IN THE SUPERIOR COURT OF SEMINOLE COUNTY, STATE OF OKLAHOMA

The Continental Supply Company, a corporation, Plaintiff, vs Board of Commissioners of Seminole County et al, Defendants.	)	No. 1156

BRIEF OF PLAINTIFF

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BRIEF OF PLAINTIFF

All of the evidence in this case was submitted several months ago and at the conclusion of the evidence the Court indicated that he would like to have typewritten briefs from the opposing counsel.

The plaintiff filed its petition stating that it was in the business of selling at wholesale and retail, pipe and other oil field equipment and that for such purposes maintained a yard just outside of the corporate limits of the City of Maud, Seminole County. In 1930 it filed with the County Assessor of Seminole County a return of all of its property used in connection with its yard near Maud, Oklahoma.

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The Assessor, or a Deputy Assessor, through a mistake of fact, showed upon the return that the property was in School District #117, when as a matter of fact it was in Wolf Township, Union Graded School District #2. On April 1, 1931, the plaintiff paid its personal taxes as shown by the rolls of the County Treasurer of Seminole County and received therefore certificate #1744. The tax paid amounted to $3582.12. Had the County Assessor correctly shown the property as being located in Wolf Township, Union Graded School District #2, the amount of taxes that the plaintiff would have been required to have paid would have been $1921.05. Therefore the plaintiff has overpaid Seminole County for 1930, the sum of $1661.07, the difference being entirely in the school taxes levied on the rate of School District #117 instead of Union Graded School District #2 of Wolf Township.

On June 30, 1931, the same being less than three months after the taxes were paid, the plaintiff filed with the County Commissioners of Seminole County an affidavit of erroneous assessment, which affidavit bore the approval of the County Assessor of Seminole County, certifying that the statements contained in the affidavit were correct. Thereafter and on or about July 1, 1931, the County Commissioners of Seminole County approved the petition of the plaintiff and directed the County Treasurer of Seminole County to refund

such excess payment. The County Treasurer refused to refund the payment, giving as his reason that there was no money in the sinking fund of Seminole County from which such payment could be made. The plaintiff has attempted to collect the refund which is specifically authorized by Section 12642 O. S. 1931, Section 9674 C. O. S. 1921, and having followed the statutory procedure described by statute, now asks that it have and recover a judgment against Seminole County in the amount of $1661.07. To this petition the Board of County Commissioners and the County Treasurer of Seminole County filed an answer. In substance their answer pleaded that Section 12642 O. S. 1931 was unconstitutional as being in violation of Section 19, Article 10 of the Constitution of the State of Oklahoma. The answer alleged that the appropriation of the Excise Board for tax refunds had been exhausted and also alleged that if any mistake was made in the assessment of the property it was a mistake made by the plaintiff. In the concluding paragraph of the defendants' answer, they stated that they were not liable for the amount claimed by the plaintiff but suggested that if there was any cause of action it should be against School District #117 and not against these defendants. To this answer a reply was filed by the plaintiff, denying that Section 12642 O. S. 1931 was unconstitutional and denying that the mistake in placing the property in the wrong school district was any fault of the plaintiff.

When the case came on for trial all of the allegations in plaintiff's petition were stipulated with the exception as to whether or not the mistake in putting this personal property in the wrong school district was caused by the County Assessor or by the plaintiff. This left before the Court the question of fact as to whose mistake it was that the property was shown in the wrong school district and the question of law as to whether or not Section 12642 O. S. 1931 is constitutional.

At the hearing the plaintiff introduced in evidence its copy of the assessment sheet which showed a blank opposite the words "School District". It also introduced in evidence the tax receipt showing that it had paid the taxes on April 1, 1931 which date was prior to the time that the 1930 taxes became delinquent. It introduced in evidence a certified copy of the petition for certificate of error which petition showed upon its fact that it had been filed on June 30, 1931 and had been acted upon favorably by the County Commissioners. In addition to that, Mr. Bell, who was the man in charge of tax returns for The Continental Supply Company, testified that he had mailed out the tax return for The Continental Supply Company for Seminole County for the year 1930 without any school district being shown in the tax return, and that the same had been filed in that manner. The former County Assessor of Seminole County testified that he was Assessor at the time

that the return was made; that he had hunted for the original return but could not find it and that it was his opinion that the school district was filled out by The Continental Supply Company.

ARGUMENT AND AUTHORITIES

Whose fault was it that the personal property of The Continental Supply Company was assessed as being in School District #117, when it should have been in Wolf Township, Union Graded School District #2?

