

POTT ET AL. V. ARTHUR.

[15 Blatchf. 314.]¹

Circuit Court, S. D. New York.

Oct. 24, 1878.

SUIT TO RECOVER BACK CUSTOMS DUTIES—BILL OF PARTICULARS—AMENDMENT.

Under section 3012 of the Revised Statutes of the United States, construed in connection with section 954, this court has power, in a suit for the recovery of duties alleged to have been erroneously or illegally exacted by a collector of customs, to allow a bill of particulars to be served after the expiration of thirty days after notice of the appearance of the defendant, and to allow a defective bill of particulars to be amended.

[Cited in *Dieckerhoff v. Robertson*, 29 Fed. 781; *Rickard v. Barney*, 32 Fed. 582; *Castner v. Magone*, Id. 579; *Sherman v. Hedden*, Id. 757.]

[This was an action by James Potts and others against Chester A. Arthur; collector of the port of New York, to recover back duties paid on certain books.]

Hartley & Coleman, for plaintiffs.

J. Dana Jones, Asst. Dist. Atty., for defendant.

BLATCHFORD, Circuit Judge. I think that section 3012 of the Revised Statutes must be construed in connection with section 954, and that it is directory merely. Where jurisdiction of a cause is acquired by a court, whether one of general jurisdiction or one proceeding under a special statute, the well settled rule is, that the time fixed by statute for the performance of intermediate steps is to be regarded as directory merely, and that an omission to perform one or more of them in time will not render the whole proceeding abortive. In *re Empire City Bank*, 18 N. Y. 199, 220; *People v. Cook*, 8 N. Y. 67, 92; *Dwar. St. (Am. Ed. 1871)* p. 222, note 29. and cases there collected. The court has the same power, notwithstanding the

provisions of section 3012, in a suit for the recovery of duties alleged to have been erroneously or illegally exacted by a collector of customs, that it has in any other suit, to allow a bill of particulars of the plaintiff's demand to be served after the expiration of thirty days after notice of the appearance of the defendant, and to allow a defective bill of particulars to be amended. The question in each case presented is, whether proper 1132 ground is shown for the exercise of the discretion of the court.

In the present case, the bill of particulars of June 3d, 1875, seems to contain all the particulars required by section 3012, except the dates of the invoices. It was received and retained by the defendant's attorney without any notice that it would not be accepted as sufficient, or because served too late, and the defendant's attorney subsequently treated the action as one to be tried, and one in which the proper bill of particulars had been served in time, by serving a notice of trial. The defendant's motion to enter judgment of non pros, against the plaintiffs is denied, with leave to the plaintiffs to serve an amended bill of particulars, containing the dates of the invoices, if desired.

{In this case there was a judgment in favor of the defendant, which was affirmed by the supreme court in error. 104 U. S. 735.}

¹ {Reported by Hon. Samuel Blatchford. Circuit Judge, and here reprinted by permission.}

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