

SHERMAN v. HEDDEN.

(Circuit Court, S. D. New York. November 7, 1887.)

CUSTOMS DUTIES—ACTIONS TO RECOVER—BILL OF PARTICULARS.

Where the bill of particulars served by plaintiff in a suit against a collector of customs, to recover duties alleged to have been illegally exacted, does not contain all the items required by section 3012, Rev. St., a motion for judgment of *non pros.* will be granted.

(Syllabus by the Court.)

Action to Recover Excess of Duties Paid under Protest. On motion for *non pros.*

Stephen A. Walker, U. S. Atty., and W. Wickham Smith, Asst. U. S. Atty., for the motion.

Wm. F. Scott, *contra.*

LACOMBE, J. In this case defendant moves for a judgment of *non pros.* on the ground that the bill of particulars heretofore served in this action, in compliance with section 3012, Rev. St., is insufficient and defective, in that it does not contain the name of the importer or importers, the place from which the merchandise was imported, the date of the invoice, and the date of the payment of the duties claimed to have been exacted in excess. In opposition to the motion, plaintiff's attorney presents an affidavit of his clerk stating that, "through some inadvertence or oversight, he omitted to insert" in the bill of particulars the details above set forth, and upon the argument plaintiff applied for leave to amend the bill *nunc pro tunc.* The papers in this case present no more excuse for plaintiff's failure to comply with the express requirement of the statute than was presented in *Dieckerhoff v. Robertson, ante*, 73, and should be denied.

Upon the argument, reference was made to the subsequent granting of an order allowing amendment of the bill of particulars in the case last cited. Such order, however, is not authority controlling in future cases, because, at the time it was granted, the representative of the district attorney expressly stated in open court that, the question of power to grant leave to amend being decided against him, he had nothing further to say in opposition to the application. It should be further noted, with regard to *Dieckerhoff v. Robertson*, that the application in that case was simply for leave to alter the amounts claimed as excess of duty, and that it was stated, and not disputed, upon the first argument of the motion, that the figures were given erroneously in the original bill because the plaintiff had relied upon a statement furnished from or obtained at the custom-house as to the exact amount of excess, which official statement was itself erroneous.

SHERMAN v. HEDDEN.

(Circuit Court, S. D. New York. December 1, 1887.)

CUSTOMS DUTIES—ACTION TO RECOVER—BILL OF PARTICULARS.

Where the bill of particulars served by plaintiff in a suit against a collector of customs to recover excess of duties alleged to have been illegally exacted does not contain all the items required by section 3012, Rev. St., the court is without power to grant leave to amend *nunc pro tunc*.

On rehearing. See *ante*, 756.

William Force Scott, for the motion.

Stephen A. Walker, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., opposed.

LACOMBE, J. Careful consideration has been given to the points presented by the plaintiff upon the reargument of this motion. The result of a re-examination of the whole question is, however, but confirmatory of the opinion expressed by the court upon the reargument—that it is without power to grant the relief asked for.

If the original statute (chapter 201 of the Laws of 1866, § 36) and the section of the Revised Statutes (3012) in which it is re-enacted were mere regulations of procedure in court, the provisions of section 954 of the Revised Statutes would, no doubt, confer upon the court the power now invoked. The sections cited, however, seem, in unmistakable language, to provide a statutory limitation upon the right of recovery; and the mere use of the phrase "Bill of Particulars" does not alter their effect. If the question arose upon the trial of the case whether the plaintiff might recover in the absence of proof showing that he had within the time limited served the notice which the statute calls for, there can be no doubt that it would be held to be as necessary a prerequisite as is the service of the notice of protest, or of the notice of appeal; and it would surely not be claimed that either of those notices might be amended by the court.

In the recent instances referred to (see *Dieckerhoff v. Robertson*, 29 Fed. Rep. 781, and the original opinion on this motion, *ante*, 756,) where amendments of similar bills of particulars have been allowed, the objection now taken was not urged, and it does not seem to have been distinctly presented to the court in *Pott v. Arthur*, 15 Blatchf. 314, the provisions of section 3012 being therein disposed of as if it were merely a regulation of procedure. The application to vacate the order denying leave to amend is therefore denied; but the original order may be modified by adding a clause to the effect that the application is denied solely on the ground of want of power. Thus the plaintiff, should he seek to review this decision, will not be prejudiced by any suggestion that the discretion of the court was exercised against him.