Quite frankly there was some conflict of testimony as to whether or not the school district blank was filled in by an agent of The Continental Supply Company, or by the Assessor or by one of his deputies. Mr. Bell testified that it was not filled in when he filed it. The Assessor could not produce the original and merely said that it was his opinion that The Continental Supply Company had filled it in. Quite frankly we think it is entirely immaterial whose fault it is. We say that it is immaterial because Section 12642 O. S. 1931 provides that: ***" if upon such hearing it appears that any such tax has been paid through a mistake of fact, either of the party paying the same or of any officer whose duty it is to assess or collect taxes, the board of county commissioners may refund the same, but no refund shall be made because of mistake of law."

Is Section 12642 O. S. 1931 (Section 9674 C. O. S. 1921) constitutional?

This section of the statute is as follows:

"The board of county commissioners of each county is hereby authorized to hear and determine allegations of erroneous assessments, mistakes or errors made in assessing or preparing the tax rolls or in the description of land or other property, before the taxes have been paid, on application of any person or persons who shall show by affidavit good cause for not having attended the meeting of the county board of equalization for the purpose of correcting such error, mistake or difference, and if upon such hearing it appears that any personal or real property has been assessed to any person, firm or corporation not owning or claiming to own the same, or that property exempt from taxation has been assessed, it shall be the duty of the board of county commissioners to correct such error, and the county clerk, upon the order of said board, shall issue a certificate of error to the county treasurer, stating the amount of such correction, which amount the treasurer shall deduct from the original assessment or assessed amount; and if upon such hearing it appears that any such tax has been paid through a mistake of fact, either of the party paying the same or of any officer whose duty it is to assess or collect taxes, the board of county commissioners may refund the same, but no refund shall be made because of mistake of law. The amount of taxes ordered refunded, as herein provided, shall be a valid charge against the county and shall be paid out of the sinking fund of the county by the county treasurer, on order of the board of county commissioners. Provided, no refund shall be made in any case where the taxes have been paid for a period of more than one year prior to the claim of such refund, nor shall there be any claim against the county for any taxes paid on any ground where the same have been paid for a longer period than herein specified".

As we understand it, there is no question that the mistake was a mistake of fact. There is no question but that

the taxes had not been paid for a period in excess of one year prior to the refund. The taxes were paid on April 1, 1931 and the claim for refund was made on June 30, 1931. There is no question as to the action of the County Commissioners in approving the claim and directing the County Treasurer to pay it because there was introduced in evidence a certified copy of the claim as approved both by the County Assessor and the County Commissioners.

The County Attorney says that this Section of the statute is unconstitutional. We think that this contention is quickly disposed of by the case of State v. State ex rel Shull, 142 Okl. 293, 286 Pac. 891. In that case the State Bank Commissioner held as part of the assets of the state guaranty fund of the State of Oklahoma certain real estate. The Bank Commissioner was of the opinion that such property was exempt from taxation. The County Assessor felt otherwise and placed the property on the tax rolls for each year at a valuation of $60,000.00 for each year. When it was discovered that the property was taxable the Bank Commissioner went before the Board of County Commissioners and asked that the assessment be reduced. The Board of County Commissioners reduced the assessment and from such action an appeal was taken. There was involved in this case the question of whether or not, under the statute, the County Commissioners could reduce an assessment where the complaining party had not ap-

peared before the Board of Equalization. In the opinion in that case the Supreme Court of Oklahoma had occasion to consider the constitutionality of Section 9674 C. O. S. 1921 because an attack had been made upon the constitutionality of that section. That section is the same section that the County Attorney of Seminole County is now attacking as unconstitutional. We quote from the opinion at page 896:

> "Defendant in error contends that the board of county commissioners had authority to correct the erroneous assessment under the authority granted by sections 9673 and 9674 C. O. S. 1921. The plaintiff in error contends that section 9673 was declared unconstitutional by the Supreme Court of this state, prior to the time that it was brought forward in the Compiled Laws of 1921, and that it cannot be given any vitality by being placed in the Compiled Laws of 1921 by the codifiers. The plaintiff in error also contends that section 9674, C. O. S. 1921, does not vest in the board of county commissioners authority to correct errors in the assessments mentioned, and in support of that contention cites Hays v. Bonaparte, 129 Okl. 258, 264 P. 605.
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> "We fully agree with the contention of the plaintiff in error relative to section 9673 C. O. S. 1921. This court in Johnson v. Grady County, 50 Okl. 188, 150 P. 497, held that the last clause in section 14, chapter 152, Session Laws of 1910-11, was unconstitutional; and, in Carroll, Brough & Robinson v. Board of County Commissioners of Oklahoma County, 64 Okl. 165, 166 P. 702, this court held that section 14, chapter 152, Session Laws of 1910-11 is unconstitutional and void, and that the board of county commissioners of Oklahoma county was without jurisdiction to grant a rebate of taxes because of an alleged excessive assessment upon the property so, this section having been declared unconstitutional prior to the time that it was brought forward as section 9673 in the Compiled Oklahoma Statutes of 1921, it has no force and effect as a

law, since it was declared unconstitutional.

