

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.

DIECKERHOFF and others v. ROBERTSON.

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

CUSTOMS DUTIES—EXCESS OF—ACTION TO RECOVER—AMENDMENT OF BILL OF PARTICULARS.

A motion, in an action to recover for excessive duties, to amend the bill of particulars by increasing the amount claimed therein for excess of duty, will be denied, where it appears that the mistake in making up the original statement was entirely that of the plaintiff's agent or broker, and was in no way induced by any misinformation furnished at the custom-house.

Action to Recover Excess of Duties Paid under Protest. On motion to amend bill of particulars.

A. P. Ketchum, for complainant.

Stephen A. Walker, U. S. Atty., and *Wm. Wickham Smith*, Asst. U. S. Atty., for defendant.

LACOMBE, J. In this case plaintiffs ask to amend the bill of particulars by increasing the amount claimed therein for excess of duty. The mistake in making up the original statement, however, appears to have been entirely that of plaintiffs' agent or broker, and in no way induced by any misinformation furnished at the custom-house. The motion is denied. See memoranda in *Castner v. Magone*, ante, 578, and *Sherman v. Hedden*, ante, 756, (filed November 7, 1887.)

WITTERS, Receiver, etc., v. SOWLES and others.

(Circuit Court, D. Vermont. October 5, 1887.)

1. INSOLVENCY—NATIONAL BANKS—STATE LAWS.

Among the assets of an insolvent national bank were three mortgages which were sought to be impeached by the assignees of the mortgagor as having been given in violation of the insolvency law of the state. Plaintiff, receiver of the bank, claimed that the state law was inoperative upon the assets of a national bank, and was ineffectual to divest him of the title acquired by the mortgages. *Held*, that the mortgages were governed by the state law, and the bank took them with all the limitations imposed by the laws of the state upon them.

2. SAME—PREFERENCES—LIMITATION OF TIME.

Rev. Laws Vt. § 1860, provides that a conveyance made by an insolvent, or one in contemplation of insolvency, within four months before the filing of a petition of insolvency by or against him, made with a view to giving a preference to certain of his creditors, shall be void. It appeared that the mortgages sought to be declared void were made three months before the filing of petition of insolvency by a creditor of the mortgagor; but the petition was left to be acted upon when requested, and not acted upon until nearly two months later, at the instance of another creditor. *Held*, that the statute contemplated present judicial procedure on the filing of the petition, and the delay in acting upon the petition at the instance of the petitioning creditor brought the conveyances outside the purview of the statute.