

the heating surface was inadequate. But that is based, I think, upon the claim of the defendants to have a speed of nine or ten miles an hour, which the plaintiff did not agree to provide for.

The defendants' own witnesses say "that the boiler is good except as to capacity," and another "that it is large enough to drive the boat 6 or 7 miles an hour," but it will not supply this continuously.

Against this there is the evidence of the plaintiffs that they made good time with the boat, and of the man who invented this kind of boiler, that it is sufficient for its work. The tests applied by the defendants appear to be rather hypercritical, having regard to the absence of the guarantee claimed by the defendants.

The best conclusion I can reach is, that that is a fair sum admitted by Mitchell, one of the defendants, that he offered the plaintiff \$575 and "call it square" before action brought.

The best conclusion I can reach is, that that is a fair sum to be paid by the defendants, \$575, with costs of action to plaintiffs. Counterclaim dismissed without any costs either way.

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JUNE 5TH, 1903.

DIVISIONAL COURT.

GILLETT v. LUMSDEN.

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

Appeal by defendants from judgment of Street, J. (4 O. L. R. 300, 1 O. W. R. 488), in favour of plaintiff in an action to restrain defendants from infringing plaintiff's registered trade mark for "Gillett's Cream Dry Hop Yeast," by selling yeast cakes under the name of "Jersey Cream Yeast." The Judge below held the words "cream yeast" were not the proper subject of a trade mark, being common words of description, but that, the plaintiff's yeast having acquired a reputation in the market under the name of "cream yeast," that name was his property as against persons seeking to use it for the purpose of selling other goods of the same character, and he was entitled to have defendants restrained from so using it.

The appeal was heard by BOYD, C., FERGUSON, J., MACLAREN, J.A.

G. F. Shepley, K.C., and F. C. Cooke, for defendants.

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