"However, after the constitutionality of this act was challenged in 1915, the Legislature in 1916 passed what is now section 9674 C. O. S. 1921, with the emergency clause attached. This section authorizes the board of county commissioners of each county to hear and determine allegations of erroneous assessments, mistakes, or errors made in assessing or preparing the tax rolls, or in the description of land or other property, before the taxes have been paid, on application of any person or persons who shall show by affidavit good cause for not having attended the meeting of the county board of equalization, for the purpose of correcting such error, mistake, or difference.

"Counsel for plaintiff in error contends that this court in Hays v. Bonaparte, 129 Okl. 258, 264 P. 605, 606, held that section did not give the board of county commissioners authority to correct an erroneous assessment of taxes.

"We cannot agree with counsel that Hays v. Bonaparte, supra, sustains his contention. In that case this court held that, where property has been voluntarily listed for taxation by the owner and valuation placed thereon by him is increased by the assessor or by the board of equalization without timely notice to him or without his knowledge or consent, and he is thereby deprived of his right of appeal, his remedy is to pay the tax under protest, and proceed in accordance with the provisions of section 9971, C. O. S. 1921. Mr. Justice Hefner, in delivering the opinion of the court, after discussing sections 9674 and 9648, says:

> "'These two sections give the county commissioners jurisdiction in at least three classes of cases in which the board is authorized to issue certificates of error in assessment.'

"Later in the case of Cotton v. Blake, County Treasurer, 183 Okl. 60, 270 P. 1105, this court held that:

> "'When the statutes provide a remedy against an excessive, erroneous, or improper assessment of the property of an individual, as by section 9966 and section 9674, C. O. S. 1921, by proceedings before a board of equalization or review, the taxpayer must at his peril avail himself of such remedy and cannot resort to the courts in the first instance.'
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> "At page 1106 of the Pacific Reporter, Mr. Justice Riley, in delivering the opinion of the court, says:
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> "'Section 9674, C. O. S. 1921, provides a remedy for erroneous assessments.'"

It will be noted that the courts of Oklahoma pass squarely upon the constitutionality of this statute. We do not think that further quotation or authority is necessary.

The County Attorney takes the position that this section of the statute is unconstitutional in that it violates Section 19 of Article 10 of the Constitution of the State of Oklahoma, which reads as follows:

> "Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose".

The County Attorney contends that the provision of Section 12642 which requires the County Treasurer to pay the refund out of the sinking fund amounts to a diversion of the money from the sinking fund and requires it to be used for a purpose for which such money was not intended.

For a clear consideration of this paragraph we should consider the purpose for which the sinking fund is created. Section 5913 O. S. 1931, provides as follows:

"It shall be the duty of the officers of each municipal corporation in the State of Oklahoma by law authorized to levy taxes to make a levy each year for a sinking fund, which shall, with the money already in such fund be sufficient to pay all the bonded indebtedness of such municipality coming due during the following year; one year's interest on all outstanding bonds of such municipality with an allowance of twenty-five per cent for delinquent taxes added; and an additional sum equal to one-third of the original amount of all outstanding judgments against the municipality, when one-third or more of such judgment remains due and unpaid, and in case less than one-third of such judgment remains due then the levy shall cover the entire amount of such judgment yet remaining unpaid."

Section 5919 provides as follows:

"Such Sinking fund shall be used:

"First. For the payment of interest coupons as they fall due.

"Second. For the payment of bonds falling due, if any such there be, and,

"Third. For the payment of judgments against the municipality, if any there be; provided, that when any sinking fund has been used or may hereafter be used to pay judgments as herein provided, that notwithstanding the fact that such judgment or judgments have been paid with such sinking fund, it shall be the duty of the proper officers to make the levies to pay such judgments the same as if the same had not been paid out of such sinking fund, and when so levied and collected the same shall be turned into the sinking fund out of which such judgment or judgments was paid."

