

other installments, being those for January, February, March, and April, were deliverable in any part of each of such months, and it would seem that the average value during the month would be the just basis of comparison for the market price.

The defendant elected on the 29th of January, 1891, to treat the contract as broken. That was the inevitable inference to be drawn from its refusal to go on with it. And, having once made its election, was bound by it, unless the parties should thereafter substitute some new agreement, which, as we have already said, was not done. The proceeding of the defendant in making the sale on July 31st of a quantity of ore equal to the remaining portion thereof, for account of the plaintiffs, was wholly unauthorized, and proof thereof was immaterial. Nor was it admissible to prove the actual market value of the ore. It was several months later than the time to which such proof would be relevant, and it is distinctly shown that the price was steadily sinking during that period. The date was too remote to furnish any reliable basis for estimating the value of the ore at the dates when it was deliverable. But it further appears that the court made the plaintiff responsible for this sale in July, and made it the basis of the defendant's recovery. It follows, from what we have said, that this was error. There is no finding in regard to the value of the ore at the time fixed by the contract for the deliveries, and we have not the data for ordering the proper judgment. The judgment of the circuit court will therefore be reversed, with directions to award a new trial.

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In re CERTAIN MERCHANDISE.

(Circuit Court, D. Massachusetts. November 23, 1894.)

No. 188.

**APPEAL—REVIEW UNDER CUSTOMS ADMINISTRATIVE ACT—PETITION—DISMISSAL.**

Though the customs administrative act of 1890 (section 15), providing for an appeal, requires security for costs on the original application for review by the importer, and the practice of the court conforms thereto, an application filed when the statute was new, and when there was no express rule of court defining what the security should be, and prosecuted in good faith by counsel, who did not understand that the statute required security at the outset, will not be dismissed because security was not given when the application was made, if the ordinary cost bond in the sum of \$50 is filed within the time named in the ruling on the motion to dismiss.

Petition by Schoelkopf, Hartford & Maclagan, Limited, for review under the customs administrative act of 1890. Heard on motion by the government to dismiss. Motion denied on conditions.

Josiah P. Tucker, for petitioner.

Wm. G. Thompson, Asst. U. S. Atty.

**ALDRICH**, District Judge. This is a petition by the importer for review under what is known as the "Customs Administrative Act of 1890," and there is no security for costs. Section 15, providing for review and appeal, requires that "on such original application

and on any such appeal security for damages and costs shall be given as in the case of other appeals in which the United States is a party." The government moves to dismiss on the ground that the statute as to security for damages and costs has not been complied with, but insists only upon the provision as to security for costs. Unquestionably, the statute requires security for costs to be furnished with the original application. We understand the practice in the Second circuit conforms to this idea. In view of the facts, however, that the statute was comparatively new at the time this petition was filed, that there was no express rule of court on the subject defining what the security should be, and that counsel by affidavit establishes that the petition is being prosecuted in good faith, and that the statute was not understood by him as requiring security at the outset, I am disposed not to grant the motion to dismiss, except upon the following condition: The petition will be dismissed unless the petitioner, on or before December 2, 1894, files with the clerk the ordinary cost bond in the sum of \$50. And leave is granted to the petitioner to file such security within such time, as of the date of filing the original application. The clerk will enter the same order in Nos. 173, 190, 236, 273, and 290.

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In re CERTAIN MERCHANDISE.

(Circuit Court, D. Massachusetts. November 23, 1894.)

No. 237.

**CUSTOMS DUTIES—CLASSIFICATION—WOOLEN CLOAKS LINED AND TRIMMED WITH FUR—ACT 1890.**

Cloaks of woolen cloth, lined and trimmed about the neck, sleeves, front, bottom, and back with fur, and not reversible, are dutiable at  $4\frac{1}{2}$  times the duty on unwashed wool of the first class, and 60 per cent. ad valorem, as cloaks "or other outside garments for ladies, and children's apparel \* \* \* composed wholly or in part of wool, \* \* \* made up or manufactured wholly or in part," etc., under paragraph 397 of the act of 1890, and not at 35 per cent. ad valorem, under paragraph 461, as manufactures of leather, fur, or of which these substances or either of them is the component material of chief value, "all of the above not specially provided for in this act," etc., though fur is a component material of chief value in such cloaks, since they are "specially provided for" by the former paragraph.

Petition by Alanson W. Beard for review of the questions of law and fact involved in the decision of the board of United States general appraisers in respect to a duty imposed on merchandise imported by C. F. Hovey & Co. in 1892. Decision of board reversed. Decision of collector affirmed.

Wm. G. Thompson, Asst. U. S. Atty., for petitioner.  
Josiah P. Tucker, for importer.

ALDRICH, District Judge. This is a petition for review of the questions of law and fact involved in the decision of the board of United States general appraisers in respect to a duty imposed upon an importation from Germany by C. F. Hovey & Co. in 1892. Para-