

For the foregoing reasons the government's appeal from the decision of the board of general appraisers must be sustained, and it is so ordered.

LEHN et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 1, 1895.)

No. 2,031.

CUSTOMS DUTIES—CLASSIFICATION—HYDROCHLORATE OF COCAINE.

Muriate or hydrochlorate of cocaine, which is covered, for tariff purposes, both by paragraph 76 and paragraph 74 of Act Oct. 1, 1890, is dutiable under the former, relating to chemical salts, which is more specific than paragraph 74, providing for medicinal preparations. *Mallinckrodt Chemical Works Case*, 66 Fed. 746, followed.

Appeal by Lehn & Fink, importers, from a decision of the board of general appraisers affirming the action of the collector in assessing duty upon certain muriate or hydrochlorate of cocaine under paragraph 76 of the tariff act of 1890. The importers insisted that it should have been assessed under paragraph 74 of the same act.

Comstock & Brown (Albert Comstock, of counsel), for importers.
James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge (orally). I am inclined to think that this case is ruled by the *Mallinckrodt Chemical Works Case* (decided in the St. Louis circuit) 66 Fed. 746. That case, as I understand it, involved the precise substance that is in controversy here. Where a court has decided the identical question, another court of concurrent jurisdiction should follow it. It is conceded that both of the paragraphs in question cover this particular importation, that is, it is a chemical salt and also a medicinal preparation. The circuit court in the *Mallinckrodt Case* held that paragraph 76, which provides for chemical salts, is more specific than paragraph 74, which provides for medicinal preparations. It is not necessary for me to express my views upon the subject, for the reason that, in the circumstances, this court should follow that decision. The decision of the board of general appraisers is affirmed.

SCHULZE-BERGE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 8, 1895.)

No. 2024.

CUSTOMS DUTIES—CLASSIFICATION—"ANTIPYRINE."

"Antipyrine," a patented medicine, ready for administration in the condition as imported, made of the aniline from coal tar, alcohol being chemically used and broken up in the manufacture, was classified for customs duties by the collector of the port of New York as a "medicinal proprietary preparation," at 25 per cent. ad valorem, under paragraph 75 of the tariff act of October 1, 1890, and as a "chemical salt," at the same rate, under paragraph 76 of the same act. The importers protested under two heads: First, that the article was dutiable as a "medicinal preparation

in the preparation of which alcohol is used," at 50 cents per pound, under paragraph 74; or, secondly, as a "coal tar preparation not a color or dye," at 20 per cent. ad valorem, under paragraph 19 of that tariff act. The board of United States general appraisers sustained the importers' alternative protest that the merchandise was properly dutiable as a "coal tar preparation," under paragraph 19. The importers appealed to this court, claiming that the antipyrine was only dutiable, under paragraph 74 of the tariff act, at 50 cents per pound. The United States took no appeal. *Held*, that the antipyrine, as between paragraph 74, for "medicinal preparations in the preparation of which alcohol is used," and paragraph 19, for "preparations of coal tar," was more specifically designated as a "coal tar preparation," as decided by the board of general appraisers.

See *Matheson v. U. S.*, 65 Fed. 422, on the proper classification of "sulpho-toluic acid."

At Law. Appeal by importers from decision of board of general appraisers sustaining the alternative protest of the importers that the merchandise in question is dutiable under paragraph 19 of the tariff act of 1890. Affirmed.

Edward Hartley (of Hartley & Coleman), for importers.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for collector and the United States.

COXE, District Judge (orally). The importation in this cause is "antipyrine," which was classified by the collector under paragraph 75 of the act of 1890. The importer protested, insisting, first, that it should have been classified under paragraph 74, and if not dutiable under paragraph 74, then under paragraph 19 of the same act. The board of appraisers sustained the second contention of the importer, and held it to be dutiable under paragraph 19 as a "coal tar preparation." The importer now appeals from the decision of the board. The United States does not appeal.

