was no suggestion that the number of ballots found at these polls was not correct, and, that being so, I do not think it would have been right to disallow the votes if none of them had been initialled. However that may be, I think they were sufficiently initialled within the meaning of the statute.

A ballot, No. 3438, at Wood and Medora 17, which had a small pencil marking thereon, which might be taken for the letter " c," was allowed by the deputy returning officer, and I am unable to say he was wrong in allowing it for Bridgland.

Both parties have been partly successful in the appeal. I think it is not a case for costs.

STREET, J.   JULY 9TH, 1902.

TRIAL.

GILLETT v. LUMSDEN.

Trade Mark—" Cream Yeast "—Protection—Acquisition of Right by User—Abandonment—Injunction.

Action to restrain defendants from infringing a trade mark registered in 1877 as " Gillett's Cream Dry Hop Yeast," and the sale of goods under the name " Jersey Cream Yeast " as calculated to deceive purchasers, and lead them to believe that they were purchasing the plaintiff's yeast.

C. A. Masten and J. H. Spence, for plaintiff.

F. C. Cooke, for defendants.

STREET, J.:—I am of opinion that the words " cream yeast " are not the proper subject of a trade mark, being common words of description: Partlo v. Todd, 14 A. R. 444, 452; Provident Chemical Works v. Canada Chemical Co., 2 O. L. R. 182, 185.

The plaintiff must, therefore, fail upon the branch of his case which depends upon his ownership of the registered trade mark. I think, however, that he is entitled to succeed upon the ground that his yeast had long ago acquired a reputation in the market under the name of " cream yeast," and that name is his property as against other persons seeking to use it for the purpose of selling other goods of the same character: Kerly on Trade Marks, 2nd ed., p. 475. The evidence that he had not for some years before 1901 sold many boxes of the article does not shew an abandonment of the right to use the name in connection with the goods, for he has always been prepared to furnish it in the