

EDWARD P. TOTTEN, )  
Complainant, ) IN THE CIRCUIT COURT OF  
vs. ) BALDWIN COUNTY, ALABAMA.  
GEORGE E. FULLER ET AL., ) IN EQUITY, NO. 815.  
Respondents. )

REPLY BRIEF OF COMPLAINANT  
ON FINAL DECREE

TO THE HONORABLE F. W. HARE, CIRCUIT JUDGE.

The first point raised by the respondents in their brief is, that we have not proved our case due to the fact that we have not proved that Mr. Fuller was acceptable to the Fairhope Single Tax Corporation. Our impression of the law is, that the fact that he is not acceptable to the corporation is a matter of defense and the burden of proof is on him to show that he is not acceptable to that corporation. Further, this matter of acceptability vel non is a condition and susceptible to proof as are other conditions, (citing Garner v. Green & Elliott, 8 Ala. 96), that is, if we show that at one time Fuller was acceptable to that corporation, then it is up to him to show that he is not acceptable now. Exhibit H to the testimony shows that Mr. Fuller was acceptable to that corporation and was accepted by them.

Surely the law is not to the effect that a man can avoid his own contract by the fact he neglects to make application and have a lease transferred which is the only way that his acceptability can be proved conclusively. The law will not

let a man profit by his own fault. We have proved that Mr. Fuller was acceptable to the Fairhope Single Tax Corporation, by taking a lease on the Playhouse. He has not shown that his condition has changed. His defense as to this point is merely that he has not made application to the corporation and had a new ruling on his acceptability. If he could prove he was not acceptable to that corporation, do you think for one minute that he would not have proved it?

The next point raised is that this bill ought to be brought in the name of Lillian B. Totten, as she was the owner of the property at the time that this suit was filed. It is true that she held title to the land but the conveyance to her was an arrangement to facilitate the passing of title to the Fullers, Totten being out of the state at the time that the trade or transfers was supposed to take place.

The case cited by the respondents denying the right on the complainant to bring this bill do not seem pertinent to their contention. They say that if the complainant does not own the property then he can not bring the bill. The case of *Melton v. Stuart*, 213 Ala. 574, 105 S. 659 is a case where the bill for specific performance was filed by parties and the property was owned by other parties, it was a suit for the purpose of compelling a purchaser to take the land. There was a demurrer filed to the bill raising the question that it was not brought in the name of the owner of the land. After the quotation made by the respondents the court went on to say;

"There is an important distinction, however, between nonmutuality of obligation and nonmutuality of remedy. True it is that a mutuality of obligation must exist when the contract is concluded. If it lack this element ab initio, no subsequent act

of the party who seeks to enforce it can obviate the objection and render capable of specific performance."

however this case is an option contract and the question of mutuality was brought out and has been settled in the Supreme Court in this case and need not be further discussed. Further on the Melton case Judge Sommerville quoted Mr. Pomroy on Equity 5 Pom Eq. Jur. 2d Ed. Sec 2250 which holds that it is sufficient that the seller can make good title at the time of the decree and affirmed the ruling of the lower court overruling the demurrer, due to the fact that the complainant in that case as in the case at bar were able to make title at the time of the decree.

Therefore if the case quoted by the respondent holds anything relative ~~it~~ holds for us and the ruling is, Quoting from Syllabus #5 "Bill for specific performance, alleging contract by plaintiff to convey property owned by others, and that plaintiff had tendered deeds from such parties to defendant, was good on demurrer as against objection that contract was uncertain in terms, and that bill did not show ability and readiness to perform because title was shown in persons other than plaintiff."

Of course if we were not able to give the respondents title to the property we could not ask the court to make them pay for something that we can not deliver. But we tendered them deeds and offered in the bill to give title on decree.

In that part of their brief they have also questioned the validity of the assignment to Lillian B. Totten, that is immaterial for the bill prays that the respondents be ordered to

pay \$3606.50 for the transfers to them of the described residence property, and not that the respondents be made to accept the deeds of the complainants as tendered to them at the time that they refused to take them.

At this time we wish to call the courts attention to the fact that this tender was refused, not because the instruments did not convey title, but the evidence shows that it was because Mr. Fuller maintained that he was not bound by the contract that he had made. Therefore the respondents have estopped themselves from going into the validity vel non of the tender. The question is can we now give title.

However we maintain that the conveyance of Lillian B. Totten to Fuller is good, and the conveyance of Totten to Lillian B. Totten is good against all but the Fairhope Single Tax Corporation and is only bad against her when attacked by them. They maintain that the conveyance of Lillian B. Totten to Fuller is bad because on the fact that it was <sup>not</sup> signed by the husband. Section 8269 quoted by them as 8289 says, "The wife, if her husband be of sound mind, and has not abandoned her, or be not a non-resident of the state, etc.," The evidence shows clearly that of this transfers at the time <sup>^</sup> the complainant was in the North and intended to stay there, he had contracted for the sale of his home and this making of the deed was the culmination of a series of acts which clearly showed his intention never to return to Alabama as his home.