Section 5915 requires sinking funds to be invested in certain types of income-bearing securities. Two things will be noted from a reading of the statutes which we have quoted when taken into consideration with Section 12642: The first thing is that the sinking fund is created to retire not only funded indebtednesses of municipalities, but also judgments. The second

thing that will be noted is that temporary uses of the sinking fund may be made in the way of investments provided that the money is back in the sinking fund when it is needed to pay off the funded indebtednesses of the municipalities. A careful reading of Section 12642 O. S. 1931 shows that the use of sinking fund money for a refund of taxes is merely temporary. It contemplates that the money will be put back in the sinking fund during the following year. In this connection we call to to the Court's attention the last few lines of Section 12641 which read as follows:

> "* * * and if any such taxes, so erroneously assessed shall have been paid, the same shall be a valid charge against the county and shall be refunded by the board of county commissioners and the amount of such refunded taxes, which have been paid over to any municipality, or to the state, shall be deducted from the tax money due the state on such municipality at the next settlement."

It is true that this part of Section 12641 has been declared invalid by the Supreme Court of the State of Oklahoma, but as one will notice in reading that part of State v. State, supra quoted above, the invalidity was occasioned by technical failure on the part of the Legislature to include in the heading a summary of these particular provisions of the statute. It will also be noted that at the next session of the Legislature, Section 12641 was reenacted in substantially the same words and became Section 12642. In other words, payment out of the sinking fund as contemplated by Section 12642 is merely a temporary use or investment of the money and does not amount to a diversion of

the use for which the money was originally collected in the form of sinking fund taxes. To declare Section 12642 unconstitutional because it provides for a temporary use of the money, would require the court also to declare Section 5915, which provides for the investment of sinking funds, unconstitutional for the same reason. Putting it in another way, the section of the Constitution which the County Attorney has quoted only intends that moneys collected as taxes for one purpose shall not be permanently diverted for another purpose.

Should there be any doubt in the Court's mind as to the constitutionality of Section 12642 after having read the quotation from the case of State v. State, supra and the analysis of the sinking fund provisions as embodied in our statutes, we call the Court's attention to the general rule that Courts should declare statutes unconstitutional only if and when there is no doubt in the court's mind that such statute is unconstitutional. The syllabi of a few of the leading cases of Oklahoma on this point are as follows:

> "Courts are not justified in disturbing legislation on constitutional grounds, except where the infraction is clear, palpable, and plainly inconsistent. - Ryan v. State ex rel., 102 Okla. 168, 228 Pac. 521."

> "If a statute is susceptible of two interpretations, that should be adopted, which gives the statute the effect evidently intended by the Legislature, especially if the other construction would render the same invalid. - Rakowski v. Wagoner, 24 Okla. 282, 103 P. 632."

"A statute will not be declared invalid as being repugnant to the provisions of the Constitution, unless such repugnancy is clear and appears beyond a reasonable doubt. - Rakowski v. Wagoner, 24 Okla. 282, 103 P. 632."

"The presumption is in favor of the constitutionality of statutes, and the Supreme Court whenever possible to do so, will uphold the constitutionality of a legislative enactment. - Dickinson v. Perry, 75 Okla. 25, 181 P. 504."

"A court will never declare an act of legislation, passed with all the forms and solemnities requisite to give it the force of law, unconstitutional and void, unless the nullity and validity of the act are placed, in its judgment, beyond a reasonable doubt. - City of Pond Creek v. Haskell, 21 Okla. 711, 97 P. 338."

"An act will not be declared unconstitutional unless its conflict with the Constitution is clear and certain. - Stout v. State, 36 Okla. 744, 130 P. 553."

Lest there be some objection that the judgment sought herein is not the remedy prescribed by Section 12642, we wish to call the Court's attention to the fact that the County Treasurer refused to comply with the order of the County Commissioners upon the ground that he had no sinking fund available for such purpose. Section 12642 of course cannot avail a taxpayer if there are in fact no sinking funds available. Surely it was not intended that a taxpayer lose the amount of the refund to which he is entitled by virtue of such a situation. The plaintiff in this case has exhausted each and every statutory remedy. That being true, it is entitled to a judgment against the County which will be paid in due course. Looking at the matter another way, the statute provides that the money be paid out of the

sinking fund. The sinking fund, as we have previously shown, is for the purpose of paying off the funded indebtedness of the County and for the purpose of paying judgments against the County. If a judgment be rendered against the County in this case, the judgment will be paid out of identically the same money that it would have been paid had the County Treasurer had the money and paid it pursuant to the order of the Board of County Commissioners. Therefore in substance, there is no difference between the remedy herein sought and the provisions of Section 12642.

