This is a different case from Wilson *v.* Eisner. There Mr. Wilson ran a racing stable in Kentucky and he made money on it for about a third of the time, though for two-thirds of the time he lost. The Circuit Court of Appeals said that as he had sworn that he was running it as a business and in the hope of making money, the judge ought to have believed him and ought to have directed a verdict for him, corroborated as he was by the evidence of past years. In Plant *v.* Walsh, Judge Thomas thought that Mr. Plant's farm, which was very like this farm, was a business. First, it appeared affirmatively that Mr. Plant had just begun the farm, and although it had not yet begun to be profitable he said that he expected to make it so. Hence, Judge Thomas thought that he was already conducting it for "gain or profit." But the learned judge went on to say obiter in addition that he did not think because the farm was conducted only for the pleasure of the owner and as a part of his estate as a country gentleman it was any less a business.

With the utmost deference I can not altogether agree with that statement. It does seem to me that if a man does not expect to make any gain or profit out of the management of the farm, it can not be said to be a business for profit, and while I should be the last to say that the making of a profit was not in itself a pleasure, I hope I should also be one of those who agree there were other pleasures than making a profit. Indeed it makes no difference whether a man is engaged in a business which gives him pleasure, if it be a business; that is irrelevant, as was said in Wilson *v.* Eisner. But it does make a difference whether the occupation which gives him pleasure can honestly be said to be carried on for profit. Unless you can find that element it is not within the statute, and I can not see in this case even the first intimation of a reason to suppose that Mr. Davies in his lifetime carried on this farm with the hope of a profit, or that if he had not got anything else out of it except the money which he did get he would have kept on.

I will therefore direct a verdict for the defendant.

(Pursuant to the direction the jury returned a verdict in favor of the defendant.)

(T. D. 3445.)

Income tax—Revenue act of 1918—Decision of court.

1. Voluntary Payment—Protest—Recovery of Taxes by Suit.
   A suit against a collector of internal revenue to recover taxes paid voluntarily and without protest can not be maintained.
2. Same—Section 252, Revenue Act of 1918.
   Section 252 does not give a right of action against the collector nor eliminate the necessity for payment of taxes under protest as a prerequisite to suit.
3. Section 252, Revenue Act of 1918, Construed.
   Section 252 of the revenue act of 1918 is intended to give the commissioner power to credit or refund overpayments of taxes where no claim for refund is filed by the taxpayer and was enacted to permit the commissioner, of his own volition, upon discovery of any overpayment, to credit or refund the same notwithstanding the provisions of section 3228, Revised Statutes.
4. Judgment Affirmed.
   The judgment of the United States District Court (280 Fed. 413; T. D. 3308) is affirmed.

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The following decision of the United States Circuit Court of Appeals, Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York in the case of Benjamin Fox *v.* William H. Edwards, collector (T. D. 3308), is published for the information of internal-revenue officers and others concerned.

D. H. Blair,
Commissioner of Internal Revenue.

Approved February 27, 1923:
A. W. Mellon,
Secretary of the Treasury.

United States Circuit Court of Appeals for the Second Circuit.

Benjamin Fox, plaintiff in error, v. *William H. Edwards, defendant in error.*

Writ of error to the United States District Court for the Southern District of New York.

Before Rogers, Hough, and Manton, Circuit Judges.

Rogers, Circuit Judge: The plaintiff commenced this action against the defendant, at the time involved collector of internal revenue for the second district of New York, to recover the sum of $1,279.79.

The complaint alleges that on March 15, 1919, plaintiff filed with defendant, who was then collector of internal revenue, a return of his net income for the calendar year 1918, showing a net income of $25,919.35, and on the 15th days of the months of March, June, September, and December of the year 1919 paid to defendant in quarterly installments the sum of $3,910.08 as and for a tax upon his net income for the year 1918, which tax had been computed by plaintiff and appeared by the return to be due. In computing his net income for 1918 plaintiff alleges that he failed to deduct an alleged loss of $15,283.33 sustained in that year. Consequently, on March 15, 1921, two years after the filing of the original return, plaintiff filed with defendant an amended return for the year 1918 showing a net income of $10,636.02 and a total tax liability of only $907.76. Demand was then made upon defendant for the sum of $3,002.32 and a claim for refund of the same filed with the Commissioner of Internal Revenue.