As to the argument that the conveyance of the homestead without the homestead acknowledgment of the wife is void, I

merely ask is it the contention that the wife can not convey her own property without a homestead acknowledgment whether there it be the homestead or not. A first reading of the code section refutes that.

As to the argument that the deeds do not convey a good title but only the leasehold interest, that is all that is called for in the contract, the contract makes no mention of the lands but calls for the dwelling house and residence of the second party in Division 4 on Morphy Avenue. Furthermore the memorandum of Agreement, to which we may look to show the intention of the parties if there is an ambiguity calls for the residence and leasehold of the first party. Mr. Fuller is a resident of Fairhope and as an ordinary man know what he was doing and what he was to get and pay for when he signed the contract and that contract is clear on its face and the court of equity will not hear him when he makes such objections as this.

If the court believes that the respondent entered into the contract. That the complainant notified him in proper time of his intention to move and offered to perform and can now make title to the respondents to complainant should get a decree as prayed in the bill excepting that there be no damages save as are proper in adjusting the equities.

Respectfully submitted.

*Edward P. Totten*  
IN PROPRIA PERSONA

*C. G. Rickard Jr.*  
AS SOLICITOR FOR COMPLAINANT

Exhibit B  
**LEASE**

**This Lease,** MADE THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 19\_\_\_\_, BY AND BETWEEN

FAIRHOPE SINGLE TAX CORPORATION, OF FAIRHOPE, BALDWIN COUNTY, ALABAMA, AND \_\_\_\_\_

OF \_\_\_\_\_, HEREINAFTER DESIGNATED AS THE LESSEE.

WITNESSETH: THAT THE SAID FAIRHOPE SINGLE TAX CORPORATION; FOR AND IN CONSIDERATION OF THE ANNUAL RENTALS AND COVENANTS HEREINAFTER MENTIONED, HAS THIS DAY LEASED TO AND SAID LESSEE TAKEN POSSESSION OF THE FOLLOWING DESCRIBED PORTION OF LAND TO WIT \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_, SECTION \_\_\_\_\_, TOWNSHIP 6 SOUTH, RANGE 2 EAST, BALDWIN COUNTY ALABAMA, FOR THE TERM OF NINETY-NINE YEARS FROM THIS DATE UPON THE FOLLOWING TERMS TO-WIT:

- (1) The said lessee, his heirs, or successors, shall pay to the said Fairhope Single Tax Corporation, its successors or assigns, in equal payments, on the first days of January and July of each year, the annual rental value of said land, exclusive of his improvements thereon, to be determined by the said Corporation through its Executive Council or Board of Directors, under its avowed principle of so fixing the rentals of its lands as to equalize the varying advantage of location and natural qualities of different tracts and convert into the treasury of the Corporation for the common benefit of its lessees, all values attaching to such lands, exclusive of improvements thereon. And the said lessee, for himself and his heirs, hereby expressly agrees that the said annual rent shall be determined by the said Corporation upon the principle just stated, and shall be expended by said Corporation, subject to the conditions hereinafter stated.
- (2) The land herein leased shall be used for such purposes only as may not be physically or morally offensive to a majority of the resident members of the Fairhope Single Tax Corporation, and the lessee shall be subject to such reasonable sanitary regulations as may be imposed by the Executive Council or Superintendent of Public Health of said Corporation.
- (3) In consideration of the payment of the rents herein provided for, the Fairhope Single Tax Corporation agrees with the said lessee to pay all taxes levied by county and state upon the land herein described and on receipt of the County Treasurer's receipt for taxes paid by him upon the improvements and other personal property held upon such lands—moneys and credits excepted—to give him a certificate of equivalent amount, receivable from bearer at its face value on rent, or in the discharge of any indebtedness to the Corporation. Provided that said lessee will appoint whomsoever may be designated by the Corporation as his agent to return his property for taxation, where permitted by law so to do; and that in no event shall the Corporation be bound to pay taxes on any more than the fair valuation of the property, on the basis require by law.
- (4) And the said Fairhope Single Tax Corporation further agrees in consideration of the covenants of the said lessee herewith evidenced, that no part of the rents paid by him upon the land herewith leased, shall be appropriated as dividends to its members or any other persons, but that all shall be administered as a trust fund for the equal benefit of those leasing its lands.
- (5) And the said Corporation still further agrees, that in the distribution of the benefits which its purpose is to secure for residents upon its lands, no distinction shall be made between individuals, whether members of the corporation or not, but that with the exception of the right of members as participants in the government of the Corporation, all shall be treated with strict equality.
- (6) It is agreed by the parties hereto, that time is of the essence of this contract. All rents not paid within ninety days of the time the same become due, shall be subject to a penalty of one per cent per month until paid; and the lessor shall have a prior lien on all improvements upon the land herein leased, to secure the payment of the rent and for the payment of all other indebtedness of any description whatsoever, by the lessee to the lessor. If the land leased be unimproved, or in the judgment of the Corporation the improvements thereon are not of sufficient value to secure the payment of the rent and cost of collecting same, then, in such event, all rights under this lease shall be subject to forfeiture without notice, after the rents shall have been due and unpaid for ninety days; and the improvements, if any, shall revert to the lessor. Upon failure to pay the rents, or any portion thereof, for six months after the same become due, the lessor is hereby authorized to sell at public sale the improvements on any leasehold, for satisfaction of the amount due, after first giving ten days' notice by one publication in some paper published at Fairhope, Alabama, the cost of such publication and the making of such sale to be paid with the rent out of the proceeds of such sale, and the remainder, if any, to be returned to the lessee or such other person as may be authorized to receive the same. The lessor, its agent or attorney, may conduct such sale; and the party so conducting the sale is authorized to make, in the name of the lessee, proper conveyance of the property so sold. The lessee hereby waives all right of exemption of any property as against the collection of any debt due under this contract. The sale of the improvements under legal process shall work a forfeiture of all rights under this lease.
- (7) The Fairhope Single Tax Corporation agrees that in case of its dissolution, either by voluntary act of its members or otherwise, and the division of its assets among its members, the said lessee, if a member, shall be entitled to have the land herein described and leased—or so much of it as he may designate—included in his portion, at its actual value at the time, exclusive of improvements thereon, and if it exceed in value such portion, to purchase the excess at such valuation. If not a member, the lessee may at such time acquire title to the land herein leased by paying to the Corporation its actual value exclusive of improvements upon it.
- (8) The Fairhope Single Tax Corporation believes its title to the land herein leased to be good, and will use every proper means in its power to maintain the same; but it is distinctly understood that the Corporation, acting only with the benevolent purpose to secure land and administer it for the benefit of those who may desire its use, shall not be held liable for any losses resulting from defects in its title.
- (9) The right is reserved by the Fairhope Single Tax Corporation to resume possession of all or any portion of the land herein described, for public purposes only, on payment of the appraised value of the improvements thereon.
- (10) Should it become necessary to determine the value of said land or the improvements thereon, in compliance with the provisions of Sections 3, 7, or 9 of this lease, the same shall be determined by a board of arbitration, one to be chosen by the Fairhope Single Tax Corporation, one by the lessee, and a third by the two.
- (11) This lease is assignable only to members of Fairhope Single Tax Corporation, or to persons acceptable to it. Assignments must be filed for record in the office of the Corporation, and the person to whom the assignment is made becomes the tenant of the Corporation. It is not the intent of this provision to interfere with the temporary sub-letting of this property or any portion of it.
- (12) Surface rights only are hereby leased. All mineral rights are reserved by lessor.