The County Attorney has in his answer, suggested that the cause of action in favor of the plaintiff is against the School District. There is a quick answer to that suggestion. That answer is that the plaintiff paid its money to the County Treasurer and the County Treasurer apportioned the money and will apportion future years' taxes. The plaintiff paid no tax to School District #117 - the County Treasurer did. Section 12641, although invalid because of a technical defect, clearly shows what the intention of the Legislature was. Aside from the statutory authority which is at least inferred in Section 12642 giving the County Treasurer the right to reimburse the sinking fund by holding out of a subsequent year's appropriation amounts sufficient to reimburse the sinking fund, we call the Court's attention to the following cases, all of which hold that

where a tax collecting agency, as for instance a County, collects taxes for other municipal subdivisions and there is a mistake made in the apportionment of the tax, that mistake may be corrected, and if necessary, the tax collecting agency may bring suit and recover from the district that has wrongfully received money the amount of the over-payment. These cases have heretofore been furnished to the County Attorney of Seminole County. For the Court's information, however, these cases are as follows:

Gilpatrick v. City of Hartford, 120 Atl. 317.
Ulster County v. State, 69 NE 370.
Hobart Township v. Town of Miller, 102 NE 847.
City of Norfolk v. Norfolk County, 91 SE 820.

CONCLUSION

We respectfully submit that Section 12642 is constitutional, not only because the Supreme Court of Oklahoma has held that it is constitutional, but because the objection interposed by the defendants refers to permanent diversion of taxes rather than temporary diversion. We also submit that the plaintiff has complied with each and every statutory requirement and having paid its tax through a mistake of fact and having obtained the approval of the County Commissioners to a certificate for the correction of error, it is now entitled to a judgment against the County which will in due course of time refund to the plain-

tiff the amount of tax paid through mistake.

Respectfully submitted,

Keaton, Wells, Johnston & Barnes

Hasley & Elston

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF SEMINOLE COUNTY,

STATE OF OKLAHOMA.

The Continental Supply Company, a corporation, Plaintiff, -vs- Board of County Commissioners of Seminole County, et al, Defendants.	No. 1156.

BRIEF OF DEFENDANT.

This is an action filed by Plaintiff against Defendant for a money judgment based on a claim of plaintiff arising out of an over payment of taxes on account of plaintiff's property being erroneously assessed in School District # 117 of Pottawatomie County.

The suit was instituted by plaintiff filing its petition alleging the erroneous assessment together with the fact that it had presented its affidavit of erroneous assessment before the Board of County Commissioners, which affidavit was approved and allowed and a certificate of error issued directing the County Treasurer to pay out of the sinking fund the sum claimed to be due plaintiff on account of said erroneous assessment. Defendant answered by the way of general denial, estoppel and further pleads the unconstitutionality of Section 12642, O S 1931, same being Section 9674, C O S 1921, this being the section of the statute under which plaintiff filed its affidavit of erroneous assessment before the Board of County Commissioners and the section of the statute that plaintiff is pleading as one of authority for the liability alleged to exist from defendant to plaintiff.

The issues were joined as above set out, the cause tried on an agreed statement of facts plus some documentary and oral testimony and for the convenience of the Court we set out herein in full the agreed statement of facts and we are sure the Court will remember the oral testimony of the witnesses.

AGREED STATEMENT OF FACTS.

It is hereby stipulated and agreed by and between the parties hereto that the plaintiff is a corporation duly organized and existing under the laws of the State of Missouri, and they are qualified to transact business in this state; that W. L. Thurston, W. E. Huddleston and C. W. Johnson are the duly elected, qualified and acting County Commissioners of Seminole County, Oklahoma, and that V. V. Criswell is the duly elected, qualified and acting County Treasurer of Seminole County, Oklahoma, and that the plaintiff is engaged in the business of selling pipe and other oil field equipment, and for the purpose of same maintains a yard outside of the corporate limits of the city of Maud, Oklahoma, the same being property in this county; that said yard is not now and never has been in the corporate limits of said city of Maud; that the property is now and has always been in Union Graded School District # 102 and not now and never has been in School District # 117.

It is further stipulated and agreed by and between the parties hereto that the plaintiff acting by and through its duly authorized agents and employees reported and returned all of its property in connection with its yard near Maud, Oklahoma, same being the property heretofore mentioned.

It is further stipulated and agreed by and between the parties that said property was assessed in School District # 117, that the rate of the levy in School District # 117 was computed against the valuation of said property and taxes collected accordingly. That on the first day of April, 1931, plaintiff

voluntarily paid into the office of the County Treasurer of Seminole County the taxes levied against said assessment. That plaintiff was not advised at the time of the payment of said taxes that said property was reported and assessed in School District # 117, that said taxes were paid voluntarily and without protest and receipt # 17449 issued by the County Treasurer of Seminole County, Oklahoma, and delivered to plaintiff. That plaintiff paid the total sum of $3,582.12 into the office of the County Treasurer. That had plaintiff paid taxes on said property as being located in Wolfe Township, Union Graded # 2, the total amount of taxes levied and assessed against said property above referred to would have been $1921.05, and the sum of $1661.07 represents that sum paid by the plaintiff because of the erroneous assessment above set out.

