

Importers protested, claiming duty at 40 per cent. ad valorem, under paragraph 271, and that truffles are a species of fungi and assimilate to mushrooms. The board of United States general appraisers sustained the importers' protest, and reversed the decision of the collector. The collector appealed from the decision of the board to the United States circuit court.

Edward Hartley, for importers.
Henry C. Platt, U. S. Atty.

WHEELER, District Judge. These truffles are not mushrooms, in similitude to which it is claimed they should be assessed, but are found to fall, commonly and commercially, within "vegetables of all kinds prepared or preserved, including pickles and sauces of all kinds not specially provided for." They, in some way, vegetate, and are a kind of vegetable. Judgment of the board of appraisers reversed

SMITH, Surveyor of Customs, v. MIHALOVITCHE et al.

(Circuit Court of Appeals, Sixth Circuit. April 3, 1894.)

No. 119.

1. CUSTOMS DUTIES—CLASSIFICATION—GLASS BOTTLES.

Flint-glass bottles, molded, and holding more than one pint, are dutiable at one cent per pound, under paragraph 103 of Act Oct. 1, 1890, and not at 60 per cent., under paragraph 105.

2. APPEAL—MATTER NOT APPARENT ON RECORD.

The provision of paragraph 104 of Act Oct. 1, 1890, that certain glassware shall not pay a less duty than 40 per cent. ad valorem, cannot be applied on appeal where the record does not show that the duty imposed is less than that rate.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

In June, 1891, the defendants in error, Mihalovitch, Fletcher & Co., imported from Germany, through the port of New York, certain flint glassware, claimed by them to be bottle glassware. The merchandise was forwarded in bond to the custom house in Cincinnati, where the acting surveyor of customs assessed it for duty at 60 per cent. ad valorem, under paragraph 105 of the act of October 1, 1890. To this action of the surveyor the importers duly protested, claiming said assessment to be illegal, and insisting that the duty should have been assessed under paragraph 103 of said act, and asking to have \$108.75, so illegally assessed, refunded. The importers appealed from the action of the surveyor at Cincinnati to the board of general appraisers at New York, under the act of June 10, 1890. In October, 1891, that board filed a decision sustaining the protest of the importers, and found the articles imported to be flint-glass bottles, under paragraph 103 of the act above cited, and to be dutiable at one cent per pound. Under the provisions of section 15 of the

act of June 10, 1890, the surveyor of customs, through John W. Herron, district attorney, filed his application in the circuit court of the United States for the southern district of Ohio, in October, 1891, asking that court to reverse the decision of said board of general appraisers. At the April term, 1892, of said court, the case was heard upon the issues made by the protest of the importers and the application of the surveyor of customs and the evidence of the parties, and thereupon, after due consideration, the circuit court affirmed the decision of the said board, and dismissed the surveyor's application. From this order a writ of error was taken to this court.

John W. Herron, U. S. Dist. Atty., and Henry Hooper, Asst. U. S. Dist. Atty., for plaintiff in error.

Wright & Wright, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

RICKS, District Judge (after stating the facts as above). When this case was tried in the circuit court, the question was whether the articles imported should be classified under paragraph 103, or paragraph 105, of the act of October 1, 1890. Paragraph 103, under which the importers claim, reads as follows:

"Green and colored, molded or pressed, flint and lime glass bottles, holding more than one pint, * * * and other molded or pressed, green and colored, and flint or lime glass bottle ware, not specially provided for in this act, one cent per pound."

Paragraph 105 reads as follows:

"Flint and lime pressed glassware, not cut, engraved, painted, etched, decorated, colored, printed, stained, silvered or gilded, sixty per cent. ad valorem."

The circuit court found that "these articles are not pressed glassware. They are molded, which brings them within an express provision of paragraph 103." We agree with this conclusion of the circuit court for the reasons stated in the opinion filed in the cause. 55 Fed. 476. The district attorney now insists that if the judgment of the circuit court is affirmed, and the articles are to be classified under paragraph 103, then they are dutiable at the rate of 40 per cent. ad valorem, under the last clause of paragraph 104, which reads:

"No article manufactured from glass described in the preceding paragraph shall pay a less rate of duty than forty per cent. ad valorem."

But the record does not contain the evidence to enable or justify us in applying this clause of paragraph 104 to the case as presented, because it nowhere appears that the duty imposed in this case was less than 40 per cent. of the value of the importation. The judgment of the circuit court is therefore affirmed.

NOTE. See *Marine v. Packham*, 3 C. C. A. 210, 52 Fed. 579.

PUSEY & JONES CO. v. MILLER et al.

(Circuit Court, D. Delaware. April 30, 1894.)

No. 153.

1. INTERPLEADER—BILL—DEMURRER.

A bill of interpleader against two defendants which shows on its face that one of the defendants has no claim, either legal or equitable, to the debt due from the complainant is demurrable.

2. PATENTS FOR INVENTIONS—LICENSE—RIGHTS OF CO-OWNERS.

Where a patent is owned by several parties, and one of them issues a license to a third person, the other owners have no claim against the licensee for any part of the royalty, their remedy, if any, being by suit against the licensor for an accounting.

In Equity. Bill by the Pusey & Jones Company against Mary Ann Miller and Will W. Bierce.

Benjamin Nields, for complainants.

Branch Giles and E. Clinton Rhoads, for defendant Miller.

WALES, District Judge. This is a bill in the nature of a bill of interpleader, by which the plaintiff seeks protection and relief from the conflicting demands of the defendants. The material facts in the case are these:

Mary Ann Miller, the executrix of Lewis Miller, and one of the defendants herein, has brought an action at law in this court against the plaintiff to recover the sum of \$3,000, which is alleged to be due to the estate of Miller under the terms of a written contract between him and the plaintiff, dated January 14, 1892, whereby the plaintiff had agreed to pay to Miller that amount of money, as a license fee or royalty, for the right to construct a patented Taylor cotton press for Will W. Bierce, of the state of Alabama. The further sum of \$212.40 is claimed by the executrix as a balance due to her husband's estate for royalties on other cotton presses built by the plaintiff. John F. Taylor, being the inventor and sole owner of all the patents covering what is known as "Taylor's Steam and Hydraulic Cotton Press," on the 23d of January, 1877, sold and assigned to Lewis Miller and William Boardman, each, one-third interest and share in and of these patents for all of the United States, excepting certain territory specifically reserved to the assignor. Prior to the making of this assignment, which was duly recorded, the parties named therein had, on the 19th of December, 1876, entered into articles of agreement (tripartite), wherein it was stipulated, among other things, that Boardman, in consideration of the assignment to him of a one-third interest in the patents, would advance to Taylor the sum of \$25,000, and would also furnish to Lewis Miller such sums as the latter might require "to enable him to carry on the business of the concern." The advance of \$25,000 to Taylor was to be reimbursed to Boardman by Taylor out of his one-third of the profits. Miller, by way of payment for the one-