BOYD, C.—The plaintiff puts his case on this, that he is entitled to the exclusive use of the word "cream" in connection with yeast. It is not contended that there is any similarity by the make-up of the goods in packages of defendants with those of plaintiff—the appeal to the eye would inform any one of the difference—but in ordering cream yeast, which the plaintiff's is called, there would be "awkwardness" in confounding defendants' Jersey cream yeast with it. There is no proof of actual deception—but all rests on the opinion of the manager of plaintiff.

There was no proof of advertising plaintiff's goods as "cream yeast" prior to defendants' use of the name complained of. The evidence at most puts it thus, that an order for "cream yeast" might cause confusion between plaintiff's and defendants' products; but the same witness says that defendants' output is known in the trade as "Jersey Cream Yeast." The defence shews that the name of "Jersey Cream" was honestly come by, being used by defendants in baking powder since 1890—and repels any idea of fraudulent appropriation, though that this is not essential in passing-off cases. It makes in the same direction of honest dealing, that the article made by plaintiff was not in the market advertised and openly vended when defendants began to use "Jersey Cream" in yeast cakes—the sale had been for years in abeyance—though that is not fatal to plaintiff's right to recover, if otherwise entitled. There is no copying of any part of plaintiff's label as to directions by defendants, as Mr. Justice Street appears erroneously to have thought.

Assume that the plaintiff has a trade mark or label in which the words "cream yeast" are used, yet there is no invasion of this on defendants' part—there is no colourable imitation of the whole thing which is the trade mark.

Then I think this case is covered by . . . Raggett v. Findlater, L. R. 17 Eq. 29. "Cream" is used by plaintiff merely as a descriptive word to suggest the frothing appearance of the yeast as it works (yeast froths like cream), and, as a word in common use to indicate a creamy, frothy look, it is not to be monopolized by plaintiff: In re Smokeless Powder Co.'s Trade Mark, [1892] 1 Ch. at pp. 194-6. To adapt the language of Malins, V.-C., in the case cited, "the word 'Jersey' completely distinguishes it from plaintiff's, as does also the character and form of the label:" L. R. 17 Eq. at p. 43. There is no evidence going to shew that the user of the words by plaintiff has been so long and so exclusive as to make the descriptive term in any sense distinctive.