It is further stipulated and agreed by and between the parties hereto that plaintiff on or about the 30th day of June, 1931, filed with the Board of County Commissioners of Seminole County in writing an affidavit of erroneous assessment, a carbon copy of which is hereby furnished and delivered to the reporter marked plaintiff's Exhibit "A" and made a part of this stipulation of fact with the understanding that plaintiff will furnish to the Court the original of said affidavit showing approval of the Board of County Commissioners stamped thereon, a certified copy of the original affidavit and assessment showing the approval of the Board of County Commissioners stamped thereon.

It is further stipulated and agreed by and between the parties hereto that the County Treasurer of Seminole County refused to recognize the certificate of error issued by the County Commissioners for the reason he had no funds appropriated or money in the sinking fund of Seminole County.

It is further agreed by and between the parties hereto that the plaintiff has filed a verified itemized statement of Seminole County, Oklahoma, as prepared by Ellis Cooper, County Clerk of

Seminole County and that the same is a true and correct statament and added to the stipulation herein as an exhibit.

It is further agreed by and between the parties hereto that a jury is waived by all parties hereto and the parties agree to try and submit said case to the court.

It is further stipulated and agreed by and between the parties hereto that the boundary lines of District # 117 are on file and made of public record with the Superintendent of Public Instruction of Pottawatomie County, and has been since 1927.

It is further stipulated and agreed by and between the parties hereto that the plat of the territory around Union Graded District # 2 is now and has been since and prior to the rendition of said assessment on file in the office of the Superintendent of Public Instruction of Seminole County, and is a part of the records of said office.

It is further stipulated and agreed by and between the parties hereto that the taxes paid pursuant to said assessment were voluntarily paid and without protest.

It is further stipulated and agreed by and between the parties hereto that subsequent to the payment of the taxes in May by the plaintiff into the office of the County Treasurer of Seminole County, Oklahoma, pursuant to said assessment, that subsequent thereto and on or about the 1st day of May, 1931, the School District money, or school tax, being a portion of said taxes were apportioned to and paid over and distributed to School District # 117, and that Seminole County does not have in its treasury nor has it had since any portion of said school money and the whole of said taxes, including the whole amount computed against said assessment, has been distributed to the various municipalities.

It is further stipulated and agreed by and between the parties hereto that the only money involved in this case is that amount of tax money that was paid over to Independent School District # 117 pursuant to the levy made and approved by said districts.

Plaintiff seeks judgment against Seminole as a municipal corporation and the burden of proof is on plaintiff to prove its cause of action by fair preponderance of the testimony. There is a further burden a person assumes in suing a municipal corporation, and that is:

> "One, who demands payment of a claim against a County or a municipal sub-division thereof, must show some statute authorizing it, or that it arises from some contract, expressed or implied, which finds authority of law. It is not sufficient that the services performed, for which payment was demanded, are beneficial."

Schulte vs. Board of County Commissioners, 122 Okla. 205; 253 Pac. 494; Board of Commissioners of Delaware County vs. News Dispatch Printing and Auditing Company, 122 Okla. 107; 251 Pac. 606; Board of Commissioners of Logan County vs. State, ex rel, 122 Oklahoma. 268; 254 Pac. 710; News Dispatch Printing and Auditing Company vs. Board of Commissioners of Le Flore County, 112 Okla. 138; 240 Pac. 64; Eelmann vs. Board of Commissioners of Le Flore County, 110 Okla. 172, 237 Pac. 94; Board of Commissioners of Tulsa County vs. News Dispatch Printing and Auditing Co, 104 Okla. 260; 231 Pac. 250; Sane vs. Walker,Taylor County, 104 Okla. 261; 231 Pac. 252; and a number of other cases supporting this general rule.

Plaintiff cites as their statutory authority for the payment of this money Section 12642, O S 1931 (Section 9674 COS, 1921). It is the contention of this defendant that this statute has been held unconstitutional.

"No tax levied and collected for one purpose shall ever be devoted to any other purpose"

Section 19, article 10 of the Constitution of Oklahoma.