The plaintiff, apparently without waiting for action by the commissioner, applied the sum of $1,722.53 by claim of credit against his income tax for the year 1920, and no action having been taken by the Commissioner of Internal Revenue within six months on the claim for refund, brought suit against defendant in error to recover the balance.

To the complaint setting forth these facts defendant demurred upon the ground that it did not state facts sufficient to constitute a cause of action. The ground of the demurrer was that plaintiff having paid his tax voluntarily and without protest, showed no right to recover the same in a suit against defendant personally.

The court below sustained the demurrer and dismissed the complaint upon the merits. The only question presented is: May a taxpayer who pays his tax voluntarily and without protest based upon figures for which he alone is responsible, but who subsequently discovers that he has made a mistake, bring an action against the collector who received his voluntary payment, to recover the amount o the alleged overpayment, where such overpayment was due not to any action on the part of the collector or of any other taxing official but solely to the taxpayer's own error.

The plaintiff relies on section 252 of the revenue act of 1918, which reads as follows:

Sec. 252. That if, upon examination of any return of income made pursuant to this act. the act of August 5, 1919, entitled "An act to provide revenue, equalize

duties, and encourage the industries of the United States, and for other purposes," the act of October 3, 1913, entitled "An act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the revenue act of 1916, as amended, or the revenue act of 1917, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

The Supreme Court in the City of Philadelphia *v.* the Collector (5 Wall. 720) had under consideration the right to recover back money paid for taxes. The plaintiffs had sued to recover the sum of $26,875.57 which they had paid under protest and which the collector had demanded of them as for internal revenue duties. The court, while it recognized the right to recover in an action at law in a proper case money illegally exacted for taxes, said:

> Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received. Where the party voluntarily pays the money he is without remedy, but if he pays it by compulsion of law or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in the action of assumpsit for money had and received.
>
> When a party, knowing his rights, voluntarily pays duties or taxes illegally or erroneously assessed, the law will not afford him redress for the injury; but when the duties or taxes are illegally demanded, and he pays the same under protest or gives notice to the collector that he intends to bring a suit against him to test the validity of the claim, the collector may be compelled to refund the amount illegally exacted.

The principle that taxes voluntarily paid can not be recovered back is thoroughly established. It has been so declared in the following cases in the Supreme Court: United States *v.* New York & Cuba Mail Steamship Co. (200 U. S. 488, 493, 494); Chesebrough *v.* United States (192 U. S. 253); Little *v.* Bowers (134 U. S. 547, 554); Wright *v.* Blakeslee (101 U. S. 174, 178); Railroad Co. *v.* Commissioners (98 U. S. 541, 543); Lamborn *v.* County Commissioners (97 U. S. 181); Elliott *v.* Swartwout (10 Pet. 137). And there are numerous like cases in other Federal courts: Procter & Gamble Co. *v.* United States (281 Fed. 1014); Vaughan *v.* Riordan (280 Fed. 742, 745); Beer *v.* Moffatt (192 Fed. 984, affirmed 209 Fed. 779); Newhall *v.* Jordan (160 Fed. 661); Christie Street Commission Co. *v.* United States (126 Fed. 991); Kentucky Bank *v.* Stone (88 Fed. 383); Corkle *v.* Maxwell (7 Fed. Cas. 3231).

And the rule of the Federal courts is not at all peculiar to them. It is the settled general rule of the State courts as well that no matter what may be the ground of the objection to the tax or assessment if it has been paid voluntarily and without compulsion it can not be recovered back in an action at law, unless there is some constitutional or statutory provision which gives to one so paying such a right notwithstanding the payment was made without compulsion.—Adams *v.* New Bedford (155 Mass. 317); McCue *v.* Monroe County (162 N. Y. 235); Taylor *v.* Philadelphia Board of Health (31 P. St. 73); Williams *v.* Merritt (152 Mich. 621); Gould *v.* Hennepin County (76 Minn. 379); Martin *v.* Kearney County (62 Minn. 538); Gar *v.* Hurd (92 Ills. 315); Slimmer *v.* Chickasaw County (140 Iowa, 448); Warren *v.* San Francisco (150 Calif. 167); State *v.* Chicago & C. R. Co. (165 No. 597).

