Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of J. Ullman and Company v. *Cesar Leuba and another, from the Supreme Court of Hong Kong (Appellate Jurisdiction); delivered the 20th July* 1908.

Present at the Hearing:

LORD ROBERTSON.
LORD ATKINSON.
LORD COLLINS.
SIR ARTHUR WILSON.

[*Delivered by Lord Robertson.*]

Their Lordships are of opinion that the Respondents, the Plaintiffs in the suit, ought to have been non-suited for want of title; and that the Appeal must therefore be allowed.

The grounds of this conclusion may be very shortly stated.

The action is for breach of trademark in Hong Kong, and the trademarks founded on originated with persons named Bovet, and were used by them in their business at Hong Kong as dealers in watches. That Hong Kong business, of selling watches to the public, belongs now, not to the Respondents, but to a certain Madame Bovet, and the relation in which the Respondents stand to Madame Bovet is simply that of manufacturers to a customer. Accordingly, the only watches which they sell at Hong Kong they sell to Madame Bovet, and with those sales to her their business in Hong

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Kong begins and ends. It results that the only person who could be deceived, so far as they are concerned, is Madame Bovet, and that is not their case at all. Their case consists in ignoring the contractual relation (of manufacturers to dealer) by which they are connected with, and are separated from, Madame Bovet, and identifying themselves with the trade which belongs to her and with which, by family as well as by business interest, they are connected.

With the trademarks themselves they have a much more direct connection, for they hold an assignment from the trustee in bankruptcy of some former Bovets, which, if paper would do, apart from business, might give them a good enough title. But it is trite law (now embodied in statute, as regards registered trademarks) that an assignment of trademark, without the business, confers no effective right. It has been suggested indeed by the Chief Justice that the following words in the assignment support the title, "avec l'entreprise dont elles [the trademarks] servent à distinguer les produits." But these general words occur in an assignment executed in Switzerland and must be applied by evidence to Hong Kong; and, unfortunately, the evidence proves that in Hong Kong the business, on the incidents of which and injuries to which the Respondents rely, is, *de facto*, not theirs and is not carried on for them. About these facts there is no ambiguity or doubt at all. Mr. Heerman, of Messrs. Gaupp and Co., who act for the Plaintiffs, on the one hand, and Madame Bovet, on the other, are perfectly explicit on the point.

It was argued for the Respondents that the trial had been so conducted that this point of title was not now open to the Appellants. But,

on the pleadings, the Appellants expressly stated that they did not admit the averments of title and then lay by. In such a situation a Plaintiff, if he ignores the question, does so at his peril, for the defence puts him to prove his title. Fortunately, however, the matter is not left to be determined on a mere question of pleading, for the evidence at the trial and the additional evidence taken during the hearing of the appeal place the question on a clear footing of ascertained fact.

It was in the end courageously maintained for the Respondents that they, in their quality of manufacturers, had sufficient interest to sue the action. No authority supports this contention and it is against principle. It is quite true that the Respondents are interested in the success of Madame Bovet's business, but this can never put them in her shoes in vindicating her rights against wrongdoers.

Their Lordships will humbly advise His Majesty that the Appeal ought to be allowed, the Judgments below discharged, with costs, and the Plaintiff non-suited. The Respondents must pay the costs of the Appeal.