Pursuant to the above constitutional provision our own Supreme Court in the case of State, ex rel, Hatfield vs. Moreland,,et al., 152 Okla. 37, the Court held the following:

> "Taxes levied and collected for the prupose of creating a sinking fund for a county may not be used for the payment of a refund of taxes, and the Legislature is without constitutional authority to provide for the payment from a sinking fund of any refund of taxes in in excess of the actual amount of taxes levied for and paid into the county sinking fund. A legislative act conflicting therewith is in violation of section 19, art. 10 of the Constitution of Oklahoma, and is void."

and in the same case the Court held the following:

> "An order of the County Commissioners made pursuant to the provisions of section 9648 C.O.S. 1921, for the issuance of a certificate of error is not a judgment against the county."

It is agreed by and between the parties hereto that the money alleged to be due plaintiff by reason of this erroneous assessment has been long since prior to the institution of this suit apportioned by the County Treasurer and paid over to School District # 117 and no part of this money ever reached the sinking fund of Seminole County, Oklahoma.

In the case of Bank of Picher vs. Morris,County Treasurer 157 Okla. 122, the Court held:

> "The Legislature is without authority to provide that refunds of taxes shall be made from a sinking fund which accrued pursuant to the provisions of sections 26, 27, and 28, art. 10, of the Constitution, for the reason that under the provisions of sec. 19, art. 10, of the Constitution, taxes levied and collected for one purpose shall never be devoted diverted to another purpose."

Thus it seems clear that Section 12642, O. S. 1931 (Sec. 9674 O S, 1921) is plainly unconstitutional in so far as it provides for payment of refund of taxes erroneously assessed and collected out of the sinking fund of the county. That being true, then the statutory authority of plaintiff to recover a judgment against Seminole County is lacking and there is no statutory authority for the recovery of a judgment

against Seminole County for this alleged erroneous assessment.

Counsel for plaintiff relies on the case of State, et al., vs. State, ex rel, Schull, State Bank Commissioner, 142 Okla. 293. The facts in that case are altogether different from the facts in this case. In the case of State vs. State they did not seek a refund of money but only to have the assessment corrected as to valuation of their property returned for assessment, which a reading of the case will disclose. The ~~report~~ Court in that case does pass upon the constitutionality of 9674, supra, but the facts in the Schull case and the facts of the case at bar are wholly dissimiliar and the case of State, ex rel, Hatfield vs. Moreland, supra is more nearly ~~at~~ in point and applicable to the facts at bar than State vs. State as cited by counsel for plaintiff. A study of these two cases will disclose this. No plainer language can be used ~~then~~ as to the constitutionality of 9764 or any statute of similiar import having for its purpose the devoting of taxes collected for one purpose to that of another, than is used by our own Supreme Court in the case of State, ex rel, Hatfield, vs. Moreland, in support of our contention in this case. A careful reading and study of that case will disclose to the Court that plaintiff's claim is without statutory foundation which brings us to the proposition of plaintiff having a common law cause of action.

The defendant contends that it is plaintiff's duty to make a proper rendition of its property and that plaintiff is chargeable with notice as to the location of its property and cannot set forth facts and statements in the return of its assessment which misleads the taxing officials of the county and causes them to make errors and mistakes. There are many things that plaintiff can do in the way of making a return of its property which works as an estoppel against plaintiff's recovery in this case.

The term "mistake of fact" has a legal significance and a statutory definition. Section 9422 O. S. 1931 defines a mistake of fact to be:

> "Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:
> First: An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,
> Second: Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed."

It is the duty of the tax payer to list his property for assessment and in the case of the Louisana Realty Company, vs. City of McAlester, 25 Okla. 726; 108 Pac. 391, the Court held the following:

> "In order to entitle one to recover taxes voluntarily paid, they must have been paid through a mistake of fact and not of law, provided, the mistake was not caused by his own neglect of duty."

In the same case the Court said:

> "Conceding that plaintiff made a mistake of fact in paying its taxes when it was not liable, the mistake was caused by its own neglect of duty, and, the payment being voluntary, the law will furnish no relief."

It is agreed in this case that the payment of taxes was made voluntarily by plaintiff. In the case of Louisiana Realty Company, supra, the court cited with approval and followed the case of San Deigo , etc., Co. vs. La Presa School District, in San Diego County, Cal. which case is reported in the 54 Pac. 528, the California court having under consideration a question similiar to the one involved in this case, used this language:

> "Where property was assessed in a district in which it was not situated, and the owner, having the means of discovering the mistake, voluntarily paid the tax, he could not recover it back, as being paid under a mistake of fact, under Civ. Code Sec. 1577, defining a mistake of fact as one not caused by the neglect of a legal duty."

It was agreed by and between the parties to this suit that a proper and correct description of School District # 117 and Union Graded School District # 2 was on file in the County Superintendent of Public Instruction's office of Seminole and Pottawatomie Counties. Plaintiff had access to these records and could have very easily located its property in the proper school district.