Assuming that the importer can appeal from a decision in his own favor, the question is whether the article in suit, popularly known as "antipyrine," should be assessed under paragraph 74 rather than under paragraph 19, where the board of appraisers placed it. The decision of the circuit court of appeals in the case of *U. S. v. Battle*, 4 C. C. A. 249, 54 Fed. 141, seems to be an authority for the proposition that in the preparation of this article, alcohol is not used, within the meaning of the law. But assuming that alcohol is used in its preparation, the question then is, which is the more specific designation, "coal tar preparation," or "medicinal preparation, in the preparation of which alcohol is used"? It seems to me that under the various decisions which have been referred to, the classification by the board is the correct one as between these two paragraphs. It is true that these cases are not directly in point, but I think the reasoning of *Matheson v. U. S.*, 65 Fed. 422, and *In re Mallinckrodt Chemical Works*, 66 Fed. 746, leads directly to the conclusion that "coal tar preparation" is a more specific designation than "medicinal preparation." In the Case of *Mallinckrodt* the court considers the phrase "medicinal preparations" to be an exceedingly broad and general classification.

The decision of the board of general appraisers should be affirmed.

CALIFORNIA FIG-SYRUP CO. v. PUTNAM et al.

(Circuit Court, D. Massachusetts. March 6, 1895.)

No. 204.

TRADE-MARKS—DECEPTION A BAR TO RELIEF.

Plaintiff, the manufacturer of a laxative compound called "Syrup of Figs," sought to restrain the use by defendants, on a laxative medicine manufactured by them, of the name "Fig Syrup," as an infringement of plaintiff's trade-mark. It appeared that syrup made from figs has no considerable laxative properties; that plaintiff's compound contained a very small amount of the juice of the fig, and its laxative ingredient was senna; but that plaintiff placed conspicuously on the bottles containing its compound labels describing the same as a "Liquid Fruit Remedy," and otherwise conveying the impression that it was made from figs and derived its laxative properties from them. *Held*, that the use of such labels was an imposition upon the public, which deprived the plaintiff of the right to seek the aid of equity.

This was a suit by the California Fig-Syrup Company against Kate Gardner Putnam and others to restrain the infringement of a trade-mark. The cause was heard on the pleadings and proofs.

R. A. Bakewell, Paul Bakewell, and Louis D. Brandeis, for complainant.

Fish, Richardson & Storrow, for defendants.

COLT, Circuit Judge. The plaintiff is the proprietor and manufacturer of a liquid laxative compound called "Syrup of Figs". The defendants manufacture and sell a laxative medicine which they term "Fig Syrup". The plaintiff claims a trade-mark in the words "Syrup of Figs" or "Fig Syrup", and seeks to enjoin their use by the defendants. There is no evidence that the defendants have imitated the plaintiff's labels or packages except in this particular. If this preparation is in fact a syrup of figs, the words are clearly descriptive, and not the proper subject of a trade-mark. Upon this point the contention of the plaintiff is that its preparation is not a syrup of figs, since it contains only a very small percentage of the juice of the fig; that the laxative ingredient in it is senna; that while the fig in the form of fruit may have laxative properties arising from the seeds and skin, the fig in the form of a syrup is no more laxative than any other fruit syrup; that it follows from these facts that these words, as applied to this compound, are not descriptive, but purely fanciful, and therefore constitute a valid trade-mark. The evidence shows that the compound is not a syrup of figs. It might more properly be termed a "syrup of senna", if the words were intended to be descriptive of the article. But, assuming this is not a syrup of figs, we are met with the inquiry whether these words, as applied to this preparation are not deceptive. The label on every bottle reads as follows:

"SYRUP OF FIGS.

The California Liquid Fruit Remedy.
Gentle and Effective."

On the sides of each bottle are blown the words, "Syrup of Figs", and on the back the words, "California Fig Syrup Co., San Fran-