people in Ceylon, is shrewd and not undiscerning. It is the judgment of Lord Haldane that is most explicit and helpful. He observed: "The respondents are not seeking to register a mark which is in itself deceptive. What may or may not mislead the natives is their failure to observe that the title 'Cat Brand' applied to the appellants' gin is in reality an insufficient description. This looseness of practice ought not, it seems to me, to be regarded as imposing any duty on either the respondents or the Registrar of Trade Marks. It is simply not relevant on an application for registration in the absence of anything to show intention either directly to deceive or to adopt a mark calculated in itself to

mislead. If the trade mark itself had been practically copied, as was the case in *Johnstone v. Orr-Ewing (supra)*, it would be easy to infer deception as a natural and probable consequence. But if the trade marks are really distinct, independent evidence of intention to deceive is necessary to give grounds for interference with what would otherwise be a right The Registrar ought never to register a trade mark which on its face indicates a design, or which is proved *ab extra* to be designed, to facilitate the passing-off of one man's goods as the goods of another. On the other hand, in the absence of evidence, intrinsic or extrinsic, of such design, he ought not to hold the new mark to be calculated to deceive in a case where the two marks are quite distinct and where registration would be permitted, but for the mere possibility of confusion by inexperienced people. For, in such a case, confusion is likely, not because of the character of the actual marks, but because the goods sold may be confused by reason of the original manufacturer having appropriated a description wider than that to which the mark he has registered entitled him. They (the circumstances giving rise to a passing-off action) are widely different from the general question which, in the absence of evidence of an attempt at such deception, the Registrar has to consider, on an application for the exercise of his discretion, on the judicial principles which must guide him."

It is quite clear that the appellants' mark is in itself not calculated to deceive, and there is no evidence whatever that the appellants have any design to facilitate the passing-off of their goods as the goods of the respondents. In my opinion, following the principles enunciated in the above case, we ought to hold that the ground of objection on the respondent's part to the registration of the appellant's trade mark is not tenable, and the appellants are entitled to the order asked for. I would, therefore, allow this appeal with costs in both courts, and direct that order be made under section 11 (1) of the Trade Marks Ordinance, 1888, requiring that the registration of the appellants' trade mark be proceeded with by the Registrar.

SCHNEIDER J.—I agree.

Appeal allowed.

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