Plaintiff by returning its property as being in the City of Maud misled the County Assessor of Seminole County as to its location, as the evidence discloses that the entire city of Maud both the Pottawatomie and Seminole County additions is in School District # 117 which is a joint school district. We request the Court to read this case as we believe in the absence of statutory authority for a refund of taxes this case is controlling as to the question involved herein.

As to the question of estoppel we call the Court's attention to the following cases and text authorities. The statement of the general rule that the tax payer is bound by his return of property for assessment is found in Cooley on Taxation, Section 1086, p. 2195:

> "Ordinarily, a property owner is bound by a schedule of his taxable property given by him to the assessor; but handing in a list which, by mistake of the owner's rights, is made to embrace property not liable to taxation, will not estop him from claiming an abatement as to such exempt property; there being no reason of justice or public policy which it should. So a tax payer cannot complain of any mere irregularity in the action of the assessors, into which they have been led by an error or imperfection in his own list not affecting his substantial rights."

The following statement from the same authority is found in Section 1208, p. 2422:

> "So an assessment cannot be attacked in respect to a matter based on the return of the taxpayer, and one who misleads the assessing board cannot complain."

In the case of Iowa Cen. Ry. Co. v. People, 156 Ill. 373, 40 N. E. 954, the proceeding was one brought by the County Collector for a judgment for unpaid taxes which included the taxes levied on a certain lot. The railway company contended that the lot was not a part of their railroad track and should be assessed as property under their statute, "other than railroad track." The Court held that the company was bound by the return which was made and that the assessor was entitled to rely upon the schedule submitted by the railroad company as to the character of the property sub-

mitted for taxation. The Court said:

> "P. 955. Now, it is quite manifest from these provisions that the assessor is to be governed by the statement made in the schedule filed by the railroad company in assessing the railroad land as real estate other than railroad track. He does not determine by the exercise of his own judgment that the land is not railroad right of way, but he must follow the return as embodied in the schedule. He receives from the County Clerk a copy of the schedule of the real estate other than railroad track, filed by the company with the clerk, and 'Such Property'--that is, the property named in the schedule as being real estate other than railroad track--he is to treat, in regard to the assessment thereof, the same as other similar property belonging to individuals. He is to treat it as 'lands' or 'lots', and not as right of way or railroad track. Hence we are inclined to hold, upon further reflection, that the decision in Railway Co. v. Goar, supra, went too far in holding substantially that the assessor is bound to take notice of a mistake made by the company in returning land in its schedule as real estate other than railroad track, and that he must look at the land in order to see to what extent it is used for right of way. If he is to determine for himself whether the land is railroad right of way or not, there is no use of requiring the county clerk to furnish him with a copy of the company's schedule. It was not the intention of the legislature to clothe the local assessor with the power to assess railroad land or not, according to his own view of the question, whether it is railroad track or real estate other than railroad track. In harmony with these views, we said in Indianapolis & St. L. Ry. Co. vs. People, 130 Ill. 61, 22 N.E. 854: 'It was the duty of the company to make a true return of its property, and both the state board and the local assessor had a right to act upon the supposition that it had honestly discharged that duty.' Still again, in the more recent case of Railway Co. vs. Mathews, 152 Ill. 157, 38 N. E. 623, we said: 'It was the duty of appellant (the railroad company) under sections 40, 41 of the revenue act, to make out and file with the County Clerk a statement or schecule, showing the property held for right of way, etc. It is to be presumed that it performed this duty, and that the county officials relied upon the statement or schecule filed as an accurate description of the right of way."

Counsel for plaintiff contends that the County Treasurer could have paid out this money out of the sinking fund and then deducted it from the school district's portion of the tax money the following year. We fail to find any statutory authority

for procedure of this kind and in the absence of statutory authority the County Treasurer would be guilty of gross mal administration of the affairs of his office. It seems that plaintiff should have sued School District as it is the person which received the money of which it was not entitled. To render judgment against Seminole County in this case means that every taxpayer has to contribute to the mistake made by plaintiff in making its rendition, and that School District receives money to which it was unlawfully entitled and that this was the mistake made by the taxpayer in returning its property for assessment. It will be unfair to penalize every taxpayer in Seminole County for the mistake committed by plaintiff in making its rendition.

We respectfully submit to your Honor that plaintiff is not entitled to recover in this case as against this defendant.

Respectfully submitted,

Tom Huser

Tom Huser,
County Attorney.

No. 1156

In the Superior Court.

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The Continental Supply Company,
a corporation,

Plaintiff,

-vs-

Board of County Commissioners
of Seminole County, et al,

Defendant.

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BRIEF OF DEFENDANT.

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Tom Huser,
County Attorney