

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, plaintiffs 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 plaintiffs 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.