IN WITNESS WHEREOF, THE PARTIES HEREUNTO HAVE SET THEIR HANDS IN DUPLICATE,

THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 19\_\_\_\_

BY ORDER EX. COUNCIL \_\_\_\_\_ 19\_\_\_\_ FAIRHOPE SINGLE TAX CORPORATION

By \_\_\_\_\_ President

\_\_\_\_\_  
Lessee \_\_\_\_\_ Secretary

"EXHIBIT C"

July 6, 1932

Fairhope Single Tax Corporation,  
Fairhope, Alabama.

Gentlemen:

On March 5, 1926 I entered into a contract with Mr. Edward P. Totten for the purchase of his leasehold, interest and improvements in the lot whereon he resides for the sum of \$3,500.00. if he moved from Fairhope within two years from that date.

Mr. Totten notified me of his intention of removing, about the end of this two year period, but meanwhile I had been informed that speculation in leaseholds on Colony land and the improvements thereon was not in consonance with your policy and it was reported that you disapproved of a transfer of the Totten lease in this instance.

I had Mr. G. G. Brown Secretary of the Baldwin County Building and Loan Association inspect the property about this time. He estimated it to be worth \$1300.00. I had Mr. Robert Stapleton, Secretary Fairhope Coal and Supply Company appraise the property also. He fixed its value at \$1350.00 of which he said \$100.00 included Axalia bushes since sold by Mr. Totten.

Mr. Totten entered suit against myself and wife to compel specific performance of the contract, including in the amount, the sum of \$106.50 for electric wiring he installed in his home after making the contract with me. Thus making the total amount \$3606.50.

A decree has been rendered on June 17, requiring the payment by me within 60 days from that date, of \$3606.50 to Mr. Totten. Failing to pay this, the Playhouse is to be sold and other property, real or personal that I possess, for the satisfaction of such judgment.

At this time it seems that it will be impossible for me to comply with such decree unless I can obtain a loan for this purpose. And the party whom I approach will wish to be assured that if I pay such judgment I will acquire a good title to the Totten property.

I am informed that I would not acquire a good title unless you consent to an assignment of the lease and I am therefore requesting you to state your position on this question.

Thanking you and awaiting your reply I am,

Sincerely,

G. E. FULLER

EDWARD P. TOTTEN,  
Complainant,

vs.

GEORGE E. FULLER and  
PATRICE B. FULLER,  
Defendants.

IN THE CIRCUIT COURT OF  
MOBILE COUNTY, ALABAMA.

