

## NELSON v. CARMAN.

{5 Blatch. 511;<sup>1</sup> 6 Int. Rev. Rec. 181.}

Circuit Court, E. D. New York. Nov. 12, 1867.

## TAXES ILLEGALLY ASSESSED—ACTION FOR MONEY HAD AND RECEIVED.

An action for money had and received is maintainable against a collector of internal revenue, for duties or taxes erroneously or illegally assessed and collected, when the payment has been made under protest, and with notice of an intention to bring a suit to test the validity of the claim.

{Cited in Greer v. Ferguson. 56 Ark. 324, 19 S. W. 967.}

This was an action {by William Nelson} against {George T. Carman} an internal revenue collector, to recover back an income tax alleged to have been illegally imposed upon the plaintiff. The cause was tried before the court without a jury, and, the testimony being closed, the district attorney raised the objection, that the action would not lie against the collector, inasmuch as it appeared that the tax in question had been decided by the assessor, as well as by the commissioner, upon appeal, to be due, and had been inserted in the assessment list as due and payable by the plaintiff, and had been collected in pursuance of the assessment list and paid into the treasury.

BENEDICT, District Judge. The question raised by the district attorney, in this case, has been passed upon by the supreme court, in the case of *City of Philadelphia v. Collector*, 5 Wall. {72 U. S.} 720, and it must now be considered as settled, that an action for money had and received is maintainable against a collector, for duties or taxes erroneously or illegally assessed and collected, when, as in the present case, the payment has been made under protest, and with notice of an intention to bring a suit to test the validity

of the claim. The objection is, therefore, overruled, and the case must proceed upon the merits.

<sup>1</sup> [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

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