And it has been many times held, in the absence of a statute on the subject, that mere payment under protest does not save a payment from being voluntary, in the sense which forbids a recovery back of the tax paid, if it was not made under any duress, compulsion, or threats, or under the pressure of process immediately available for the forcible collection of the tax.—Dexter *v.* Boston (176 Mass. 247); Flower *v.* Lance (59 N. Y. 603); Williams *v.* Merritt (152 Mich. 621); Oakland Cemetery Association *v.* Ramsey County (98 Minn. 404); Robins *v.* Latham (134 No. 466); Whitbeck *v.* Minch (48 Ohio St. 210); Peebles *v.* Pittsburgh (101 Pa. St. 304); Montgomery *v.* Cowlitz County (14 Wash. 230); Cincinnati & C. R. Co. *v.* Hamilton County (120 Tenn. 1).

The principle that a tax or an assessment voluntarily paid can not be recovered back is an ancient one in the common law and is of general application. See Cooley on Taxation (vol. 2, 3d ed. p. 1495). That eminent authority also points out that every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make he can not afterwards assign his ignorance of the law as a reason why the State should furnish him with legal remedies to recover it back. And he adds:

> Especially is this the case when the officer receiving the money, who is chargeable with no more knowledge of the law than the party making payment, is not put on his guard by any warning or protest, and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction. Mistake of fact can scarcely exist in such a case except in connection with negligence; as the illegalities which render such a demand a nullity must appear from the records, and the taxpayer is just as much bound to inform himself what the records show, or do not show, as are the public authorities. The rule of law is a rule of sound public policy also; it is a rule of quiet as well as of good faith, and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made, and into which they have not been drawn by fraud or accident, or by any excusable ignorance of their legal rights and liabilities.

But the question presented must be decided upon the language of section 252 hereinbefore set forth in this opinion. In the cases within the purview of the section the right of the taxpayer to so much of the tax as he has paid in excess of that properly due is not made to depend upon whether it was paid under protest. The nature of the section must be regarded, as in the case of the statute before the court in United States *v.* Hvoslef (237 U. S. 1, 12), and so regarded it negatives any intent that a protest should be necessary. In this case as in that the right of repayment is established by the express terms of the statute itself.

The section is intended to give the Commissioner of Internal Revenue power to credit or refund overpayments when no claim for a refund is filed by the taxpayer. Prior to that enactment the commissioner had no authority to credit or refund overpayments of taxes unless appeal was duly made to him in the manner prescribed by section 3220 of the Revised Statutes.

Section 252 of the act of 1918 has nothing whatever to do with the collector of internal revenue or with an action against him. The power or duty to make refunds under the section is vested not in the collector but in the Commissioner of Internal Revenue. The commissioner, prior to the enactment of section 252, had no authority to credit or refund overpayments of taxes unless appeal was duly made to him in the manner prescribed by section 3220 of the Revised Statutes, which read: "The Commissioner of Internal Revenue * * * is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected * * *." And the appeal had to be made within two years after the cause of action accrued, as required by section 3228.

That being the condition of the law Congress enacted section 252 of the act of 1918. The primary purpose of that enactment was to permit the commissioner of his own volition upon discovery of any overpayment to credit or refund the same notwithstanding the provisions of section 3228 of the Revised Statutes, and to limit the time within which he could make such credit or refund to "five years from the date the return was made." The section does not in express terms purport to give the taxpayer a right to sue for the recovery of the excess in the tax paid. It simply defines the powers and duties of the commissioner in correcting overpayments which he finds have been made. It was intended to protect the commissioner in making refunds which ought to be made

even though no claim for refund was filed, or though the two year period for filing claims prescribed by section 3228 had expired.

Taxes erroneously paid or illegally exacted may be recovered—

1. From the Commissioner of Internal Revenue under section 3220 of the Revised Statutes heretofore referred to.

2. Through an action at law brought against the United States. This is by virtue of the so-called Tucker Act (Judicial Code, sec. 24, par. 20, ch. 397, 24 Stat. 635) being held that a suit may be maintained directly against the United States for the recovery of taxes wrongfully assessed and collected.—Emery, Bird, Thayer, Realty Co. *v.* United States (198 Fed. 242, 249); Christie Street Commission Co. *v.* United States (136 Fed. 326).

3. Through an action against a collector who wrongfully exacted the tax and who may be sued for such money as he is not entitled to retain.—Smietanka *v.* Indiana Steel Co. (257 U. S. 1); Sage *v.* United States (250 U. S. 33).