IN EQUITY

This cause is submitted on motion by defendants for a rehearing. After reading and duly considering said motion, it is ordered, adjudged and decreed that said motion <sup>for rehearing</sup> ~~be granted~~ and that ~~said motion~~ be heard in the Court House in the Town of Bay Minette, Alabama, at ten o'clock a.m. on the 15<sup>th</sup> day of August, 1932, and that notice of the time and place of hearing be given to the complainant or his Solicitors of Record at least ten days prior to the date set for said hearing by serving a copy of the motion and this order on the complainant or his Solicitors of Record.

It is further ordered that the Register of the Circuit Court of Baldwin County, Alabama, be and is hereby directed not to sell said dwelling or any other property ordered to be sold in said final decree until said motion can be heard and passed upon.

Ordered, adjudged and decreed this the 11<sup>th</sup>  
day of July, 1932.

[Signature]  
JUDGE

Service accepted July 12 1932

G. G. Richardson  
for Complainant.





far as the contract concerning the purchase of the homestead is concerned. It is also unilateral in that Totten did not bind himself to sell the property to Fuller.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS.

Case No. 813

Edward P. Totten

vs.

George E. Fuller

Bill of Complaint

Received this file ..... 194.....

Filed April 24, 1929

Recorded -

Attorney.

APPLICATION FOR LAND  
of  
FAIRHOPE SINGLE TAX CORPORATION

*Exhibit B.*

Fairhope, Alabama, .....192.....

TO THE EXECUTIVE COUNCIL  
FAIRHOPE SINGLE TAX CORPORATION

I, the undersigned, hereby make application for lease of

.....  
.....  
.....  
.....

upon the terms and conditions set forth in the leases given by you.

I make this application with the full knowledge that I will be required to pay your Corporation the full rental value of the land exclusive of my improvements thereon. I understand that the rental values will increase as demand for the land increases, whatever the cause; that said values will be determined by the Corporation in the manner set forth in its constitution and lease contracts; that out of the land rentals the corporation will pay the state and county taxes on the land, improvements and personal property of its lessees held thereon, moneys and credits excepted; and that the balance will be spent for the public good in local improvements and services.

I have read your constitution and pledge myself that while I hold lease

EDWARD P. TOTTEN,  
Complainant,

-vs-

GEORGE E. FULLER, ET AL.,  
Respondents.

| IN THE CIRCUIT COURT OF BALDWIN  
| COUNTY, ALABAMA. IN EQUITY.  
| CASE NUMBER 'L#813  
|

TO THE HONORABLE F. W. HARE, JUDGE OF SAID COURT.

IN CHAMBERS. MONROEVILLE,

Comes the Complainant and under Ruler 81 of the Rules and Practice of the Chancery Court petitions the Court in Chambers for a rehearing upon the following grounds:

FIRST, Because the decree in this cause was improvidently rendered.

SECOND. Because the Court erred in entertaining this cause for final decree and considering evidence taken after the former submission without setting aside that submission and giving Complainant notice of a new submission of the cause, thereby denying Complainant the opportunity of showing that the premises were not materially altered in that the two azalea shrubs, not being unique, could be replaced by shrubs of similar size and variety, or other defences going to the merits of the cause.

THIRD. Because the Court erred in considering any evidence in this cause taken after the first final decree, there being no showing made to the Court that this evidence was newly discovered without fault or neglect on the part of the Respondents, warranting the submission of new and additional evidence after the rendition of a decree.

FOURTH. Because the Court did not have jurisdiction of this cause for final decree at the time the decree was rendered dismissing the bill, the cause being submitted only for a rehearing and the evidence offered, or rather tendered to the Court to show cause vel non whether a rehearing should be granted.

WHEREFORE COMPLAINANT PETITIONS; that the Court will consider this petition and if it concludes that there is any merit therein it will grant a rehearing of this case, setting the day, time and place for said rehearing, and will give the Respondents proper notice of said rehearing; and that on said rehearing the Court will consider only proper evidence, that is, evidence offered prior to the first decree and evidence which was not taken before ~~the~~ the decree but newly discovered, without fault or neglect on the part of the parties offering it, and on said rehearing reinstate the correct decree first rendered.

C. L. Rickard, Jr.  
AS SOLICITOR FOR COMPLAINANT.

The above and foregoing petition  
for rehearing is ordered overruled and  
denied. This April 29, 1933-  
F. W. Hare  
Judge

EDWARD P. TOTTEN,  
Complainant,

vs.

GEORGE E. FULLER and  
PATRICE B. FULLER,  
Defendants.

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA.

