

The government contends that "products of coal tar" are, by the phraseology of this paragraph, excepted from its operation. We do not so read the act. On the contrary, free entry is accorded to "coal tar, crude"; "all coal tar preparations, except medicinal coal-tar preparations"; and "products of coal tar, not colors or dyes." There is no dispute, on the testimony, that the article in question is one of the five products of distillation of coal tar, and, unless it is shown to be specifically provided for elsewhere, is entitled to free entry, under paragraph 443. The only "special provision" relied upon by the appellant is paragraph 60, it being contended that the article is therein referred to as distilled oil. The testimony, however, abundantly sustains the proposition (which, indeed, was conceded on the argument) that this "dead oil" was not known, commercially, as a distilled oil; and the government chemist testified that in the terminology of his profession, and according to his understanding, "dead oil" would not be classed as a distilled oil. Since it is neither commercially nor scientifically known as a distilled oil, it does not come within the enumeration of paragraph 60. In view of the testimony, it will not be necessary to discuss the other questions raised on the argument, viz.: Whether the words "known as" should not be construed as meaning "known commercially as"; and whether paragraph 443, providing for all "products of coal tar," is not more specific than is paragraph 60, providing for "products or preparations known as * * * distilled oils," but without any such restriction as to use as was found in the paragraph for "acids," which was discussed by this court in *Matheson & Co. v. U. S.*, 18 C. C. A. 143, 71 Fed. 394. The decision of the circuit court is affirmed.

WM. ROGERS MFG. CO. v. ROGERS.

(Circuit Court, E. D. New York. January 31, 1898.)

No. 2.

TRADE-NAMES—INFRINGEMENT—UNFAIR COMPETITION.

One selling goods in packages prominently marked with his own name and initials, not collocated with other words tending to induce greater confusion than would naturally result therefrom, cannot be restrained by another of the same name, having a long-established business thereunder, even though the former expected that unscrupulous dealers would offer his goods as the goods of the latter.

This was a suit in equity by the William Rogers Manufacturing Company against William A. Rogers for alleged infringement of a trade-name. The cause was heard on a motion for preliminary injunction.

C. E. Mitchell, for the motion.

Wm. C. Beecher, opposed.

LACOMBE, Circuit Judge. Defendant's right to use the ordinary abbreviation of his name, "Wm. A. Rogers," was settled by the decision of the circuit court of appeals (17 C. C. A. 575, 70 Fed. 1019); and

in no instance does it appear that he has put up his goods, or offered them for sale, in any form of package which directly or indirectly describes them otherwise than as the goods of "Wm. A. Rogers." There seems very little doubt that he has availed of the similarity of name, which naturally tends to confound his goods with those of the original Rogers, who built up a valuable trade in plated ware years before defendant went into the business. But, so far as the mere name produces such confusion, plaintiff has no cause of complaint. It is a reasonable inference from all the testimony that defendant expected that unscrupulous dealers would offer his goods as those of one or other of the original manufacturers, whose name was well known to, and popular with, consumers. The two advertisements reproduced in complainant's brief are most persuasive to that conclusion. But both of those advertisements contain his own name in prominent type, and the statements, "Our goods are 'Rogers' goods," and "The genuine Rogers goods, as used by U. S. government," etc., are technically accurate. There are some points of resemblance between this case and those of *Baker v. Sanders*, 26 C. C. A. 220, 80 Fed. 889, and *Hoff v. Tarrant*, 22 C. C. A. 644, 76 Fed. 959, but there is not enough to warrant an injunction, so long as defendant's goods are packed and labeled with his own name, Wm. A. Rogers, not collocated with other words in such manner as to induce any greater confusion in the minds of purchasers than would naturally be produced by the use of such name. Motion denied.

AIR-BRUSH MFG. CO. v. THAYER et al.

(Circuit Court, N. D. Illinois, N. D. April 14, 1897.)

1. TRADE-MARKS—DESCRIPTIVE NAMES—"AIR BRUSH."

Whether or not a given word is a trade-mark is a question of fact. The evidence does not show the words "air brush" to be used as a mark of origin by complainant. These words are apparently used descriptively by both parties.

2. FEDERAL TRADE-MARK STATUTE.

The case rests on the federal statute; but defendants have not affixed complainant's registered mark to merchandise of substantially the same descriptive properties as that described in the registration.

This was a suit in equity by the Air-Brush Manufacturing Company against Thayer and others for alleged infringement of a trade-mark.

L. L. Morrison, for complainant.

Barton & Brown, for defendants.

SHOWALTER, Circuit Judge. I do not find from the evidence that complainant in fact uses the words "air brush" as a mark of origin. Complainant calls the patented article made by it an "air brush." The name of the complainant company, "Air-Brush Manufacturing Company," is stamped on said article; but the mark "air brush," as a sign of origin, is not there. In the specification of patent No. 310,754 the patentee says: "My invention relates to that class of instruments or machines designated as 'air brushes,' for the distribution of pigments by means of an air blast to produce portraits, land-