But in Elliott *v.* Swartwout (10 Pet. 137), the court held that the collector was not liable in an action to recover the excess duties mistakenly collected unless protest was made at the time of payment or notice was given to him not to pay the money over to the Treasury. The principle applied was the one applied to agents in private transactions—that a voluntary payment to an agent without notice of objection would not subject the agent to liability he having paid it over to his principal, but that payment with notice or with a protest might make the agent liable if in despite of the notice or protest he paid the money over to his principal. But after an act of Congress required collectors to pay over such moneys it was held that the personal liability was gone.—Cary *v.* Curtis (3 How. 236). But later statutes, as pointed out in Smietanka *v.* Indiana Steel Co., supra, recognize suits against collectors in such cases.

In our opinion section 252 of the act of 1918 was apparently designed to counteract the effect of section 3228 of the Revised Statutes which limited refunds to a period of two years after the tax had been paid, and it relates to the matter of obtaining a credit or a refund from the commissioner. If it impliedly gives a cause of action, about which we are not now called upon to express an opinion, it is a cause of action against the United States. It does not confer a right to bring an action against the collector in cases in which no liability otherwise existed.

Judgment affirmed.

(T. D. 3446.)

Certificates of stock.

Article 13 of Regulations No. 40 (1922 edition) amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Paragraphs (*k*) and (*l*) of article 13, Regulations No. 40, 1922 edition, are hereby amended to read as follows:

(*k*) The mere delivery of a certificate of stock by or on behalf of a customer to his broker solely for the purpose of enabling such broker to make a sale thereof for the customer, where the broker has no ownership or interest therein, is not subject to stamp tax and does not require an exemption certificate. The transfer of a certificate of stock from the name of the owner thereof to the name of a broker, solely for the purpose of enabling such broker to make a sale thereof for the owner, is not subject to tax, provided the broker shall in every case, at the time of such transfer to him, make

and sign a certificate stating that he has no ownership in such stock and that the transfer to him was made solely to enable him to sell the stock for the owner. Such certificate shall in every case be attached to the certificate of stock and presented to the transfer agent at the time such certificate of stock is surrendered for transfer and shall be preserved, together with the old certificate, by such transfer agent for the inspection of the revenue officer.

(*l*) The mere delivery of a certificate of stock from a broker to his customer for whom he has purchased such certificate, and when such broker has no ownership or interest therein, is not subject to the stamp tax and does not require an exemption certificate. The transfer of a certificate of stock from the name of a broker to the name of his customer for whom and upon whose order he has purchased such stock, where the tax has been paid upon the transfer of the stock to the broker, is not subject to tax, provided that the broker shall in every case, at the time of such transfer from him, make and sign a certificate stating that the transfer from the broker to his customer is made solely to complete the purchase made by such broker for such customer. Such certificate in every case shall be attached to the certificate of stock and presented to the transfer agent at the time such certificate of stock is surrendered for transfer, and shall be preserved, together with the old certificate, by such transfer agent for the inspection of the revenue officer.

Article 13 of Regulations No. 40 (1922 edition) is hereby amended by adding two new paragraphs (*o*) and (*p*) reading as follows:

(*o*) A "call" is an agreement to sell and is taxable; but a transfer of a certificate of stock pursuant to the "call" is not taxable, being only a fulfillment of the original agreement. The seller shall execute and attach to the certificate of stock his certificate, which shall be accepted by the transfer agent and shall be preserved by him for inspection of the revenue officer. The certificate here prescribed shall be in the following form:

We hereby certify that the transfer of ..... shares of the within stock to .... has been made pursuant to a "call," and that the Federal stock transfer stamps for the transaction are affixed to such "call," which is in our possession.

(Seller sign here.)

(*p*) Where, under paragraph (*k*) of this article, a certificate of stock, standing either in the name of the owner or any other person, has been delivered by the owner thereof to a broker for sale, and subsequently, under paragraph (*l*) of this article, such certificate has been delivered by a broker to his customer for whom it is purchased and the tax has been paid upon the delivery of such certificate from the seller's broker to the buyer's broker, the transfer of such certificate of stock into the name of the buyer is not subject to tax, provided, that either requisite stamps shall have been affixed to the certificate of stock upon its delivery to the buyer's broker, or the memorandum of sale evidencing the transaction between the seller's broker and the buyer's broker, with the requisite stamps affixed thereto, shall have been attached to such certificate at such time and presented to the transfer agent at the time such certificate is surrendered for transfer. The old certificate, together with the memorandum of sale, if used, shall be preserved by such transfer agent for the inspection of the revenue officer.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved March 1, 1923:
A. W. MELLON,
Secretary of the Treasury.