IN EQUITY

Come the defendants in the above styled cause  
and move for a rehearing, and for ground of motion say:

1. That paragraph 6 in the original lease entered  
into by and between the said Edward P. Totten and Fairhope  
Single Tax Corporation provides and is in words and figures  
as follows:

"(6) It is agreed by the parties hereto, that time  
is of the essence of this contract. All rents not paid within  
ninety days of the time the same become due, shall be subject  
to a penalty of one per cent per month until paid; and the  
lessor shall have a prior lien on all improvements upon the  
land herein leased, to secure the payment of the rent and for  
the payment of all other indebtedness of any description what-  
soever, by the lessee to the lessor. If the land leased be  
unimproved, or in the judgment of the corporation the improve-  
ments thereon are not of sufficient value to secure the pay-  
ment of the rent and cost of collecting same, then, in such  
event, all rights under this lease shall be subject to forfeiture  
without notice, after the rents shall have been due and unpaid  
for ninety days; and the improvements, if any, shall revert  
to the lessor. Upon failure to pay the rents, or any portion  
thereof, for six months after the same become due, the lessor  
is hereby authorized to sell at public sale the improvements  
on any leasehold, for satisfaction of the amount due, after  
first giving ten days notice by one publication in some news-  
paper published at Fairhope, Alabama, the cost of such publica-  
tion and the making of such sale to be paid with the rent out  
of the proceeds of such sale, and the remainder, if any, to  
be returned to the lessee or such other person as may be authoriz-  
ed to receive the same. The lessor, its agent or attorney,  
may conduct such sale; and the party so conducting the sale  
is authorized to make, in the name of the lessee, proper  
conveyance of the property so sold. The lessee hereby waives  
all right of exemption of any property as against the collection  
of any debt due under this contract. The sale of the improve-  
ments under legal process shall work a forfeiture of all rights  
under this lease."

2. That subsequent to the execution of the afore-  
mentioned lease or rental contract between the said Totten and Fairhope  
Single Tax Corporation, the said Fairhope Single Tax Corporation  
adopted a new form of application for leases or rental con-  
tracts which it required all applicants to sign and execute  
before it would enter into any lease or rental contract for  
leases of property owned by it to any applicant for a lease  
thereon, which placed additional burdens upon applicants and  
imposed new and additional burdens upon the lessee should

said application be granted. A blank form of said new applica-  
tion, *and copy of form of contract thereby required each* marked "Exhibit A" *are* hereto attached and made ~~is~~ parts  
hereof as though fully set out herein, and likewise a blank  
form of the application to be executed by proposed lessees  
prior to the adoption of the new form and in existence at the  
time of the said lease or rental contract between the said  
*together with form of lease then in use are* Edward P. Totten and Fairhope Single Tax Corporation *is* here-  
to attached, *each* marked "Exhibit B" and made ~~is~~ parts hereof as though  
fully set out herein.

3. That paragraph 11 of the rental contract entered into by the said Edward P. Totten and the said Fairhope Single Tax Corporation is in words and figures as follows:

"(11) This lease is assignable only to members of Fairhope Single Tax Corporation, or to persons acceptable to it. Assignments must be filed for record in the office of the Corporation, and the person to whom the assignment is made becomes the tenant of the Corporation. It is not the intent of this provision to interfere with the temporary subletting of this property or any portion of it."

There is no provision or stipulation relative to assignment of contracts in the said contract between said Totten and Fairhope Single Tax Corporation, other than that set forth in paragraph 11 of said rental contract which is hereinabove quoted.

4. That in paragraph 11 of the new form of lease or rental contract which was adopted subsequent to the said original contract, and prior to the agreement entered into by and between the said Edward P. Totten and George E. Fuller, on, to-wit, February 24th, 1926, and prior to the additional agreement entered into by the said Edward P. Totten, on the one part, and George E. Fuller and Patrice B. Fuller, his wife, on the other part, on, to-wit, February 24th, 1926, additional burdens were placed upon those entering into leases or rental contracts with the said Fairhope Single Tax Corporation, it being provided in paragraph 11 of said new form for rental contracts in words and figures as follows:



"(11) This lease is assignable only to members of Fairhope Single Tax Corporation, or to persons acceptable to it. The original lease must be returned to the Corporation with any proposed transfer endorsed thereon, and if approved, a new lease will be issued to the transferee."

Under the rental contract between the said Totten and the said Fairhope Single Tax Corporation it did not require the surrender of the rental contract and did not provide for the execution of a new lease or rental contract as is provided for in paragraph 11 of the new form for leases or rental contracts.

5. That paragraph 6 in the new form of leases or rental contracts is identically the same as that contained in the lease or contract between the said Totten and said Fairhope Single Tax Corporation. That under the provision of said numbered paragraph in each and both of said forms of leases or rental contracts, it is specially provided that,

"The lessor shall have a prior lien on all improvements upon the lands herein leased to secure payment for the rent and for the payment of all other indebtedness of any description whatsoever by the lessee to the lessor",

Under said provision the lessor acquired a lien prior to all others, save those for taxes, on any and all improvements, including said dwelling house and other improvements on said lands at the time of the execution of said lease or rental contract by said Fairhope Single Tax Corporation to the said Edward P. Totten, as well as any improvements that may thereafter be placed upon said lands, and said prior lien will continue to exist and remain in full force and effect on said improvements until the agreed rent has been fully paid and discharged for the full term of said rental contract between the said Totten and said Fairhope Single Tax Corporation, consequently neither the said Edward P. Totten, nor the defendants, nor any other person, firm or corporation will have any right or authority to remove said improvements, or any of them from said lands until the rents required to be paid by said contract has been fully paid and discharged up to the time of the termination of said lease or rental contract. And should the defendants or either of them, or their heirs and assigns, or any other person, firm or corporation, undertake to remove said dwelling or any other improvements on said land prior to the time the rent has been fully paid and discharged up to the time fixed for the termination of said contract, he or they can be immediately enjoined by said Fairhope Single Tax Corporation from removing the same on filing and prosecuting a proper bill in equity. Defend-

*No evidence of rent due,*

ants therefore respectfully submit that the Court erred in its opinion and/or decree in holding to the effect that defendants on making the payments required of them by said decree, may remove said dwelling and/or other improvements on said land at any time they may see fit and proper so to do.

6. That the instrument executed, on, to-wit, February 24th, 1926 and entitled "MEMORANDUM OF AGREEMENT" and the instrument executed on, to-wit, February 24th, 1926, and entitled "CONTRACT" both relate to the same subject matter, and should and do in truth and in fact constitute but one instrument or agreement, and should be construed together, it being evident from the reading of both of said instruments that it was never intended that the defendants should have simply the dwelling and other improvements on said land without at the same time acquiring proper assignment of said rental contract between the said Totten and the said Fairhope Single Tax Corporation, it being evident that a simple sale of the dwelling and improvements on said land, with the prior lien of said Fairhope Single Tax Corporation existing on or against said dwelling and other improvements, ~~that~~ <sup>that</sup> a purchase of said dwelling and improvements ~~defendants~~ could not remove any of said improvements until the rent and other indebtedness for which the complainant bound himself had been fully paid and discharged for the rental term, nor until there is executed and delivered a proper assignment of said lease, can the defendants, or either of them, take possession of the rented premises and/or enjoy the possession of said premises or said dwelling or other improvements.

7. Defendants further show that on, to-wit, July 6th, 1932, the defendants, George E. Fuller, wrote the Fairhope Single Tax Corporation a letter, copy of which marked "Exhibit C" is hereto attached and made a part hereof as though fully set out herein. That subsequent to the writing of said letter, copy of which is Exhibit C hereto, at the invitation of the Secretary of said Fairhope Single Tax Corporation, the defendant, George E. Fuller, on, to-wit, July 6, 1932, appeared before the Executive Council, Fairhope Single Tax Corporation, which is the governing body of said corporation, while said Executive

Council was in regular session, and asked said Council whether they would make transfer or have proper transfer made or consent to a transfer of said lease entered into between it and said Edward P. Totten, to which said Executive Council replied in substance that if the said lease between the said Edward P. Totten and said Fairhope Single Tax Corporation with the transfer thereon or thereof was surrendered to the said Fairhope Single Tax Corporation together with a duly executed application required for leases, at the time of said meeting, copy of which is Exhibit A hereto, they would consider the matter and if they agreed that the defendants should take over said rented property, they would enter into with him a new lease of the form now required to be executed by lessees from said Fairhope Single Tax Corporation, but they would not consent to an assignment or transfer of the said lease held by the said Totten upon the conditions therein written, nor would they execute a lease or rental contract with the defendants, or either of them, similar or like that entered into by and between the said Totten and the said Fairhope Single Tax Corporation.

8. Defendants are informed and believe, and on such information and belief, charge that subsequent to the execution of the aforementioned contracts with or to Edward P. Totten, the said Edward P. Totten, without the knowledge, permission or consent of the defendants, or either of them, moved or caused to be moved and carried away from said rented premises a lot of Azalia bushes that were growing thereon at the time of the execution of said contracts, and the beauty and attractiveness of said property was greatly marred by the removal of said bushes therefrom.

Wherefore, the premises considered, defendants respectfully pray that this Court or the Honorable Judge thereof, make an order setting a day for the hearing of this motion, and that the complainant be given notice of this motion, together with the day set for the hearing of the same, by serving on the complainant or his Solicitors of Record a copy of this motion and the order setting a day for the hearing of said motion, and that upon the final hearing of said motion the final

decree heretofore entered be set aside and one made and entered dismissing the bill of complaint and all amendments, if any there be, thereto, and that the Register be directed not to sell said dwelling or any other property ordered to be sold in said final decree until motion can be heard or passed upon.

And defendants pray for such other, further, different and general relief to which they may be entitled, the premises considered.

Webb & Sheppard  
Gordon Eddy & Lang  
SOLICITORS FOR DEFENDANTS

SEE NEXT PAGE

STATE OF ALABAMA,  
COUNTY OF MOBILE.

Before me, Janie Ryser Davis, a Notary Public in and for said County, in said State, this day personally appeared George E. Fuller, one of the defendants in the above styled cause, who being by me first duly sworn, deposes and says:

That he has read the above and foregoing motion for a rehearing, and known all of the contents thereof and that all facts set forth and contained in said motion are true and correct as therein written.

George E. Fuller

Subscribed and sworn to before me  
this the 8th day of July, 1932.

Janie Ryser Davis  
NOTARY PUBLIC, MOBILE COUNTY, ALABAMA.

APPLICATION FOR LAND

Exhibit A

—of—

FAIRHOPE SINGLE TAX CORPORATION

Fairhope, Ala.,

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TO THE EXECUTIVE COUNCIL  
FAIRHOPE SINGLE TAX CORPORATION

I, the undersigned, hereby make application for lease of

upon the terms and conditions set forth in the leases given by you, and the further stipulations set forth in this application, which are hereby made a part of my lease contract as fully as if printed in the lease.

I make this application with the full knowledge that I will be required to pay your Corporation the full rental value of the land exclusive of my improvements thereon. I understand that the rental value will increase as demand for the land increases, whatever the cause; that said value will be determined by the Corporation in the manner set forth in its constitution and lease contracts; that out of the land rentals the Corporation will pay the state and county taxes on the land, improvements and personal property of its lessees held thereon, moneys and credits excepted; and that the balance will be spent for the public good as provided in its constitution.

I further particularly state that I understand the purpose of the Single Tax Corporation to be to prevent anyone profiting from the holding of its land, other than by the bona fide use of the same, and respecting this purpose, of which I am beneficiary, in the Corporation making land available to me without any purchase price and recognizing further that it is to my interest that what is commonly known as "land speculation" shall be kept out of the "Single Tax Colony" conducted by the Corporation, so that rents assessed against me shall not be affected by an artificial demand for land not for use, but for resale at a profit, I agree that I will neither ask nor accept a "bonus" for transfer of an unimproved leasehold and that the proved attempt to do so shall be cause for forfeiture of my lease to such unimproved land; nor will I charge an excessive price, out of any fair relation to the value of my improvements for transfer of an improved leasehold; and, recognizing that in the transfer of an improved leasehold there are necessarily two factors of value, one the improvements which are my property and the other the land upon which the same stand, which is not my property but the property of the Corporation, I agree to advise the Corporation, before a transfer of an improved leasehold shall be effective, of the exact consideration for the transaction and that the Corporation, if it believes the consideration to include in fact a profit for the transfer of the land which belongs to it, shall be entitled to examine me and the prospective purchaser as to the elements of value in the consideration and if satisfied that the consideration is in part for the possession of the land above the value of the improvements, may refuse approval of the transfer; in which event I shall be entitled to call for an appraisal of the value of my improvements by three disinterested persons, myself and the Corporation each choosing one out of three persons named by the other and the third being selected by the two; and the Corporation shall be required to approve the transfer at such consideration as the arbitrators shall find to be the real value of my property, if accepted by me; it being understood and agreed that every factor of value attaching to the premises proposed to be transferred due to my efforts or expenditures, or in any way to my initiative which is transferable, such as the good will of a going business, the exercise of taste in planning improvements or the making of grounds attractive, or the element of time and care in growing an orchard or shade trees, or making land more productive by improved methods of farming, or increment of value due to increasing cost of building, shall be held to inure to me as fully as tangible structures upon the land; the purpose being to protect the user and improver of land in the full ownership and right of transference of everything due to him, but to preserve to the Corporation all value due to demand for the land exclusive of improvements.

I have read your constitution and pledge myself that while I hold lease of Fairhope land I will not oppose the full application of the principles set forth therein.

Respectfully yours,

Exhibit A

# LEASE

This Lease, MADE THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 19\_\_\_\_, BY AND BETWEEN

FAIRHOPE SINGLE TAX CORPORATION, OF FAIRHOPE, BALDWIN COUNTY, ALABAMA, AND \_\_\_\_\_

OF \_\_\_\_\_, HEREINAFTER DESIGNATED AS THE LESSEE.

WITNESSETH: THAT THE SAID FAIRHOPE SINGLE TAX CORPORATION; FOR AND IN CONSIDERATION OF THE ANNUAL RENTALS AND COVENANTS HEREINAFTER MENTIONED, HAS THIS DAY LEASED TO AND SAID LESSEE TAKEN POSSESSION OF THE FOLLOWING DESCRIBED PORTION OF LAND TO WIT \_\_\_\_\_

SECTION \_\_\_\_\_, TOWNSHIP 6 SOUTH, RANGE 2 EAST, BALDWIN COUNTY ALABAMA, FOR THE TERM OF NINETY-NINE YEARS FROM THIS DATE SUBJECT TO THE CONDITIONS HEREIN STATED AND THE REPRESENTATIONS AND AGREEMENTS OF THE LESSEE IN HIS APPLICATION FOR SAID LAND HERETO ATTACHED AND A PART OF THIS LEASE CONTRACT AS FULLY AS IF PRINTED HEREIN.

(1) The said lessee, his heirs, or successors; shall pay to the said Fairhope Single Tax Corporation, its successors or assigns, in equal payments, on the first days of January and July of each year, the annual rental value of said land, exclusive of his improvements thereon, to be determined by the said Corporation through its Executive Council or Board of Directors, under its avowed principle of so fixing the rentals of its lands as to equalize the varying advantage of location and natural qualities of different tracts and convert into the treasury of the Corporation for the common benefit of its lessees, all values attaching to such lands, exclusive of improvements thereon. And the said lessee, for himself and his heirs, hereby expressly agrees that the said annual rent shall be determined by the said Corporation upon the principle just stated, and shall be expended by said Corporation, subject to the conditions hereinafter stated.

(2) The land herein leased shall be used for such purposes only as may not be physically or morally offensive to a majority of the resident members of the Fairhope Single Tax Corporation, and the lessee shall be subject to such reasonable sanitary regulations as may be imposed by the Executive Council or Superintendent of Public Health of said Corporation.

(3) In consideration of the payment of the rents herein provided for, the Fairhope Single Tax Corporation agrees with the said lessee to pay all taxes levied by county and state upon the land herein described and on receipt of the County Treasurer's receipt for taxes paid by him upon the improvements and other personal property held upon such lands—moneys and credits excepted—to give him a certificate of equivalent amount, receivable from bearer at its face value on rent, or in the discharge of any indebtedness to the Corporation. Provided that said lessee will appoint whomsoever may be designated by the Corporation as his agent to return his property for taxation, where permitted by law so to do; and that in no event shall the Corporation be bound to pay taxes on any more than the fair valuation of the property, on the basis require by law.

(4) And the said Fairhope Single Tax Corporation further agrees in consideration of the covenants of the said lessee herewith evidenced, that no part of the rents paid by him upon the land herewith leased, shall be appropriated as dividends to its members or any other persons, but that all shall be administered as a trust fund for the equal benefit of those leasing its lands.

(5) And the said Corporation still further agrees, that in the distribution of the benefits which its purpose is to secure for residents upon its lands, no distinction shall be made between individuals, whether members of the corporation or not, but that with the exception of the right of members as participants in the government of the Corporation, all shall be treated with strict equality.

(6) It is agreed by the parties hereto, that time is of the essence of this contract. All rents not paid within ninety days of the time the same become due, shall be subject to a penalty of one per cent per month until paid; and the lessor shall have a prior lien on all improvements upon the land herein leased, to secure the payment of the rent and for the payment of all other indebtedness of any description whatsoever, by the lessee to the lessor. If the land leased be unimproved, or in the judgment of the Corporation the improvements thereon are not of sufficient value to secure the payment of the rent and cost of collecting same, then, in such event, all rights under this lease shall be subject to forfeiture without notice, after the rents shall have been due and unpaid for ninety days; and the improvements, if any, shall revert to the lessor. Upon failure to pay the rents, or any portion thereof, for six months after the same become due, the lessor is hereby authorized to sell at public sale the improvements on any leasehold, for satisfaction of the amount due, after first giving ten days' notice by one publication in some paper published at Fairhope, Alabama, the cost of such publication and the making of such sale to be paid with the rent out of the proceeds of such sale, and the remainder, if any, to be returned to the lessee or such other person as may be authorized to receive the same. The lessor, its agent or attorney, may conduct such sale; and the party so conducting the sale is authorized to make, in the name of the lessee, proper conveyance of the property so sold. The lessee hereby waives all right of exemption of any property as against the collection of any debt due under this contract. The sale of the improvements under legal process shall work a forfeiture of all rights under this lease.

(7) The Fairhope Single Tax Corporation agrees that in case of its dissolution, either by voluntary act of its members or otherwise, and the division of its assets among its members, the said lessee, if a member, shall be entitled to have the land herein described and leased—or so much of it as he may designate—included in his portion, at its actual value at the time, exclusive of improvements thereon, and if it exceed in value such portion, to purchase the excess at such valuation. If not a member, the lessee may at such time acquire title to the land herein leased by paying to the Corporation its actual value exclusive of improvements upon it.

(8) The Fairhope Single Tax Corporation believes its title to the land herein leased to be good, and will use every proper means in its power to maintain the same; but it is distinctly understood that the Corporation, acting only with the benevolent purpose to secure land and administer it for the benefit of those who may desire its use, shall not be held liable for any losses resulting from defects in its title.

(9) The right is reserved by the Fairhope Single Tax Corporation to resume possession of all or any portion of the land herein described, for public purposes only, on payment of the appraised value of the improvements thereon.

(10) Should it become necessary to determine the value of said land, or of the improvements thereon, in compliance with the provisions of clauses 3, 7, or 9, of this lease, the same shall be determined by three disinterested persons, to be selected as follows: the Corporation and the Lessee each choosing one of three persons named by the other and the third to be selected by the two. Should any Lessee fail to name his arbitrators within thirty days after written notice by registered mail to do so, the Corporation may name an arbitrator for him.

(11) This lease is assignable only to members of the Fairhope Single Tax Corporation, or to persons acceptable to it. The original lease must be returned to the Corporation with any proposed transfer endorsed thereon and, if approved, a new lease will be issued to the transferee.

(12) Surface rights only are hereby leased. All mineral rights are reserved by lessor.

IN WITNESS WHEREOF, THE PARTIES HEREUNTO HAVE SET THEIR HANDS IN DUPLICATE,

THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 19\_\_\_\_

BY ORDER EX. COUNCIL \_\_\_\_\_ 19\_\_\_\_ FAIRHOPE SINGLE TAX CORPORATION

By \_\_\_\_\_ President

\_\_\_\_\_  
Lessee Secretary